CANADIAN PLANNING
AND PUBLIC PARTICIPATION

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PREFACE

LAND POLICY PAPERS

This is the fourth in a series of papers concerned with Canadian land and planning policies. The original objective was wider and more ambitious - to undertake a comparative study of land and planning policies in Canada, Britain and the United States. This was conceived as a long-term systematic study of the approaches made in different jurisdictions to a range of policy issues such as the restriction of property rights, compensation and betterment, zoning and development control, the development process, etc.

A more modest program was necessitated by my move to the U.S.A. Nevertheless, some significant work has been accomplished, and support is gratefully acknowledged of the Social Science Research Council of Canada, the Canada Mortgage and Housing Corporation, and the University of Toronto.

This paper is essentially a draft chapter of a major outcome of the research program: a volume which attempts to review a large part of the field of urban and regional planning in Canada. The author would welcome comments. The diversities of Canadian planning defy neat categorization, and much of the reality of the planning process escapes documentation. The synthesizer faces major difficulties and he is heavily dependent upon the generosity of those who are moved to respond to first endeavours to chronicle the operation of the planning system.

A great many people unstintingly assisted me on this project, and it is almost invidious to single out particular individuals for mention but, in relation to this particular paper, I must record my indebtedness to Larry Bourne, Judy Kjellberg and Lucia Lo.

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INTRODUCTION

"It is dangerous to let the public behind the scenes. They are easily disillusioned and then they are angry with you, for it was the illusion they loved."

W. Somerset Maugham

Public participation is largely a product of the activism of the sixties. This in turn came about as a result of disillusionment with the effects and processes of planning, a greater understanding of its distributional aspects, a heightened awareness of environmental and ecological values, and sheer bafflement at the scale and complexities of contemporary life and the vast array of institutions which have been created to cope with them.

That activism has now been institutionalized. Physical protests against the bulldozer have given way to public hearings, commissions of inquiry, social surveys, community meetings, environmental impact assessments, advisory councils, and a multiplicity of mechanisms for appealing or objecting decisions. Public participation is now part of the planning process. How far true participation can survive institutionalization is an open question, but there is clearly a demand for a greater degree of participation in a wider range of matters. A neat illustration, which goes to the heart of the matter, is provided by Kolankiewicz's study of pollution control in British Columbia:

"Procedures for participation in setting objectives have heavily favoured the technically informed, when the question is really one that depends at least as much on public value preferences as on technical considerations. To date, submissions by those outside government expressing "environmental values" have probably not influenced decision-making to any extent." 2

The particularly interesting point here is the reference to "technical considerations". It might have been thought that pollution matters were essentially "technical" and not subject to public participation in the same way that a redevelopment scheme is. Nothing could be further from the truth, and indeed, after the quotation was written, British Columbia developed further methods of involving the public in the standard-setting process. 1

A comparative study of environmental standards in Alberta, Ontario, Saskatchewan and British Columbia (together with federal provisions) concluded that in fact British Columbia was the only one of these jurisdictions to hold hearings on pollution standards. More generally this is seen as a technical process involving only government and industry. The authors argue that, on the contrary, the public ought to be involved:

"In our view, public participation should be an essential part of standard-setting. It reinforces accountability of standard-setters, given the significant value judgements involved. And it provides direct guidance and support for public servants faced with value judgements that may involve human health or even human life trade-offs. Effective public participation is likely to enhance public understanding of risks and trade-off factors involved in establishing environmental standards." 2

This leads into the difficult area of enforcement, where again public participation is argued to be an important (but usually absent) input. This is not just a matter of encouraging the public to report violations. It is also a matter of obtaining public confidence in, and support for, environmental control programs.

It is, in fact, "often difficult to portray an accurate picture of the enforcement process", and lack of information can easily lead to a lack of faith in the process. "It becomes easy to believe that the laws

1 Franson et al, pp. 101-102.
2 Ibid., p. 9.
are not being enforced, that government and industry are conspiring to avoid enforcement of environmental standards." 1

A positive measure taken by Ontario is to require anyone responsible for severe and long-standing pollution to prepare a report outlining the options available for abating the problem. The Ministry of the Environment then evaluates the report, and both documents are made public (subject to confidentiality of any proprietary information). If the problem is a major one or if there is significant public interest, a public "information session" is arranged. 2

There are some wider points that can be made on the issue of "technical aspects". It is worth spending some time on these.

EXPERTS, FACTS AND VALUES

"The choice of values is the heart of the planning process."

C.A. Reich 3

The more a problem can be defined, or made to appear, as a technical matter, the easier it is for politicians and administrators to deal with it. The difficulties which arise with "people in the way" 4 are avoided. Life is quieter, and it is possible to get on with the task in hand without having to justify or explain it. But the chickens may come home to roost. The transportation planning of the fifties and sixties fooled most of the people some of the time, and major political issues concerning relative provision for public and private transport were disguised as technical issues such as "modal split". The desecration of

1 Ibid.
4 The title of an excellent study of "the human aspects of the Columbia River Project" by J.W. Wilson, University of Toronto Press, 1973.
A favourite smoke screen is provided by the concept of "public interest" being promoted by "experts". Reich describes these as a myth:

"The myth begins with the assumption that there is an objective reference for the concept of what is best. The process of decision may therefore be carried on in accordance with standards or criteria.... The raw materials of decision are facts: how much will the highway cost if it follows route A or route B; how many people travel between points X and Y; what are the engineering requirements? The decision makers combine expert knowledge and professionalism with judicial bearing. The tools they use for decision are science and reason. At the core of the myth is its cardinal point: decisions are not primarily choices between values. The entire machinery of administrative law serves to deny the role of values in the planning process." 3

The point here is a crucial one. It is also, at one and the same time, both obvious and obscure. It is obvious in the sense that, stated in the abstract, there would be general agreement (at least in democratic societies) that values are a matter of judgement and therefore of "politics". It is obscure in the sense that the issue is so pervasive that it can be forgotten: it is not always easy to see that an argument is essentially about values.

A good example is the debate on nuclear power. Correspondence in the London Times (a great source for quotations, believable and otherwise)

1 The Canadian urban renewal program was also relatively small.
3 C.A. Reich, op. cit., pp. 1235-1236.
provides a good illustration. Following a letter from Lord Rothschild, attacking "econuts", Professor Cotgrove wrote:

"When environmentalists protest about reprocessing nuclear fuel or pollution they are protesting about a society which values economic and material goals more than quality of life and environmental protection. Nuclear power stations have for them come to have a deep symbolic significance. Their opposition stems from anxieties which go beyond technical questions of risk and safety. Above all, they are rooted in growing objections to large, remote, impersonal bureaucracies, increasing dependence on expert elites and reduced participation in the decisions which profoundly affect our lives.

By contrast, the supporters of nuclear energy believe in a society dedicated above all to the production of wealth, in which efficiency, cost effectiveness and the needs of industry are the touchstones of policy. If the environment takes a knock or two, or if society takes some calculated risks, then this is the price we pay for the pursuit of the greater good.

