

AN ANALYSIS OF HERITAGE PROPERTY LEGISLATION:
BALANCING THE PUBLIC INTEREST WITH PROTECTION
FOR THE PROPERTY OWNER

By

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ABSTRACT

In the last two decades, Canadian provinces have enacted legislation designed to protect buildings with architectural or historical significance. The legislation typically prohibits a private owner of one of these designated heritage properties from demolishing or altering the structure without approval from a governmental body. This restriction invariably affects the property rights of the owner and thus, conflict is likely to develop. To avoid conflicts, the ultimate goal of any heritage property statute should be to strike a balance between protection of the public's desire to preserve the building and the protection of the owner's basic rights in the property to use it as he wishes. Thus far, Canadian heritage statutes have had little success in achieving this balance because no logically designed form of protection for the property owner has been presented. This thesis analyses in detail one of these statutes, British Columbia's Heritage Conservation Act in order to formulate recommendations for a second generation of Canadian heritage legislation that would better balance the competing interests of the public's right to preserve the building and the owner's right to utilize his property in any manner he wishes.

The first part of this thesis analyses the Heritage Conservation Act's protective measures for buildings and compares them to the provisions of the Alberta, Saskatchewan and Ontario heritage statutes. To be effective, the statute must satisfy several requirements, notably interim control, demolition pro-

hibition, maintenance standards and strong enforcement provisions. The thesis also analyses the relationship of heritage powers to a municipality's zoning powers. This part entailed researching primary legal materials including statutes, by-laws and litigation. Examples of current situations in the City of Vancouver are also included.

The second part of the thesis concerns the protection of the owner. The current system in British Columbia is to impose compensation for any decrease in the value of the property caused by the heritage restriction. The analysis demonstrates that this system has been a failure and thus, alternatives are examined in order to recommend one that is inexpensive to a municipality or government yet provides significant protection to the property owner. The thesis analyses six alternatives, namely expropriation, revolving funds, transfer of development rights, property tax relief, the consideration of the economic consequences of designation and income tax incentives. The thesis examines the effectiveness of these alternative methods in other jurisdictions and their adaptability to the present law of British Columbia. Research for this section concerned more secondary legal materials, especially law journal articles and textbooks by American experts in the field of historic preservation law.

The general conclusion of the thesis is that the present system is ineffective in balancing the two competing interests. The Heritage Conservation Act's protective measures for the building might be adequate, if used, but contain obvious flaws

that need to be remedied. The greatest defect in the statute is its mandatory compensation provisions which act as a great deterrent to heritage protection. These provisions should be replaced with a form of property tax relief whereby a property owner will be at least partially compensated and provided incentives to rehabilitate the property. This programme should be accompanied by the right for the owner to seek de-designation or further compensation upon proof that the heritage restriction creates an unreasonable economic hardship. With this scheme, the conflicts currently surrounding heritage protection could be eliminated.

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I. INTRODUCTION

Heritage properties are buildings or structures that have special historical or architectural significance for a community or province. The preservation of these structures is a worthwhile activity because they act as evidence of our past and for the most part, remain useful components of our present. They serve as living museums to educate us on our communities. As stated in the United States Supreme Court, governmental bodies enact historic preservation laws to support:

the widely shared belief that structures with special historical, cultural or architectural significance enhance the quality of life for all. The buildings and workmanship represent lessons of the past and embody precious features of our heritage and serve as examples for today.¹

One commentator² indicated that heritage preservation provides the public with a "sense of place" thus strengthening local community ties. On a large scale, preservation may incidentally improve the economy by increasing employment and tourism. Clearly, the public benefits from the preservation of these significant structures and therefore laws have been enacted to protect them and the contributions they have made to our communities' past and present.

Because our country is so young and our history so relatively brief, it has only been in the last two decades that Canadian jurisdictions have enacted legislation to preserve heritage properties. Typically, these heritage statutes provide for the designation of significant properties and then prohibit all alterations or demolition of that property unless the designating body approves. This leads to the fundamental

conflict in legislating heritage protection. Measures that protect the public's interest by preserving heritage structures necessarily restrict the rights of the private owner to use and enjoy his property as he pleases and to enjoy maximum profits. Thus, to be truly effective and fair, a heritage statute must suitably balance the protection of the property with protection for the property owner from the frequently considerable burdens of the heritage restrictions. Thus far, Canadian heritage property laws have given reasonably safe protection to the property but little success has been achieved in balancing this protection to the public interest with compensation or other forms of protection for the property owner. This thesis will examine the failure of British Columbia's heritage statute, the Heritage Conservation Act³, in achieving this balance, and, by analysing other heritage statutes, attempt to formulate recommendations that would lead to a better balance between the conflicting interests.

Since most heritage protection is done at the municipal level, this thesis will emphasize the role and powers of British Columbia municipalities in heritage preservation. The City of Vancouver's Heritage By-Law and related powers will receive special emphasis because of their availability.

To clarify some of the terminology I will use in this thesis, "heritage", as defined by the statutes, has a very broad meaning. Generally, heritage means "inherited from the past"⁴. A "heritage property" means any significant property worthy of protection whether or not it has actually been

formally designated and thus protected by a governmental body. American commentators use the word "landmark" which can be used interchangeably with heritage property.

Heritage property legislation is a relatively recent development in Canadian legal systems and thus little analysis has been made in determining the fairness and effect of these statutes. Perhaps now that these statutes have been used and tested for several years, it is time to comprehensively analyse their effect in order to determine more efficient and fair measures for a second generation of heritage statutes.

II. PROTECTION OF THE PROPERTY

A. History

Before the enactment of the Heritage Conservation Act⁵, British Columbia relied on a variety of statutes to protect historic sites. The provincial government was given designation powers under two different Archaeological and Historic Sites Protection Acts. The first⁶, enacted in 1960, was replaced in 1972 by a more comprehensive statute⁷. Designation by the Provincial Secretary protected a site from destruction or alteration without a permit.

In 1973, all municipalities governed by the Municipal Act⁸ were given the power to designate buildings and structures of historic or cultural significance. The designating by-law was effective only with the approval of the provincial cabinet. Designation protected the structure from demolition or the alteration of its facade. The Vancouver Charter was amended⁹ in 1974 to provide similar powers for the Vancouver City Council. The Charter amendment had two advantages over the Municipal Act. Firstly, the Vancouver Council did not require the approval of the provincial government¹⁰. More importantly, Vancouver was given the power to refuse any application for a demolition permit for up to ninety days pending the enactment of a heritage designation by-law¹¹. A property owner could only demand compensation if council did not designate his property after withholding a demolition permit¹². Using these powers, the City of Vancouver enacted its Heritage

By-Law under which over fifty structures have been designated¹³.

Other municipalities had less success. The Municipal Act provisions¹⁴ did not protect a building until a by-law was adopted by council and then approved by the provincial government. In the interim, the owner could apply for and receive a demolition permit and destroy the structure to avoid the burdens of designation. The municipality's inability to withhold the demolition permit made the powers severely inadequate. The City of Victoria discovered soon after completing a survey of potential heritage properties that there was an increase in the number of demolition permit applications involving many of the four hundred listed properties. To avoid the burdens of owning and maintaining a protected property, private owners were demolishing their structures to insure their land would be available for future development. Council was forced to react by using an extraordinary power. Under s. 290 of the Municipal Act¹⁵, a municipality, where it finds its powers are inadequate to deal with an emergency, may declare that an emergency exists and exercise any powers necessary to deal effectively with the emergency. This declaration of an emergency must be made by a by-law passed by a two thirds majority. The only limitation on the powers used during the emergency is that they must be under provincial jurisdiction¹⁶. Victoria City Council declared an emergency existed because of an "alarming increase in the number of buildings having historical value being demolished."¹⁷ To contain the emergency, council gave itself the power to revoke all existing demolition permits

and to refuse any demolition or building permit applications pending the passing of designation by-laws.

The use of the emergency power was extremely rare and thus it was challenged in court by the owner of one of the listed properties. In E & J Murphy Ltd. v. The Corporation of the City of Victoria¹⁸, Mr. Justice Macdonald held that the use of the emergency power was entirely valid because the existence of an emergency was to be determined solely by council. The determination was not colourable because there was ample evidence available to prove that the city's designation powers were ineffective. The purpose of the emergency by-law was to provide time for council to preserve the structures by formal designation. There was no bad faith because the preservation of these structures was in the public interest. The landowner's argument that the by-law was discriminatory was rejected because the by-law was of general application and thus did not operate to the special detriment of the Appellant and a small number of others. Presumably, because four hundred landowners were affected, the by-law could be considered to be of general application. Furthermore, cases¹⁹ imply that discrimination will only exist where bad faith or an improper purpose can be shown. In the present case, the court found that preservation was in the public interest and therefore not an improper motive.

This action by the Victoria Council was the only time the Municipal Act's emergency power was successfully implemented. It may have shocked the provincial government into passing new

legislation with more powers for municipalities because less than one year later, the Heritage Conservation Act (HCA) was proclaimed²⁰. Section 2 of the Act stated its purpose was "to encourage and facilitate the protection and conservation of heritage property in the province." This act provided the first comprehensive heritage protection legislation in the province as designation powers for both the provincial government and all municipalities were included in the same act. The Archaeological and Historic Sites Protection Act²¹ as well as the heritage provisions of s. 714A of the Municipal Act²² and s. 564A of the Vancouver Charter²³ were repealed.

The Heritage Conservation Act²⁴ provides no transition rules. This causes some uncertainty as to the status of designations made under previous statutes. When the second Archaeological and Historic Sites Protection Act²⁵ was enacted, it included a section that expressly indicated that designations and permits made under the former act would continue to be valid and would be enforceable by the provisions of the new act. The HCA does not include a similar provision. Instead, the situation appears to be governed by the Interpretation Act²⁶. Section 36 states:

(1) Where an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it, . . . all regulations made under the former enactment remain in force and shall be deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their place . . .

A "regulation" would include a designating by-law or a provincial designating order²⁷. Since the purpose of the repealed

heritage enactments was the same as the purpose of the HCA and the means of designation and enforcement are similar, the designating orders and by-laws from the previous provisions should be consistent with the HCA and thus remain valid.

An administrative board has taken the opposite view. The Assessment Appeal Board concluded that a designation under the original Archaeological and Historic Sites Protection Act²⁸ was inconsistent with the HCA and thus no longer valid. In Estates Investment Ltd. v. The Assessor for Area #09 - Vancouver²⁹, the Board was concerned with the assessment of property in the Gastown district of Vancouver. The area had been designated as a historic site under the former act in 1971. When the second Archaeological and Historic Sites Protection Act³⁰ was passed in 1972, the transition rules insured that the designation remained valid but because the HCA was passed with no transition rules, the Board concluded that the previous designation was inconsistent with the new act for several reasons. Firstly, the designation was made by the Provincial Secretary; current designations were to be made by the Lieutenant-Governor in Council. Secondly, under the old system, an owner could alter or demolish the structure with a permit; the new system required permits or the approval of council. Thirdly, the previous statute provided for general designation by the province; the new statute set up a dual system whereby both provincial and municipal heritage sites were created. In the Board's opinion, this provided a veto to one jurisdiction so that if both had designated a structure, demolition was only

available if both agreed to it.

This final reason has no legitimacy. In finding this new dual system of protection in the Heritage Conservation Act, the Board neglected to notice that a dual system had existed with the Archaeological and Historic Sites Protection Act³¹ and the two other enactments, s. 714A of the Municipal Act³² and s. 564A of the Vancouver Charter³³. The latter two statutes provided the municipal designation power consistent with the power given under s. 11 of the HCA and the former statute provided the provincial power. The difference in the provincial designating bodies between the two acts did not provide an inconsistency incapable of being administered under the new act. The alteration and demolition approval systems were nearly identical under the two systems. The owner of a provincially designated structure continued to require a permit from a government minister and the owner of a municipal heritage site continued to require approval of council as under both ss. 714A and 564A. No inconsistencies existed. Designations under the previous enactments remain valid.

B. Interpretation

Delegated powers, like those of municipalities, are generally interpreted narrowly and literally by courts. The E & J Murphy Ltd.³⁴ case is clearly an exception. Heritage property laws, because they deal with private property rights, are likely to be interpreted very strictly.

Just such an approach was taken by the Supreme Court of

Canada in Trustees of St. Peter's Evangelical Church v. The Corporation of the City of Ottawa³⁵. The case demonstrated exactly how strict the powers will be interpreted. The case involved Ottawa's last remaining residence from an early 19th Century upper-class residential area. The landowner, a church organization, purchased the home with the intention of demolishing it and expanding its parking lot. Council refused to issue a demolition permit. Instead, it invoked the powers of s. 29 of the Ontario Heritage Act³⁶ designating the structure as a heritage property. The designation protected the structure because no alterations could occur without the written consent of council³⁷. Soon after the designation, the church applied to council for consent to demolish under s. 34 of the Act. This section gave council ninety days to consider the application. When council refused the application, the Act automatically prohibited any demolition or any work to occur for the next 180 days. When the 180 days expired, the owner would be allowed to demolish the building. Under s. 34(2), council was required to give notice to the owners of its refusal within ninety days of the application being received. Without giving notice, the council was "deemed to have consented to the application." Council never gave formal notice but the church knew at all times that their application had been refused. The city's actions had been highly publicized and the owners were present at the council meeting. Soon after the ninety-day period expired, the city attempted to serve the church leaders with notice of their refusal. The service was

refused. Very early the next morning, the church began demolition of the structure. The 180-day period had clearly not expired. The city then sought damages and an injunction to stop the demolition. In response, the church applied for judicial review of the original designating by-law.

In both the Ontario High Court³⁸ and the Court of Appeal³⁹, the city was successful because both courts held that the word "deemed" in s. 34 meant "deemed until the contrary is proved." Since council could prove that it did not consent to the application and thus the owners of the building knew of the refusal, the contrary could be proven.

On further appeal⁴⁰, the Supreme Court found that the Act was remedial and thus should be construed in a purposive manner. Mr. Justice McIntyre indicated that since the Act was enacted to provide for the conservation and protection of Ontario's heritage, the Legislature must have intended to give municipalities wide powers to interfere with individual property rights. But the preservation purpose of the statute should not have been accomplished by totally disregarding certain provisions of the Act. The scheme of the Act, in allowing the municipality only 180 days to protect the building beyond designation, made it evident that the cost of preservation was to be borne by the community and not at the cost of the individual property owner. The Act provided a detailed scheme of procedure to govern the exercise of the municipal powers and, if followed, the procedure would achieve the goals of the statute and, at the same time, protect the property owner. These provisions

had to be given effect. To hold otherwise would have allowed the city to hold the landowner in suspension of his rights for longer than the Act contemplated. The Court ordered the city to de-designate the structure.

Mr. Justice Estey dissented preferring a large, liberal interpretation as specified by the Ontario Interpretation Act⁴¹. Estey took a very strong purposive approach. He indicated that the goal of the Act would only be accomplished with a liberal construction equating actual knowledge with formal notice. Estey followed the two previous decisions in the case and found "deemed" to equal "deemed conclusively" or "deemed until the contrary is proved." For authority, he followed Hickey v. Stalker⁴² in which Mr. Justice Middleton of the Ontario Court of Appeal found that such an interpretation would save the legislation from being unjust and absurd. Following this principle, Mr. Justice Cartwright of the Supreme Court stated:

In many cases, which can easily be imagined, to construe the word "deemed" . . . as "held conclusively" would be to impute the Legislature the intention of requiring the court to hold to be fact something directly contrary to the true fact . . .⁴³

In the present case, council did everything but consent to the demolition. Because they had full knowledge of the events and actively participated in the process, the property owners were adequately protected. Therefore, it would have been absurd to deem the lack of notice as consent.

One commentator criticized the majority's decision because of its strict approach to the interpretation of the

heritage statute. Richards⁴⁴ found that the emphasis on protecting the private property rights of individuals was inappropriate unless the municipality's procedural mistake actually prejudiced the enjoyment of those rights. Since the church had complete knowledge of the city's intention and actions, it was not prejudiced by the lack of formal notice.

I cannot agree with this criticism. Courts should continue the tradition of strictly interpreting the powers of municipalities especially when they involve property rights of individuals. This strict interpretation is important for the just implementation of heritage protection laws. It must be remembered that heritage protection laws have a dual purpose. Firstly, the law should protect significant structures in our communities from demolition. And secondly, the law should provide adequate protection for the owners of these structures because a designation by-law drastically interferes with the owner's property rights whether the by-law merely suspends the right to demolish the building for a short period or preserves the building in perpetuity. To insure, the owner receives all the protection to which he is entitled, the procedural rules laid down in the enabling statutes must be strictly followed.

C. Reasons for Designation

The Heritage Conservation Act⁴⁵ allows the provincial government and municipal councils to designate properties with heritage value. But little guidance is given in what makes a

property worthy of designation. "Heritage" is defined in s. 1 of the Act as being "Of historic, architectural, archaeological, palaeontological, or scenic significance to the province or a municipality, as the case may be." This definition is clearly wider than that used in some other provinces⁴⁶ and in the previous municipal heritage designation powers of this province. Section 564A of the Vancouver Charter⁴⁷ and section 714A of the Municipal Act⁴⁸ allowed designation of properties that were evidence of the municipality's history, culture, and heritage. There was no power to designate "scenic" structures. This addition provides the power to designate aesthetically pleasing property that may have no historic or architectural significance.

More specific and detailed standards for designation would provide an individual with more certainty as to the potential restriction of his property. More detail would also insure that only the truly significant structures are protected. An example of more specific standards is the definition of "historic and cultural significance" used by the City of Seattle. To be designated, a building must have:

significant character, interest or value as part of the development, heritage or cultural characteristics of the City, state or nation, or is associated with the life of a person significant in the past or an historic event with a significant effect on society.⁴⁹

According to Duerkson⁵⁰, such detail is preferable over a definition such as "Historical includes all of the past" which was used by the City of Dallas. Designations following this standard were ruled invalid because of the vagueness⁵¹. In

Canada, the Ontario Municipal Board invalidated a by-law that prescribed buildings had to conform to a "heritage concept" because the phrase was undefined and so vague that it did not provide any guidance whatsoever to interpretation⁵².

Despite wide discretion in British Columbia to determine exactly what a heritage structure is, the sufficiency of the reasons for designation cannot be questioned by a court. In Murray v. The Corporation of the Township of Richmond⁵³, the owner of a designated property applied to have the designating by-law quashed because there was no evidence of any historical significance of the site. Mr. Justice Gould of the Supreme Court found that so long as there is some evidence of heritage significance, the Court could not substitute its own opinion as to whether the evidence was sufficient. Council had some evidence because it acted on the advice of its Recreational Department⁵⁴.

British Columbia municipalities are not required to provide reasons for designation. Other provinces, notably Ontario⁵⁵, Nova Scotia⁵⁶, and Saskatchewan⁵⁷, require the municipality to provide written reasons for the designation. This would prevent the legitimate use of the designation power for some reason other than preservation such as to stop an unpopular development. Stated reasons would also provide evidence that careful research was undertaken to determine that the building was truly significant. Designation because of "windshield surveys" could thus be deterred.

D. The Mechanics of Designation

1. Provincial Designation

The Heritage Conservation Act⁵⁸ provides that heritage sites may be designated by either a municipality or the provincial government. Part 2 of the Act deals with provincial heritage conservation. Under s. 4(1), the Lieutenant-Governor in Council may designate land as a provincial heritage site or personal property as a heritage object. Unlike other provinces, there is no requirement in British Columbia to register the designation against the property's title. Section 6 prohibits all persons from destroying or altering a provincial heritage site. The building may only be altered or demolished with a permit issued by the Minister in charge of administering the Act or his delegate⁵⁹. Part 2 also includes several special provisions with respect to archaeological sites⁶⁰.

2. Municipal Heritage Designation

Most heritage protection occurs at the municipal level. Municipal designation is governed by Part 3 of the Act⁶¹. Section 11 provides the power for municipalities to designate structures within their boundaries. The Act provides a fairly detailed procedure for municipalities to follow. Council must give a property owner notice of its intention to consider designation. Notice must be delivered by registered mail at least ten days before the by-law will be considered. Ten days may be inadequate time for an owner to prepare an argument

against designation. Ten days notice is much less than property owners receive in other jurisdictions⁶². To insure that all interested parties know of the intention to designate, council is also required to twice publish a notice in a newspaper of general circulation within the municipality⁶³. Once designated, the structure can only be demolished or its exterior altered with the approval of council by way of a resolution⁶⁴. Section 15(1) provides that council may establish a heritage advisory committee to provide advice on heritage matters. The committee is to be purely advisory as it does not have designation powers.

The City of Vancouver designates municipal heritage sites with its Heritage By-Law No. 4837. The by-law was first enacted in 1974 under council's previous powers under the Vancouver Charter⁶⁵ but because of transition rules discussed earlier⁶⁶, the by-law and designations under it should remain valid and be administered under the Heritage Conservation Act. Since 1974, fifty buildings have been designated and protected from demolition.

The by-law's prohibitions closely follow the protective powers given under the HCA but the by-law may exceed the municipality's jurisdiction in other areas. Several of the buildings designated are owned by either the federal or provincial Crown. The City has no jurisdiction over federally-owned buildings such as the Federal Building in the Sinclair Centre⁶⁷. The heritage by-law would also have no application over federally regulated structures such as the Canadian

National Railway Station⁶⁸.

Similarly, the designation of buildings owned by the provincial Crown are ineffective. The old Provincial Court House was designated by the City in 1974. Section 14(1) of the Interpretation Act⁶⁹ binds enactments on the provincial Crown unless the enactment specifically provides otherwise. The Heritage Conservation Act does not specifically exclude the Crown from its operation. But s. 14(2) of the Interpretation Act exempts the Crown from provisions with respect to "the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements" Clearly, a heritage restriction is just such an enactment. Of all the provincial heritage statutes in Canada, only the Saskatchewan⁷⁰ and Nova Scotia⁷¹ Heritage Property Acts specifically bind the provincial Crown by municipal heritage designations.

One provision of Vancouver's Heritage By-Law may be invalid because of improper delegation. In 1976, the by-law was amended to add a second schedule of designated buildings. The amendment reads:

Those parts of buildings or structures more particularly described in Schedule B to this by-law are hereby designated as Heritage buildings or structures as the case may be provided that approval is hereby granted to any alteration to the whole or any part thereof where the proposed alteration has been referred to the Vancouver Heritage Advisory Committee for a report and subsequent thereto a valid development permit is issued authorizing the same.

Six months later, six building facades were placed on Schedule B by council. The Heritage Conservation Act⁷² prohibits

alteration of the facade without the prior approval of council by resolution. The by-law amendment presumes that merely by designating the structure, approval is granted automatically so that the owner may make any alterations so long as the development permit board eventually approves it. In effect, the council has delegated to the board its powers to approve or reject intended alterations to a designated structure when it was given no such power to delegate. The delegation to the development permit board of this power is not the same as approval by council by resolution. Improper delegation makes that portion of the by-law invalid⁷³.

E. General Issues

To be truly effective in the protection of significant buildings, a heritage statute must address several issues including interim control, demolition control and enforcement. The Heritage Conservation Act in British Columbia is one of the simplest and shortest heritage statutes in Canada. To determine its effectiveness, in protecting heritage properties, I will compare its provisions with the protective measures in other Canadian statutes. Primarily, I will compare the HCA with the Alberta, Saskatchewan and Ontario legislation. The Alberta Historical Resources Act⁷⁴ and the Saskatchewan Heritage Property Act⁷⁵ are probably the most comprehensive and detailed Canadian Heritage statutes. The Ontario Heritage Act⁷⁶ is a useful comparison because it takes a different approach in attempting to protect the structure.

1. Interim Control

To be effective, a heritage protection statute must protect a structure before as well as after the formal designation process takes place. The City of Victoria discovered that a lack of interim control powers made their protective measures totally inadequate. Upon a mere rumour of council considering designation, property owners were levelling their buildings in order to keep the property free for future development. Since designation at that time was a fairly lengthy process requiring approval by a provincial minister, property owners had a great deal of time to demolish their structures in order to avoid the heritage restrictions⁷⁷.