The acceptability of risk cannot be isolated from values. We take incalculable risks to save the life of a child. To cross the road, presumably even Lord Rothschild seeks zero risk. Where he and the environmentalists differ so passionately is for what goals, and to promote what kind of society, it is worth taking particular risks. Both are from this perspective rational." 1

The point to be stressed is that "values" arise everywhere, and it is important that they be recognized. Much of the so-called debate on planning issues is not about the issues at all: it is about values.

THE PUBLIC AND THE PROFESSIONALS

"To make a reputation
When other ways are barred,
Take something simple,
And make it very hard."

Anon

It is difficult to communicate. Sometimes this helps the planning system since the various participants can feel that they are

communicating when, in fact they are not. Alternatively one or more parties may withdraw from the process on the grounds (for instance) that "participation is a sham". Either way, the machine keeps going. Indeed, it halts only when one resolute force meets another equally so; ¹ or when the communication is rendered impossible by different "languages". Maruyama nicely explains the problem here:

"The difficulty in cross-disciplinary, cross-professional and cross-cultural communication lies not so much in the fact that the communicating parties use different vocabularies or languages to talk about the same thing, but rather in fact that they use differing structures of reasoning. If the communicating parties remain unaware that they are using different structures of reasoning, but are aware of their difficulties only, each party tends to perceive the communication difficulties as resulting from other parties' illogicality, lack of intelligence, or even deceptiveness and insincerity. He may also fall into an illusion of understanding while being unaware of his misunderstandings." ²

The point has been made many times, and with many variations. One further example: "expert domination undermines the participation and staying power of both individuals and citizen groups. Perhaps it is this professional domination that is the telling blow that sends the once fledgling convert to participatory democracy back to apathy." ³

There are, however, other aspects to this. To the professional, the expert, the committed bureaucrat or politician, public participation can be seen as (at most) a means of obtaining supplementary information about "impacts" and measures that might need to be taken to alleviate problems

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¹ As with the case of John Tyme in relation to British motorways. See his Motorways versus Democracy: Public Inquiries into Road Proposals and their Political Significance, Macmillan, 1978.


which will follow after (or during) a development. At the least public participation is simply "public relations": providing the public with information and, possibly, reassurance. A good illustration is a revealing comment relating to the nuclear power stations in New Brunswick, reported in the study of public inquiries by Salter and Slaco: both the province and the New Brunswick Power Corporation "assumed that nuclear power plants would be built". 1 Inquiries and studies were "site specific", "choice specific" and "development specific": they related to a particular development in a particular location (rather than to wider questions of the need for this type of development) and were restricted to a limited range of impacts. The authors continue that the only analysis required was a cost-benefit analysis. Beyond that:

"The only other technical issue the Cabinet considered was whether New Brunswick was more earthquake prone than Pickering, the site of an Ontario nuclear power plant already in operation.

As watchdogs and information monitors, opponents of the nuclear power project operated at a severe disadvantage. The only resource they had for independent research was published literature.... At best, participants in the Environmental Assessment Review Process and in the citizen meetings were considered as a group to be satisfied during the engineering design process. At worst they could be easily ignored." 2

Even more telling is the comment on public interest groups which "represented at the very least an element of surprise and often a kind of mystery. The fact that they did not always agree on certain points, and that different public interest groups appeared to speak on behalf of the same people, made it difficult for New Brunswick Power and government officials to understand them. The usual response of officials was to suggest programs of public education." 3

2 Loc. cit.
3 Loc. cit.
This lack of communication extends into professional fields, neatly summed up in a phrase of Lax: "while the Ministry of the Environment has no medical expertise, the Ministry of Health has no environmental expertise". ¹

Each profession and discipline has its own language, its own value system, and its own structure of thinking. This is highly supportive of a political system which wants to get things done while, at the same time, providing some limited scope for public participation. The Solandt inquiry, for example, was established to provide an opportunity for the public to comment upon a proposed Hydro line across southern Ontario, ² but there was no opportunity to question whether there was a need for any line: "thus the Hydro Commission was able to sidestep the really important issue and provide less important ones for the people to discuss and argue about". ³

Public participation — when it is effective — plays havoc with this myopic professionalism and departmentalism. But, more usually, the conclusion is a wearisome, somewhat baffled, confusion. There is a real conflict of view between those who see the inquiry in narrow terms and those who refuse to accept pre-determined battle-lines.

The same issue has arisen with pre-expropriation hearing procedures. These clearly point to the basic problem. Under the federal Expropriation Act, public hearings are "realistically" simply "a conduit for complaints to the Minister of Public Works. Many people ..... expect the pre-expropriation hearing to be more than it ever can be .....". The reason is simple: "in many cases, the hearing is the first available public


forum for people affected by a proposed project.....; the basic problems, then, do not lie with the pre-expropriation hearing itself..... but with the prior lack of information about and public participation in the planning process." ¹

This is the way things work out: there is no "conspiracy" (except in Bernard Shaw's sense that "all professions are a conspiracy against the laity"). But the system is ruled by outdated concepts of "expertise".

WHO IS THE EXPERT?

"There's no greater expert than the people. They know what they want and have to fight for it."

R. Sankey ²

Expertise is a function of time and place - as The Admirable Crichton amusingly showed; but the 1970s evinced a distrust of expertise and professionalism which went far wider than the readership of the books of Ivan Illich. ³ Though this affected educationalists, doctors and lawyers (and many other professions as well) it hit planners especially hard, partly because they were relative newcomers to the professional lists, and partly because the matters on which they were supposedly the experts were uniquely transparent as political in essence.

It was only a matter of time (and place) before someone hit on the idea of assisting "the public" not only with finance but also with

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instruction in the necessary arts of public participation. Finance is discussed in a later section; here attention is focused on a particular educational program for participators:

"A training program to enable the Saskatchewan Environmental Society to intervene effectively in the Cluff Lake inquiry was initiated by the Public Interest Advocacy Centre. It had the following objectives:

1 To assist a small group of sophisticated and knowledgeable non-lawyers to acquire the rudiments of the art of cross-examination.

2 To provide a quick training in the law of civil procedure, together with some understanding of how these rules are likely to be applied in practice before a special inquiry such as the Cluff Lake Inquiry.

3 To help develop confidence in growing advocacy skills through actual on-the-job demonstrations as to how the work is done and direct one-to-one supervision during the hearings process.

4 To reduce dependency on lawyers.

5 To reduce demand for the advocacy services of the centre."

Use was made of a guidebook on how to prepare cases for administrative tribunals. Available evidence was analyzed particularly to identify points for cross-examination (for example, internal inconsistencies, exaggerated statements and unsubstantiated assertions). Lengthy sessions were organized to thoroughly debate the relevant issues, to develop avenues of questioning, to establish what additional evidence should be sought at the inquiry, and so forth. It was generally agreed that the experiment worked well.


2 Since published by the Consumers' Association of Canada.
Less happy has been the experience in Prince Edward Island (documented at length by McNiven\(^1\)). Interestingly, "the biggest obstacle to the effective implementation of government-administered public participation projects appears to have been the government itself".\(^2\) Public participation can easily upset the relationships between departments, and between politicians and civil servants. Moreover, in Prince Edward Island, "it was feared that if people . . . . were involved in the development of a plan, then expectations would be raised for immediate returns, and, when these were not forthcoming, frustration would lead them to reject the plan during the phase of implementation.\(^3\)

The Island does not stand alone in its failures. Indeed, failures in public participation are far more common than successes, mainly because too much is expected.

**ADVISORY COMMITTEES**

"Many citizen concerns are not founded on rational argument and it would be unrealistic to assume that they can be allayed by a process that seeks to be rational."

John Bousfield\(^4\)

Following U.S. traditions, Canadian planning was originally largely administered through ad hoc planning boards. Thus "planning" and "politics" were separated (or thought to be so). In Ontario the separation was made even greater by the requirement that a majority of

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2 J.D. McNiven, *op. cit.*, p. 35. The quotation continues: "The Community Involvement Planning Unit as well as the original budget for the Public Participation Programmes were involved in delays, policy changes, wrangles and infighting which eventually led to the termination of the unit and the effective end of the project under its care."

3 Ibid, p. 11.

the members of a planning board had to be citizen appointees. This was changed in 1972, following which a board could have a majority of elected politicians. The change reflected a major shift in both the nature of planning and attitudes towards it. Above all, planning was increasingly seen as a political activity which should be controlled by elected and accountable politicians. Planning boards were no longer seen "as important components in the system of checks and balances, but rather as barriers restricting the access of citizens to their elected representatives". 1 The trend has continued, and the 1983 Ontario Planning Act abolished planning boards completely (except in the north where the local government system is incomplete).

Though planning may now be more "democratic", the change has removed one opportunity for citizen involvement in the planning process. For this reason a number of provinces have set up planning advisory committees. (The 1983 Ontario Planning Act empowers municipalities to appoint such committees. In typical "Ontario style" no indication is provided in the statute as to the composition or role of these bodies; nor is there any provision for provincial approval.) 2

There has been little study of planning advisory committees but one, undertaken for the Comay committee, showed that they can be a mixed blessing. 3 The advantages were identified to be fourfold. First, it enables the planning staff to call on the knowledge and resources of the community to identify concerns and to devise specific policies or plans. Secondly, it provides a means by which the public can contribute, "through a few key spokesmen" to the planning process. Because of the small numbers involved good relationships are easily established between the planners and the advisors. Thirdly, it creates "a pressure group through which political lobbying can be carried out effectively". Finally, it

1 Ibid, p. 6.
provides a mechanism for sustained public involvement in the planning process. On the other hand:

"The shortcomings of advisory committees and task forces must be weighed against their benefits. First, in several instances, the committees became non-professional planning staff for all practical purposes. This did not result in an increase in the numbers of opportunities afforded for the participation by the general public. In fact, the committees were frequently less receptive than the professional planning staff to input from the general public. Second, such committees found it difficult to work within an already established broad policy framework. They seemed to expect to establish policies exclusively for their own particular area. Third, individual committee members were sometimes open to conflicts of interests which were not always declared. Property owners, tenants, and professionals alike, as members of an advisory committee, were in a position to derive personal gain by advocating certain policies, or recommending certain land use designations. Few rules of conduct were established to regulate such situations. Fourthly, it is evident that because of their exposure to more information and different planning perspectives than the average resident, committee members can come to judge issues in a very different light than the 'uninformed' public. This was most evident in North Midtown where the final plan included a level of commitment to providing low income housing and social services for low income groups which did not reflect the views of the more conservative elements of the community. Finally, there is a discernible tendency for task force members to see themselves as deciders, not as advisers. When their advice is not accepted unquestioningly by staff and politicians, some committee members may become disillusioned, if not hostile and uncooperative." 1

The conclusion is that advisory committees can play a useful role, but "it seems essential that the interests of other residents must be safeguarded by providing other more conventional ways of public involvement".

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1 John Bousfield Associates, op. cit., p. 28.
FUNDING PUBLIC PARTICIPATION

"Sufficient funds must be provided to allow for the retention of a significant corps of expert witnesses - expert enough to be a match, in the eyes of the Board, for the witnesses called by the other side. Failing this minimum, participation would tend to be more symbolic than real."

A.J. Roman 1

Public hearings or inquiries burgeoned in the 1970s, 2 but with certain notable exceptions where funding has been provided, "many of the hearings are, for the public, little more than a sham". So argued David Estrin. He continues:

"The proponent comes to the hearings having spent years and perhaps hundreds of thousands, if not millions, of dollars hiring experts and obtaining massive reports to convince the tribunal that its project is worthy. On the other side, persons opposed or who simply wish to participate to ensure that all the facts are before the tribunal usually have neither the resources to examine adequately and respond to such technical preparation, nor the resources to appear at the hearing through counsel." 3

It is the exceptions which are interesting and persuasive. For example, the Alberta Energy Resources Conservation Board noted that "local interveners" had serious difficulties of "costs in terms of time effort and commitment". They therefore pressed - and obtained - authority to award costs. 4 At the federal level, only the Canadian Radio-Television and Telecommunications Commission makes "intervenor cost awards" - in striking contrast to the situation in the United States. 5

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1 A.J. Roman, op. cit., p. 31.
3 Ibid, p. 84.
Perhaps the best known example in Canada is the Berger Commission on the Mackenzie Valley Pipeline Inquiry.\textsuperscript{1} Berger argued:

"It is true that Arctic Gas carried out extensive environmental studies, which cost a great deal of money. But they had an interest: they wanted to build the pipeline. This was a perfectly legitimate interest, but not one that could necessarily be reconciled with the environmental interest. It was felt that there should be representation by a group with special interest in the northern environment, a group without any other interest that might deflect it from the presentation of that case."\textsuperscript{2}

Berger therefore arranged for a funding program (which cost nearly two million dollars) for "those groups that had an interest that ought to be represented, but whose means would not allow it". His approach was clear:

"These groups were sometimes called public interest groups. They represent identifiable interests that should be considered. They do not represent the public interest, but it is in the public interest that they should be heard."

Berger laid down five criteria which a group seeking financial assistance had to meet:

"1 There should be a clearly ascertainable interest that ought to be represented at the inquiry.

2 It should be established that separate and adequate representation of that interest would make a necessary and substantial contribution to the inquiry.

3 Those seeking funds should have an established record of concern for, and should have demonstrated their own commitment to, the interest they sought to represent.

4 It should be shown that those seeking funds did not have sufficient financial resources to enable them adequately to represent that interest, and that they would require funds to do so.

\textsuperscript{1} Report of the Mackenzie Valley Pipeline Inquiry, Supply and Services Canada, 1977.

Those seeking funds had to have a clearly delineated proposal as to the use they intended to make of the funds, and had to be sufficiently well-organized to account for the funds.\textsuperscript{1}

In 1982, the federal government announced its policy for "sharing transportation costs" for participants in public consultation meetings:

"In order to qualify for attendance at the headquarters and regional yearly meetings designated by the Public Consultation Policy, a public interest group or professional association must satisfy the following requirements:

1 Be a non-profit organization with an interest in the policies and programs of Environment Canada;

2 Indicate a financial need and be willing to make available a financial statement and budget, if requested;

3 Indicate its reasons for wishing to attend a designated meeting for which financial assistance is being requested;

4 Participate at the designated meeting.

In addition, to assist Environment Canada in allocating the limited funds available, the following criteria will be used as guidelines:

1 That there is a clearly ascertainable interest that ought to be brought to the attention of Environment Canada;

2 That separate and adequate representation of the interest would make a necessary and substantial contribution to the annual meetings;

3 That the applicant organization demonstrate or be willing to demonstrate its own commitment to, and representativeness of, the interest it seeks to represent (e.g., nature and extent of its own contribution, past involvement in similar activities, size of its constituency);

4 That the applicant organization not obtain funds for the same activity from other federal agencies.\textsuperscript{2}

Such is the inevitable bureaucratization of public participation!