The interim protection measures of the Heritage Conservation Act were drafted to remedy this problem. Section 14 of the Act gives the municipality the power to ignore demolition permits and other regulations so that it may order a building cannot be altered or destroyed for a period of up to thirty days. This is to give the city an opportunity to assess the potential heritage value of the building. The city can prohibit demolition or alteration for a further sixty days once a designating by-law is introduced. The freeze on demolition ends when council rejects the by-law or at the end of the sixty-day period if the by-law is never adopted. The freeze, using both these provisions, can last for no longer than ninety days. This system is similar with one exception to that included in the Vancouver Charter⁷⁸ provisions. Under

the Vancouver Charter, council was liable for compensation if the building was not designated during the freeze. Sub-section 14(2) of the HCA removes this liability for compensation by deeming the action not to injuriously affect the property. The removal of this liability should have made the section much more attractive for municipalities to use.

The British Columbia interim protection measures are some of the most effective in Canada. Only Saskatchewan provides a longer period, sixty days, in which demolition can be frozen to allow a survey or consideration of the heritage value of a property⁷⁹. In both Alberta⁸⁰ and Ontario⁸¹, demolition cannot be prohibited until the municipality serves the owner with notice of an intention to designate. The British Columbia provision requires no notice to be effective and thus can be implemented much more quickly providing greater protection.

2. Control of Demolition and Alteration

The control and prohibition of the demolition of the heritage structure is the most vital component of an effective heritage power. Without this control, the protection afforded to a designated structure will be useless.

In British Columbia, provincially designated properties cannot be demolished or altered unless the owner obtains prior written consent from the minister in charge⁸². This approval process is easier than the actual designation process which requires approval by the entire cabinet. Other provinces⁸³ give the designating body control over demolition requests so

that effectively de-designation is required for a building to be demolished. Ontario provides no powers for provincial designation.

Municipally designated structures can only be demolished with the prior approval of the municipal council that designated the property⁸⁴. A resolution and not a by-law is the form council shall use so that it does not need to follow the same procedure it followed in designation. But once designated, the building is protected from demolition and only an action by council can remove that protection.

In Ontario, the municipal council does not necessarily control demolition. Under the Ontario Heritage Act⁸⁵, municipal councils have the power to designate heritage properties. But designation only effectively protects the structure if the owner does not object. Under ss. 32 and 33 of the Act, an owner of a designated property may apply to the municipal council to have the designating by-law repealed or to obtain consent for alteration of the building in a manner "likely to affect the reason for designation." This will set in motion a review process but eventually council's decision not to repeal or to refuse consent will be final. But, if the owner wishes to demolish or remove the structure, council cannot block it indefinitely. The right to demolish a structure is easier to obtain than the right to make alterations. Under s. 34, the owner is entitled to apply to council for consent to demolish his property. Upon receiving the owner's application, council is given ninety days to consent or refuse.

Notice of the decision must be given to the owner within those ninety days⁸⁶. If council refuses to approve the application, the owner is automatically prohibited from demolishing or removing the structure for a period of 180 days from the date of council's refusal. Once that 180-day period expires and the owner has not volunteered to extend that period, he may proceed to demolish or remove the structure. Council has no power to withhold the demolition permit after that 180-day period. Therefore, an owner of a designated structure may acquire the right to demolish his structure merely by making application and waiting for a maximum of 270 days. The section provides an incentive to demolish a designated structure and thus provides poor protection for heritage buildings in Ontario belonging to private owners unsympathetic to heritage conservation. Under such circumstances, an Ontario municipality's only options would be to expropriate the structure, as was recommended to council in the St. Peter's case⁸⁷, or negotiate some compromise with the owner to save the structure. In Re College Street Centre and the City of Toronto⁸⁸, an owner of a building designated under the Ontario statute was denied the right to destroy an important section of the building only because he had previously agreed under a development agreement with the city to protect the heritage components of the building.

In Saskatchewan, the protection afforded a structure through municipal designation may be eliminated by the provincial government. A recent amendment to the Heritage

Property Act states:

71.1(1). If the minister is of the opinion that a designation or intended designation of any real property as Provincial Heritage or Municipal Heritage Property would preclude proceeding with a development project that is of major significance to and benefit for the people of Saskatchewan, he may, by order, exempt that real property from such designation.⁸⁹

It is very important that a truly worthy structure is protected from major redevelopment such as the type contemplated by this section. The veto power by a provincial minister removes the protection from the municipal by-law. The amendment effectively dilutes the otherwise attractive protective measures of the Saskatchewan act and makes any designation under the Act uncertain.

One area in which the powers of British Columbia municipalities are ineffective is in protection of the interiors of designated buildings. Section 12 of the HCA only prohibits persons from altering the exterior of the designated building. Interiors may be altered without approval by council. The rationale for this must be that preservation is only for the public and since the public would only normally see the exteriors of structures, only the exteriors need be preserved. This is usually true but frequently the interiors of heritage structures are as valuable as the exteriors. Buildings like the Orpheum Theatre in Vancouver are designated entirely because of their interior features. Other designated buildings such as the former Canadian Pacific Railway Station have interior features that should be protected. Control over alterations of the interior may be necessary to insure im-

portant heritage features are preserved. For example, preservationists have greatly criticized the modernization and rehabilitation of the interior of Vancouver's old Court House, now the Vancouver Art Gallery, because much of the original features were abandoned⁹⁰. Even if the municipal designation of the provincially-owned building could have been effective, council would have had no control over this interior work.

Municipalities in other provinces have control over interior heritage space. Designation protects the entire building⁹¹. This approach also presents problems because where the interior is not significant or does not contain special features, the owner is likely to be deterred from renovating and rehabilitating his interior space because of the requirement that every change be approved by the designating body. For example, the Saskatchewan statute requires that detailed plans be presented before council may approve of any renovations⁹². This would add time and expense to the renovation process not suffered by other property owners. The City of Winnipeg has developed a scheme whereby buildings are classified as to the extent of restrictions necessary to protect them. The Winnipeg by-law⁹³ divides heritage properties into four grades. First Grade buildings are those in which the entire structure, including the interior, is worthy of protection. Renovations of any part of the structure could only be made with prior approval of council. With Second Grade structures, only the exterior and specified elements

of the interior are restricted by designation. Designation of Third Grade buildings only regulates the exterior of the structure. Fourth Grade buildings receive the least protection because designation only restricts the demolition or removal of the structure. Renovations to any part of the buildings do not require prior approval by the designating body. This system is designed to provide necessary protection for truly worthy heritage features without unduly hindering renovations necessary for the rehabilitation of the structure.

British Columbia municipalities should be given the power to control interiors of designated structures but that control should be limited to interior features specifically detailed in the designating by-law. To further restrict this power, interior features should only be protected if they form part of the structure generally open to the public and thus available for the public to view. This would insure that alterations and renovations of other areas of the building that may be necessary for the rehabilitation of the structure will not be hindered by regulation nor by a time-consuming process for obtaining council's approval.

3. Maintenance

Preservation is an on-going process. Once the building is designated and protected from demolition, the preservationist's concern continues because in order to remain a valuable asset to the community, the property must be properly maintained. The maintenance of a heritage property may require

special attention to insure that old materials and significant features do not deteriorate. A municipality could insure that proper maintenance continues if it had the power to impose affirmative maintenance standards on the owner. By doing so, the problem of "demolition by neglect" could be eliminated⁹⁴. This problem occurs when an owner of a designated or a potentially designated structure neglects the maintenance of his property. The building deteriorates and becomes so unattractive that the public will be less sympathetic to its protection. There will thus be much less political pressure on council to protect the structure through designation. Such circumstances occurred in the City of Vancouver in 1977. At that time, the city council refused to designate what was then the city's oldest standing school. A major reason for the refusal was the school's owners had left the building vacant and had seriously neglected to maintain the structure so that it had become an unattractive and dilapidated eyesore that the majority of the public wished removed⁹⁵. When the designation was denied, the owners demolished the structure and replaced it with a parking lot. Thus, a potentially worthy structure was demolished by neglect.

British Columbia municipalities have no powers to impose maintenance controls on private owners unless the structure becomes a danger to the public or is "so dilapidated or unclean as to be offensive to the community."⁹⁶ At that time, council may order the structure be removed or dealt with in some other way. If the owner does nothing, the municipality may enter

the property and effect the order itself with the owner being liable for all costs or auction off the structure. It is likely that such an order would override a heritage designation because of its involvement with public safety. The Ontario act⁹⁷ specifically indicates that the designation may be ignored where the property is in an unsafe condition. At the very least, the existence of an unsafe structure would politically force council to de-designate. Neither the Heritage Conservation Act nor the two municipal enabling acts provide any powers for council to impose maintenance standards before the structure reaches a dilapidated state.

Very few Canadian heritage statutes provide powers to impose minimum maintenance standards on private heritage property owners. In Alberta, the Historical Resources Act⁹⁸ gives the provincial government the power to make regulations concerning the standards of maintenance and signs on all provincially designated heritage properties. No similar power is given to municipalities. Saskatchewan allows municipalities and the provincial government to order a landmark owner to make specific repairs if he has not observed "accepted maintenance of operation procedures" and where the integrity of the structure is endangered⁹⁹. If the owner ignores the order, the municipality may do the work itself. It then acquires an interest in the land for which it may register a caveat¹⁰⁰ against title¹⁰⁰. The interest will remain until the owner pays the municipality for all costs of the maintenance work.

Under the present law, British Columbia municipalities

would have to impose maintenance standards through restrictive agreements with the owner. Section 27 of the HCA empowers a municipality to enter easements or covenants that will run with the land. This may be a better approach than a general power to impose maintenance standards because the covenant would provide greater flexibility in that standards could be specialized for each individual property. However, covenants will only work where the owner agrees to them. The best solution would be for the Legislature to give the municipalities the power to impose maintenance standards on heritage properties and, to allow greater flexibility, to also give council the power to delegate the creation and enforcement of the standards to an administrative official or a committee of experts¹⁰¹.

4. Relaxation of Building Codes

One deterrent to restoration is that the development will have to comply with building codes. It may be exorbitantly expensive or impossible to upgrade older buildings to the levels required by municipal building codes. Duerkson¹⁰² gave the example of a preservation being severely delayed because a stairway was two inches too narrow, thus violating a modern building code. To insure that the building code requirements do not unduly interfere with rehabilitation projects, some heritage statutes provide for relaxation of the regulations for designated properties. The Alberta Historical Resources Act provides that the provincial minister may exempt a provincially designated structure from building codes where the

enforcement of the regulation would "prevent or seriously hinder the preservation, restoration, or use of the site."¹⁰³ In Saskatchewan, the Heritage Property Act provides the Lieutenant-Governor in Council may exempt either a provincially or municipally designated heritage site from building codes¹⁰⁴. The Heritage Conservation Act does not provide a similar power. Vancouver has the power to relax zoning regulations and "by-laws prescribing requirements for buildings" if their enforcement would result in "unnecessary hardship"¹⁰⁵. The city's Zoning and Development By-Law No. 3575 provides for relaxation of the zoning regulations but not necessarily of the building codes for restoration works on heritage sites. Municipalities governed by the Municipal Act¹⁰⁶ have no such flexibility.

5. Zoning Powers

Zoning and land use powers may assist municipalities in heritage conservation. Zoning powers may be particularly helpful in protecting the surrounding area to insure that new development does not seriously interfere with the integrity of a heritage structure. Under s. 963 of the Municipal Act¹⁰⁷, British Columbia municipalities are empowered to regulate the use of land by creating zones. Among the powers important to heritage conservation, municipalities may regulate the size and siting of buildings within each zone. Obviously, if the zoning is set so that the allowable size of a building is the same as the size of the existing heritage structure, there would be less incentive

for a developer to demolish and replace the structure. The Municipal Act also gives powers over the size and form of signs within each zone¹⁰⁸. Powers in other provinces are wider. In Alberta, municipalities may specifically regulate such features as "the design, character and appearance of buildings", landscaping, fences and the alteration of buildings¹⁰⁹.

British Columbia municipalities have further powers under the development permit provisions of the Municipal Act¹¹⁰. Through the permit system, council may regulate the exterior design and finish of buildings, landscaping and other factors affecting the character of development in an area. However, these powers are severely limited in that the permit system can only be introduced to land that was specified in the official community plan as a designated heritage site under the Heritage Conservation Act, an approved revitalization area or an area requiring guidelines for the form and character of development within it^{110A}. The objectives of this special treatment and the guidelines for development must be included in the official plan^{110B}. This development permit system provides little flexibility in the control of development neighbouring or involving a heritage structure.

A caveat applies to the direct use of the zoning powers for heritage conservation. The zoning powers must be used for a planning purpose. Frequently, an enabling power will list the purposes for which the zoning powers may be used. For example, the City of Winnipeg Act specifically recognizes that heritage preservation is a planning purpose because council must consider:

the preservation, protection and enhancement of areas of land, buildings, structures and sites of historical, archaeological, geological, architectural, environmental, or scenic significance.¹¹¹

New amendments to the Municipal Act may make heritage preservation a valid planning purpose in British Columbia^{111A}. A municipal council may designate areas for the protection of heritage sites designated under the HCA but the protection of undesignated heritage properties is not made a planning purpose. The Vancouver Charter does not have a similar section.

Jurisdictions where heritage conservation is not specifically made a planning purpose are likely governed by The City of Edmonton v. Tegen Developments¹¹². The Tegen case indicated that heritage conservation was not an appropriate planning purpose unless specifically expressed to be in the enabling legislation. The facts of the case are the City of Edmonton passed a resolution that attempted to restrict demolition and any development that would detract from the preservation of the historic Old Strathcona District. Following the resolution, development permit applications could be rejected on the basis of "lack of harmony" with buildings of the early 1900's. Buildings could only be erected if the facade and design were sympathetic to surrounding buildings and to the period architecture of the district. The permit issuing officer had to consider above all the potential for preservation of the area's architecture by restoration or replacement. The city relied on its zoning and development control powers as authority to make the resolution. Those

powers gave council the right to make rules respecting the use of land or "any special aspects of specific kinds of development."¹¹³ Mr. Justice Moir of the Alberta Court of Appeal found this resolution was not concerned with this purpose. Instead, the resolution's purpose was expressly stated to be to preserve the historical structures pending designation under the Alberta Historical Resources Act¹¹⁴ and to entitle the city to grants from two heritage foundations. The zoning power given the city could only be exercised for the purpose for which it was given. Preservation of historic sites was not a purpose of the land use law. As a creature of statute, municipalities must exercise their powers only for the purpose for which they were given. The Old Strathcona Resolution was declared invalid. At the Supreme Court of Canada, Moir's decision was affirmed.¹¹⁵

If heritage conservation is not a valid planning purpose, then the City of Vancouver's Historical Area zoning regulations are likely ultra vires. The City's Zoning and Development By-Law no. 3575 created two Historic Area (HA) Districts in Chinatown (HA-1) and Gastown (HA-2). A third HA District has been approved for the Yaletown area¹¹⁶. The District Schedule of the by-law states the intent of the HA-2 District is as follows:

Gastown is the site of the old Granville Townsite and it is from this area that the City of Vancouver developed and grew. This District Schedule is designed to recognize the area's special status and to ensure the maintenance of Gastown's "turn of the century" historical and architectural character.

The Chinatown Schedule has a similar intent. Both schedules give height, size and use regulations for buildings in the district, as authorized by s. 565 of the Vancouver Charter¹¹⁷.

But what the Charter does not authorize is the need for approval of all proposed alterations or exterior changes to the building. Clearly, this need for approval is the same as a heritage restriction. Since the alteration restriction infringes on the property owner's rights, the power to restrict must be very expressly given by the Legislature. There is no clear power given in the Vancouver Charter to control alterations in this manner. Section 565(d) allows the city to regulate the "external design of buildings to be erected within the designated districts or zones."¹¹⁸ The words, "to be erected" limit the regulation to new construction and exclude design changes to buildings already erected. Section 565A allows council to regulate "development" through a permit system. Section 559 defines development as "a change in the use of any land or building, including the carrying-out of any construction" "Construction" includes alteration and demolition¹¹⁹ so that external alteration may be regulated by development permits. However, the intent of the HA Districts in Vancouver is expressly given as preservation of the area's character as a historic site. This is the same purpose that the courts ruled invalid for the exercise of zoning and development permit powers in the Tegon case¹²⁰. Therefore, without the express legislative recognition of preservation as a purpose of zoning powers, the HA District regulation governing alterations may be invalid. Clearly, the Legislature intended a municipality's preservation powers should be limited to those given in the Heritage Conservation Act.

One advantage the City of Vancouver has over other municipalities is that it may relax its zoning regulations in certain cases. Section 565A(e) of the Charter provides the power to relax a zoning by-law where its literal enforcement would result in "unnecessary hardship." The only restriction is that the relaxation must not allow multiple occupancy structures in one-family dwelling zones. The power to relax may be helpful to heritage preservation in that greater flexibility in the use of the building may encourage its preservation. The City of Vancouver appears to have recognized this because the Zoning and Development By-Law delegates to the Development Permit Board and the Director of Planning the right to make zoning relaxations for heritage preservation. The power to delegate is given in s. 565A(e). Sections 3.2.5 and 3.2.6 of the by-law give the power to relax the by-law's regulations where the "literal enforcement would not allow the restoration and renovation of sites with architectural, historical or cultural merit." The Heritage Advisory Committee must support any proposed conservation work. It is arguable whether the prevention of restoration is an "unnecessary hardship" as required under the Charter. Proof of economic hardship may be necessary to obtain a relaxation. The permit board has discretion to refuse or approve with conditions a development permit application where the development may adversely affect significant buildings with possible heritage value on the site or in the surrounding area¹²¹. Municipalities governed by the Municipal

Act¹²² do not have the same powers. Relaxation of zoning regulations would have to be implemented through development variance permits or the Board of Variance system. Only "minor variances" would be available under these two systems¹²³.

6. Enforcement

Penalties for offences under the Heritage Conservation Act are clearly inadequate and are a major reason for the statute's ineffectiveness. Section 29 of the Act makes it an offence to contravene the Act. Section 4 of the Offence Act¹²⁴ specifies that the penalty for an offence is a fine up to two thousand dollars or imprisonment for a maximum of six months or both. Two thousand dollars is clearly an inadequate penalty when dealing with properties worth millions of dollars. An offence under the City of Vancouver's Heritage By-Law is even less onerous. The offender is only liable for a fine of not more than five hundred dollars and not less than four hundred dollars¹²⁵. With such inadequate penalties, a landowner may simply demolish a structure on his property to keep the property free for future development knowing he will only be liable for a fine of a few hundred dollars. Recently, a historic school house in the municipality of Langley was demolished to make way for a new subdivision. The building had not yet been designated under the Heritage Conservation Act but because the demolition was without a permit, the developer may be liable for a maximum fine of one thousand dollars¹²⁶. Had the building been designated, the maximum

fine would have not been much more providing little deterrent to developers of valuable property.

Other Canadian heritage statutes provide much more onerous penalties. The Alberta Historical Resources Act¹²⁷ provides for a penalty of up to fifty thousand dollars and prison for one year. The Ontario act provides an identical penalty for corporate offenders but individuals are only liable for a maximum fine of ten thousand dollars¹²⁸. Saskatchewan has the stiffest penalty and perhaps the only one that truly deters developers from illegal demolition. Corporations are liable for a maximum penalty of 250,000 dollars¹²⁹. Individuals can be fined up to five thousand dollars and imprisoned for six months¹³⁰. Only the statutes of Prince Edward Island¹³¹, Newfoundland¹³², and Manitoba's badly outdated Historic Sites and Objects Act which specifies a maximum fine of one hundred dollars¹³³, provide penalties less than the Heritage Conservation Act.

A more useful and onerous penalty is the civil remedy contained in section 28 of the HCA. When a person alters designated property illegally, council or the provincial minister may order that person to restore property to its condition prior to the alteration. If the person does not comply with the order, council itself may restore the property and the offender will be liable for all reasonable costs of the restoration. Ontario¹³⁴ and Saskatchewan¹³⁵ empower municipalities to sue for damages of all restoration costs incurred because of an illegal alteration. A similar section

in Alberta applies to only provincially designated structures¹³⁶. This remedy is only of assistance where the offence was the alteration of a designated structure, not its demolition. Presumably, once a building is demolished, it is gone forever.

The right to inspect a designated heritage or potential heritage property is necessary for the enforcement of heritage restrictions. The HCA gives the provincial government the power to investigate and survey potential heritage sites or designated sites that are in the opinion of the minister likely to be altered, damaged or become dilapidated¹³⁷. Municipal councils have the power under the Municipal Act¹³⁸ to authorize inspections of properties to determine if its by-laws are being followed. The City of Vancouver derives its building inspection powers from s. 306(h) of the Vancouver Charter¹³⁹.

Members of the public have no standing to force the provincial government to designate a site. In 1981, the provincial Environment Minister was advised by his advisory committee that the main building of the C.P.R. Roundhouse in Vancouver should be designated. Before the minister made a decision on designation, the building's owners began demolishing the Roundhouse's ancillary buildings. A group of private individuals sued for an injunction to restrain any further demolition until the minister decided whether or not to designate. In Friends of the Roundhouse Society v. B.C. Place Ltd.¹⁴⁰, Mr. Justice Hinds held that the group

had no standing. Merely because a group of citizens requested the minister to form an opinion on the site did not give it the right to preserve those buildings.

There would be a similar result with municipal designation powers. It is only once a by-law is actually passed that a taxpayer or interested groups may have standing to challenge the by-law¹⁴¹. This would be helpful if council ever attempts to de-designate a structure.

F. Railway Properties

A problem peculiar to Canadian heritage legislation is the exclusion of all railway properties from the provincial protective measures. Railways are an important part of our nation's heritage, especially in Western Canada where the railway was the leading instrument of settlement. The railway station was frequently the most prominent and busiest structure in Canadian towns and cities during the first half of this century. In many communities, the railway station is the most important heritage structure remaining¹⁴². Yet its protection by the municipality is impossible. Constitutional problems exclude railway properties from any heritage protection legislation.

Under the Constitution Act, 1867, railways are excluded from provincial jurisdiction and thus s. 91(29) makes them a federal jurisdiction. The jurisdiction extends over all property necessary for the operation of the railway. Thus provincial heritage laws have no effect on railway stations.

This is so even where the station is no longer in use. The lack of protection has led to the destruction of many Canadian railway stations of heritage value. Since 1969, seventy-five stations have been demolished despite provincial designations and strong objections from municipalities¹⁴³. The conflict has reached the courts in a few cases.

Canadian Pacific v. Saskatchewan Heritage Property Review Board et al.¹⁴⁴ made it clear that municipalities are powerless to protect heritage railway stations. The plaintiff, Canadian Pacific Railways, planned to remove its station at Kerrobert, Saskatchewan and demolish it. The land would then be used by the company for railway storage. The Kerrobert council attempted to block the move by passing a by-law designating the station as a municipal heritage property. The heritage value of the structure was not in doubt because the station had existed for seventy-one years. The designation would normally have prevented the station's removal without council's approval. Council made it clear that when asked it would not give its approval. Canadian Pacific applied to the court seeking a declaration that the municipality did not have the power to designate the station as heritage property.

Mr. Justice Matheson first examined the railway power of the federal Parliament. Using the Railway Act definition¹⁴¹, the power was widely defined as being over all stations, properties and works connected with the railway. But to continue under that federal jurisdiction, the property had to remain an essential part of the transportation system. Hotels

and quarries owned by railways have been held not to be essential to the system and thus had no immunity from provincial and municipal laws¹⁴⁶. In the present case, the station had been closed and out of operation for at least a year so that it could not be classified as essential to the system. However, Canadian Pacific claimed the building had to be removed to make room for operating equipment, to provide parking space for Canadian Pacific and private vehicles. Even though the municipality argued that other property could easily have been used for these purposes, the Court found that the property was not just a convenience to the railway company but an essential part of the transportation operation. The Court further found it could not interfere with the railway's bonafide decision that property was required to maintain its operations¹⁴⁷. Therefore, because the property was a federal jurisdiction, the municipality had no power to designate and protect it under provincial legislation.

Canadian Pacific's most infamous conflict with provincial heritage legislation occurred in the City of Toronto when it demolished the suburban West Toronto Station. The station clearly was worthy of protection as a heritage site. The company proceeded with demolition without a municipal demolition order and in defiance of a stop work order issued under the Ontario Building Code. The company was prosecuted by the city for the illegal demolition. The company was found not guilty in Provincial Court because the station sat on land owned by the railway and was thus under federal jurisdiction¹⁴⁸.

The station had been boarded up and vacant for over three years so that an argument was clearly available indicating that the station was no longer immune from provincial legislation. Unfortunately, I have not been able to discover whether or not the argument was actually made.