\textsuperscript{1} Loc. cit.
EFFECTIVE PUBLIC PARTICIPATION

"The most important contribution of the community hearings was, I think, the insight it gave us into the true nature of native claims. No academic treatise or discussion, formal presentation of the claims by native people by the native organizations, and their leaders, could offer as compelling and vivid a picture of the goals and aspirations of native people as their own testimony. In no other way could we have discovered the depth of feeling regarding past wrongs and future hopes and the determination of native people to assert their collective identity today and in years to come."

Justice T.R. Berger

A great deal has been written about the desirability of public participation, but there has been little analysis of its effectiveness. Given the inherent difficulties, this is not surprising. How can the effectiveness of public participation be measured? Is the participation sufficient in itself as an essential element in a democratic process?

These are big questions which bristle with difficulties. Here attention is focused on a number of cases of public participation which, for one reason or another, appear to have some interesting and positive aspects.


3 Among these is the sheer weight of material: as Burton has noted, ".... while a constant problem in effecting participation consists in obtaining access to information, the problem faced by anyone attempting to survey the field is an overload of information about the subject itself". T.L. Burton, op. cit., p. 13. For a number of Canadian essays in evaluation, see B. Sadler, op. cit., particularly P. Homenuck et al, "Evaluation of Public Participation Programs" (Vol. I, pp. 103-119) and W.R.D. Sewell, "Public Participation: Towards an Evaluation of Canadian Experience (Vol. 2, pp. 205-224).
The most striking is the Berger inquiry. Quotations have already been made from the Berger report, but a further one is appropriate. Given the (funded) public participation and the breadth and depth of the evidence collected, Berger clearly demonstrated (as he has explicitly argued) that:

"A Commissioner of Inquiry has - or ought to have - an advantage that ministers and senior executives in the public service do not have: an opportunity to hear all the evidence, to reflect on it, to weigh it, and to make a judgement on it. Ministers and their deputies, given the demands that the management of their departments impose upon them, usually have no such opportunity....

I advised the government that a pipeline corridor is feasible, from an environmental point of view, to transport gas and oil from the Mackenzie Delta along the Mackenzie Valley to the Alberta border. At the same time, however, I recommended that we should postpone the construction of the pipeline for ten years, in order to strengthen native society, the native economy - indeed the whole renewable resource sector - and to enable native claims to be settled." ¹

There is no doubt that the persuasive and powerful nature of the Berger report stemmed at least in part from the effectiveness of the public input.

A very different example is given in a paper by Deryck Holdsworth on heritage conservation. ² He demonstrates how "increasing community involvement ..... is slowly beginning to transform perspectives away from

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the rarity biography and establishment criteria for heritage". ¹ He also quotes the Halifax case of The Battle of Citadel Hill, where a long conflict of interests eventually ended with the safe-guarding of view-corridors between the Citadel and the Harbour. ²

More contentious is Ontario Hydro's program for public participation. ³ The contentiousness relates partly to the definition of the issues on which public participation is encouraged and partly to the difficulties which beset any large bureaucracy - particularly when it achieves the size and power of Ontario Hydro. (Any organization of this scale inevitably has internal differences of opinion and attitude.) Further complications have arisen recently with changes in perceptions of (and policies for) the use of energy. The change from the promotion of electricity to the conservation of electricity must have had dramatic implications on the internal workings of Ontario Hydro (which probably will take many years to "work through" the system). The currently volatile nature of energy demand and policy must make life very difficult in 700 University Avenue.

¹ Holdsworth's particular references are to O.M. Williams (ed), LACACs at Work: A Primer of Local Architectural Conservation Advisory Committee Activities in Ontario, Ministry of Culture and Recreation, 1978; M. Fraser, Conserving Ontario's Main Street, Ontario Heritage Foundation, 1979; and W.R. Rodgers (ed), Five Studies of Planning for Downtown Conservation, Ontario Ministry of Culture and Recreation, 1978. He adds: "There is of course still considerable room for improvement. The predeliction for the old or the first is perhaps a first step and one that taps local enthusiasm; this is beginning to give way to a reassessment of what is meant by 'cultural', 'historical', and 'architectural' significance." (See, for example, Nichols, "Restoring a Neo-1930 Virginia Vernacular", Preservation News, Vol. 20, 1980, pp. 6-7.)


³ Ontario Hydro, Public Participation in Route and Site Planning, 1980; and Public Participation in Project Planning, undated (1980?). See also R.C. Henderson, Public Involvement in Right of Way Selection Projects, Canadian Electrical Association, mimeo, 1982.
This is conjecture, though it provides a warning against regarding any published material as representing the up-to-date situation. The immediate point, however, is that Ontario Hydro is very much aware of the importance of its Community Relations Department; and there is nothing sinister in its battery of "public involvement techniques". The reasons for encouraging public participation are quite explicit, though undoubtedly some may experience difficulty in interpreting the statement:

"Ontario Hydro encourages public involvement in the planning of new electrical facilities for the following reasons:

- To ensure the decision reflects the concerns and values of the community;
- To broaden public understanding of the need for the facilities;
- To obtain knowledge of the area, community priorities, and perceptions of possible impacts that the project may create;
- To discuss and evaluate local options during the course of the environmental assessment study;
- To establish, maintain and enhance two-way communication between Hydro and the public throughout all stages of a project."  

A study by Professor Risk has a less confident and joyous note, and concludes that "intelligent choices of institutions and procedures can produce better and more acceptable decisions about location, but hopes should be modest. Unhappiness and dispute cannot be avoided."  

The truth is that, however much electricity is used, no one loves the things that go to produce it.

Much more could be written about the experience of public participation in Canada, but sufficient has been said to highlight the main issues. It is now necessary to turn to some other aspects of this amorphous subject.

MACHINERY FOR APPEALS AND OBJECTIONS - THE ONTARIO MUNICIPAL BOARD

"..... the OMB tries to follow government policy in making its decisions. However, in at least two types of case the OMB obviously makes policy. One type occurs when there is no clear statement of government policy. A second occurs when the board has only a generalized policy to guide it and feels obliged to make detailed policy applicable to the issues before it."

Ontario Legislature

Special machinery for hearing appeals against planning decisions has been established in a number of provinces. For example New Brunswick and Nova Scotia have provincial planning appeal boards, both of which publish detailed accounts of their decisions. Other provinces have added an appellate function to an existing body, as with the Manitoba and Ontario Municipal Boards. Since it is not possible to discuss each of these bodies, attention is restricted here to the fascinating case of the Ontario Municipal Board (OMB).


The OMB originated as the Railway and Municipal Board in 1906, but had an increasing number of functions allocated to it, including a range of planning matters. The latter make up a very wide range indeed, from appeals for amendment of zoning bylaws to approval (or otherwise) of official plans referred by the minister. The board is thus much more than an appellate body. Indeed a detailed study of its operation was entitled Land Planning by Administrative Regulation.  

It is this "policy" aspect of the board's work which is of particular interest.

The Ontario Municipal Board is an extraordinary gift to politicians. Though never designed for the purpose, it now has the role of deciding upon many of the more difficult political planning issues which elected representatives are glad to shirk. In this it is abetted by the legal profession who naturally view planning as a process which is concerned with conflicts of interests which can best be resolved through an adversary process guided - and decided - by independent arbiters.

Planning, politics and law in Ontario have thus become confused. Legal concepts of impartiality and "due process" are being applied to matters of political judgement. Major issues of policy in relation to the unforeseeable future are subjected to adversary processes with the objective (if not of "proving" what the future holds or what the effects of policy will be) of judging impartially what is "right and proper".

The OMB plays a central role in this confusion. The report on the Toronto "downtown plan" is replete with examples. One of the three board members (W.H.J. Thompson), clearly exasperated with the lengthy and convoluted hearings, ended his dissenting opinion (which incorporated a series of character-assassinating commentaries) 2 with the statement that the city's proposals involved "a massive change in the future direction

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2 Compare the attitude taken by the board towards the chief planner in the 45 Foot Holding Bylaw case: see L.D. Feldman and M.D. Goldrick, op. cit., pp. 235-254.
of development of the commercial sphere of a major city and I for one, not being a planner, am reluctant to participate in the overhaul of a complicated document relating to this vital area..... I cannot endorse an implementation which, in my opinion, gambles with the economic viability of a very important segment of this country's wealth-generating mechanism." ¹

His colleagues in the hearing had no such reluctance. In a majority decision, B.E. Smith and K.D. Bindhardt concluded:

"The evidence convinced us that the two main policies of the plan, namely, the introduction of substantial amounts of housing into the central area of the city and the deconcentration of office growth, are worthy objectives and represent sound planning for Toronto. The housing policies will result in an efficient use of the transportation system and provide housing where existing services and amenities are available. It will bring vitality to an important area of the city for a much longer period of the day and will ensure the preservation of a number of valuable residential areas which presently exist in this part of the city." ²

Does any contemporary planner speak with such certainty?

Even more incredible is the quasi-legal judgement which the majority of the board passed on private enterprise. Their argument is worth reproducing at length:

"Throughout the hearing, the board was continually urged by those in opposition to the plan to allow the marketplace to determine the rate of office growth and to keep as many options open as possible by not arbitrarily restricting the intensity of development. This position is a cause of some concern to us, for equitable free enterprise can never be attained without open competition in the marketplace. We have come to the view that free enterprise is inextricably a part of the democratic system of government, and rights go hand in hand with free enterprise as well. Since these ideals are so cherished, we tend to guard zealously against their erosion, and any

² Ibid, p. 54.
planning policies which appear to derogate from those ideals should be carefully scrutinized before this board gives its stamp of approval." 1

This political statement (which might have been taken from Hayek or Milton Friedman — and appropriately used in a conservative election manifesto) was followed by a succinct lesson in political economy:

"In an ideal situation, an individual has the right to do anything he chooses until those rights interfere with the rights of others. It is in this definition of boundaries of the free market that the conflict occurs. For that reason it is necessary to introduce certain standards into our society, even though they may be somewhat arbitrary, to bring some order to the control of behaviour. To some extent, all regulations represent an interference with the operation of a free market and individual rights. In a planning sense, regulations or standards take the form of official plans and zoning bylaws, but what is sought is a reasonable balance between the many forces operating in the planning area. It is in this light that the board must weigh the evidence presented.

In maintaining the status quo which was suggested, the opportunity is lost to commence a development programme for the deconcentrated land use option for the city. The time appears to be opportune to preserve stable neighbourhoods and give some direction for the construction of residential dwelling units in the central areas of the city. It is therefore clear that it is impossible to maintain all options and a choice has to be made." 2

Given the existing system, that choice falls to the OMB. And so a judgement had to be handed down after a solemn consideration of the "evidence" (which the dissenting Mr. Thompson considered to be largely worthless). Undaunted by a mountain of technical, pseudo-scientific and political papers, the two board members posed the issue in Solomon-like terms:

"We therefore believe that the board should answer two questions. Firstly, whether the plan unduly interferes with the operation of a free market so that it is wrong

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1 Ibid, p. 25.
2 Ibid, p. 25.
in principle and, secondly, if there is some interference, whether that interference justifies the benefits to be derived therefrom." 1

Political reputations and Ph Ds have been lost on such debates, but timidity has no place in the board's proceedings. It is required to decide - and it did so in favour of the city.

In approving the main provisions of the plan, the case of private enterprise was judged inadequate. The planners won the trophy. But there was a consolation prize:

"It is in the interest of allowing the market place to operate as freely as possible that we are modifying the plan to permit commercial densities in the high density mixed areas up to the full maximum of 4.5 times the area of the lot without the necessity of including a residential component." 2

These lengthy quotations from the board's report clearly indicate its role. It is an ambiguous, if not a bogus one. It acts as if political issues can be settled impartially. The Canadian Bar Association argues that the board fulfils the essential function of "a fair and impartial forum in which to resolve conflicts"; 3 but impartiality has no place in a political decision. An "impartial" analysis finds no difficulty in exposing the unavoidably slender "objective" basis of the plan - as the dissenting Mr. Thompson saw only too clearly (and explained with temerity). By their very nature, political decisions are partial (to policy objectives) and typically based on unproveable contentions. The superstructure of technical studies may divert attention from this, but, as the awkward Mr. Thompson noted, they may constitute a tenuous basis for policy; and, in this case, he had little difficulty in demonstrating (at least to his own satisfaction) that even "rigorous" academic analysis only "proved" what individual academics believed.

1 Ibid, p. 25
2 Ibid, p. 27.
This particular OMB hearing may have been exceptional in the obviousness of its political content, but this is simply a matter of degree. The essence of a democratic system of government is that responsibility and accountability for political decisions lie with elected representatives, not with appointed boards. The complexity of modern society makes this an ideal difficult of achievement, but there can be no escape from the point that planning policies are political policies and should therefore be for elected representatives to decide upon. Some matters may, for a variety of reasons, be assigned to non-representative bodies, but it is a delusion to think that their subject matter thereby becomes non-political, still less impartial.

The accidents of history which have cast the OMB in its present role are precisely that. To bring in aid of its defence arguments concerning impartiality, "protection" of citizen rights and such like simply confuse the issue. The only justification for the OMB apart from history, is its acceptability to articulate interests.