It was therefore left up to federal law to punish Canadian Pacific. Under the federal Railway Act¹⁴⁹, any proposed deviation, change or alteration in the railway must be submitted to the Canadian Transport Commission (CTC) for approval. Since the definition of railway includes stations, such approval would have been necessary for demolishing and removing one of the system's stations. Canadian Pacific did not obtain CTC approval before demolishing the West Toronto Station. The CTC held a public inquiry at which Canadian Pacific argued that the Railway Act no longer applied to the building because it had not been a "station" for three years. Ironically, this is the counter-argument to what was likely their position in arguing immunity from provincial legislation because of its status as a railway. The CTC rejected the argument and recommended that the Attorney-General of Canada institute proceedings against Canadian Pacific for the illegal demolition of the station. Canadian Pacific challenged the right of the CTC to make such a recommendation but the Federal Court of Appeal upheld the commission's right¹⁵⁰. Leave to appeal was denied by the Supreme Court¹⁵¹. Criminal proceedings by the federal Crown are now pending¹⁵².

This section of the Railway Act is the only protection

that heritage railway stations have. It is clearly inadequate protection in that its purpose is to regulate the workings of the railway system and not to protect worthy buildings. The Commission is not equipped to judge the architectural merits and heritage value of a railway station to a community. Thus, it is likely that approval to demolish would be given without consideration of the building's heritage value.

The federal government has virtually no powers to protect significant buildings under its jurisdiction. The federal heritage legislation is the Historic Sites and Monuments Act¹⁵³. The only means of protection the Act provides is the power to purchase historic places and preserve them as museums. The federal government does not have the funds to purchase every railway station worthy of preservation. Furthermore, use as a museum is an unproductive and unnecessary condition. Heritage buildings are more valuable to the public when they are rehabilitated into active commercial centres. Maintaining the property in private hands yet protecting it by designation would be preferable to the present federal system.

There are cogent policy reasons for enacting protective legislation that would place a burden on railway companies to preserve its stations for the public benefit. The leading American case, Penn Central Transportation Co. v. The City of New York¹⁵⁴ dealt with the burden of landmark designation on a railway terminal building. In the New York Court of Appeal, Mr. Justice Breitel indicated that railroads, because of government subsidies, should have a duty to the public to

allow preservation of their buildings. Without government granted monopolies, subsidies, and expropriation powers, the railway company would never have been in a position to own the land and build the station. It has received its livelihood from society and therefore the public has a right to have that station preserved for its benefit. Railway companies like Canadian Pacific thus have a duty to preserve their stations and therefore, an appropriate, legislated imposition of that duty should be enacted.

Several legislative proposals have been made but never adopted. A persistent Private Members Bill^{154A} was inadequate in its details but was schematically attractive. The power to designate would have been given to the Historic Sites and Monuments Board as constituted under the federal act^{154B}. Presumably, this board would have more expertise than the CTC in determining the heritage value of railway stations. To avoid the Constitutional problems of interdelegation^{154C}, Parliament should give the power to this federal board instead of empowering existing provincial bodies with powers to designate railway stations.

III. PROTECTION FOR THE PROPERTY OWNER

Protection of the buildings and structures of our past by designation has been the focus of heritage legislation thus far. The analysis in Part II demonstrates that the results of this goal have attained some success. For example, the Heritage Conservation Act^{154.D}, if used, could provide adequate protection for designated structures. But to be effective, heritage legislation must balance this protection with protection for the property owner from the burden of designation. This burden can be harsh. The owner no longer has the right to use his property as he wishes. He must maintain his property exactly as it stands even if that no longer provides a profitable use. Clearly the owner must be protected from the consequences of the designation or the arbitrary use of the heritage powers against his land but little thought and effort have been put into providing this protection in heritage legislation. The protection that has been used is either procedural fairness or compensation. The effectiveness of these forms of protection, the proper means of their implementation and their success in achieving a balance with the protective measures for the building will be examined in this part.

A. Procedural Fairness

Most provincial statutes provide protection to the owner with a statutory right to a public hearing and a right to appeal the designation. For example, in Alberta, the

owner of a potential Provincial Heritage Resource is given the right to object to the pending designation and is entitled to a hearing before the Historic Sites Board¹⁵⁵. The Board must provide a report for the minister before he can determine if the property should be designated. There is no similar statutory right of objection for the owner of property designated by a municipality in Alberta. In Saskatchewan, the Heritage Property Act¹⁵⁶ provides the pre-designation right to object and a public hearing before a provincially appointed watchdog committee for both provincial and municipal designations. The Act also provides the right to appeal a designating by-law¹⁵⁷. The owner, on appeal, is allowed to apply yearly to the municipal council or the provincial cabinet for a new hearing.

In British Columbia, there is no right to appeal nor any statutory right to a public hearing before designation. Section 11(2) of the Heritage Conservation Act states an owner must be notified before designation and be given instructions on how he may object but this does not clearly give a right to a hearing. Cases such as Christmas v. City of Edmonton¹⁵⁸ can be used as authority for the proposition that a municipality can pass a by-law without giving those affected a right to address the issue. However, the common law duty to act fairly and the rules of natural justice may impose, in the absence of legislation, a right to a public hearing. According to Makuch¹⁵⁹, a municipality is under a common law duty to follow certain procedures when it acts judicially and when rights

are affected. The duty requires the municipality give notice of its actions and hold a hearing. This duty is not imposed when the power to be exercised is legislative.

The Supreme Court of Canada, in Wiswell v. Greater Winnipeg¹⁶⁰, held this duty to act fairly demanded council hold a public hearing before rezoning an individual parcel of land. The Court found rezoning was a quasi-judicial function because it involved a conflict between private individuals. However, many rezoning situations or heritage designations do not involve a conflict between private individuals but instead between the private individual and council. Thus, it can be argued that these are legislative powers and are not subject to the rules of natural justice. However, the Supreme Court subsequently expanded the definition of quasi-judicial power to being one which involved an adversarial situation between a private owner and council because in effect the council is acting as the judge of its own actions. In Homex Realty and Development Ltd. v. Village of Wyoming¹⁶¹, an owner was not given notice or an opportunity to be heard before council passed a by-law de-registering a subdivision plan of his land, thus restricting his rights to convey the property. Mr. Justice Estey held that wherever a statute authorizes an interference with property rights, the Court will require the municipality give the subject an opportunity to be heard. Mr. Justice Dickson (as he then was) dissented in the final result but agreed that the duty of fairness applied. He indicated the right to fairness did not depend on the classification of the

power or the need for competing interests. Furthermore, it was irrelevant that the by-law might be in the public interest because so long as it operated to the detriment of a particular individual, there was a right to a hearing.

Clearly, heritage designation powers are analogous to the quasi-judicial power in Homex. Designation is an interference with the property rights of the owner and can lead to an adversarial conflict between a reluctant owner and an unsympathetic council. Therefore, municipalities are obliged to afford a hearing to an owner before designation.

Although not statutorily required, the City of Vancouver always holds a public meeting to consider the merits of designating a structure before passing a by-law¹⁶². This satisfies the duty to act fairly and gives the owner the opportunity to present his circumstances and publicize the potentially harmful effects of designation on his property. To insure that hearings are held in all municipalities and the owner knows of his right to a hearing, it would be more effective to make the right statutory.

There is no statutory right to appeal the designation in British Columbia. The designating by-law would however be challengeable under the setting aside provisions of the Municipal Act¹⁶³ and the Judicial Review Procedure Act¹⁶⁴.

B. Current Protection in British Columbia

The second form of protection is to compensate the owner whose property has decreased in value due to the restrictions

placed on the property by the heritage designation. This is the only statutory protection given to the owner by the British Columbia legislation. Most provincial heritage statutes deal with the problem by making a compensation award discretionary by the designating body¹⁶⁵. The practical effect of such a provision is with limited funds available to municipalities and other governing bodies, any compensation award will be small. However, British Columbia and Alberta¹⁶⁶ make compensation mandatory where a heritage designation diminishes the value of the property.

The Heritage Conservation Act¹⁶⁷ clearly makes compensation mandatory where a provincial heritage site is designated by the cabinet under s. 4(1). Section 4(2) states:

Where designation under subsection (1)(a) decreases the economic value of land, the minister shall pay to the owner of the land an amount to be determined by order of the Lieutenant-Governor in Council (emphasis added).

The legislative intent is less clear in providing guidelines or impartiality in setting the amount of that compensation. Subsection (3) deems the amount determined by the cabinet's order to be sufficient compensation for any loss. There appears to be no appeal for an owner unsatisfied with the amount given. Therefore, the party with the liability has total freedom to set the amount of its liability. This unilateral determination could create an inequity. A more equitable method to setting the amount of compensation payable would be to follow the provisions of the Expropriation Act¹⁶⁸. Under that Act, a property owner disputing the amount offered as

compensation may have his dispute settled by either arbitration or by a jury's verdict¹⁶⁹.

The liability for compensation is less clear when a municipality designates a heritage site. Section 11(4) of the Heritage Conservation Act provides that a municipal council "may" provide compensation to an owner where designation reduces the property value of the land. The compensation may be by grant, loan, tax relief or some other form. Section 11(5) deems the compensation given, if any, by the municipality to be full restitution for any loss. The use of the word "may" instead of "shall", as used in s. 4(2), implies the compensation is discretionary.

Although the heritage legislation appears not to make compensation mandatory, liability probably is created when the designation injuriously affects the property. Section 544(1) of the Municipal Act¹⁷⁰ states:

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

Where the claim for compensation is not agreed upon, it will be determined by arbitration¹⁷¹. Presumably, designation of a municipal heritage site would be an exercise of one of the municipality's powers thus creating the liability for any decrease in the property value.

Traditionally, injurious affection has been linked with damage to land caused by a damaging public work on or expro-

priation of the adjoining property. Over one hundred years ago, the House of Lords gave examples including loosening of the foundation, obstructing lights or drains or making the land inaccessible¹⁷². However, it now appears that mere government regulation without physical interference is an injurious affection. For example, in the 1950's, the Aeronautics Act¹⁷³ specifically included damage caused by zoning regulations made under the Act as compensable injurious affection to affected property. In British Columbia, the Court of Appeal in Tener v. The Queen in Right of British Columbia¹⁷⁴, found the denial of a permit for exploiting an established mineral claim which diminished the value of the property interest constituted an injurious affection for which compensation was payable. The decision was subsequently appealed to the Supreme Court of Canada where the Court came to a similar result but with different reasoning¹⁷⁵.

The Municipal Act¹⁷⁶ provides that damages are available "beyond any advantage which the claimant may derive from the contemplated work." The word "work" may imply a physical undertaking is necessary. Yet, the word "work" is far removed in the subsection from the phrase imposing liability so that liability may exist without a "work". Furthermore, one commentator¹⁷⁷ suggested that s. 544(1) applies to all acts of the municipality. Only an express provision will remove the compensation requirement as in s. 972. That section expressly denies compensation for a zoning change unless the property is zoned exclusively for public use. Zoning for public use is

merely regulatory and requires no physical "work" yet can constitute an injurious affection. Furthermore, section 14(2) of the Heritage Conservation Act deems property not to be taken or injuriously affected when a temporary delay of work has been ordered while council considers the heritage significance of the property¹⁷⁸. This implies that a permanent restriction to the use of the property through designation by the municipality will make it liable for compensation when the property value is decreased by the action. In Vancouver, municipal officials treat the designation provisions as imposing a mandatory liability for compensation on the city¹⁷⁹.

C. Compensation

There is considerable debate as to the necessity of compensation and its effectiveness in protecting the landowner. Authorities have suggested several reasons for and against the use of compensation in protecting heritage property owners. This section will survey those reasons.

1. Reasons for Compensation

a) The Private Owner Pays for the Public Benefit

The most common and obvious argument raised in favour of compensation is based on the principle of the user pays. That is, the party which benefits from a governmental act should pay for those benefits. The purpose of heritage designation is to preserve structures for the enjoyment and education of the public. It is the public which benefits from preservation

yet the burden of providing that benefit is placed firmly upon the proprietor instead of on the public. According to Denhez¹⁸⁰, the public as user of the heritage values of the structure has a responsibility to pay for it.

Clearly, the burden on the proprietor upon designation can be great. Costonis¹⁸¹ listed several burdens. Firstly, the owner loses the opportunity to redevelop the site to a more profitable use. He loses any added value the land may have if it could be assembled with surrounding properties. Secondly, the owner could lose income if he is unable to provide the same quality of interior space as provided by competing landowners who may increase the efficiency of their structures through relatively unrestricted renovations. Thirdly, if a building is listed as a heritage property, the owner could have difficulty in obtaining financing because of the restrictions placed on the property. A lender may decide that there are too many circumstances beyond his control. And fourthly, the owner may discover that the restrictions make it impossible to operate the building at a profit as it continues to age. In actual monetary terms, the burden can be great. Tudor Manor, a small apartment block in Vancouver's West End, was recently considered for designation. Its owner estimated that it would cost at least three million dollars to renovate the structure in order to preserve its heritage value and to provide a potentially profitable use¹⁸². With the public providing compensation, much of this burden could be alleviated.

b) Designation is Discriminatory

A second argument is that designation leads to a discriminatory loss. According to Denhez¹⁸³, the designation singles out certain properties and deprives the owner of part of the development potential while his neighbours are not so deprived. Such a loss interferes with the private property rights and thus demands compensation. This is especially true where the zoning for the area provides much greater development than what the restricted heritage structure holds. Mr. Justice Renquist of the United States Supreme Court labelled landmark designation as discriminatory because it penalized an owner for doing too good a job of designing his building¹⁸⁴.

This argument is not persuasive because designation can be likened to discriminatory zoning where compensation is not available. A principle of zoning law is that it is to apply over a large area. But frequently, a particular individual parcel of land is rezoned differently from its neighbours. This is called spot-zoning. The Supreme Court of Canada held in Town of Scarborough v. Bondi¹⁸⁵ that spot zoning, although discriminatory is a perfectly valid exercise of power by a municipality. But Bondi may be distinguishable from a heritage designation situation in that the spot zoning was allowed because it merely corrected an anomaly to conform to the general standards of a neighbourhood. Designation provides a standard for the property much different from the general standards of the neighbourhood. This makes its discriminatory effect greater than that of zoning so that compensation may be in order.

In the Penn Central Railway case¹⁸⁶, Mr. Justice Brennan, writing for the majority, indicated that historic landmark designation could not be discriminatory so long as it is part of a comprehensive plan. The problem with this statement is that although some cities have studied or inventoried heritage properties to form a comprehensive plan¹⁸⁷, most designations are the result of a worthy structure being threatened with demolition. Little studying or planning has occurred before this threat is made known to the designating body. In such cases, designation has a discriminatory effect.

c) Maintenance

The preservation of a building will involve on-going costs and positive action from the owner well after designation because the maintenance of an older building will be more time-consuming and more expensive. Municipal approval of any alterations may also be time-consuming and thus persuade an owner to forego needed repairs in order to avoid the bureaucratic measures. The maintenance of landmarks is frequently neglected so that the building becomes so run-down that it is demolished by neglect. Should affirmative maintenance standards be imposed¹⁸⁸, further expenses would be added to the landowner's burden. Compensation would alleviate that burden and perhaps encourage the rehabilitation and self-sufficiency of the structure.

A similar argument for compensation given by Denhez¹⁸⁹ is that the possibility of compensation may influence the owners

of undesignated, potential heritage properties to allow their structures to remain standing. At present, the fear of the effects of designation has led many owners to demolish their buildings to keep the properties free for future development. Such conditions led the City of Victoria to use emergency powers to protect buildings pending investigation and the passing of new legislation¹⁹⁰. Denhez states that the greater the prospective loss likely to be sustained with designation, the faster the rate of demolition. With compensation, the losses would diminish and the incentive to demolish would be limited.

d) Quasi-Expropriation

An argument can be made that property ownership involves a bundle of rights and when one of those rights is taken away by a governmental authority, it is an expropriation that demands compensation. Using the definition of a leading American authority¹⁹¹, a legal title to real estate is not unitary or a "monolithic right" but is rather a bundle of individual rights each one of which may be separated and transferred to someone else. In lands with uses other than agriculture or mining, the right to develop the lands frequently becomes the most valuable component among the many rights of ownership. According to one commentator, "the essence of property is its potential for profitable use."¹⁹² Heritage designation removes that potential. The designation forces an owner to preserve his building and thus removes his right to

develop the property in any other way. Therefore, a very valuable interest in that property has been taken by government.

According to La Ferme Filiber Ltee. v. The Queen¹⁹³, an expropriation necessarily requires the transfer of property or rights from one party to the other. The Crown therefore must acquire something belonging to the private owner. Heritage designation meets this requirement because, in effect, the Crown receives a servitude much like a conservation easement. In the United States, a taking of property occurs "when inroads are made upon an owner's use of the property to an extent that, as between private parties, a servitude has been acquired."¹⁹⁴ Canada, unlike the United States¹⁹⁵, has no constitutional protection of property rights. Yet this American definition may still be relevant because Canadian law presumes a right to compensation where an interest is expropriated. A statute must very expressly provide no compensation is available in such circumstances¹⁹⁶. Therefore, when development rights are removed by governmental action, an inroad is made on the use of the property as if the authorities had acquired a servitude. Although zoning provisions frequently expressly preclude compensation¹⁹⁷, designation statutes rarely do. Therefore, consistency in our law demands a right to compensation be presumed when this interest is taken.

2. Reasons Against Compensation

a) Designation Should Not Be Treated Differently from Other Governmental Regulations

A strong argument raised against awarding compensation is that heritage regulation should not be treated any differently from other regulation by government. The detrimental effect of other statutes and regulations does not create a liability for compensation. Denhez¹⁹⁸ uses the example of government action forcing a change in the value of the Canadian dollar. The government could never afford to compensate all losers each time the dollar's value decreased.

One obvious way in which the heritage regulation differs from most governmental regulation is that it deals with land. Real property has always been given special status in the English common law system. The ownership and possession of land shaped English law with the development of feudalism. Land's importance was derived from its permanence¹⁹⁹. It provided all sustenance and a suitably firm base for the institutions of government and wealth. Courts have consistently interpreted regulation of land so as to interfere as little as possible with the owner's right to enjoy his property and use it as he wishes. The Supreme Court of Canada indicated that an owner has a prima facie right to utilize his property in whatever manner he deems fit subject only to the rights of the surrounding landowners²⁰⁰. But in a more recent case²⁰¹, Madame Justice Wilson indicated that the paramount consideration

given to private property rights has eroded so that when in conflict with the public interest, the public interest will prevail. Yet, I submit that surely when the prima facie right is removed in order to cater to the public interest, the rights taken away are valuable and special enough considering the historical importance of real property that the owner should be compensated. Real property rights continue to deserve paramount treatment. Therefore, an argument based on the lack of compensation for regulation of non-real property possessions should not be given much weight.

A more appropriate comparison would be to land use law. Zoning laws regulate the type of use an owner may make of his land just as heritage conservation regulations do. Compensation is almost never payable for a change in zoning even where the change is discriminatory²⁰². However, there is clearly a difference in the purposes of zoning and heritage laws which may imply the latter deserves special treatment. In the New York Court of Appeal decision in Penn Central Railway Co. v. New York City²⁰³, Mr. Justice Breitel found that zoning operates to advance a comprehensive plan and is usually applied over a relatively large area where owners are equally burdened by the restrictions on the use of their land and equally benefitted by the implementation of the comprehensive plan. Property owners acting individually could not achieve the same benefits. But heritage designations are not designed to further a general plan. The burden of the restrictions is placed on a single land owner. He will probably not benefit from the limitation

but his neighbours will. This discriminatory effect requires that heritage regulations be treated differently from down zoning.

Another reason why the statute should be treated differently is that the British Columbia Legislature, in enacting the mandatory compensation section²⁰⁴, has expressed its intention that heritage regulation is more onerous a restriction and should therefore be treated differently. In comparison, the Legislature has expressly denied compensation for down zoning under s. 972(1) of the Municipal Act²⁰⁵.

b) Foreseeability

It is argued²⁰⁶ that an owner who purchases a unique property with the view to redevelop it is taking a risk that the heritage legislation will frustrate his plans. A restriction on the use of the property should be foreseeable. A prudent purchaser would make inquiries concerning the possibility of designation and assess the architectural and historical significance of the structure before buying. If a risk of designation exists, he is forewarned.

Judicial notice of this argument was made by Mr. Justice Kern in 900 G. Street Associates v. Department of Housing and Community Development²⁰⁷. A developer purchased a century old building with the intention of demolishing it and redeveloping. The property was listed on the National Register of Historic Properties so a demolition permit application was denied. The court, in reviewing the denial, found it was not appropriate to

consider the developer's expectation of profits before the council imposed the landmark restrictions because it was clearly foreseeable that there would be problems in attempting to redevelop the property. The court considered that the property was already listed as a landmark when the developer purchased it; he knew the previous owner had had difficulty in obtaining a demolition permit; and the city had publicized its efforts to enact a stringent historic preservation statute. These factors clearly influenced the developer's realistic expectations for the use of the property. The purchase of land was purely speculative anyway so that the owner could not complain about the heritage restrictions.

Clearly, the amount of knowledge of the risks to redevelopment in this case make it an extreme case. The foreseeability argument is less cogent when dealing with property that was undesignated when purchased. The general lack of awareness of heritage values in our society implies that a prospective purchaser is unlikely to assess the historical value of a property before purchasing it for redevelopment. Even if the property has been designated, notice to a prospective purchaser may be inadequate because in this province there is no requirement that a designation be registered against the title in the land title office. Only a restrictive covenant need be registered. Therefore, foreseeability may be an inadequate argument against compensation.

c) Morality

Denhez²⁰⁸ gives one argument based on morality. Because architecture is considered an art form, the destruction of a worthy piece of architecture should acquire the same sanctions as the destruction of any work of art. Society does not compensate people for restraining from anti-social behavior like destroying art so it should not be obligated to pay people to restrain them from demolishing worthy architecture. The Quebec Civil Code specifically states that all property values are subject to "public order and good morals."²⁰⁹ This principle is also implicit in our common law system²¹⁰. The principle implies that the property rights of an owner should be subject to an obligation not to engage in demolition which has anti-social effects. Unfortunately, because society does not presently have a great awareness of heritage values, it does not treasure architecture as much as it does the conventional art forms so the moral shame is not strong enough for this argument to be persuasive.

d) Practical Uncertainty

A common argument against awarding compensation is that it would be impossible to accurately determine the extent of a loss, if any, to the property owner. Up to this point, the arguments have assumed that designation reduces the value of the property. This assumption is not always valid. Designation can increase the value of the property. This is most obvious where an entire district is designated, thus insuring a certainty

in the surrounding aesthetics and bringing in the lucrative tourist trade. Gastown in Vancouver and Bastion Square in Victoria are this province's best examples of this occurrence²¹¹. Status of being a heritage property can alone increase its value. For example, designation is often valuable for residential buildings because owners and tenants are often willing to pay a premium for the special status. Several factors can combine to decrease or increase the value of designated property²¹². They are the type and use of the property, the maintenance costs of facade upkeep, and the potential left for alteration. It may take years after designation to determine the real effect on value.

The quantum of compensation would be equally uncertain. This could be solved by the use of arbitration as used in expropriation. A provincial official has suggested that if compensation awarded in arbitration is too high, a municipality could then de-designate²¹³. This approach may lead to certainty in protecting the property owner but the danger of de-designation of the property is too great a risk.

e) Compensation Acts as a Deterrent to Designate

The fifth and most persuasive argument against mandatory compensation is that it may defeat the purpose of heritage property legislation by deterring municipalities from designating worthy structures for fear they would be liable for large amounts of compensation. One reason legislatures impose compensation is to force municipalities to prioritize their

costs. With limited resources, a municipality is forced to determine if the potentially large cost of designation through compensation would be better spent on some other, more popular municipal project. Designation and the protection of heritage structures becomes a low priority in cash-poor municipalities and thus available protective measures involving compensation are avoided and the heritage buildings are lost.

British Columbia is a forceful example of the deterrence value of compensation. The goal of prioritizing costs has succeeded as the threat of liability has forced municipalities to ignore the Heritage Conservation Act provisions so that worthy buildings may be destroyed much to the public's detriment. Effectively, the mandatory compensation provisions have made the Heritage Conservation Act virtually useless in protecting heritage properties. One writer²¹⁴ noted ironically, "The law intended to promote conservation of the city's architectural character has become an impediment to doing so."