Thus the Comay report, with its predecessors, were all correct in arguing that "the board should not be responsible for determining policy"; that it "should not be assigned nor should it have to assume a policy-making function"; that "the government should clearly state the policies it expects the OMB to follow". Similarly the Robarts Report argued that the supervision of municipalities by the OMB is "a legacy from the past, when municipalities did not have sufficient political or

1 But see G.M. Adler, op. cit.
3 Comay Report, p. vi, paragraph 28.
4 Ontario Economic Council, op. cit., p. 103.
5 Ontario Legislature, op. cit., p. 3.
technical sophistication to provide an adequate standard of planning without detailed checking and direction". ¹

When successive reports making basically the same recommendations are ignored, there is a presumption (to put the matter no more strongly) that some basic issues have been ignored or insufficiently stressed. In the case of the OMB there appear to be two such issues.

Firstly, the OMB nicely allows politicians to abrogate the responsibilities which properly fall to them. Hopefully the new commitments to provincial policy statements will change this. ² Secondly, it is alleged that the public has more "confidence" in the OMB than it has in its elected local government. It is difficult to establish how far this is in fact so, but the public consultation program instituted by the Comay committee ³ shows that there is a wide range of opinion on this matter (a classic justification for political inaction).

The weaknesses of the OMB are easy to spell out, but it is equally easy to miss some of its strengths. Two particular points are striking. First, under the chairmanship of J.A. Kennedy, the OMB became, in the late sixties, a major political force in sponsoring "citizen interests (as distinct from "official" or "developer" interests). ⁴ In other words, whatever theoretical limitations the board had, in practice it was instrumental in (or at the least supportive of) the promotion of the public interest as expressed by citizenry. (It was not until the seventies that political change took place - at the provincial level with the 1971


² The new Planning Act makes specific provision for policy statements on matters of provincial interest.


⁴ John Bousfield Associates, op. cit., p. 44.
decision to halt the construction of the Spadina Expressway; and at the local level by the 1972 Crombie election victory.)

Thus the OMB cannot be dismissed as a reactionary body (though some of its specific decisions and obiter dicta might suggest this).

Secondly, the OMB has had a remarkable degree of independence. While this may well be indefensible in terms of political theory (and has been subjected to the earlier critical discussion) it has avoided the problems posed by an alternative system. The British model is instructive here. The problem involved is that of devising a system of publicly acceptable quasi-judicial procedures for dealing with a range of planning matters, particularly at the level of the individual householder. This is not the place to embark upon a comparison of Canadian and British systems of planning. It is sufficient for present purposes to note that there is increasing pressure in Britain for a greater degree of "independence" for those who are appointed to consider "appeals" and "objections". The trend towards greater independence (or at least separation from the relevant ministries) for "inspectors" leads clearly in the direction of a body such as the OMB.

The problem here is to divide issues into categories of importance or political significance. ¹ Pipelines are very different matters from front-yard parking. Unfortunately it is not always easy to predict the extent to which an issue might develop into a political matter. (It could transpire that front-yard parking could become as political an issue as expressways did with Spadina.) Nevertheless, the distinction is important, and different procedures are required in relation to major planning proposals and to the application of policy to individual cases.

¹ In Britain this was attempted in the Dobry report, Review of the Development Control System, HMSO, 1975. Dobry devised a scheme for dividing planning applications into two categories: those that were minor and uncontroversial, and those that were major or controversial or both. For further discussion see the author's Town and Country Planning in Britain, Allen and Unwin, 8th edition, 1982.
Indeed, there is a real need for a classification of municipal actions (or inactions) into categories which require different types of review. Such a classification might have three major categories: policy; the application of policy; and maladministration and illegalities.

This may be oversimple but, without claiming that anything more than a preliminary review along these lines is being attempted, the following section discusses review mechanisms under these three headings. It is argued that different mechanisms are needed for each of these. Policy is a political matter requiring political review. The application of policy may involve fine matters of judgement for which an appeal procedure is appropriate. Maladministration falls within the scope of the Ombudsman unless it involves legal issues which are the preserve of the courts.

CONTROLLING THE PLANNING MACHINE

"There are severe limits to the reform of planning by law."

M.J. Kiernan

(i) Policy Plans

"Policy" is a grand word; but the concept is a nebulous one. In the abstract it can only be defined in terms of other abstractions. Webster's Dictionary defines it as (1)(a): prudence or wisdom in the management of affairs; (b): management or procedure based primarily on material interest; (2)(a): a definite course or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions; (b): a high-level overall plan embracing the general goals and acceptable procedures, especially of a governmental body.

This gives us some positive clues as to what policy is - the most important (in the present context) being "to guide and determine present and future decisions". To instance the Toronto Central Area Plan:

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"It is the policy of the council that in the mutual interests of the city and the metropolitan region, the central area should continue to serve a primary regional role and at the same time continue to function as a major residential area of the city. It is, therefore, the policy of the council that growth in commercial offices and public institutions will continue to be accommodated in the central core of the central area consistent with the other policies of this plan respecting the encouragement of regional deconcentration and the retention of the central area low rise neighbourhoods."

This highly generalized statement is a typical policy statement. It involves a number of policy objectives of a highly general nature which can be debated in broad terms. Its very generality tends to command broad acceptance - or alternatively, fundamental opposition.

Similarly, general statements about group homes or non-exclusionary zoning constitute highly generalized policies.

Policies of this nature are clearly political, and the issues they raise involve considerations of general public acceptance, of their relationships to policies of other organs of government. The decentralization policy of the City of Toronto must obviously harmonize with relevant provincial policies, with the general development policies of the adjacent municipalities which are intended to accept the decentralized activities, and with transit policies (a responsibility of a different agency).

These are all subjects for a wide ranging planning inquiry in which the main issue is the compatibility and merits of the relevant policies of a multiplicity of agencies. Only the highest level political body can decide upon this, namely the province. The matters have nothing to do with a legal process in which an "unbiased" judge determines where justice lies.

This is not to say that an adversary style is inappropriate. Though life might be more comfortable for the governmental agencies concerned without it, an adversary style has the advantage of pointing up the weaknesses (and strength) of the case presented by the various parties. If the comfort of governmental agencies were the prime consideration, the inquiry would be held *in camera*: but it goes without saying that a political process of this nature must be public. It is also a safeguard against sloppy and ill-considered policies: it positively demands a thorough review and study which is subject to public appraisal.

(ii) Policy-Application

Though ungainly, the term "policy-application" has the merit of clarity. It means precisely what it says: the application of policy to specific issues. Conceptually it is quite distinct from policy making. If the distinction were as clear in practice as it is in concept, the determination of appropriate review machinery would be simple. Policy would be a matter for political review, while policy-application would involve some type of quasi-judicial review in which the merits (or otherwise) of the application of policy to particular cases would be judged by a body at one remove from the decision making organization. It is the fact that the reality is so much more complicated which makes the problem of deciding upon appropriate review machinery so difficult. There is a world of difference between generalized policy statements and particularized actions. Policy is not "applied": it is "interpreted" in the light of the circumstances of particular cases (and in the context of time). In interpreting policy and the situation to which it relates, policy is given meaning. Indeed it has no reality other than this.

By their nature "policies" are simple statements (on which agreement is often relatively easy) which in practice relate to complex specific situations (when clashes of interest become very apparent). Moreover, the policy statements themselves frequently contain the seeds of conflict which their highly generalized articulation can mask.

This is so both within the "planning" field and between it and other policy areas. On the first, the previously given example of the Toronto
Central Area Plan illustrates the point nicely. Here the policy is that the central area should serve both commercial and residential functions. New office developments are to be allowed as long as they are consistent with the residential policy (as well as the deconcentration policy). But how much development of a particular kind will be allowed (even if estimates are given in the policy plan) will inevitably depend upon future circumstances. If white collar unemployment develops, the tendency will be to increase the allowable amount of office development; if there is a housing crisis the emphasis will switch to housing development. These "adjustments at the margin" are seen by planners as constituting a "flexible" policy. In fact, of course, policy and specific actions are inseparable except in the words of the plan.

Other conflicts arise when different fields of policy lead to opposite conclusions. For instance, though all may agree with policies aimed at combatting unemployment and with policies directed to reducing pollution, what is to be done when one clashes with the other? What is "the policy" to be if a polluting industry can conform with environmental requirements only at the cost of closing down part of its works and making many employees redundant?

The point needs no lengthy elaboration. Policies have to be interpreted and given substance in the context of specific circumstances. It is at this stage that individual interests are most clearly affected. Thus though there may be political agreement on a "policy plan", there can be intense opposition to "policy-application". Moreover, given the fallibility of judgement, the unpredictability of the future, the impossibility of establishing the long run effect of specific decisions, and the general acceptance of the right of challenge, there is in any case a clear argument for a review of individual decisions separate from (and, as is argued here, different from) a review of policy. Perhaps the clearest illustration of this is the desirability - and the difficulty - of separating a review of transport needs and policies from a review of the location and alignment of an agreed transport route.
The British experience may be of some interest here. Currently statutory plans are of two main kinds: a structure plan (which is a broad policy plan) and a local plan (which is a detailed plan which elaborates the structure plan policies for smaller areas). Both are subject to a public inquiry undertaken by "inspectors" (in England and Wales) or "reporters" (in Scotland) appointed by the planning minister. With a structure plan, the report on the public inquiry (or "examination in public" as it is called) is made to the planning minister, and it is he who decides whether the plan is to be approved (with or without amendment). With a local plan, however, the report is made to the local authority and they have the responsibility for "adopting" it (again with or without amendment). Proposals for development are considered by local authorities within the framework of these plans but, if it is decided to reject them, or to impose conditions which the applicant finds unacceptable, there is machinery for "appeal". Appeals are similarly heard by inspectors or reporters. On "minor" matters (the majority) they can make the final decision: on others they may make recommendations to the planning minister who typically (but not always) accepts them. In no case does the decision rest with the municipality.

Whether or not this system is appropriate to, or acceptable in, Canada is not at issue here: all that is suggested is that there may be some attraction in the model of a hierarchy of decision making in which policy planning is subject to political review (major plans by the central government and minor plans by local governments) while plan-application is subject to a quasi-judicial review process.

(iii) Maladministration and Illegalities

The issues of maladministration and illegal action can be dealt with more briefly, though they are not without their difficulties.

One difficulty is simply that the OMB likes to see itself (and is often seen) as an Ombudsman, protecting innocent citizens from excesses of zeal on the part of local councils. (The point is heavily made in the suggestion that "OMB" is a shorthand for "Ombudsman.") But this is to confuse functions. Subject to Approval confuses the matter even further:
"There is little doubt that the 'Ombudsman' function is an essential part of the planning process. But the mixing of two significantly different functions - protection of the rights and interests of affected residents, and elaboration of government policy through the adjudication of conflicting viewpoints - in one and the same process, the OMB hearing, should not be accepted as a continuing feature of the municipal planning process in Ontario." 1

The confusion is not just between the protection of rights and the adjudication of planning proposals: there are the additional factors of "maladministration" and "legality".

In the preceding section a distinction has been drawn between planning inquiries concerned with policy matters and planning appeals concerned with the merits of a specific planning application. In both cases questions of maladministration and legality can arise: and such questions need to be decided by separate special machinery. For maladministration there exists the Ombudsman, while for legality there is the well established judicial system.

The Ombudsman is a new institution in Canada. (Alberta was the first province to legislate for an Ombudsman - in 1967; Ontario's legislation came in 1975.) 2 Currently his powers relate generally only to central government administration. 3

The Comay committee recommended that (in relation to municipal planning) these functions should be allocated to the OMB. Thus the OMB would hear grievances on allegedly "unreasonable or unfair behaviour" or on the contention that "in reaching or failing to reach a decision, the council acted on incorrect or inadequate information or advice".

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1 Ontario Economic Council, op. cit., p. 102.
2 See V. Lundvik, The Ombudsmen in the Provinces of Canada, International Ombudsman Institute, University of Alberta, Faculty of Law, 1982.
3 The exceptions are Nova Scotia, New Brunswick and (when proclaimed) British Columbia.
That there is an important (and distinct) role here is exemplified in the Ombudsman's reports on those planning matters which currently fall within his jurisdiction. Nevertheless, Comay's specific wording is not as appropriate, clear or workable as the terms of reference provided in the Ombudsman Act. These refer to administration which, on his investigation:

(a) appears to have been contrary to law;
(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
(c) was based wholly or partly on a mistake of law or fact;
(d) was wrong.

or where administrative power "has been exercised for an improper purpose or on irrelevant grounds ...." and so on. 1

It is also interesting to note that the Ombudsman can decide not to proceed with an investigation where he considers that the complaint is trivial, frivolous, vexatious or not made in good faith, or that the complainant has not a sufficient personal interest in the subject matter of the complaint. 2

The issues involved here clearly extend well beyond planning; but the point being made is simply that maladministration requires treatment different from the public inquiries and appeals appropriate for the review of plans and planning applications. It is concerned with the way in which these procedures are operated.

Of course, if there is a breach of the law then the courts are the appropriate body to deal with the matter.

1 The Ombudsman Act, section 22.
2 The Ombudsman Act, section 18(2).
"..... the system of planning now reflects the ideologies of a governing elite, of which planners in practice are a part, and serves their interests, rather than reflecting the aspirations and ideals which planners so frequently commit to paper for discussion."

P. McAuslan 1

The public interest is elusive, not only because there are in any typical case several publics with differing interests, but also because someone has to determine where the balance of interest lies. The issue can be usefully discussed in the terms of McAuslan's Ideologies of Planning Law.

Before the public health problems of the industrial revolution towns, the dominant ideology was that the law existed to protect the interests and institutions of private property. This private property interest came under strong attack as public health problems - and later planning problems - required public controls. Thus developed the public interest ideology - the ideology of law as seen by the public administrator. The movements for the "city healthy", the "city beautiful", and the "city efficient" were all illustrations of this. Private property owners might - and did - resist the increasing public interest legislation, but it could be politically unwise to do so (the fear of social unrest), it could be physically dangerous to do so (cholera was no respecter of social class), and it could be uneconomic to do so (the belief that zoning protects property values). Moreover a great deal of the legislation was not very effective: it looked more threatening than it really was.