Designations disappear as municipal governments balk at the prospect of having to pay for it when there is little money available in the public coffers. Vancouver is an excellent example of this. Before the Heritage Conservation Act was passed in 1977, the Vancouver City Council designated fifty-two structures under its Heritage By-Law No. 4837 during a five year period. At least thirty-four of those buildings designated were owned privately. The Heritage Conservation Act with its mandatory compensation came into force on September 22, 1977. Since then, the City of Vancouver has only used its designation

powers five times²¹⁵. Four of those buildings were city-owned at the time of designation. The fifth building was the Canadian National Railway station which is under federal jurisdiction and therefore unaffected by municipal regulation. Therefore, none of these designations involved an unsympathetic private owner and there was thus never any question of compensation.

Since 1977, there has been one highly publicized attempt to designate a private building. The failure of the action can be directly attributed to the threat of the liability to compensate the owner for the resulting decrease in the property value. City Council in November of 1977 considered designating the city's oldest standing school, King George School, as a heritage property. The building occupied an entire block of downtown real estate so that a heritage restriction would have severely reduced the value of the land. The necessity to maintain a large, older building would have made redevelopment of the block impossible. The building's owners threatened to launch a multi-million dollar lawsuit against the city should the council vote to protect the structure. Press reports²¹⁶ indicated that this threat influenced City Council into voting against designation. Soon after, the building was demolished and replaced by a parking lot.

Since then, the city's policy is to avoid designation if possible. In a report of the Heritage Advisory Committee²¹⁷, the chairman indicated that the threat of financial liability has made the "present legislation and designation unusable

and poor tools to accomplish the goal of heritage conservation."²¹⁸ Thus, the City of Vancouver completely by-passes the provisions of the Heritage Conservation Act and instead protects worthy buildings, if at all possible, by simply negotiating with private owners. Since designation by the city is known to be too expensive, it provides a very ineffective bargaining tool. Instead, the city must give away zoning bonuses and development rights transfers as bargaining tools. A recent example of protection by negotiation in Vancouver has been the Tudor Manor episode. Tudor Manor is a fifty-eight year old, three story apartment block in the city's West End. Its architectural significance is limited but its location and diversity from surrounding high-rises make it a landmark to most Vancouver residents. Had the city designated the structure, which it never considered, it might have been liable for a considerable amount of compensation. An accurate assessment of the decrease in the property value by the designation is not available but the owner estimated it would cost at least three million dollars to maintain the structure in such a way that the structure would be economically viable and still remain within the heritage restriction²¹⁹. Under the existing zoning, the owner could demolish the structure and build a six story building²²⁰. To preserve the facade of the building and its formal garden, the city had to allow the developers to build behind it a high-rise of over twice the size of what the existing zoning allows. The zoning bonus was the city's only option in protecting the facade because the

compensation requirement had made the HCA impossible to implement²²¹.

The greatest problem with protection by negotiation is that it only works if the owner compromises. The City of Vancouver attempted to preserve the Orillia, a turn-of-the-century wooden structure in the city's downtown. Council offered to increase the allowable zoning on the site if the owner would retain the facade. The owner rejected the offer and since the city would not designate, the building was demolished²²².

Alberta municipalities are also liable to compensate upon designation²²³. A similar deterring effect is also evident. The liability to compensate has certainly provided an argument for antagonistic private owners. In Slatter & the Bank of Montreal v. City of Edmonton²²⁴, the private owner of a building the city designated, argued in an action to overturn the designation that the cost to the city in compensating him for the loss would be so great that it would not be in the public interest for the city to proceed with designation. The argument was rejected by the Court which held the matter of the cost and the benefit to the public was best determined by council. However, the building's designation was subsequently rescinded when the building's owners sought compensation of seventy-five million dollars²²⁵.

Clearly, the fact that compensation deters designation and the protection of heritage structures forms a very persuasive argument against mandatory compensation. The necessary

balance between protecting the public's interest and protecting the property owner has not been obtained as the balance is tilted completely in the property owner's favour. So long as municipalities avoid designation because of the liability, the property owner can be confident that the use of his property will be unrestricted by heritage regulation or, at the very least, he will receive a valuable zoning bonus in return for voluntary preservation.

Direct compensation therefore defeats the protective purpose of heritage property legislation. There are several alternatives. Designation could be available only where the owner consents. In the United States, the Reagan administration has amended the National Historic Preservation Act of 1966 to allow National Register listing and protection only where the owner agrees²²⁶. Once again, the landmark owner is fully protected and the building receives no protection. In Ontario, an owner has a similar power over the preservation of his structure. If he applies for approval to demolish the structure, the very most council can do is delay the demolition for 270 days²²⁷. The delay system is designed to force the parties to reach a compromise. Although this type of system has been praised²²⁸ for forcing the public to become aware of and active in the preservation of the structure, it ultimately provides inadequate protection for a worthy building owned by a party totally unsympathetic to its preservation.

A very simple solution to this compensation problem would be to legislate that no compensation is ever necessary with

designation. But clearly, designation places too much of a burden on the private property owner and to provide no compensation would be unfair. Compensation would alleviate the burden of preserving the structure for the public's benefit and provide an incentive to properly maintain and rehabilitate the structure. Thus, compensation is necessary but the present system is inadequate and destructive. To solve this contradiction, I propose to eliminate direct compensation for designation and instead implement an alternative form of compensation that would be less onerous on the municipality yet protect the owner from the burdens of designation.

D. Alternative Forms of Compensation

Various forms of compensation or alternative forms of protection for the property owner have been implemented across North America. American historic preservation laws are particularly helpful because, for many years, compensation for designation was thought to be constitutionally required. The United States Constitution divides governmental powers into police and eminent domain powers. The police power is defined²²⁹ as being in furtherance of public health, safety, moral and general welfare while the eminent domain function of government is to acquire private interests in property without the owner's consent. A person affected by a police power has no right to compensation. But a property owner affected by the eminent domain power is entitled to due process under the law by being compensated for the property interest taken. Both

powers may only be exercised to advance a proper governmental purpose. In 1974, Professor Costonis wrote that if the governmental restriction reduces the income potential of the affected property to such an extent that it prevents the owner from earning a reasonable return, it will require compensation as a use of the eminent domain power²³⁰. Since landmark designations have a tendency to greatly reduce the income potential of affected properties, many American municipalities assumed it was an eminent domain power and thus enacted ordinances that provided compensation, either directly or through innovative incentives.

In 1978, the United States Supreme Court addressed the issue in Penn Central Transportation Co. v. New York City²³¹ and held that landmark ordinances involved a police power. Manhattan's Grand Central Station was designated by the city as a landmark and protected from demolition and any inappropriate alterations. The city refused to approve the terminal owner's plans to build a fifty story office complex above the existing building forcing the owner to challenge the constitutionality of the landmark designation. Mr. Justice Brennan found that historic preservation was clearly for the benefit of the public and because it did not actually interfere with the present use of the terminal, there was no economic hardship. The ordinance was therefore a valid exercise of the city's police power and thus no compensation was required.

This decision did not completely clear up the issue because several commentators²³² noted that Brennan appeared

influenced by the fact that the ordinance provided compensation with the right to transfer the unused development rights of the structure. Thus, the severity of the property restriction was reduced sufficiently by the compensation to make it a police power. Although some cities, notably Chicago²³³, used the Penn Central decision as authority to immediately cut off compensation for designation, other cities have assumed that even though designation may be a valid exercise of the police power, compensation may insure it will continue to be interpreted as a police power. Thus, American cities continue to provide innovative incentives and methods to protect the landowner's property rights upon designation.

1. Purchase and Expropriation

The most obvious scheme that would insure the public would be able to see and enjoy a structure and at the same time provide for full compensation to the owner would be for the public body to purchase or expropriate the structure. With the structure owned by the public body, its preservation would be assured.

For a governmental body to expropriate property, it must be given the power to do so very expressly and that power is sometimes limited to specific purposes²³⁴. For example, the City of Edmonton expropriated an old hotel using powers given it by the Alberta Housing Act²³⁵ to expropriate land for housing rehabilitation. When evidence showed that the city expropriated primarily to preserve the heritage value of the structure, the Alberta Court of Queen's Bench quashed the expropriating by-law

because the city only had the power to expropriate when the objective was a housing rehabilitation programme²³⁶.

Only the heritage statutes of Ontario²³⁷ and Nova Scotia²³⁸ give municipalities the express power to expropriate for heritage preservation. The Saskatchewan act had a similar provision that was repealed in 1982²³⁹. The municipalities of most provinces would have to rely on expropriation powers in more general enabling statutes²⁴⁰.

In British Columbia, it is unclear whether all municipalities have the power to expropriate for the purpose of preservation. The City of Vancouver has sufficient power. Section 532 of the Vancouver Charter²⁴¹ gives the city the power to expropriate wherever the city exercised any of its powers to acquire real property but fails to come to an agreement with the owner. One of the powers under which the city may acquire property is section 13(d) of the Heritage Conservation Act. The expropriation of heritage property is thus an available option to the city.

Municipalities governed by the Municipal Act²⁴² have no such option. The Municipal Act does not provide a general expropriating power. Instead expropriation powers are given for specific purposes only. Section 680 of the Act provides a possible power for which heritage property may be expropriated. The section empowers a municipality to expropriate property for "pleasure, recreation or community uses of the public, including . . . (a) museum" This section would likely limit expropriation to buildings that will have a

special use after acquisition. Section 530 of the Act provides the power to expropriate property the city wishes to develop for residential or commercial use. This could allow a municipality to acquire worthy property for rehabilitation for a non-community use. Certainly, a power to expropriate for the express purpose of heritage conservation would provide a more useful power for a municipality than reliance on these more general powers.

Even if British Columbia municipalities had an express power to expropriate specifically for heritage preservation, it would not solve the problems created by the HCA's mandatory compensation provisions. If municipalities currently avoid designation because of an inability to compensate for the decrease in the property's value, they will refrain completely from protection by expropriation due to its significantly greater costs. No municipality could ever afford to purchase all worthy structures within its jurisdiction. The financial burden on the municipality would continue after acquisition with the cost of maintenance and restoration. The municipality would also suffer financially with the removal of the property from the tax rolls²⁴³. The United States Supreme Court mentioned a further problem in that public ownership of buildings often results in preservation as museums rather than "economically productive features of the urban scene."²⁴⁴ Mr. Justice Breitel of the New York Court of Appeal indicated that cities might desire to preserve landmarks through compulsory purchase powers in affluent times but never when the city is in financial distress

or if a less expensive alternative for preservation is available²⁴⁵. Therefore, expropriation or purchase is not a feasible alternative so long as less expensive methods are available. The subsequent methods surveyed will demonstrate that such alternatives are available.

2. Revolving Funds Scheme

A variation of purchase or expropriation would be to set up a revolving fund. From the fund, money could be used to purchase historic buildings in danger of demolition. The properties would then be sold to a buyer sympathetic to the need to protect the heritage building. The proceeds of this sale would go into the revolving fund and could be used to purchase other structures for a similar resale. The fund can be administered by a public body, or more likely, by a charitable foundation. A large cash outlay to start the fund and make the first purchase is necessary but theoretically, this money should be recovered, almost entirely with each resale so that no further funds should be necessary. Little public money is ultimately spent; the building is preserved and the building's owner is protected by being bought out and suitably compensated. The subsequent purchaser will know exactly what his burdens as a heritage property owner are before he commits himself so that special protection for him is not necessary.

To best implement such a scheme, the administering body should ideally be given two powers. Firstly, the power to expropriate would provide a last resort to save a structure

where negotiations with an owner fail. The threat of expropriation would also provide an important bargaining tool in insuring the price paid for buildings remains reasonable. The lack of clear expropriating powers for heritage preservation has been discussed in the previous section.

Secondly, the power to enter restrictive covenants with the purchasers is integral to the success of a revolving funds scheme. In reselling the property, the purchaser must promise to preserve the integrity of the structure and maintain it to specified standards. To make this covenant truly effective, it must bind future owners should the property be sold again. Under the common law, a restrictive covenant could only run with the land and bind future owners if the party with whom the owner contracts owns land that directly benefits from the covenant. Parties who did not own such land could not have enforced the covenant against subsequent owners because their right under the covenant was held in gross. This common law rule developed because before land registry systems were implemented, rights in gross could easily become lost creating uncertainty of title²⁴⁶.

Since the introduction of land registry and the Torrens land title systems, Canadian legislatures have been able to reform the law and allow covenants in gross in certain circumstances. In British Columbia, s. 27 of the Heritage Conservation Act provides that the provincial Crown, a municipal council or the British Columbia Heritage Trust²⁴⁷ may enforce an easement or covenant against the owner even if it does not

benefit land owned by the covenantee. All provinces now have legislation allowing easements or covenants in gross²⁴⁸. All statutes provide the covenant may be assignable and enforceable by the assignee. Although British Columbia limits the power to covenant to governments, municipalities and the government foundation, some provinces allow the covenant to be entered into by private organizations and some private citizens²⁴⁹. Although this may expand the potential protection by allowing private interests to make covenants, care should be taken to insure that the covenantee is serious, relatively permanent and ready to enforce. Therefore, a government official should have to approve the private covenantees before the covenant is effective.

One of the most successful revolving funds schemes in North America has been the Galveston, Texas programme²⁵⁰. The city had a large concentration of 19th Century buildings known as the Strand. The City Council had previously tried to preserve the structures through designation but bitter opposition from existing landowners made it politically impossible. The city then turned to a private foundation to preserve the area without designation. Funds were donated by local businesses and national foundations to start up the programme. The first buildings purchased were resold at a lower price to reflect the effect of a restrictive covenant on the value of the property and also to build momentum by speeding up sales and restoration activity in the area²⁵¹. The deed restriction specified that the building could not be destroyed or altered

without the foundation's approval. Specific points included cleaning and repointing of brick, replacing fire escapes with interior fire stairs, restoring cast iron, and restricting the number and size of signs²⁵². The agreement to purchase also contained undertakings to restore the exterior in accordance with the foundation's own specifications. The contract specified the minimum investment the new owner was required to make in the restoration and a deadline for its completion. Should this undertaking be breached, the foundation could collect liquidated damages or enforce specific performance²⁵³. The main purpose of this undertaking was to insure the new owner did not speculate. For its part, the foundation promised to encourage and control the restoration of the area.

The practical problem with protection by restrictive covenant is that an owner must consent. To obtain such consent, a municipality may have to give up a great deal. The Galveston example illustrates this. In purchasing the foundation's property, an owner was faced with very stringent undertakings that must have severely reduced the property's value. Therefore, the foundation had to reduce the resale price considerably from the amount it originally paid so that the fund would always have involved a deficit. The sum that originated the fund would never be recovered. The foundation also attempted to obtain deed restrictions from existing owners but was not surprisingly unsuccessful²⁵⁴. The only consideration offered

by the foundation was the promise to encourage and control the preservation of the area which would be insufficient consideration for a private property owner facing restrictions on the property's use.

As the area began to rehabilitate, the property values increased meaning the foundation had to make greater expenditures to purchase properties. At this point, the resell prices would clearly have been higher reflecting the increased popularity of the area so that the restrictions and undertakings would have been considered less of a burden. But it also meant that the foundation was outbid in purchases by private developers and thus it lost control over the aesthetics of the structures. For example, the foundation was outbid in attempts to purchase a valuable art deco train station. It then had to rely on a massive expression of public sentiment to force the building's owners to renege on their deal to sell to a demolition firm. Public sentiment was a very volatile substance making it an unreliable tool for preservation. The foundation could not have relied on it to save other buildings for which it was outbid. To always be successful, the foundation needed some sort of bargaining power to wield. Designation or expropriation powers could have provided that bargaining power.

One of the reasons the Galveston programme succeeded was the fact that several incentives were available to purchasers. The reduced purchase price was the most obvious but purchasers were also entitled to very attractive financing from local banks²⁵⁵. It is doubtful that this could be replicated else-

where. The United States income tax provisions with generous deductions for expenses for the renovation of heritage properties also made the foundation's properties much more attractive to prospective purchasers²⁵⁶.

In setting up a similar programme in British Columbia, municipalities have the power under s. 269 of the Municipal Act²⁵⁷ to grant a sum to an organization that could originate the revolving fund²⁵⁸. Alternatively, if a municipality wishes to implement and administer a revolving fund scheme itself, it has the ability to acquire and dispose of land for heritage conservation under s. 13(d) of the HCA. Proceeds of the resale would go into a special fund²⁵⁹ or applied to the debt incurred for the purchase of any real property by the municipality²⁶⁰ implying the fund would not necessarily be self-perpetuating. More express powers to set aside a special fund specifically for the purchase and sale of heritage properties would be necessary to successfully set up a self-perpetuating fund.

In conclusion, the revolving funds scheme is impractical. To be successful, the scheme would be expensive so that its theoretic goal of recovering all money originally spent is unrealistic. Since incentives like inexpensive financing and generous income tax deductions are not available in Canada, heritage properties with stringent restrictive covenants would not be attractive to purchasers. Because it will only work with the existing owner's consent, the method gives him plenty of protection but the protection to the building is inadequate and necessarily made variable by the whims of the owner.

3. Transfer of Development Rights

Development rights are the amount of floor area that may be developed on a given parcel of land. Heritage structures are frequently much smaller than the size authorized by the zoning. Therefore, these structures possess unused development rights. Heritage restrictions prevent the owners of these buildings to exploit these unused and potentially profitable rights. To compensate the owner for the heritage restriction, many cities allow him to transfer his unused development rights to other properties unencumbered by the heritage restrictions. Since heritage structures are often located in the densely developed commercial cores of cities, their unused development rights can be in demand and quite valuable. Thus, the transfer of these rights should adequately compensate an owner for the burden of heritage designation at no cost to a municipality. As Costonis describes it²⁶¹, the transfer of development rights (known as TDR) shifts preservation costs from the city and landmark owner to the downtown development process.

Integral to understanding the TDR system is acceptance that property involves a bundle of easily distinguishable rights instead of a unitary concept of ownership. According to Richards²⁶², among the common law rights is the right to build upwards following the maxim cujus est solum, ejus est usque ad coelum²⁶³. Until about a century ago, this right was limited by construction technology but once steel skeleton

construction was perfected, buildings of tremendous height were possible. When zoning laws were implemented, the right to build upwards was restricted by certain height regulations. Presumably, the ejus est usque ad coelum maxim may be modified to provide an owner with air rights that have been defined²⁶⁴ to be the right to "the inclusive use and control of a designated space within delineated boundaries." These air rights might be separated from the other interests in the property and transferred to someone else. There is much legal precedent for this bundle of rights theory. Mineral rights are commonly separated from surface rights in British Columbia²⁶⁵. Governments and utilities frequently acquire less than fee simple rights by expropriating rights-of-way for installing utility poles²⁶⁶. Separating the development or air rights would not provide any additional problems.

a) TDR Use in Vancouver

The City of Vancouver has used the transfer of development rights in isolated instances. The most important use was the scheme implemented to save Christ Church Cathedral, a designated heritage building, from demolition. The structure sat on one of the most valuable lots in downtown Vancouver. The Church's congregation had decided the church was no longer adequate for their purposes and therefore it wanted to tear the structure down and replace it with a combined office tower and church. Council refused to approve the plan and instead designated the structure as a heritage site protecting it from

demolition. In December of 1974, the congregation found a solution to survive financially in the structure.²⁶⁷ It entered into an agreement with a development company who purchased the unused development rights of the church for a sum of twenty-nine million dollars spread out over 105 years. With the compensation paid for the development rights, the church was able to pay for engineering repairs and the ongoing preservation of the structure. The church agreed to restrict the development of its lot for the term of the contract. The development company, with the city's approval, was able to transfer these development rights to the adjoining lot. There the developer was able to build Park Place, the city's largest office building which is far larger than what the existing zoning would have allowed²⁶⁷.

The most recent TDR scheme implemented in Vancouver was with the developers of the Price-Waterhouse Tower. In exchange for the promise to build a large public plaza on one lot, the developers were entitled to transfer the unused development rights from that lot to the adjoining lot where a large tower with valuable views could be built larger than the allowable zoning²⁶⁸.

b) The New York City Experience

Vancouver has limited any transfers to lots adjoining the transferor property. This is the system used in New York City where the continent's most successful TDR scheme has been operating for nearly twenty years. According to Richards,

with rapid development in the 1950's and 1960's, the city discovered that many older landmarks were being endangered by zoning ordinances which encouraged new office buildings²⁶⁹. Urban economics dictated tall buildings were the only feasible way to use the limited space in Manhattan. Older buildings were too small to compete and thus were destroyed and replaced with towers providing more space, more concentration of facilities and more prestige. To supplement existing landmark preservation programmes, the city enacted a TDR ordinance allowing the transfer of a designated landmark's unused development rights to adjoining properties owned by the same party²⁷⁰. Once transferred, the rights were gone forever so that the landmark would always be restricted to its existing density thus removing an incentive to demolish.

Under the New York system, the density over the entire neighbourhood would not be increased by the transfer. For example, since the existing zoning of the area would accommodate "X" buildings with "Y" square feet of usable space each, the area's density will remain the same with X - 2 buildings with a density of Y square feet, one building, the designated structure, with Y - Z square feet and one building, on the transferee lot, with Y + Z square feet. Thus, algebraically,

$$\begin{aligned}
 \text{Total Density Allowed} &= X \times Y = XY \stackrel{?}{=} (X - 2)(Y) + Y - Z + Y + Z \\
 &= XY - 2Y + Y + Y + (Z - Z) \\
 &= XY + (2Y - 2Y) + 0 \\
 &= XY + 0 \\
 &= XY.
 \end{aligned}$$

The density of the neighbourhood remains constant.

The prototype for TDRs in New York City was the Amster

Yard project. The yard consisted of a group of 19th Century brick residences surrounding a courtyard. The buildings had been designated as protected structures. The owner of the adjoining lot wished to build a forty-two story office tower but the zoning density allowance was insufficient. The city gave special permission to the landmark owner to sell 30,000 square feet of unused floor area ratio (FAR) to the developer giving him enough density to build his project. In return, the developer paid a large sum of money of which a portion had to be set aside in a trust fund to be used for the maintenance of the landmark. The developer was also required to make a number of design concessions so that only colours and materials compatible with the landmarks would be used. Thus, the buildings were protected by the designation and the owner was duly compensated for the restriction and provided means with which to maintain the buildings at no cost to the municipality²⁷¹.

The requirement that restricted transfers to adjoining lots also owned by the same party forced the city to make unique arrangements in order to give developers the development rights they desperately wanted. The owner of a lot adjacent to a court house which was a city owned landmark, wished to build an office tower that would exceed the density allowed by the area's zoning ordinance. To accommodate the transfer of the court house's unused development rights, the city leased the building to the developer for seventy-five years and then subleased it back. The seventy-five year lease made the

developer the deemed owner of the court house property and allowed him to transfer the unused development rights to his adjoining property. The developer paid the city three million dollars for the lease. Inappropriately, none of that sum was earmarked for maintenance or restoration of the landmark²⁷².

The restriction allowing transfer only to adjoining and commonly owned properties was eventually thought to be too limiting²⁷³. It did not provide sufficient compensation to the landmark owner because frequently there was no lot available to accept the transfer and thus the development rights were never utilized. The ordinance was therefore amended to allow the transfer to lots across the street or contiguous²⁷⁴. The owner was entitled to transfer the development rights along a series of contiguous lots providing he owned them all, thus allowing the ultimate transferee lot to be a city block or farther away from the landmark. This amendment was specifically designed to accommodate the owners of the Grand Central Terminal, a designated landmark. The owners owned much of the land surrounding the terminal. In the subsequent challenge by the owners of the constitutionality of the landmark restriction, both the New York Court of Appeal²⁷⁵ and the United States Supreme Court²⁷⁶ found that the TDR scheme adequately compensated the owners even though many of the eligible transferee lots were unavailable for redevelopment because of long term leases. It is perhaps ironic that a TDR scheme involving the allowable transfer of the terminal's air rights at least partially contributed to the failure of the owner's challenge

because it was profits from the sale of air rights over the railway's covered tracks in downtown Manhattan that allowed the company to build such a spectacular and significant terminal building in the early 1900's²⁷⁷.

The New York TDR system was originally considered such a success that ways to expand its use into other areas were explored. The TDR right was originally limited to private owners of landmarks but proposals were made to allow the transfer of development rights from public buildings without the lease arrangement used in the court house development. The city made plans to sell excess air rights above all public property except streets and parks which possess no development rights. The plan has been severely criticised by Schnidman and Roberts²⁷⁸ because the vast increase in available development rights would severely impair their marketability. The commentators also wrote that revenue production alone should not be sufficient to justify the transfer of development rights. Other worthy purposes such as landmark preservation should be exploited first.