These two ideologies - of the private property interest and the public interest - have been paramount until relatively recently. Though action in the public interest has developed greatly, the private property interest remains virile - and the growth of owner-occupation has strengthened it (as its early sponsors argued that it would). Topically reference can be made

to the campaign of the Canadian Real Estate Association: "a national campaign to strengthen property rights in Canada" and to have the Charter of Rights amended to incorporate "a guarantee of property rights". ¹

The studies of "the erosion of property rights in Ontario" have produced long catalogues of the extent to which the ideology of the public interest has prevailed over the private property interest (though, of course, these terms are not used). ²

The demand for the enshrinement of a property right in the Bill of Rights is an interesting one in the present context since it points to the restricted role which the courts have in limiting the power (and discretion) of public administrators. If an act provides for the use of a discretionary power, then (assuming that all the statutory procedures have been carried out) the courts cannot override the legislation by appeal to a higher authority. If, however, the Bill of Rights were amended the courts could strike down legislation which violated the property right. ³

There is little indication at present that there is any substantial political support for the change.

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In considering the operation of the public interest ideology it has to be stressed that its essential feature is that the public interest is decided, not by the public, but by public administrators (ironically termed public servants). There is, of course, nothing sinister about this. Indeed, until recently, few would have thought of a competing ideology that law is a vehicle for the advance of public participation. This is McAuslan's third planning ideology:

"It is the most recent and least developed of the ideologies both in practice, in terms that is of legislation, circulars and cases, and as a separate identifiable ideology backed by a separate and clearly identifiable constituency as the private property ideology is by the courts and the public interest ideology is by the administrators and planners. It is none the less an ideology of equal importance to the other two. It sees the law as the provider of rights of participation in the land use planning process not by virtue of the ownership of property but by virtue of the more abstract principles of democracy and justice. These in turn come down to the argument that all who are likely to be affected by or who have, for whatever reason, an interest or concern in a proposed development of land or change in the environment should have the right of participation in the decision on that proposal just because they might be affected or are interested. This ideology, like the public interest ideology, denies the property-owner any special place in participation; such an interest is merely one of a great number to be considered in the democratic process of decision-making and by no means the most important, particularly when it is in conflict with the majority view; e.g. the tenants of a building have an equal if not a greater moral claim to participation than the landlord, public or private, present or absent. This ideology differs, however, from that of public interest by denying that the public interest can be identified and acted upon by public servants on the basis of their own views and assumptions as to what is right and wrong. Public servants should act only after full public debate (and by public debate is meant a debate in which the general public can take a direct part) and subject always to continuous consultation with the public."  

Though written against a background of English planning law and administration, McAuslan's analysis clearly has relevance to Canada,

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2 P. McAuslan, op. cit., p. 5.
though equally clearly a parallel study cannot be embarked upon here. The ideology of public participation was in the ascendant in the seventies but the eighties appear different. Public participation means the making of a public input into the decision-making process. The decision itself rests firmly with the managers of the public interest.\(^1\) Put in this light some at least of the OMB's decisions can be seen as promoting the ideology of public participation. This was explicit in the 1966 decision regarding the approval of a bylaw passed by the then township of East York:

"It is the duty of this board to determine whether or not it \(\begin{array}{c} 
\text{the municipality's decision} \\
\text{will create}
\end{array}\) undue hardship on others."

The decision regarding Toronto's 45 foot bylaw is interpreted similarly by Jaffary and Makuch as indicating a concern for individual rights — in this case the rights of large real estate companies.\(^2\) It could also be interpreted as a victory for the private property interest. Either way it was a defeat for the ideology of the public interest as interpreted by the city planners.

A number of related issues arise. One is perhaps simply a reformulation of the basic issue: what discretion is to be allowed to planning authorities, or to their staffs?\(^3\) This leads into issues of "justice" or "justice in conflict" to use the terminology of the legal profession (though the underlying ideas of "fairness", "the public interest" etc are the same). One Scottish study has noted:

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1 It hardly needs to be said that there are political implications of this, particularly in terms of what is called participatory democracy. See C.B. Macpherson, *The Life and Times of Liberal Democracy*, Oxford University Press, 1977.


"..... there are two aspects of justice in conflict - firstly, the justice created by certainty, by having fixed rules which can be relied on for all cases; and secondly the justice arising from an independent consideration of each case in all its own particular circumstances. The former may result in hardship and unfairness in particular cases, but all the parties involved in the given area will know the legal position and can act on that knowledge with confidence. The latter ensures justice in the individual cases, but leaves the law, and those whose actions are guided by it, in a state of great uncertainty." 1

The basic issue here is one which constantly arises in planning: flexibility versus certainty; or discretion versus precision; or adaptability versus stability. It is interesting to inquire, not only how often this dichotomy is apparent, but also how it is dealt with by different provinces and even by the same province in relation to different planning processes. A detailed study of this would make fascinating reading.

Another issue is that of the extent to which public participation and the decision-making process is fostered or hindered by the availability (or otherwise) of information. "Freedom of information" has become a topical subject in Canada, through there is a suspicion that the matter is being drowned in a flood of reports.

Even more difficult is what Bregha, in a provocative essay, has referred to as the "cultural base of public participation". 2 He writes:

"Public participation, however it is conceived in Canada, has many patterns and appears determined not only by education, income, and class but also by language, religion, and culture. In some countries, it seems quiet, ordered, and instructive; in others, it is vocal and perpetually hangs on the brink of anarchy. In some societies, it is far more evident than in others; in still others it apparently does not exist at all. All of this suggests that public participation is much more a product of a culture than of any given political system. The latter, however, may facilitate or impede public participation:

1 C. Crawford and C.T. Reid, op. cit., pp. 3-4.
a truly totalitarian regime can make it impossible while no democracy has yet succeeded in making it as widespread and effective as political philosophers have desired."

Bregha's argument is compelling. Jim Lotz was perhaps making essentially the same point when he quipped, "in the west, there is too much geography, and too little history. In Atlantic Canada, there is too little geography, and too much history ....". 1

The thought is prompted that it might be the case that, in examining the various aspects of public participation, attention has been too much in certain directions (labelled "law" or "ideology") and too little in others (which might be labelled "sociology" or "political culture"). Certainly, there is a danger that Canadian planning is misleadingly interpreted either in British terms (with its highly elaborate legal apparatus of planning dominated by what McAuslan calls the public interest ideology), or in American terms where the constitutional (and attitudinal) situation is totally different.

This is to raise some large and interesting - but difficult - questions, which cannot be adequately dealt with here. The developing field of urban political studies promises to provide more insights than traditional studies of "law" or "planning" have so far done. 2

1 J. Lotz, "Community Development and Public Participation" in B. Sadler, op. cit., Vol. 2, p. 55. See also his Understanding Canada: Regional and Community Development, NC Press (Toronto), 1977.

2 The case of Winnipeg may be unique (to use Kiernan's term) but it certainly illustrates his thesis that planning is not necessarily reformed by legal changes: in that city both the elected politicians and the appointed planners have been opposed to the significant reforms envisaged in the City of Winnipeg Act. See M.J. Kiernan, "The Fallacy of Planning Law Reform", Urban Law and Policy, Vol. 5, 1982, pp. 23-64. See also M.J. Kiernan and D.C. Walker, "Winnipeg", in W. Magnusson and A. Sancton (eds), City Politics in Canada, University of Toronto Press, 1983, pp. 222-254; other papers in this volume illustrate the rich variety of Canadian urban politics.