The New York TDR scheme was not fool-proof in that it proved to be inappropriate in certain circumstances. A plan was proposed that would preserve the brownstone apartment buildings of Manhattan's Upper East Side. The brownstones were not considered landmarks so that designation was not appropriate. Instead, the plan called for developers to purchase the brownstones' unused development rights and apply them to high-rise developments on the end of each block. The

brownstone apartment buildings in the middle of the block would have been saved. The plan was bitterly fought by East Side residents who forcefully argued that the new development would increase the density and use of amenities in an already crowded neighbourhood. It later became obvious that the purpose of the plan was to encourage construction and not for the preservation of the brownstones²⁷⁹. The incident implies that a TDR scheme will not be accepted as an alternative to zoning. There must be a worthy purpose such as preservation of landmarks or open space for a TDR scheme to be politically and practically possible.

Another New York TDR failure, the Tudor City Parks transfer, had such a worthy purpose but was found to be legally invalid²⁸⁰. In order to save two much needed private parks, the City Council prohibited development on the lands by removing all of their unused development rights and allowing the owner to sell those rights to developers in a commercial district. The private park was to be maintained out of the money received for the development rights. Since the lots were left with no reasonable use from which the owner could make any profit, the city's action was tantamount to reserving private land for a public purpose without expropriation. The right to transfer the development rights was held to be insufficient compensation. The city argued that the value of the development rights increased because of their transfer from a residential to commercial area²⁸¹, but the Court found the value was uncertain because of the dependence on the availability of receiving

parcels and approval of council²⁸². The rights were totally useless until an accommodating transferee lot was found. This TDR scheme was held to be invalid by the New York Court of Appeal. The United States Constitutional protection of property rights was integral to this decision but a similar result is likely in Canada²⁸³. Therefore, commentators²⁸⁴ predict that a TDR scheme would be more likely to be valid if the New York Landmark Ordinance provisions are followed leaving a reasonable use of the property, a large amount of potential transfer lots and little room for discretion by municipal authorities to reject the transfer.

c) The Chicago Plan

In the early 1970's, Professor Costonis criticized the New York Landmark TDR scheme as being too limited because of the adjacent lot restriction and the tendency to create intolerable congestion on the two lots that could destroy the dimensional scale of the heritage property²⁸⁵. To compensate for these limitations, Costonis proposed a new TDR plan that provided greater marketability of the development rights and protection for the heritage structure with the use of restrictive covenants. Costonis's "Chicago Plan" was designed to protect the many examples of early skyscrapers built in the Loop area of Chicago.

The Chicago Plan's chief feature was the creation of a transfer district²⁸⁶. Instead of being limited to adjoining lots with common ownership, the owner of a landmark could

transfer his building's unused development rights to lots all over the city's downtown core. This covered the city's most valuable land where development rights were likely to be worth more and be in demand. The concentration of low rise landmarks in the area would have provided light and air parks among the new development²⁸⁷. By widely dispersing the transferee lots, there would have been less chance for congestion in a small area around the landmark. For an added safeguard against over-crowding and buildings being wildly out of proportion to its surroundings, the density increases on the transferee sites would have been held within bulk and height ceilings. Thus, the unused development rights from one landmark could have been separated and distributed among several transferee lots within the transfer district.

In return for the right to transfer the development rights, the landmark owner was required to accept designation of his property and give a restrictive covenant to the city insuring the landmark's continued preservation. This preservation restriction would have included restrictions against demolition and alteration, maintenance obligations, and a duration clause by which the owner could petition city council when the building failed to provide a reasonable return²⁸⁸.

The owner who accepted these terms was also entitled to a reduction in property taxes reflecting the preservation encumbrance. This would have presented a great incentive because, according to Costonis²⁸⁹, property taxes were the largest single item in the cost of operating a downtown building.

The reduced tax yield of the landmarks was to be made up by increased taxes paid by owners of more profitable buildings. Thus, the burden of heritage preservation was to be taken away from the public sector.

For the owner who refused these terms, the city was to be given the option of expropriating his unused development rights. To compensate for the expropriation, a development rights bank would have been set up to act similarly to a revolving funds scheme²⁹⁰. Once again, an initial sum from public funds would have been necessary to initiate the bank but that sum would theoretically be recovered when expropriated rights were resold to developers. The start-up sum could also have been obtained from a sale of the unused development rights of a public building. The danger of selling public property development rights has been examined above. The bank would also have administered the sale of rights voluntarily sold or donated by landmark owners to the city. Costonis optimistically predicted the profits of the resale of the rights would be large enough not only to cover the bank's operating costs but also to subsidize landmark owners who would not have benefitted from the right to sell or transfer development rights. A subsidy would have been available where the heritage structure exhausted substantially all of the allowable floor area for the site and thus the sale of the remaining rights would not provide enough money to maintain or restore the structure²⁹¹.

The Chicago Plan was never implemented in the City of Chicago due to problems with the plan that will be canvassed

below²⁹². However, a similar scheme was used successfully by New York City²⁹³. To preserve the South Street Seaport district around the Fulton Fish Market, a plan was set up whereby two districts were created. The first district contained the structures the city wished to preserve. The buildings were attractive but too small to be economically viable. The second district was the surrounding neighbourhood that was considered ripe for intensive redevelopment. The unused development rights from the first district were shifted to a bank. These banked rights could then be transferred to developers in the second district where larger buildings were built. The profits from the sale of the rights were then used to renovate and maintain the historic buildings. The result was a successfully rehabilitated and economically viable historic district with little public money spent and the allowable density in the two areas combined remaining the same.

d) Problems with TDR Schemes

The success of the South Street Seaport TDR project and other plans similar to the Chicago Plan would be dependent on the zoning of the transfer district. To make the development rights marketable, the transfer district must be underzoned. Therefore, added density to the area from the purchased development rights would be easily absorbed without creating congestion. By underzoning an area, the developer would be forced to buy extra density through the development rights in order

to construct a development with maximim profitability. Therefore, in implementing such a plan, a city council would likely be forced to downzone a prospective transfer district. Although downzoning is a perfectly valid and non-compensable action so long as existing non-conforming uses are allowed to remain²⁹⁴, it is politically unwise and therefore unlikely to ever be implemented.

A problem with TDR schemes in general may be the valuation of each right. The TDR may be a rather nebulous, floating creature incapable of precise valuation. Planners assume that development rights will be transferred on an equal basis of exchange. Clearly, value is dependent on the location of the transferee lot. According to Delaney et al²⁹⁵, if a TDR is purchased at a constant market value and transferred to a less desirable location, its value will likely never be recouped in a subsequent purchase price. But if the transferee lot was in an expensive, affluent area, the TDR may be worth ten times the constant market value. Furthermore, a development right from a very desirable property should be worth more than a TDR from wasteland. Delaney suggested that the differing potential values of TDRs to various sending and receiving lots must be closely scrutinized to insure fairness in allowing the land-owners achieve some value from their restricted sending parcels. For example, the owner of a downtown landmark should receive more for transferring his development rights from his prime piece of real estate than an owner of suburban open land.

TDR programmes have only found success in high density

areas. The rights transferred are more likely to flow to areas that are already highly congested because of the concentration of advantages. Only newer and bigger office and apartment buildings can absorb the transferred rights and that will necessarily increase the density of areas that are already congested. Therefore, the price to the public of greater congestion and strain on amenities may be too great to justify a transfer of development rights programme to preserve heritage properties.

The value of a TDR is also dependent on its market. Many of the development rights transferred in New York remained unused for many years due to a weak market for office space. In Vancouver, construction of the office building to which Christ Church Cathedral's development rights were transferred was delayed for several years and the agreement for the transfer had to be revised to make it more feasible for the developer. This shows the ultimate flaw of any TDR scheme. The success of a TDR system will always depend on the market for office building space or high density residential developments. Where the market for office space is soft in a city, developers will not redevelop properties and thus will not need to buy development rights from heritage property owners. As Richards submitted²⁹⁶, "No mere loosening of the straight-jacket of administrative controls in favour of an arguably more flexible Chicago Plan is going to remove the market impediment to landmark preservation through TDR." A programme cannot work unless a builder wants the redevelopment rights regardless of how far

they may be transferred. Presumably, one of the reasons why the Chicago Plan was never implemented was the fact that there was a ten percent vacancy rate in commercial space in Chicago when the plan was proposed. A comprehensive TDR system will only work in periods of tremendous growth and thus has limited applicability. This dependency on the fluctuating and frequently depressed market makes a TDR system unreliable in protecting heritage properties and their owners. As Richards concludes, a TDR programme should not be necessary where other preservation powers are available²⁹⁷.

e) Application to British Columbia

The above criticisms imply that a TDR scheme has an extremely limited use, if any, but the power to implement such a scheme may be valuable for municipalities in certain cases such as the Christ Church Cathedral scenario. British Columbia municipalities do not appear to have the power to implement a comprehensive transfer district style TDR system but they can implement a TDR scheme on an individual project basis. In the City of Vancouver, a transfer of development rights would be possible under powers given the city under s. 565(f) of the Vancouver Charter²⁹⁸. This section empowers the city to create zones (known as Comprehensive Development Districts) for which there are no set regulations for height and density. A development can only proceed in such zones if the City Council and the Director of Planning have approved the detailed plans for the project²⁹⁹. Such a zone could allow

increased density from a transfer of development rights with civic officials given the opportunity to insure the design and size of the new project is compatible with the nearby heritage structure from which the development rights were transferred.

Other municipalities in British Columbia do not have such wide powers. These municipalities may be limited to their zoning power under s. 963 of the Municipal Act³⁰⁰. To transfer development rights, a municipality would likely have to create a new zone specifying a greater allowable density. In so doing, the council would be required to hold a public hearing where all owners of neighbouring properties and other interested parties must be given the opportunity to be heard³⁰¹. Originally, British Columbia municipalities other than Vancouver, had wider powers to implement TDR projects with the use of land use contracts³⁰². These contracts allowed municipalities to negotiate specific details of a particular project without being restricted by the existing zoning. The land use contracts were replaced in 1979 by development permits. The permits in their present state after recent amendments do not provide the same flexibility as they must not vary the permitted uses or densities of the land in the applicable zoning by-law³⁰³. The only possible use for development permits may be a transfer of development rights within one lot. Although the permit cannot affect the density on the lot, it could vary the dimensions and siting of the structures on the land. In this way, a developer could be allowed to construct a taller.

building than normally allowed using the unused density and height of a heritage building on the same lot. The lack of flexibility in the allowable density may make the use of development permits in implementing a TDR scheme severely limited.

4. Property Tax Relief

Property tax liability on heritage property is an important factor in the economic survival and potential rehabilitation of the structure. It forms one of the largest single expense items for the landowner and thus, according to Listokin³⁰⁴, its extent can either be a catalyst to preservation or, if great, a deterrent to the building's survival. Much success has been achieved across North America in encouraging preservation and protecting the owner by providing property tax relief to historic structures. This relief can take many forms but the various schemes may be roughly divided into two categories. The programmes either involve an exemption or abatement of property taxes or involve an adjustment of the property's assessed value for taxation purposes.

British Columbia's Heritage Conservation Act expressly provides that any compensation payable to an owner upon designation may be made in the form of tax relief³⁰⁵. Similar provisions are contained in the heritage statutes of Alberta³⁰⁶, Saskatchewan³⁰⁷, and Quebec³⁰⁸. British Columbia municipalities are however restricted in the form in which this relief may be provided.

a) Exemption or Abatement of the Tax

Many heritage properties may already be covered by other statutory exemptions from property tax. These exemptions typically have nothing to do with the significance of the structure but are granted because of the special trait of the owner. For example, in British Columbia, church properties are exempted entirely from taxation under s. 398(h) of the Municipal Act³⁰⁹. This would cover the eight church-owned structures designated under the City of Vancouver's Heritage By-Law. Other jurisdictions exempt properties owned by charitable institutions. This exemption is of great importance where non-profit private heritage foundations own heritage buildings. But these exemptions do not apply to privately owned heritage properties.

Since property taxes traditionally form the largest source of municipal revenues, municipalities are hesitant to decrease those revenues by extending the exemptions to other property owners. But several American jurisdictions have implemented innovations that allow some private, profit-seeking owners an exemption from or an abatement of the property tax.

In Connecticut, municipalities are empowered to pass ordinances that will reduce the property tax liability for owners of heritage properties. But this abatement is only available where the level of taxation materially threatens the continued existence of the structure³¹⁰ and therefore, the measure would not help the typical heritage property owner.

In North Carolina, municipalities are empowered to defer

fifty percent of the annual property taxes so long as the landmark continues to qualify for listing under the National Register³¹¹. The deferred taxes become payable if the building is demolished. This scheme has failed to encourage preservation because its penalty provisions have deterred owners from seeking the benefit³¹². The penalty is very harsh in that the taxes must be paid with interest at a maximum rate of forty-six percent. Only an act of God will excuse a demolition from this penalty.

A New Mexico statute³¹³ is designed to insure that any money saved from the tax relief will be used to preserve or restore the structure. A privately-owned landmark will be exempt from property taxes but only for the amount of expenses incurred for approved preservations or maintenance of the building. The landmark owner is generously protected even when the costs of a major preservation are great because he may carry forward this right to an exemption for a ten-year period. The state of Maryland has a similar programme involving a tax credit for up to ten percent of the costs of restoration³¹⁴.

There are two Canadian examples of special tax exemption powers for historic structures. Section 33 of Quebec's Cultural Property Act³¹⁵ provides that any designated property may be exempted from up to half of its property taxes but the eligibility is limited to "non-commercial" properties. The City of Winnipeg recently passed a by-law that will exempt designated buildings from taxation while renovation occurs³¹⁶. According to one commentator³¹⁷, the by-law is expected to

provide a major incentive to owners of designated structures to rehabilitate their properties making them economically profitable again.

Under section 400(2)(a) of the Municipal Act³¹⁸, British Columbia municipalities are given the express power to exempt "historical buildings" from taxation but the procedure required to implement the exemption makes it impractical. Council may activate the exemption by two methods. Firstly, it may pass a by-law by a two thirds majority but this exemption will only be effective for one year. This would mean, the exemption would have to be reconsidered yearly thus giving the property owner minimal long-term protection. For exemptions of longer periods, council would require approval from both the provincial Minister of Municipal Affairs and the electors³¹⁹. The expense of holding a plebescite would likely make this option impractical.

Commentators³²⁰ have criticized these exemption programmes because of their expense. The municipality suffers an absolute loss in the tax base for a varying period of time. Since the municipality is very dependent on property tax schemes, tax exemption may cost too much to justify.

b) Assessment Adjustments

Programmes which have concentrated on the assessment of structures for tax purposes have been more popular. The cost to the municipality is less apparent and the programme should result in a minimal loss from the existing tax base. Two assessment methods are available to encourage preservation.

The assessment may be frozen so that added value from restoration and rehabilitation will not be taxed or the assessment may be adjusted to better reflect the restricted use of a designated heritage structure.

i) Frozen Assessments

The most successful property tax scheme ever implemented for historic preservation in North America is an Oregon scheme whereby a property's assessment was frozen for a fifteen-year period³²¹. In order to survive financially, privately-owned landmarks will likely require extensive renovations and rehabilitation to compete with more modern neighbours. These renovations will add to the value of the building and thus, the assessment will be increased and more property tax will be payable. The increased tax liability acts as a deterrent to rehabilitate and thus adds a further burden to the owner of the protected property. The Oregon scheme removed this deterrent by freezing the assessment of an eligible property before renovations are made. The property was assessed at its true cash value in the first year of approval. If any renovations were made during the fifteen-year period, these improvements would not be reflected in the assessment which remains constant.

For a property to be eligible, it had to have been on the National Register of Historic Properties. The owner also had to agree to maintain his building according to established standards of the state preservation officer and open it to

the public at least one day a year³²². The property would lose the special assessment if any of these conditions were breached or if the property was sold to a tax exempt owner³²³. The property would then be subject to a recapture of the increased taxes that would have been payable for the year of disqualification. This sum would be multiplied by the number of years that the property was specially assessed. This penalty was clearly onerous enough that it encouraged applicants to satisfy the maintenance and other conditions for the full fifteen years. Yet because it did not involve the harsh interest provisions of the North Carolina recapture scheme³²⁴, the penalty was less of a deterrent to property owners applying for the special treatment.

One fear about the Oregon scheme was it could severely limit the tax base of municipalities. But by freezing the assessments, there was no decrease in the municipality's existing tax base so that there was no net loss in revenue. The municipality merely failed to realize on improvements that did not previously exist. The scheme's effect was minimal in cities with large tax bases over which a smaller increase in assessed value could be spread. For example, in the City of Portland, a study showed that if all eligible properties received the special assessment, the city would forego revenue on improvements worth 14.5 million dollars³²⁵. To make up the added revenue on these improvements, the maximum increase of the tax rate would have been four cents per one thousand dollars of assessed value. The average homeowner would have paid an

extra seventy-five cents in taxes per year.

In smaller municipalities, the effect could be much greater. The town of Jacksonville had a particularly unique problem in that almost all of its buildings were either situated in a National Register Historic District or were potentially eligible for designation. If all these properties applied for the special assessment, the remaining non-historic property owners would be burdened by increased taxes whenever the municipality required additional funds due to inflation. To solve this problem, a system of "trending" was introduced³²⁶. All structures were physically reassessed every six years in Oregon. During the interim, assessors would "trend" the properties' values to allow for inflation. The properties with frozen assessments were originally exempted from this trending but to solve the Jacksonville problem, historic properties' assessments were to increase to reflect inflation. Therefore, the original assessment would increase due to inflation but improvements remained untaxed. Powers suggested³²⁷ that this trending would also further encourage landmark owners to make improvements. It would no longer be worthwhile to obtain the frozen assessment without making improvements because the land would be encumbered for fifteen years without receiving any real benefit. The trending would allow the municipality's tax base to keep up with inflation but any additional increases necessary would have to be borne by the non-historic property owners.

The programme was a tremendous success. In the first

four years of the ten years in which assessments could be frozen, forty percent of all eligible properties were certified³²⁸. By 1980, more landmarks in Oregon had received property tax relief than in all other American jurisdictions combined³²⁹. Powers³³⁰ attributed this success to the fact that property taxes in Oregon were quite high making the savings from freezing the assessment quite significant to the property owner. The programme allowed greater cash flow for owners so that bank loans were more easily available for rehabilitation costs. Furthermore, the straightforward nature of the Oregon law enabled the property owner to know what the property tax would be for a considerable period. The programme was also popular because the property owner had relatively minor burdens in order to benefit. The programme only had a slight effect on tax revenues so the effect on the municipality was minimal.

Unfortunately, British Columbia municipalities have insufficient powers to implement a frozen assessment programme. In the late 1970's, the City of Victoria unsuccessfully implemented a similar programme. Using the tax relief section of the Heritage Conservation Act³³¹, the city attempted to freeze the assessed values of all its designated heritage sites. This action was challenged by the British Columbia Assessment Authority which claimed the by-law interfered with its assessment powers³³². Under the Assessment Authority Act³³³, the province created an independent authority to provide uniform assessments throughout the province. Municipalities thus have no assessment power of their own and are not entitled to adjust

in any way the assessments provided by the authority. In the challenge, the Supreme Court of British Columbia found that the "tax relief" power in the HCA did not include any power to alter or fix assessments and thus the assessment authority's power could not be abrogated. The court found that freezing the assessment would not necessarily have the effect of providing tax relief. Council's power under the HCA was limited to reducing the amount of tax payable after assessment or by giving direct monetary compensation through a grant or loan. The city was forced to abandon the scheme and has since tried to provide property tax incentives through an informal and less comprehensive system of grants³³⁴.

ii) Assessment on Actual Use

Since the use of a heritage property is restricted, that restriction should be reflected in the property's assessment. In many cases, the existing structure will not be the highest and best use of the property. Yet, the property may be assessed on the basis of the highest and best use even though that use is impossible due to heritage restrictions. According to Listokin³³⁵, this over-assessment can contribute to financial pressure that might discourage the property's owner from rehabilitating or even maintaining the structure. Some jurisdictions have implemented formal systems of assessment in which heritage buildings must be assessed at their actual use³³⁶. If the property is susceptible to a resale for a different purpose that threatens the continued existence of the structure,

the adjusted assessment will likely produce a lower tax³³⁷.

The British Columbia Assessment Authority informally considers heritage designation as a factor in calculating the value of a property. Under s. 26(3) of the Assessment Act³³⁸, an assessor may consider several factors including economic and functional obsolescence. Economic obsolescence has been defined³³⁹ as being caused by external factors resulting in a lack of demand for a particular area. Almy defined functional obsolescence as pertaining to design features of a building that make it obsolete for its originally intended purpose. The Assessment Authority uses these two factors, especially functional obsolescence, to reduce the assessments of property encumbered by heritage designation. Because this is done informally, the effect on heritage properties is inconsistent but does provide some relief in almost all cases for designated heritage property owners.

The earliest cases heard by the Board on this topic involved the Vancouver Club building, a designated structure in a high-rise area³⁴⁰. The Board categorized the site as clearly secondary in relation to its neighbours because the designation placed a restriction on the development potential of the site. The Board reduced the assessment on the land by seven percent and allowed an additional twelve and a half percent in obsolescence costs for the structure.

In Art Gallery of Greater Victoria v. Assessor of Area 02-Capital³⁴¹, the non-profit organization that owned the gallery challenged the assessment that was based on the value

of their land if subdivided according to the allowable zoning. Since the building on the site had been designated as heritage property, it could never be demolished so that the property could never be subdivided. Therefore, despite the zoning, the Board found the property's highest and best use would always be as an art gallery and thus the land was valued as one unsubdividable lot.

The most detailed decision on this adjusted assessment was made by the Appeal Board in Mitchell Holdings v. Assessor of Area 09-Vancouver³⁴². The case involved the Vancouver Block, a sixty year old building designated by the city as a heritage structure. The assessor had valued the property without any reference to its heritage restriction because the building was already developed to a higher floor space ratio than allowed by the current zoning. The assessor also depreciated the building less than usual because he assumed the designation would insure the building's existence and thus extend its life expectancy. The Board found this approach incorrect because designation could not extend the utility of the structure to alleviate the physical and functional obsolescence. Furthermore, since the land was completely covered by the building, it had no utility or income generation capability beyond that derived from being the site of the building. Once the building fails to be profitable, the land no longer has utility and there will be no return received on the investment of the building. The Board likened this to an expropriation of a "significant portion of the continuing utility" of the

land. The land thus loses much of its own value while a neighbouring property may be made more valuable by the increased scarcity of developable land. This makes the life expectancy of the income earning potential uniform over both land and improvement. The Board indicated that there would remain a contingent value in that the building might someday be de-designated or be destroyed by fire or earthquake. But the Board decided that such a contingency was not a proper component of the actual present value and thus would not be included in the current assessment. To insure that the building will continue to provide a reasonable rate of return and recapture the investment made in it during its remaining useful life, usual assessment practices, such as the sale of comparable buildings, had to be set aside. Instead, the value of the building was determined by the present value of an annuity equal to the current net income for the remaining useful life at a current interest rate. This resulted in an assessment of approximately 400,000 dollars less than the 3.5 million dollars set by the assessor.

The Board used Suffredine v. Assessor of Area 21-Nelson³⁴³ as a precedent for the use of this income method for valuing heritage properties. Comparison with non-heritage properties is inadequate because they would not be restricted to their existing use. Comparison with other heritage sites would be impossible because of the varying sizes of the buildings that they contain. In this case, the assessment of a small frame building was reduced by approximately seven percent to reflect

the restriction. In other cases, the Board has been more generous. The assessment of a designated restaurant in Victoria was allowed a thirty-five percent reduction in economic obsolescence to reflect the restriction³⁴⁴. Not all heritage properties have been given downward adjustments. The Board refused to decrease the assessment of a condominium in a designated building because residential heritage properties are more likely to be sold at rates comparable to other non-heritage units and thus the comparable sales methods should be used³⁴⁵.

Clearly, the Board will only make allowances for heritage property when the property has been formally designated under the Heritage Conservation Act. In Estates Investment Ltd. v. Assessor of Area 09-Vancouver³⁴⁶, the Board, as I have suggested, incorrectly found that designations made under a previous act were no longer valid. Therefore, the heritage value of the structure was not considered as part of the assessment. When the heritage restriction is created by restrictive covenant instead of designation, it is unlikely that the assessment will be adjusted. In Telford v. Assessor of Area 14-Surrey-White Rock³⁴⁷, the Board considered a lot encumbered by a non-heritage restrictive covenant and found the assessment could not be adjusted because the owner himself agreed to reduce the usability and marketability of the lot. The case followed a Manitoba Court of Appeal decision³⁴⁸ in which it was found that the municipality was not obliged to subsidize the property by lowering its assessment when the taxpayer created the

restriction without the municipality's approval. To decide otherwise would have encouraged owners to devise restrictive schemes that could unilaterally lower the value of the property.

c) Conclusion

Property tax relief is an excellent method of providing compensation and thus protection to the owners of heritage buildings. Almy³⁴⁹ suggested that property tax relief will work because the group of potential beneficiaries is small in relation to the number of taxpayers generally so that the cost of an additional exemption may be spread thinly among many. However, such a programme is only advisable where the municipality can afford it. It will not work where a substantial portion of the municipality's tax base is already exempt as in university towns, capital cities or where large areas of Crown land are located. Washington, D.C. has been unsuccessful in several attempts at implementing property tax relief for preservation because of the concentration of government properties in the city³⁵⁰. Council found it was politically unwise to erode the city's already small property tax base. Property tax relief may also not work in smaller towns and cities where there is a substantial concentration of historic districts and buildings that would potentially receive tax abatements. In such municipalities, there would be little room for growth of the tax base so that non-heritage building owners would be burdened disproportionately. In British Columbia, the City of Nelson has a small population but a large concentration of

heritage structures³⁵¹ so that any tax relief programme for the owners of these structures might be too costly a burden for the small population of non-heritage property owners.

For a tax relief system to work, a municipality must make sure that the incentive will have a real dollar impact on preservation. The Oregon scheme was successful mostly because property taxes were high in the state so that any saving was significant. But Professor Stipe³⁵² used an example that showed the system would inadequately protect the owner where the tax rate was small. If a city has a tax rate of three dollars per one hundred dollars of assessed valuation, an owner is unlikely to repair a slate roof on his Victorian mansion when the costs will be 30,000 dollars and his annual tax saving, if the assessment is frozen, will be nine hundred dollars. In such areas, other forms of incentives will have to be used.

Property tax relief does have advantages over other forms of compensation. According to Powers³⁵³, property tax relief is more equitable than income tax incentives where the primary benefit was only for owners with large enough incomes to make the deductions. A property tax relief programme would directly benefit all owners of historical properties regardless of income. A property tax relief programme such as freezing the assessments may be better than a simple grant of compensation because it acts as an incentive to make renovations and repairs so that the structure may be more competitive and its restrictions less of a burden to the owner³⁵⁴. The owner only receives the benefit if he has in fact made improvements while with a grant,

there is not always a guarantee that the money given will be spent on preservation.

A successful comprehensive tax relief system will not be possible in British Columbia without a change in the law. The current permissive tax exemption powers given to municipalities may be adequate to provide short-term relief on a case by case basis. But the powers are impractical and inadequate for any long-term or comprehensive compensation scheme.

Tax exemption probably is too expensive to implement on a wide basis so that assessment adjustments are a better alternative. The current practice of the Assessment Appeal Board in making heritage designation a valid consideration in assessment does provide the heritage owner valuable protection against part of the burden created by designation. But to insure this factor is treated consistently by assessors, it may be advisable to expressly state in s. 26 of the Assessment Act³⁵⁵ that heritage restrictions must be considered in determining the actual value.

To provide significant protection for the owner and incentives to rehabilitate, tax relief must come through freezing the assessments of all designated privately-owned structures. The Assessment Authority Act³⁵⁶ and the Re Corporation of the City of Victoria³⁵⁷ decision make it impossible for a municipality to implement such a scheme. However, an amendment to the Assessment Act³⁵⁸ creating a separate class for heritage properties could provide that improvements made

to the structures will not be assessed for a certain period of time. To insure there will never be a net loss to the tax roll, the heritage properties' original assessment should be subject to trending to keep up with inflation. This would provide protection to the owner while spreading at least a portion of the cost of preservation over all other property taxpayers in the municipality.

5. Consideration of the Economic Consequences of Designation

Protection for the property owner need not be by compensation. The property owner can be protected by consideration of the economic consequences of the designation and by the opportunity to have the building de-designated once the restrictions make the building no longer economically viable. This safety valve is perhaps indicative of American landmark ordinances while Canadian heritage statutes rarely include it. This is likely because of the United States Constitution's recognition of the right to property³⁵⁹.

Section 367A of the City of St. John's Act³⁶⁰ provides that the City Council must consider the "costs and benefits of preservation" before designating a structure³⁶¹. The wording of the section provides little protection for the property owner. It is unclear if "the costs of preservation" are the costs to the owner, to the city, or to both. The owner has no right to have his property de-designated upon proof that the property cannot remain viable with the burden of heritage restrictions. The Council is only required to consider costs.

It is not required to make a decision in a certain way should proof of economic hardship be presented. The section adds little protection to requirements in other provinces that allow an owner to object to a designation and have a public hearing where he may present proof of the economic effect on him expected by the designation³⁶².

American ordinances provide much more comprehensive and clear protection for a property owner who is unable to survive financially because of a designation. The New York City Landmark Ordinance³⁶³ provides the most detailed protection and has been the subject of a great deal of litigation. The ordinance allows an owner of a designated property to apply for a certificate of appropriateness from the landmark commission that would permit him to demolish the structure on the ground of "insufficient return"³⁶⁴. The owner is entitled to this certificate if he can establish the property is not capable of earning a reasonable return. If he wants to demolish the structure, he must also show that he seeks the certificate in good faith so that he may construct a new income-producing facility with reasonable promptness. Or he must show that he requires the certificate for the purpose of terminating the existing operation at a loss. The same proof is necessary if the owner wants to make alterations which would destroy the integrity of the designated structure.

If such proof is presented, the landmark commission is obliged to make a preliminary finding of insufficient return. The commission may then devise a plan whereby the structure would

be preserved and made capable of a reasonable return. This plan could include a partial or complete tax exemption or the authorization of alterations. If the owner rejects this plan, the city council may condemn or purchase the structure or find a purchaser sympathetic to preservation. If not, the city must grant the certificate, de-designate the structure and allow the proposed work to proceed promptly.

Obviously, an important issue involved in this process is what constitutes a reasonable return. The New York ordinance defines reasonable return as being "six percent on the current assessed valuation established by the city."³⁶⁵ For the purposes of this thesis, six percent will be assumed to be reasonable to provide sufficient income for the property owner. Professor Costonis questioned the use of a fixed amount as indication of reasonable return³⁶⁶. He argued that a fixed amount would only work where a rent control scheme imposed a reasonable rate of return on a building. Instead, he submitted that reasonable return should act as a standard of fairness only and not as a measure of value. It should therefore not be subject to precise calculation but should be determined by the "community's values". This proposition appears to add vagueness to the process but, in practice, the judiciary has had little trouble isolating reasonable return where no precise figure is given. In fact, the Supreme Court in Penn Central³⁶⁷ never addressed whether or not Grand Central Terminal was indeed returning six percent yearly. The Court found by more subjective means that there was a reasonable return.

The Washington, D.C. Landmark Ordinance³⁶⁸ allows designation where the restrictions have resulted in "unreasonable economic hardship to the owner." The term is not defined by the ordinance. In 900 G. Street Associates v. Department of Housing and Community Development³⁶⁹, the District of Columbia Court of Appeal, resorting to American zoning principles, defined unreasonable economic hardship as being where no reasonable economic use for the property remained. In this case, the owner wanted to demolish the designated building and redevelop the property. But because the building could be rented out in its present state and return a profit, although much less than what the new development would yield, an economic use was available. The restriction of a higher and better use did not constitute an unreasonable economic hardship.

The Washington ordinance specifically lists what must be submitted as proof of unreasonable economic hardship³⁷⁰. The owner must submit the date of purchase and the amount paid, the assessed value, the taxes, all appraisals obtained within two years of application, the asking price and any offers received where the property has been listed for sale, the annual gross income and operating expenses and any consideration the owner has made as to profitable adaptive uses for the property. Clearly, from all these submissions, a court should be able to determine the profitability of a structure. In 900 G. Street³⁷¹, the Court would only consider this list of factors. It refused to consider other things such as expected profits from a new development on the property.

In New York where the ordinance does not list any necessary submissions, the courts have found much more stringent requirements for proving economic hardship. There must be substantial evidence of hardship to support a finding of insufficient return³⁷². The Court of Appeal decision in Penn Central³⁷³ went well beyond the criteria followed by the District of Columbia court in 900 G. Street³⁷⁴. Mr. Justice Breitel considered the financial effect of Grand Central Terminal on the surrounding properties owned by the same person. The justice also held that any public incentives granted to the Terminal in the past should also be considered in determining a reasonable return. The court further held that if the owner mismanaged his property or failed to use his best efforts to obtain a reasonable return, he was not entitled to claim an unreasonable economic hardship. Such stringent requirements may make it impossible for an owner to ever prove an economic hardship from designation and thus, the property owner is given little protection. The approach of the Washington, D.C. court and ordinance provide a much more definite and useful means for the owner to have the heritage burden alleviated or removed where economic hardship has resulted.

Most of the rare instances where courts have found that economic hardship exists under the New York ordinance have been cases involving churches or charitable organizations. The measure of reasonable return is alien to non-profit organizations and thus they are not covered by the ordinance's economic safety valve. In Trustees of Sailor's Snug Harbor

v. Platt³⁷⁵, it was held that a charitable organization must prove that preservation of the building would seriously interfere with the present use of the building and that conversion to a useful purpose would be impossible without excessive costs. The New York Court of Appeal found such a situation in Lutheran Church in America v. New York City³⁷⁶. An office building owned by the church had been designated under the city's landmark ordinance. The church proved that the building's structure was so inadequate for its purposes that the enforcement of the landmark restriction would result in the end of its charitable activities. The Court thus forced the city to de-designate the structure allowing the church to build a larger building on the site. This issue is of importance to Vancouver where eight of the fifty-seven structures designated under the Heritage By-Law are owned by church organizations.

The economic safety valve could only be adapted for use by British Columbia municipalities with considerable amendments to the statute. A provision similar to s. 20 of the Saskatchewan Heritage Property Act³⁷⁷ could be incorporated in British Columbia by statute. This provision allows an owner to apply to council to have a designation by-law repealed six months after it is passed. Six months should allow a reasonable period to assess the economic effect of the designation on the property. Like the Saskatchewan provisions, the owner should be allowed to re-apply for de-designation every twelve months. If the property owner could prove the designation leaves his property without any reasonable economic use,

council would have three alternatives. The municipality could purchase or expropriate the property. It could devise a plan through which other protective measures could make the existing structure viable. Or it could repeal the designating by-law. The HCA does not expressly give the power to de-designate a structure but by s. 27(4) of the Interpretation Act³⁷⁸, municipalities already have the power to repeal or amend any by-law it makes. This would include a by-law originally designating a structure. This safety valve, if properly implemented, could provide excellent protection for the property owner when he is truly burdened excessively by a designation.

6. Income Tax Incentives

In the United States, tremendous success has been achieved in rehabilitation of heritage property through incentives built into the Internal Revenue Code³⁷⁹. Authorities determined that historic preservation was an important national goal that was largely dependent on the use of private funds. Tax considerations were known to have an important bearing on whether the private interests were willing to maintain and rehabilitate historic structures or allow them to deteriorate³⁸⁰. Experts estimate that the incentives have led to between five hundred million and two billion dollars of private money being used for rehabilitation of landmarks. The sizes of the projects varied from restoring a small house worth 30,000 dollars to the twenty-five million dollar restoration of the art deco Chrysler Building in New York City. Oldham estimated that the loss to the Treasury was only twenty-five million dollars for the first twelve hundred

applications worth five hundred million dollars in construction³⁸¹.

The Canadian income tax system provides no special incentives to owners of heritage properties. In many cases, the Income Tax Act³⁸² acts as a disincentive to preserve. It is doubtful that the Act will soon be changed to allow greater incentives because the current finance minister is on record as being opposed³⁸³. Furthermore, the preservation of heritage property is primarily a provincial jurisdiction under "Property and Civil Rights"³⁸⁴ and thus, the federal government has little incentive to amend its income tax provisions for this purpose. Perhaps the great success of the American incentives that boosted the economy as well as preservation efforts may lead to a change in the federal government's policy. In combination with other preservation and compensation programmes, Income Tax Act amendments could provide a valuable incentive for owners to renovate their protected and possibly unprofitable structures turning them into viable, income producing commodities that would no longer be a burden to the owner.

The United States incentives can be classified into three categories. The incentives deal with the deductibility of the costs of renovation, disincentives to demolish and the deductibility of the value of restrictive covenants as a charitable contribution. I will examine the current Canadian law in these three areas and whether the American amendments are adaptable to our system.

a) The Deductibility of Renovation Costs

In general, the owner of a heritage property is entitled to deduct any expenses incurred in earning income from that property. Since renovations and preservation costs are presumably incurred to improve the structure in order to increase income from the property, they should logically be fully deductible. But section 18(1)(b) of the Income Tax Act disallows any deduction for:

an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.³⁸⁵

An expense disallowed by the section cannot be deducted from current expenses but are instead added to the capital cost of the property. The only relevant deduction expressly allowed from this capital account is depreciation referred to by the Act as the capital cost allowance³⁸⁶. For a building, the maximum amount of depreciation allowed to be deducted in one year is five percent of the undepreciated value of the property³⁸⁷ or ten percent if the building is of frame construction³⁸⁸. Clearly, the ability to deduct the entire amount of the expense in one year or even over a few years is greatly advantageous over deducting only five percent of the expense as a capital outlay.

Whether a renovation expense is a current expense or a capital outlay is frequently debated by the tax authorities and courts. Some costs are specifically deemed capital under the Act. "Soft costs" such as interest on loans and legal

expenses incurred during construction or renovation of a building are specifically deemed to be capital expenses and added to the capital cost of land or the building³⁸⁹. Other expenses have been dealt with by the courts.

In British Insulated & Helsby Cable Ltd. v. Atherton³⁹⁰, the House of Lords formulated the test as follows:

When an expenditure is made, not only once and for all but with a view to bring into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason . . . for treating such an expenditure as properly attributable not to revenue but to capital.

Canadian courts have not always found that the costs of repairs and renovations are expenses made with a view to creating a lasting benefit. Ordinary repair costs have been accepted as a validly deductible current expense³⁹¹. So long as the repairs are merely to preserve the usefulness of the building, they are current expenses. But if they materially increase the value of the building or its useful life, they are capital outlays³⁹². The replacement of worn components such as floors or walls would be a current cost³⁹³ even if it is a substantial project³⁹⁴. But if the part is a separate part in itself instead of an integral part of the larger structure, its replacement is a capital outlay. New heating units would be covered by this principle³⁹⁵. Similarly, if the replacement part is larger or adds greater efficiency, it will be a capital outlay³⁹⁶. A recent case, Shabro Investments³⁹⁷ held that repairs are not disqualified as current expenses merely because they are carried out in light of technology not known when the structure was originally built.

With a heritage structure, it is likely that any repairs will be major in that they would be designed to rehabilitate the structure and make it viable economically. Therefore, the costs of these renovations are likely to be considered capital outlays and thus their deductibility will be severely limited. Despite the Levinter decision³⁹⁸, courts usually find major repairs to be capital. In Graham v. The Minister of National Revenue³⁹⁹, the costs of rehabilitating a condemned apartment building into an office building were held to be a capital outlay because the work significantly added to the value of the structure. Most heritage property restorations would be treated similarly. In No. 709 v. The Minister of National Revenue⁴⁰⁰, the Tax Appeal Board dealt with the cost of improving the heating system and installing air conditioning. These are two projects probable in any heritage restoration. Even though much of the work was undertaken to comply with new Liquor Board and Hydro Commission regulations, the costs were capital outlays.

The Americans have changed their tax code to provide greater deductions for renovations and thus the code encourages ownership and renovation of heritage properties. In the United States, renovation costs were dealt with in three ways.

Firstly, section 191 of the Internal Revenue Code⁴⁰¹ allowed rehabilitation costs to be amortized over five years instead of regular depreciation. This is clearly superior to the Canadian system where such costs may never be completely deducted even after twenty years. The incentive was to cover

expensives for renovations that would modernize the structure and make it competitive with newer buildings⁴⁰². These renovations included modern plumbing, electrical wiring and fixtures, heating, air conditioning, elevators, escalators and other improvements required by building codes. Furniture, carpeting, drapes and office equipment were not included. The cost of new additions, parking slots and surrounding entities were also excluded. The expenses were only deductible as normal depreciation. On allowable renovation expenses, there was no monetary limit.

The programme's popularity meant that care had to be taken to insure that only owners of significant structures were eligible for the incentives. To be eligible, a building must have been listed in the National Register or be located in a registered historic district that was certified by the Secretary of the Interior⁴⁰³. A historic district was certified if its designating statute contained criteria that would "substantially achieve the purpose of preserving and rehabilitating buildings of historic significance." The statute also had to substantially meet the requirements for National Register designation. The National Register was created by the 1966 National Historic Preservation Act⁴⁰⁴ to designate historically and architecturally significant, privately-owned structures. The definition of "significant" is very general and leads to a subjective decision on inclusion⁴⁰⁵. The only protection a property receives from listing is a review process for all federally-funded undertakings that could affect the property.

The tax relief was available only where the rehabilitation was certified by the Secretary of the Interior as being consistent with the historic character of the property⁴⁰⁶. The buildings had to be income producing as rental housing, office buildings or hotels⁴⁰⁷. A long-term lessee, as well as the owner, could claim the deduction.

In lieu of this scheme, a landmark owner could have taken accelerated depreciation of all rehabilitation costs⁴⁰⁸. Eligibility was the same as in section 191. Without accelerated depreciation, the owner would be forced to depreciate on a much longer, straight-line basis.

These two programmes were replaced in 1981 by the Economic Recovery Tax Act⁴⁰⁹ which provided an investment tax credit for rehabilitation expenditures. Under the programme, up to twenty-five percent of the amount of the investment could be credited against income tax payable. This tax credit provided much greater benefit for the owner. According to Dworsky⁴¹⁰, a dollar of tax credit was a dollar of taxes saved while the value of a dollar of depreciation depended on the tax bracket of the owner and the effect of recapture. At best, a dollar of depreciation deduction saved the owner only seventy cents. The eligibility for this programme was broader than the previous two. A "Qualified Rehabilitated Building" had to be one in which at least seventy-five percent of the existing exterior walls was retained in the rehabilitation process. The building had to be in service before the beginning of the rehabilitation. There was no requirement that the building be eligible for

inclusion in the National Register or to have been locally designated. But designated historic properties were eligible for an additional five percent in tax credits⁴¹¹. The only age requirement for other buildings was that at least twenty years must have elapsed since construction of the buildings or the last rehabilitation. Non-historic residential rental properties were excluded. Eligible rehabilitation expenses were any amounts properly chargeable to the capital account for the property. Specific exclusions were costs of acquisition of the structure, enlarging the structure and any renovations for which the s. 191 expense amortization provisions had been taken⁴¹². To insure the integrity of a heritage property was not destroyed by the rehabilitation, the renovations had to be certified as appropriate for any historic structure using the same definition used in s. 191⁴¹³.

b) Treatment of Demolition

According to Denhez⁴¹⁴, the Canadian taxation system's treatment of demolition may actually provide a disincentive for preservation. To understand this disincentive, the concept of recapture must first be explained. When an owner of property over-depreciates his property, the proceeds of a sale of that property are applied against the undepreciated capital cost and the result is a negative figure⁴¹⁵. If this negative figure exists at the end of the taxation year, the amount by which the property was over-depreciated will be "recaptured" and considered as income for the year⁴¹⁶. Clearly, a taxpayer

wants to avoid this extra taxable income and thus will avoid being put in a recapture situation. Recapture can only occur if there has been some disposition of the asset⁴¹⁷. Therefore, one method in which recapture may be avoided with a building is to simply destroy the structure. According to Denhez⁴¹⁸, demolition is not considered a disposition under the Act and therefore, no recapture will be detected where the owner has over-depreciated. The Revenue Department disagrees as one of its interpretation bulletins⁴¹⁹ indicates that a disposition occurs even where a capital property is destroyed and there is no entitlement to compensation. Even if there is a disposition, the recapture will be avoided because the "proceeds of the disposition" will be considered nil⁴²⁰. Since the undepreciated capital cost of the property can never be less than zero, there will be no recapture detectable and thus no income. In fact, if the taxpayer/owner has no other depreciable property of the same class⁴²¹, he will be able to write off any remaining amount of the undepreciated capital cost as a terminal loss. The entire amount of the terminal loss may be deducted from other property and business income as a current expense⁴²².

Several cases have held that where older buildings have no attraction to an investor, they have a zero value so that the land on which they sit would be worth more vacant⁴²³. The zero value of the building when destroyed can avoid a large amount in recapture income. In Audrey Cold Storage v. R.⁴²⁴, a recapture of 262,000 dollars was avoided by demolishing the structure and consequently, the owners were able to deduct

that entire amount as a terminal loss. In Emco Ltd. v. The Minister of National Revenue⁴²⁵, the Exchequer Court went so far as to hold that where land values are increasing, the best and most profitable use of the property would be to destroy its buildings and use it for a parking lot or to erect a more profitable structure. Therefore, by levelling a potential heritage building, an owner could not only increase the value of his property by avoiding the restrictions of a subsequent designation but also greatly benefit under the tax system with an additional deduction.

A solution to this problem is not evident because of the well established capital cost provisions of the Canadian Income Tax Act. The United States Internal Revenue Code attempted to deal with the problem by providing disincentives to demolish historic structures. Section 167(n) of the Code precluded accelerated depreciation for structures built on the site where a certified historic structure has been demolished⁴²⁶. Since the Canadian act does not contain benefits similar to the Americans' generous accelerated depreciation provisions for new construction, this disincentive to demolition does not solve the current problem.

The second American disincentive is to deny any deductions for demolition expenses and the undepreciated basis of the demolished historic building⁴²⁷. The demolition costs and undepreciated capital cost are added to the capital cost of the land. Currently in Canada, demolition expenses are likely attributable to the capital cost of the land because they are

incurred to increase the land's value⁴²⁸. But the allocation of the undepreciated capital cost of the building to the cost of the land could greatly help preservation efforts in Canada because the terminal loss advantage would be removed. Furthermore, the Income Tax Act regulations indicate land is never depreciable so that the undepreciated capital cost of the destroyed structure could never be recovered through the tax system⁴²⁹. Even if this plan was implemented, it would not prevent the avoidance of the recapture and there would thus still remain a powerful incentive to demolish older and potentially worthy structures.

c) Preservation Easements as Charitable Deductions

The U.S. Code has been amended so as to allow the value of an easement for conservation purposes to be validly deducted as a charitable expense⁴³⁰. The easement must be donated to a certified heritage organization and be in perpetuity. The owner must prove that the donation of the covenant reduces the building's market value. This tax deduction appears to be crucial to the increase and effectiveness of using conservation easements as a method of heritage preservation in the United States⁴³¹.

In Canada, the Income Tax Act allows the deduction of gifts to charitable organizations or to the Crown under s. 110(1)(a) and (b). Gifts to a Canadian municipality are expressly made deductible⁵³². This might include a gift of a preservation easement. The only limitation is that the gift

must be proven by an official receipt. Practically, the value of this gift would be very difficult to determine⁴³³. Subsection 2.2 provides rules for assessing the value of tangible capital property but it is doubtful that an easement would be considered tangible. Regulation 3501(1)(e.1) implies that an appraisal of that market value would be sufficient as evidence of the value for the official receipt.

A second problem would be that eligibility should be limited to avoid over use and abuse of this deduction. Any clarification to the Income Tax Act with regard to the validity of the deduction should include rules limiting the deduction to owners of designated properties.

d) Conclusion

The policy of the current federal government is incentives like those in the U.S. Internal Revenue Code will not be implemented in Canada because there are too many differences in the two taxation systems. The Minister of Finance recently suggested⁴³⁴ that our system is fundamentally different from the American system because the Canadian taxpayer may elect to claim depreciation deductions or carry them forward for deduction at a later date. In the United States, the deduction must be claimed even if it creates a tax loss that will expire. This point may be valid if an accelerated depreciation scheme is implemented. But if renovation expenses are merely considered as current non-capital expenses amortizable over a set period, such as five years, the costs would be completely removed from

the depreciation provisions. Tax credits for investment would be similarly isolated from any depreciation provisions.

A more persuasive argument submitted by the government concerns the eligibility for special treatment as heritage properties⁴³⁵. Criteria for eligibility is of vital importance to insure that only bonafide heritage property owners obtain the tax benefits thus limiting any loss in revenues caused by the incentive. Eligibility would have to be determined by municipal and provincial standards. These standards and the number of designations vary greatly among the various jurisdictions and thus all Canadians would not receive equal application under the Income Tax Act. A solution could be to place the onus on the taxpayer to prove the worthiness of his structure following very general guidelines that federal officials could devise. Heritage Canada rejected Wilson's argument because under the American system certification of an eligible property is practically approved by state level officers and there has been no problem with varying standards⁴³⁶.

Because of the federal jurisdiction of the income tax system and the multitude of complications already plaguing the Act, the Income Tax Act may be a poor means by which to provide adequate compensation to heritage property owners. However, incentives such as a tax credit could be implemented for heritage property owners without eliminating significant government revenues. An American commentator indicated that the most valuable result of the income tax incentives was the increased awareness and interest in the preservation of existing

structures⁴³⁷. Thus, the real value of a Canadian tax incentive would not be to compensate the owner but to encourage him to become eligible for the incentive by voluntarily seeking designation without demanding full, direct compensation from municipalities. This would encourage him to restore his structure providing immediate jobs and once the restoration is complete, greater economic viability for the structure.

7. Grants

Where municipalities have not implemented any other compensation scheme, they frequently provide grants to owners of heritage buildings. Section 11(4) of the Heritage Conservation Act⁴³⁸ provides that municipalities may compensate owners with grants. The Municipal Act further provides that a council may, by by-law, make a grant to "an organization considered by council to be contributing to the general interest and advantage of the municipality."⁴³⁹ The Vancouver Charter includes a power to make grants to "any organization deemed by the Council to be contributing to the culture, beautification, health or welfare of the city."⁴⁴⁰ Presumably, these two sections would include an owner preserving his heritage building for the public's benefit. In Vancouver, grants are a major incentive under the city's Heritage Conservation Programme⁴⁴¹. Victoria uses its powers to provide direct grants in lieu of property tax relief⁴⁴². Grants are inferior to other forms of compensation for two reasons. Firstly, they do not necessarily insure that the funds will be used for preservation⁴⁴³.

Secondly, the grants are unlikely to provide adequate compensation for the owner. With limited funds, municipalities cannot afford to provide large grants so that a landmark owner will be insufficiently protected from the burdens of designation.

IV. RECOMMENDATIONS AND CONCLUSION

The present system of designation and mandatory compensation under the Heritage Conservation Act has failed to achieve its objectives. The Act seeks to achieve a balance between protection of the public's interest in maintaining outstanding buildings and protecting the owner's property rights in that building. But the compensation measure instituted to provide protection to the owner has been such a massive deterrent to designation that the statute upsets the balance by providing too much protection for the owner and none for the building. Thus, municipalities ignore the statute and instead seek protection by the uncertain means of negotiation with the owner. This negotiation and the use of zoning bonuses and development permits may provide more flexibility in protection than designation but British Columbia municipalities may not have sufficient powers under municipal enabling statutes to provide the flexibility. And, more importantly, reliance on the owner's consent indicates there will be no safe, definite protection for the structure. Thus, major changes must be made to the present law to provide greater protection for heritage properties and to replace the HCA's poorly designed compensation measures. The idea behind compensation as protection for the property owner is a worthy and admirable idea but to limit its deterrent effect, a different and potentially cheaper form of protection must be instituted.

The present system of protecting the buildings through designation might provide adequate protection but improvements

could be added. Some features, notably the interim control measures, are excellent and the provision of blanket coverage until de-designation is a much more effective scheme than the Ontario scheme's protection by delay. But municipalities could use greater powers to protect all the worthy features of heritage properties. Municipal protection should be expanded to cover the interiors of structures where the particular features are commonly seen by the public and are specifically outlined in the designation by-law. To insure the heritage property remains a significant structure, the municipality must have the power to impose affirmative maintenance controls on the property owners before the building deteriorates. The municipality should also have the power to relax building code regulations when they act as obstacles to preservation projects. And finally, the municipality should be given the right to expropriate for heritage conservation purposes and thus have a powerful weapon with which to preserve the community's most significant structures when threatened. Such a power must of course be accompanied with the requirement of full and fair compensation for the owner of the expropriated property.

Two other amendments are also needed to provide sufficient protection to heritage properties. Firstly, the Heritage Conservation Act should require that a designation be registered against title in the land titles office. This would provide notice of the heritage restriction to all who deal with the land. And secondly, there must be a substantial increase in the Act's penalties. Fines of at least a hundred thousand

dollars will provide much greater deterrents to developers of multi-million dollar properties.

As stated, a better compensation scheme should be implemented. This system could not only provide protection for the property owner but act as an incentive to the owner to voluntarily seek designation. This new form of compensation should only be available where the building is formally designated and thus safely protected.

Of the compensation methods surveyed, the one that best meets these requirements is property tax relief. The assessments of designated heritage properties should be frozen so that improvements necessary to rehabilitate the structure will provide a relatively inexpensive method of compensation yet provide sufficient incentive for an owner to rehabilitate his structure and make it economically viable thus lessening the burden of heritage designation.

Although this system would decrease the heritage property owner's expenses, it would clearly not compensate the owner completely where designation decreases the value of the property. Therefore, an additional means of protecting the owner should be available. Methods such as the transfer of development rights and revolving funds have limited application and thus would not provide comprehensive protection for heritage property owners. Instead, a heritage statute should provide an economic safety valve to owners. After designation, the owner should have the statutory right to a hearing where he can prove the heritage restriction even with the property tax relief has

created an economic hardship. An economic hardship would exist where the property does not yield a reasonable return. If the owner can prove economic hardship, the onus will be on council to offer further incentives, expropriate the structure if it is truly important to a community, or de-designate. This safety valve thus provides complete protection for an owner where he is severely burdened by the restriction.

At present, the Heritage Conservation Act's compensation measures are designed to protect the property owner. But if logically designed, a compensation provision could go beyond that purpose and give greater strength to preservation of heritage properties and improve the state of the property owner. By acting as an incentive, heritage measures could make designation attractive to the owner so that if he seeks the restriction voluntarily and rehabilitates his building, the heritage property will become economically viable. The building will thus become a living, functioning part of a community that incidentally provides aesthetic pleasure and evidence of the community's past. With significant amendments to present legislation and the addition of a logically designed incentive system, the crucial balance between the owner's property rights and the public's right to protect the building could be better achieved. In this way, most of the conflicts surrounding current heritage preservation attempts could be eliminated and we may all begin to enjoy the contributions to the past given us by our built environment.

Footnotes

1. Penn Central Transportation Co. v. City of New York (1978), 438 U.S. 104 (U.S.S.C.) affirming (1977), 366 N.E. (2d) 1271 (N.Y.C.A.).
2. C.Rose, "Preservation and Community: New Directions in the Law of Historic Preservation" (1981), 33 Stan. L.R. 473.
3. R.S.B.C. 1979, c. 195.
4. See A. Falkner, Without Our Past? (1977) at p. 10.
5. R.S.B.C. 1979, c. 165.
6. R.S.B.C. 1960, c. 15.
7. S.B.C. 1972, c. 4.
8. R.S.B.C. 1960, c. 255, s. 714A as amended by S.B.C. 1973, c. 59, s. 19.
9. S.B.C. 1953, c. 55 as amended by the Vancouver Charter Amendment Act, S.B.C. 1974, c. 104, s. 45.
10. S.B.C. 1953, c. 55, s. 564A(1) as amended by S.B.C. 1974, c. 104, s. 45.
11. Ibid, s. 564A(7)(a).
12. Ibid, s. 564A(7)(b).
13. Heritage By-Law No. 4837 (December 17, 1974).
14. R.S.B.C. 1960, c. 255, s. 714A as amended by S.B.C. 1973, c. 59, s. 19.
15. R.S.B.C. 1979, c. 290.
16. See Kent District v. Storgoff (1962), 41 W.W.R. 301 at 306 (B.C.S.C.).
17. City of Victoria Heritage Buildings Protection By-Law 1976 No. 6988 (July 15, 1976) referred to in E & J Murphy Ltd. v. Corporation of the City of Victoria (1976), 1 M.P.L.R. 166 (B.C.S.C.).
18. Ibid.
19. Eg., Re Lacewood Development Co. and the City of Halifax (1975), 58 D.L.R. (3d) 383 (N.S.C.A.).
20. R.S.B.C. 1979, c. 165 proclaimed September 22, 1977 by B.C. Reg 402/77.

21. S.B.C. 1972, c. 4.
22. R.S.B.C. 1960, c. 255, s. 714A as amended by S.B.C. 1973, c. 59, s. 19.
23. S.B.C. 1953, c. 55 as amended by S.B.C. 1974, c. 104, s. 45.
24. R.S.B.C. 1979, c. 165.
25. S.B.C. 1972, c. 4.
26. R.S.B.C. 1979, c. 306.
27. Ibid, s. 1.
28. R.S.B.C. 1960, c. 15.
29. Assessment Appeal Board Decisions, May 28, 1981.
30. S.B.C. 1972, c. 4.
31. Ibid.
32. R.S.B.C. 1960, c. 255, s. 714A as amended by S.B.C. 1973, c. 59, s. 19.
33. S.B.C. 1953, c. 55, s. 564A as amended by S.B.C. 1974, c. 104, s. 45.
34. Supra, note 17.
35. (1982), 20 M.P.L.R. 121 (S.C.C.).
36. R.S.O. 1980, c. 337.
37. Ibid, s. 33.
38. Reported at (1980), 12 M.P.L.R. 241.
39. Reported at (1980), 14 M.P.L.R. 51.
40. Supra, note 35.
41. R.S.O. 1980, c. 219, s. 10.
42. (1924) 1 D.L.R. 440.
43. Gray v. Kerslake, (1958) S.C.R. 3.
44. Richards, "Harsh Results for Municipalities: St. Peter's Evangelical Lutheran Church and Costello" (1984), 6 S.C.L.R. 401.
45. R.S.B.C. 1979, c. 165, ss. 4, 11.

46. Eg., s. 29 of the Ontario Heritage Act, R.S.O. 1980, c. 337 only allows designation of property of "historic or architectural value or interest."
47. S.B.C. 1953, c. 55, s. 564A as amended by S.B.C. 1974, c. 104, s. 45.
48. R.S.B.C. 1960, c. 255, s. 714A as amended by S.B.C. 1973, c. 59, s. 19.
49. Seattle, Washington Landmarks Ordinance No. 102229, s. 6 found in A Handbook on Historic Preservation Law (Duerkson, ed., 1983) at p. A37.
50. Duerkson, "Local Preservation Law" in A Handbook on Historic Preservation Law (Duerkson, ed., 1983) at p. 83.
51. See Texas Antiquities Commission v. Dallas Community College District (1977), 554 S.W. (2d) 924 (Texas S.C.).
52. See DiGregorio v. Town of Ancaster (1979), 10 O.M.B.R. 161.
53. (1978), 6 M.P.L.R. 226.
54. See also Manhattan Club v. Landmarks Preservation Commission of the City of New York (1966), 273 N.Y.S. (2d) 848 (N.Y.S. C.) for a similar result.
55. See the Ontario Heritage Act, R.S.O. 1980, c. 337, s. 29(4)(b).
56. See the Heritage Property Act, S.N.S. 1980, c. 8, s. 13(2).
57. See the Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 12.
58. R.S.B.C. 1979, c. 165.
59. Ibid, s. 5.
60. Ibid, s. 6(b),(c),(d).
61. Ibid, ss. 10-15.
62. For eg., in Saskatchewan, the Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 11(2) requires thirty days notice. The Alberta Historical Resources Act, R.S.A. 1980, c. H-8, s. 22(2) requires sixty days notice.
63. R.S.B.C. 1979, c. 165, s. 11(2)(b).
64. Ibid, s. 12.
65. S.B.C. 1953, c. 55, s. 564A as amended by S.B.C. 1974, c. 104, s. 45.

66. See footnotes 24-33 and accompanying text.
67. See the Constitution Act, 1867, s. 91(1A); and Rex. v. Ross, (1926) 4 D.L.R. 894 (N.B.C.A.); Ottawa v. Shore & Horwitz Construction (1960), 22 D.L.R. (2d) 247 (Ont. H.C.); Delta v. Aztec Aviation Group (1985), 28 M.P.L.R. 215 (B.C.S.C.).
68. See discussion on Railway Station Designation, infra, p. 39.
69. R.S.B.C. 1979, c. 306, s. 14(1).
70. S.S. 1979-80, c. H-2.2, s. 80.
71. S.N.S. 1980, c. 8, s. 25.
72. R.S.B.C. 1979, c. 165, s. 12.
73. See Regina v. Pride Cleaners & Dyers Ltd. (1965), 49 D.L.R. (2d) 752; and R. v. Horback (1967), 64 D.L.R. (2d) 17 (B.C.S.C.).
74. R.S.A. 1980, c. H-8.
75. S.S. 1979-80, c. H-2.2.
76. R.S.O. 1980, c. 337.
77. For facts, see E & J Murphy Ltd. v. The Corporation of the City of Victoria, supra, note 17.
78. S.B.C. 1953, c. 55, s. 564A as amended by S.B.C. 1974, c. 104, s. 45.
79. S.S. 1979-80, c. H-2.2, s. 28(1)(e).
80. R.S.A. 1980, c. H-8, s. 22(8).
81. R.S.O. 1980, c. 337, s. 29(3)(a).
82. See the Heritage Conservation Act, R.S.B.C. 1979, c. 165, s. 5(1).
83. Eg., Alberta Historical Resources Act, R.S.A. 1980, c. H-8, ss. 15, 16; Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 44.
84. R.S.B.C. 1979, c. 165, s. 12.
85. R.S.O. 1980, c. 337.
86. This notice provision must be strictly followed. See St. Peter's Evangelical Lutheran Church v. The City of Ottawa,

supra, note 35.

87. Ibid.

88. (1984), 12 D.L.R. (4th) 396 (Ont. Div. Ct.).

89. S.S. 1979-80, c. H-2.2, as amended by S.S. 1983-84, c. 39, s. 20.

90. Pettit, "Teetering on the Pacific Rim" (1986), 12:2 Cdn Heritage 14.

91. Eg., Alberta Historical Resources Act, R.S.A. 1980, c. H-8, s. 22(6); Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 23; Ontario Heritage Act, R.S.O. 1980, c. 337, s. 33.

92. Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 23(3).

93. Winnipeg, Manitoba By-Law no. 1474/77 as amended by By-Law No. 2032/78 as described by Regelous, "Heritage Preservation in Manitoba: The New City of Winnipeg By-Laws" in Isaac Pitblado Lectures on Continuing Legal Education, (1980) at p. 209.

94. The term was used by Duerkson, supra, note 50 at pp. 108-112.

95. See "King George School" (1977), 1:4 Heritage West 10; "A Shame and a Scandal" (1978), 2:1 Heritage West 8.

96. See the Municipal Act, R.S.B.C. 1979, c. 290, s. 936(1). The City of Vancouver has similar powers under the Vancouver Charter, S.B.C. 1953, c. 55, s. 306(q) as amended.

97. R.S.O. 1980, c. 337, s. 69(5)(a).

98. R.S.A. 1980, c. H-8, s. 19.

99. S.S. 1979-80, c. H-2.2, ss. 30(1). Amendments (S.S. 1983-84, c. 39, ss. 11, 15) provide that if an owner objects to the order, he is entitled to a hearing.

100. Ibid., s. 30(2).

101. This could be accomplished in much the same way the City of Vancouver was allowed to delegate the powers to a municipal official to set safety inspection standards for vehicles. See the Vancouver Charter, S.B.C. 1953, c. 55, s. 317(p)(ii) as amended by S.B.C. 1968, c. 71, s. 15.

102. Supra, note 50 at p. 53.

103. R.S.A. 1980, c. H-8, s. 47(1).

104. S.S. 1979-80, c. H-2.2, s. 76.
105. The Vancouver Charter, S.B.C. 1953, c. 55, s. 565A(e) as amended by S.B.C. 1964, c. 72, s. 18; S.B.C. 1966, c. 69, s. 23; S.B.C. 1978, c. 41, s. 31.
106. R.S.B.C. 1979, c. 290.
107. Ibid, as amended by Bill 62 (Proclaimed Dec. 31, 1985). For the City of Vancouver's zoning powers, see infra, notes 116-120 and accompanying text.
108. Ibid, s. 967.
109. See the Planning Act, R.S.A. 1980, c. P-9, s. 69(3).
110. R.S.B.C. 1979, c. 290, s. 976 as amended by Bill 62 (Proclaimed Dec. 31, 1985).
- 110A. Ibid, ss. 945(4), 976.
- 110B. Ibid, s. 945(4)(f),(g).
111. S.M. 1971, c. 105, s. 573(e.1) as amended by S.M. 1977, c. 64, s. 65. Other Manitoba municipalities have a similar duty to consider preservation under the Planning Act, S.M. 1975, c. 29, s. 27(4)(v).
- 111A. R.S.B.C. 1979, c. 290, s. 945(4) as amended by Bill 62 (Proclaimed Dec. 31, 1985).
112. (1979) 1 S.C.R. 98 affirming (1977), 81 D.L.R. (3d) 543 (Alta. C.A.).
113. See the Planning Act, R.S.A. 1970, c. 276, s. 106.
114. R.S.A. 1980, c. H-8.
115. Similarly, an American case, Rebman v. The City of Springfield (1969), 250 N.E. (2d) 282 held that there must be express legislative recognition that preservation advances the general welfare of a community before zoning can be used for preservation.
116. "Yaletown Rezoned for Heritage", Vancouver Sun, May 9, 1986 at p. A3.
117. S.B.C. 1953, c. 55 as amended by S.B.C. 1959, c. 107, s. 20; S.B.C. 1964, c. 2, s. 17.
118. Emphasis added.
119. See the Vancouver Charter, S.B.C. 1953, c. 55, s. 304 as amended by S.B.C. 1963, c. 60, s. 8.

120. Supra, note 112.
121. Zoning and Development By-Law No. 3575, s. 3.3.4(d).
122. R.S.B.C. 1979, c. 290.
123. Ibid, ss. 962(2), 974.
124. R.S.B.C. 1979, c. 305.
125. Heritage By-Law No. 4837, s. 4 (December 17, 1974).
126. See "Schoolhouse Demolition Sparks Row in Langley", Vancouver Sun, May 21, 1986 at p. A11.
127. R.S.A. 1980, c. H-8, s. 48.
128. R.S.O. 1980, c. 337, s. 69.
129. S.S. 1979-80, c. H-2.2, s. 73(1)(a).
130. Ibid, s. 73(1)(b).
131. See the Recreation Development Act, P.E.I.R.S. 1974, c. R-9, s. 14.
132. See the Historic Objects and Sites Act, S.N. 1973, c. 85, s. 39.
133. R.S.M. 1970, c. H-70, s. 20.
134. R.S.O. 1980, c. 337, s. 69(5).
135. S.S. 1979-80, c. H-2.2, s. 73(2).
136. R.S.A. 1980, c. H-8, s. 48(3).
137. R.S.B.C. 1979, c. 165, s. 7(3).
138. R.S.B.C. 1979, c. 290, s. 310.
139. S.B.C. 1953, c. 55, s. 306(h) as amended.
140. Unreported, December 1, 1981 (B.C.S.C. No. C8151.74).
141. To determine whether or not an interested group would have standing, see Re Saanich Inlet Preservation Society and Cowichan Valley Regional District (1983), 147 D.L.R. (3d) 174 (B.C.C.A.); Re Sunshine Hills Property Owners Association and the Municipality of Delta (1977), 80 D.L.R. (3d) 692 (B.C.S.C.); Association des Propriétaires des Jardins Tache Inc. et al v. Les Entreprises Dasken Inc. et al (1971), 26 D.L.R. (3d) 79 (S.C.C.).

142. The Federation of Canadian Municipalities Resolution No. IX - 9006, "Protection of Heritage Railway Buildings"(1985).
143. See Murphy, "Canada's Train Stations: Destination Oblivion or Protection" (1985), 11:3 Cdn Heritage 28.
144. (1984), 26 M.P.L.R. 245 (Sask. Q.B.).
145. R.S.C. 1970, c. R-2, s. 6(1)(c).
146. Eg., C.P.R. v. A.G.B.C., (1950) 1 W.W.R. 220 (P.C.); C.N.R. v. Nor-Min Supplies Ltd., (1977) 1 S.C.R. 322.
147. See MacFie v. Callander and Oban Railway Company, (1898) A.C. 270 at 287 (H.L.).
148. For facts, see Murphy, supra, note 143.
149. R.S.C. 1970, c. R-2, s. 119.
150. See C.P.R. v. C.T.C., (1985) 1 F.C. 554.
151. Leave to appeal denied February 25, 1985.
152. Supra, note 143.
153. R.S.C. 1970, c. H-6.
154. (1977) 366 N.E. (2d) 1271 affirmed by (1978), 438 U.S. 104 (U.S.S.C.).
- 154A. See Bill C-253, 2nd Session, 32nd Parliament, 1983-84.
- 154B. R.S.C. 1970, c. H-6, ss. 4-6.
- 154C. For eg., see A.G. Nova Scotia v. A.G. Canada (Inter-delegation Case), (1951) S.C.R. 31.
- 154D. R.S.B.C. 1979, c. 165.
155. See the Alberta Historical Resources Act, R.S.A. 1980, c. H-8, s. 16.
156. S.S. 1979-80, c. H-2.2, ss. 13, 14, 40, 42.
157. Ibid, ss. 20, 54.
158. (1970), 14 D.L.R. (3d) 228 (Alta. C.A.).
159. S.M. Makuch, Canadian Municipal And Planning Law, (1983) at pp. 267-269.
160. (1965) S.C.R. 512.

161. (1980), 13 M.P.L.R. 234 (S.C.C.).
162. See "High Rise Tudor Tower Approved" re Dick Building, Vancouver Sun, March 12, 1986 at p. A3; Fenton et al, Heritage Preservation in Vancouver, (1977).
163. R.S.B.C. 1979, c. 290, ss. 313-319.
164. R.S.B.C. 1979, c. 209.
165. See for eg., Heritage Property Act, S.S. 1979-80, c. H-2.2, ss. 3(1)(j); 28(1)(a); Historic Sites and Objects Act, R.S.M. 1970, c. H-70, s. 8(1); Ontario Heritage Act, R.S.O. c. 337, s. 39(1); Heritage Property Act, S.N.S. 1980, c. 8, s. 24(1)(d); Historic Objects and Sites Act, R.S.N. 1973, c. 85, s. 18.
166. Section 24 of the Alberta Historical Resources Act, R.S.A. 1980, c. H-8 makes compensation mandatory for municipal designation by the provincial government.
167. R.S.B.C. 1979, c. 165.
168. R.S.B.C. 1979, c. 117.
169. Ibid, s. 23.
170. R.S.B.C. 1979, c. 290. An identical provision exists for the City of Vancouver under the Vancouver Charter, S.B.C. 1953, c. 55, s. 541.
171. See the Municipal Act, R.S.B.C. 1979, c. 290, s. 555; Vancouver Charter, S.B.C. 1953, c. 55, s. 544.
172. See Ricket v. Metropolitan Railway Co., (1867) L.R. 2 H.L. 175.
173. R.S.C. 1970, c. A-3, s. 6(1)(j), (10).
174. (1982), 24 L.C.R. 266 (B.C.C.A.).
175. (1985), 17 D.L.R. (4th) 1.
176. R.S.B.C. 1979, c. 290, s. 544.
177. See Huot, "Compensation for Designation" (1981), 5 Heritage West 15. See also Denhez, "What Price Heritage?" (1981), 21 Plan Canada 5.
178. Further proof of the injurious effect of a designation comes from other provinces' heritage legislation that specifically exclude liability for the injurious affection caused by designation. For eg., see the Heritage Property

- Act, S.S. 1979-80, c. H-2.2, s. 75.
179. See Vancouver Heritage Advisory Committee, "Towards a Second Century" (1982). See also Pettit, "Teetering on the Pacific Rim", supra, note 90.
 180. Denhez, supra, note 177.
 181. Space Adrift: Landmark Preservation and the Marketplace (1974) at p. 10.
 182. See "Vancouver Trying to Put a Price on History", Vancouver Sun, November 4, 1985 at p. A18; "Facade Tower Plan Fought", Vancouver Sun, March 4, 1986 at p. A3.
 183. Supra, note 177.
 184. See Penn Central Transportation Co. v. City of New York, supra, note 1.
 185. (1959), 18 D.L.R. (2d) 161 (S.C.C.).
 186. Supra, note 1.
 187. For eg., see Commonwealth Historic Resource Management Ltd., Listing of Potential Heritage Buildings, prepared for the City of Vancouver (1985); City of Regina Planning Department, "A Heritage Program for Downtown" (1983).
 188. See the discussion on the need for maintenance standards, supra, notes 94-101 and accompanying text.
 189. "What Price Heritage?", supra, note 177.
 190. See E & J Murphy Ltd. v. The Corporation of the City of Victoria, supra, note 17.
 191. U.S. v. Causby (1946), 328 U.S. 256.
 192. See Marcus, "Mandatory Development Rights and the Taking Clause" (1975), 24 Buff L.R. 77.
 193. (1980) F.C. 128 (T.D.).
 194. U.S. v. Dickinson (1947), 331 U.S. 745 at 748.
 195. U.S. Const., Amend. V.
 196. See R. v. Tener, supra, note 175; A.G. v. Dekeyser's Royal Hotel Ltd., (1920) A.C. 508 at 542.
 197. See for eg., the Municipal Act, R.S.B.C. 1979, c. 290, s. 972(1) as amended.

198. Supra, note 177.
199. J.H. Baker, An Introduction to English Legal History (1979) at p. 191.
200. See The City of Ottawa v. Boyd Builders Ltd., (1965) S.C.R. 408.
201. Hartel Holdings Co. v. Calgary City Council, (1984) 4 W.W.R. 193 (S.C.C.).
202. For eg., see the Municipal Act, R.S.B.C. 1979, c. 290, s. 972(1) as amended by Bill 62 (Proclaimed Dec. 31, 1985).
203. Supra, note 1.
204. The Heritage Conservation Act, R.S.B.C. 1979, c. 165, ss. 4(2), 11(4).
205. R.S.B.C. 1979, c. 290 as amended.
206. See Denhez, supra, note 177 among others.
207. (1981), 430 A. (2d) 1387 (D.C.C.A.).
208. Supra, note 177.
209. Code Civil de la Province de Quebec, Article 13.
210. See Hartel Holdings, supra, note 201, where Madame Justice Wilson indicates that private property rights are subservient where they conflict with the public interest.
211. The Heritage Conservation Act does not specifically empower the designation of a historic district but the definition of a heritage site is broad enough to apply to include areas as well as individual buildings.
212. See Listokin, Landmarks Preservation and the Property Tax (1982) at pp. 43-44.
213. Huot, supra, note 177.
214. Pettit, supra, note 90.
215. City of Vancouver By-Laws No. 5291 (Oct. 30, 1979), 5300 (Dec. 4, 1979), 5353 (June 17, 1980), 5354 (June 17, 1980), 5355 (June 17, 1980) amending the Heritage By-Law No. 4837.
216. M. Denhez, Heritage Fights Back (1978) at p. 162.
217. See Vancouver Heritage Advisory Committee, "Towards a Second Century (1982).

218. The City of Victoria has a similar policy using designation only as a "last resort" and in the most exceptional circumstances. See Stark, "It Started in Bastion Square" (1984) 10:1 Cdn Heritage 26.
219. "Facade Tower Plan Fought", supra, note 182. The cost of maintaining the facade alone is 1.3 million dollars.
220. "Vancouver Trying to Put a Price on History", supra, note 182.
221. City of Vancouver Planning Department Report to Council on Tudor Manor, referred to in "Tudor Manor's Fate Awaited", Vancouver Sun, February 1, 1986 at p. A3.
A second example of the city using a zoning bonus as leverage to preserve a heritage structure is the Model School development where the floor space ratio for the lot was increased from 0.75 to 2.0 in return for consent to designate the structure. See "School Moving Up in Status", Vancouver Courier, November 27, 1985 at p. 8: "Heritage Designation Proposed for School", Vancouver Sun, November 19, 1985.
222. See Pettit, supra, note 90.
223. See Alberta Historical Resources Act, R.S.A. 1980, c. H-8, s. 24.
224. (1981), 32 A.R. 336 (Q.B.);
225. See Cowan, "How They're Saving Alberta's Past", (1984), 10:3 Cdn Heritage 13.
226. National Historic Preservation Act, 16 U.S.C. s. 470 (1976 &ss.106(a)(6) of 1980 amendments. More frequently, municipalities implement an informal policy whereby buildings will not be designated where the owner objects. See for eg., the City of Regina's policy referred to in "150 Properties in Regina on Heritage List", Regina Leader Post, June 10, 1986 at p. A3.
227. See Ontario Heritage Act, R.S.O. 1980, c. 337, s. 34.
228. See Rose, supra, note 2.
229. See Costonis, supra, note 181 at p. 14.
230. Ibid. See also Costonis, "Development Rights Transfer: An Exploratory Essay" (1973), 83 Yale L.J. 75.
231. Supra, note 1.
232. See Siedel, "Landmark Preservation After Penn Central" (1982), 17 Real Prop, Prob and Tr J. 340; Duerkson, supra, note 50

at p. 42; Costonis, "The Disparity Issue: a Context for the Grand Central Terminal Decision" (1977), 91 Harv L.R. 402.

233. See Rose, supra, note 2.
234. See Campbell v. The Municipality of Sydney, (1925) 1 W.W.R. 660.
235. R.S.A. 1970, c. 175, s. 39.
236. See Ritchie v. City of Edmonton (1980), 20 L.C.R. 29 (Alta. Q.B.).
237. See Ontario Heritage Act, R.S.O. 1980, c. 337, s. 36. This expropriation power is vital to Ontario municipalities who lack the power to indefinitely prevent the demolition of a designated structure.
238. Heritage Property Act, S.N.S. 1980, c. 8, s. 27(9).
239. Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 26 repealed by S.S. 1983-84, c. 39, s. 10.
240. Eg., The Municipal Government Act, R.S.A. 1980, c. M-26, s. 12 and the Municipal Expropriation Act, R.S.S. 1978, c. M-27, s. 3 combined with the Heritage Property Act, ibid, s. 28(1)(g) should be wide to allow municipalities in Alberta and Saskatchewan to expropriate heritage buildings.
241. S.B.C. 1953, c. 55 as amended by S.B.C. 1958, c. 72, s. 28.
242. R.S.B.C. 1979, c. 290.
243. See Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks" (1972), 85 Harv L.R. 574 at 584.
244. Penn Central Transportation Co. v. The City of New York, supra, note 1.
245. Ibid.
246. See Netherton, "Restrictive Agreements for Historic Preservation" (1980), 12 Urban Law 54.
247. The Heritage Trust is a corporation created by ss. 16-26 of the Heritage Conservation Act to "support, encourage and facilitate the conservation, maintenance and restoration of heritage property" in British Columbia.
248. Alberta Historical Resources Act, R.S.A. 1980, c. H-8, s. 25; Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 59;

Ontario Heritage Act, R.S.O. 1980, c. 337, s. 37; Historic Sites Protection Act, R.S.N.B. 1973, c. H-6, s. 2.1(1); Heritage Property Act, S.N.S. 1980, c. 8, s. 18; Museum Act, S.P.E.I. 1978, c. 34, s. 10(1); Historic Objects and Sites Act, S.N. 1973, c. 85, s. 20A.

249. Eg. Alberta Historical Resources Act, *ibid*, s. 25(1)(d); Historic Sites Protection Act, R.S.N.B. 1973, c. H-6, s. 2.1 as amended by S.N.B. 1977, c. 27.
250. For facts, see Brink, "Experience of the Galveston Historical Foundation in Using Legal Tools to Support Historic Preservation" (1980), 12 Urban Law 74.
251. Ibid.
252. Galveston Historic Foundation, "Proposed Deed Covenants" found in Historic Preservation Law (Robinson, ed., 1979).
253. Brink, supra, note 250.
254. Ibid.
255. Ibid.
256. See the discussion on Income Tax Incentives, infra, pp. 118-131. In "Private Land Use Controls Useful for Historic Preservation" at p. 327 of Historic Preservation Law (Robinson, ed., 1979), Jahns implied that the deductibility of the value of the conservation easements and covenants is essential to the successful use of conservation easements.
257. R.S.B.C. 1979, c. 290.
258. The Vancouver Charter, S.B.C. 1953, c. 55, s. 206(j) as amended by S.B.C. 1963, c. 60, s. 4 provides a similar power to the City of Vancouver.
259. See the Municipal Act, R.S.B.C. 1979, c. 290, Pt. VIII.
260. Ibid, s. 537(2).
261. See Costonis, supra, note 181 at p. xvi.
262. See Richards, "The New York Plan: Transfers to Adjacent Properties" in Transfer of Development Rights (J. Rose, ed., 1975) at p. 123.
263. "Whoever has land possesses all space upwards to an indefinite extent."
264. See Schnidman and Roberts, "Municipal Air Rights: New York's City Proposal to Sell Air Rights Over Public Buildings and

Public Spaces" (1983), 15 Urban Law 347.

265. See the Mineral Act, R.S.B.C. 1979, c. 259.
266. Eg., Saskatchewan Telecommunications Act, R.S.S. 1978, c. S-34, s. 12(2).
267. For details, see Fenton et al, supra, note 162.
268. See "The Moody Gem on a Dreary Corner", Vancouver Sun, February 1, 1986 at p. D3.
269. Supra, note 262.
270. New York, N.Y. Zoning Resolution Article VII, c. 4, ss. 74-792 (1971).
271. For details, see Eliot and Marcus, "From Euclid to Ramapo: New Directions in Land Development Controls" in Transfer of Development Rights, (JprRose, ed., 1975) at p. 157; Marcus, supra, note 192; Richards, supra, note 262.
272. See Richards, ibid at p. 135.
273. Costonis, supra, note 181 at p. 55.
274. New York Zoning Resolution Article VII, c. 4, s. 74-79 as quoted in Richards, supra, note 262 at p. 134.
275. Penn Central Transportation Co. v. New York City, supra, note 1.
276. Ibid.
277. See Richards, supra, note 262 at p. 132.
278. Supra, note 264.
279. For details, see Richards, supra, note 262 at pp. 137-140.
280. Fred F. French Investing Co. v. City of New York (1976), 350 N.E. (2d) 381 (N.Y.C.A.).
281. See Marcus, supra, note 192.
282. See Siedel, supra, note 232.
283. See Re Columbia Estates and the District of Burnaby (1974), 49 D.L.R. (3d) 123 (B.C.S.C.); Re Corporation of the District of North Vancouver Zoning By-Law 4277, (1973) 2 W.W.R. 260 (B.C.S.C.).

284. See Hoskins, "Police Power and Compensable Takings: A Landmark Decision Clarifies the Rule" (1979), 11 Conn L.R. 273; Delaney et al, "TDR Redux: A Second Generation of Practical Legal Concerns" (1983), 15 Urban Law 593; Siedel, supra, note 232.
285. See Costonis, supra, note 181 at pp. 55-59.
286. Ibid, pp. 48-52.
287. See Costonis, supra, note 230, p. 86.
288. Costonis, supra, note 181, pp. 52-54.
289. Supra, note 230, p. 87.
290. Costonis, supra, note 181, pp. 52-54.
291. Ibid, pp. 53-54.
292. Duerkson, supra, note 50, p. 73.
293. Marcus, supra, note 192.
294. See Makuch, supra, note 159, p. 262.
295. Supra, note 284.
296. Supra, note 262.
297. Ibid.
298. S.B.C. 1953, c. 55, s. 565(f) as amended by S.B.C. 1959, c. 107, s. 20; S.B.C. 1964, c. 72, s. 17.
299. Ibid.
300. R.S.B.C. 1979, c. 290 as amended.
301. Ibid, s. 956.
302. Ibid, s. 702A(3).
303. Ibid, s. 976(3).
304. See Listokin, supra, note 212, p. xxiii.
305. R.S.B.C. 1979, c. 165, s. 11(4).
306. The Alberta Historical Resources Act, R.S.A. 1980, c. H-8, s. 24(4) allows compensation may be by tax relief where the owner agrees.
307. See Heritage Property Act, S.S. 1979-80, c. H-2.2, s. 28(1)(a).

308. See the Cultural Property Act, R.S.Q. 1977, c. B-4, s. 33.
309. R.S.B.C. 1979, c. 290.
310. Conn. Gen. Stat. Ann. s. 12-127a.
311. N.C. Gen. Stat. 105-278.
312. See Stipe, "State and Local Tax Incentives for Historic Preservation" in Tax Incentives for Historic Preservation, Revised Edition (Andrews, ed., 1981) at p. 91.
313. N.M. Stat. Ann. 18-6-13 (Michie 1978).
314. Md. Ann. Code, Art. 81, s. 12G (Supp 1978).
315. R.S.Q. 1977, c. B-4, s. 33.
316. Winnipeg, Man. Taxation By-Law referred to in Krotz, "No Boom Was a Boon" (1985), 11:4 Cdn Heritage 22, and in "Winnipeg Tax Freeze a Boon to Heritage" (1986), 12:2 Cdn Heritage 10.
317. Krotz, ibid.
318. R.S.B.C. 1979, c. 290, s. 400(2)(a).
319. Ibid, s. 400(1).
320. See Listokin, supra, note 212, p. 170.
321. Or. Rev. Stat. ss. 358.475-.565 (Supp 1977); Or. Laws, c. 514, s. 15 (1975).
322. Ibid, s. 358.480(1).
323. Ibid, s. 358.515.
324. See note 311 and accompanying text.
325. See "Impact of Property Tax Exemptions on the Average Homeowner", submitted by the Budget Division, Bureau of Management and Budget to the Mayor and Commissioners of Portland, Oregon (December 31, 1975), referred to in Powers, "Tax Incentives for Historic Preservation" (1980), 12 Urban Law 103.
326. Bill 265, Oregon Legislative Assembly, 1979, referred to in Powers, ibid.
327. Ibid, pp. 126-127.
328. Ibid, p. 123.

329. See Roddewig, "Preservation Law and Economics" in A Handbook on Preservation Law, (Duerkson, ed., 1983) at pp. 427, 451-452.
330. See Powers, "State Historic Preservation Tax Statutes: Three Case Studies" in Tax Incentives for Historic Preservation, (Andrews, ed., 1981) at p. 108.
331. R.S.B.C. 1979, c. 165, s. 11(4).
332. Re Corporation of the City of Victoria (1979), 15 B.C.L.R. 254 (S.C.).
333. R.S.B.C. 1979, c. 22.
334. See Vancouver Heritage Advisory Committee, supra, note 179.
335. Supra, note 212.
336. For eg., Cal. Rev. Code s. 439.2 (West Supp 1979); Cal. Pub. Res. Code s. 5031 (West Supp 1979); Washington, D.C. Code Encycl. s. 47-652 (West Supp 1979).
337. See McGee, "State and Local Taxation: Current Practices, Procedures and Effects" in Tax Incentives for Historic Preservation (Andrews, ed., 1981), at p. 102.
338. R.S.B.C. 1979, c. 21, s. 26(3) as amended by S.B.C. 1984, c. 11, s. 16.
339. See Almy, "Considerations in Creating Property Tax Relief for Historic Preservation" in Tax Incentives for Historic Preservation (Andrews, ed., 1981), at p. 125.
340. See Vancouver Club v. Assessor of Area 09-Vancouver, Assessment Appeal Board, Sept. 20, 1978 and June 14, 1979.
341. Assessment Appeal Board, June 12, 1978.
342. Assessment Appeal Board, Oct. 18, 1983.
343. Assessment Appeal Board, July 22, 1981.
344. Captain's Palace Restaurant Inc. v. Assessor of Area 02-Capital, Assessment Appeal Board, July 30, 1982.
345. Elworthy v. Assessor of Area 02-Capital, Assessment Appeal Board, Sept. 28, 1982.
346. Assessment Appeal Board, May 28, 1981, supra, note 29.
347. Assessment Appeal Board, Aug. 15, 1978.

348. Consolidated Shelter Corporation v. Rural Municipality of Fort Garry (1968), 49 D.L.R. (2d) 565 (Man. C.A.).
349. Supra, note 339.
350. See Stipe, supra, note 312.
351. According to "Nelson: A Proposal for Urban Heritage Conservation", submitted by the Ministry of Provincial Secretary and Government Services, Province of British Columbia, Nelson, despite a population of only 9500 people, has the highest number of heritage structures of any British Columbia community other than Vancouver and Victoria.
352. Supra, note 312.
353. Supra, note 325.
354. See Stipe, supra, note 312.
355. R.S.B.C. 1979, c. 21.
356. R.S.B.C. 1979, c. 22.
357. Supra, note 332.
358. R.S.B.C. 1979, c. 21.
359. U.S. Const., Amend. V, XIV.
360. R.S.N. 1970, c. 40 as amended by S.N. 1975-76, c. 72, s. 9.
361. The Vancouver Charter's heritage provision (S.B.C. 1974, c. 104, s. 45), repealed by the HCA, had a similar provision.
362. Eg., the Heritage Property Act, S.S. 1979-80, c. H-2.2, ss. 13, 14, 40, 42.
363. N.Y.C. Admin. Code, c. 8-A, s. 205-1.0 et seq (1976).
364. Ibid, s. 207-8.0.
365. Ibid, s. 207-1.0.
366. See Costonis, supra, note 232.
367. Supra, note 184.
368. Historic Landmark and the Historic District Protective Act of 1978, D.C. Code s. 5-821 et seq. (Supp 1980).

369. Supra, note 207.
370. D.C. Code s. 5-824(g) (1980 Supp).
371. Supra, note 207.
372. See Manhattan Club v. Landmark Commission of New York City, supra, note 54.
373. Supra, note 1.
374. Supra, note 207.
375. (1968), 288 N.Y.S. (2d) 314 (S.C.A.D.).
376. (1974), 316 N.E. (2d) 305 (N.Y.C.A.).
377. S.S. 1979-80, c. H-2/2, s. 20.
378. R.S.B.C. 1979, c. 206, s. 27(4).
379. I.R.C. Code, s. 191 as amended by Tax Reform Act of 1976; I.R.C. of 1954, s. 167(d).
380. See Oldham, "Federal Tax Provisions and the Federal Framework for Historic Preservation" (1980), 12 Urban Law 66.
381. Ibid.
382. R.S.C. 1952, c. 148 as amended.
383. See "Approval Withheld on Tax Policy: Michael Wilson" (1985), 11:5 Cdn Heritage 11.
384. The Constitution Act, 1867, s. 92(13).
385. R.S.C. 1952, c. 148, s. 18(1)(b).
386. Ibid, s. 20(1)(a).
387. Income Tax Regulations, Schedule III, Class 3, S.O.R. Cons/78, c. 945.
388. Ibid, Class 6.
389. Income Tax Act, R.S.C. 1952, c. 148, s. 18(3.1) as added by S.C. 1980-81-82-83, c. 140.
390. (1926), 10 T.C. 188 (H.L.).
391. See Canada Steamship Lines v. M.N.R., (1966) C.T.C. 255 (Exch.Ct); The Queen v. Shabro Investments, (1979) C.T.C. 125 (Fed. C.A.).

392. See Montship Lines v. M.N.R. (1954), 54 D.T.C. 1157 (S.C.C.). See also Harris, Canadian Income Taxation (3d ed.) 1983) at pp. 183-189.
393. See Canada Steamships Ltd. v. M.N.R., supra, note 391.
394. See Levinter v. M.N.R. (1951). 5 D.T.C. 359 (Income Tax Appeal Board).
395. See Canada Steamships Ltd. v. M.N.R., supra, note 391.
396. See Levinter v. M.N.R., supra, note 394.
397. Supra, note 391.
398. Supra, note 394.
399. (1965), 65 D.T.C. 684 (T.A.B.).
400. (1960), 60 D.T.C. 318 (T.A.B.).
401. I.R.C. Code s. 191 (1976) repealed by Economic Recovery Tax Act, Pub. L. No. 97-34; 95 Stat 239 (1981).
402. See Tiedt, et at, "Historic Preservation Provisions of the Internal Revenue Code" in Historic Preservation Law (Robinson, ed. 1979) at p. 379.
403. I.R.C. Code s. 191(a)(1)(B) (1976) repealed by Economic Recovery Tax Act, Pub. L. No. 97-34; 95 Stat. 239 (1981).
404. 16 U.S.C. s. 470 et seq. (1974 & 1982 Supp.).
405. 36 Code of Federal Regulations s. 60.2 (1981) and see Dworsky et at, "An Overview of Federal Preservation Law" in A Handbook on Preservation Law (Duerkson, ed., 1983) at p. 49.
406. I.R.C. Code s. 191(a)(4) (1976) repealed by Economic Recovery Tax Act, Pub. L. No. 97-34; 95 Stat. 239 (1981).
407. See Tiedt, supra, note 402.
408. I.R.C. Code s. 167(o) (1978) repealed by Economic Recovery Tax Act, Pub. L. No. 97-34; 95 Stat. 239 (1981).
409. 26 U.S.C. s. 48 et seq. (1981).
410. Dworsky, supra, note 405.
411. 26 U.S.C. s. 48(g)(2)(C) (1981 Supp). Non-historic buildings were eligible for a maximum tax credit of twenty percent of the rehabilitation costs.

412. I.R.C. Code s. 191 (1976) repealed by Economic Recovery Tax Act, Pub. L. No. 97-34; 95 Stat. 238 (1981).
413. Ibid, s. 191(a)(4).
414. Heritage Fights Back, supra, note 216, p. 150. See also Denhez, Protecting the Built Environment (1980).
415. As defined by Income Tax Act, R.S.C.1952, c. 148, s. 13 (21)(f).
416. Ibid, s. 13(1).
417. Ibid, s. 13(21)(f)(iii)-(viii). See also Harris, supra, note 391, p. 216.
418. Heritage Fights Back, supra, note 216, p. 150.
419. IT-460, "Dispositions - Absence of Consideration" (Oct. 6, 1980).
420. For eg., see R. v. Malloney's Studio Ltd., (1979) C.T.C. 206 (S.C.C.).
421. With buildings, either Class 3 or 6 of Schedule II, Income Tax Regulations, S.O.R. Cons/78, c. 945.
422. Income Tax Act, R.S.C. 1952, c. 148, s. 20(16).
423. See M.N.R. v. Steen Realty, (1964) C.T.C. 133 (Exch. Ct.).
424. (1976) C.T.C. 665 (F.C.T.D.).
425. (1968) C.T.C. 457 (Exch. Ct.).
426. I.R.C. Code s. 167(n) (1976) repealed by Economic Recovery Tax Act, Pub. L. No. 97-34; 95 Stat. 238 (1981).
427. I.R.C. Code s. 280B (1976). The section remained in effect under the Economic Recovery Tax Act, s. 212(d).
428. Eg., see Cooper Block Ltd. v. M.N.R. (1963), 33 Tax A.B.C. 62.
429. Income Tax Regulation 1102(2).
430. I.R.C. Code s. 170(f)(3)(B) (1980).
431. See Dworsky, supra, note 4405, pp. 485-499; Jahns, supra, note 256.
432. Income Tax Act, R.S.C. 1952, c. 148, s. 110(1)(a)(iv). Gifts to a municipality, like those to charitable organi-

zation, are limited to twenty percent of the taxpayer's income with provisions to carry the deduction forward. This limitation does not apply to gifts made to the federal or provincial Crown under s. 110(1)(b).

- 433. See Dworsky, supra, note 405, pp. 485-499.
- 434. See "Approval Withheld on Tax Policy", supra, note 383.
- 435. Ibid.
- 436. Ibid.
- 437. See Oldham, supra, note 380, pp. 66-67.
- 438. R.S.B.C. 1979, c. 165.
- 439. R.S.B.C. 1979, c. 290, s. 269(n).
- 440. S.B.C. 1953, c. 55, s. 206(j) as amended by S.B.C. 1963, c. 60, s. 4.
- 441. See "Value in Those Old Boards", Vancouver Courier, Nov. 27, 1985, p. 10.
- 442. See Stark, supra, note 218.
- 443. See Stipe, supra, note 312.

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