

Federal Court



Cour fédérale

Date: 20101220

Docket: T-427-10

Citation: 2010 FC 1308

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 20, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**JEAN-FRANÇOIS BONIN AND
MANON LAPOINTE**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are tenants of a residence located in Gatineau Park, Quebec (the residence), which they rent from the National Capital Commission (the Commission or NCC). They are challenging the legality of a decision made on behalf of the NCC to have the residence demolished (the impugned decision).

[2] The impugned decision was made under the supposed authority of section 12 of the *National Capital Act*, R.S., 1985, c. N-4, as amended (the Act) by the Capital Planning Branch and was signed on March 16, 2009, by its executive director, François Lapointe (the Executive Director).

[3] The Capital Planning Branch reviewed the demolition proposal submitted by the Real Estate Management Division, another department of the NCC (the proponent). In this case, the Executive Director approved the proponent's proposal and allowed the residence to be demolished and the site to be reclaimed, subject to certain conditions.

[4] The operative portion of the impugned decision reads as follows:

[TRANSLATION]
FEDERAL LAND USE APPROVAL IS HEREBY GRANTED
FOR THE DEMOLITION OF A RESIDENCE AT
288 KINGSMERE ROAD IN GATINEAU PARK
(MUNICIPALITY OF CHELSEA) PURSUANT TO SECTION 12
OF THE *NATIONAL CAPITAL ACT*, SUBJECT TO THE
FOLLOWING CONDITIONS:

1. Land use

- (a) Approval is granted solely for work relating to the demolition of a residence located at 288 Kingsmere Road in Gatineau Park and the reclamation of the site, as described in the documents and plans identified in Appendix A;
- (b) Any amendment to this project or any other project on NCC lands shall be submitted to the Executive Director, Capital Planning, for review and approval;
- (c) The project shall comply with the applicable laws and regulations (federal, provincial and municipal).

2. Design

- (a) The site shall be left free of any debris upon completion of the work.

3. Environmental

- (a) All mitigation measures identified in the report “Class Screening Procedure – Demolitions – 288 Kingsmere Road” prepared by NCC Environmental Services, dated October 27, 2006, must be implemented;
- (b) All standard mitigation measures identified by the Natural Resources Division of Gatineau Park, dated February 2, 2007, must be implemented.

4. Heritage and archaeological

- (a) If remains from ancient human occupation are found on the land in question during the demolition, work must be suspended immediately, and Ève Wertheimer, Manager, Heritage Program, NCC, shall be notified immediately at 613-239-5225.

5. Monitoring of land use, design and environmental conditions

- (a) Monitoring of these conditions will be the responsibility of Robert Parent (613-239-5591), Real Property Portfolio Officer, Real Estate Management Division, NCC.

6. Realty transactions / access permits

- (a) Before work begins, the contractor selected to perform the work shall obtain an access permit from the NCC allowing the contractor to use its land and go ahead with the work. The contact person for access permits is Richard Moore, Senior Officer, Gatineau Park Division, at 819-827-6017.

[5] The respondent did not submit any affidavits from persons directly involved in the process that led to the impugned decision. However, the documentary evidence from the NCC filed with the affidavit of Jean-François Bonin, one of the two applicants, shows that the NCC had decided to demolish the residence long before the Capital Planning Branch and the Executive Director became involved.

[6] On September 9, 2008, six months before the impugned decision was made, Robert Parent, Real Property Portfolio Officer, Real Estate Management Division, notified the

applicants in writing that the Commission had decided to evict them and demolish the residence. First, the property needed considerable repairs in the short and medium term. Second, it was not a designated federal heritage building. For these reasons, the residence would have to be demolished. Mr. Parent explained that the decision was in accordance with the *Gatineau Park Master Plan* (2005), which recommends demolishing residences in the park that have no heritage value and are at the end of their life cycle or require major work.

[7] Also on September 9, 2008, an official eviction notice signed by the NCC's legal counsel was sent to the applicants to advise them that [TRANSLATION] "[a]s explained in Mr. Parent's letter enclosed with this [eviction] notice, . . . the NCC has decided to demolish the residence located on the property upon termination of the current lease on April 30, 2009. The NCC intends to restore the site to its natural state as green space".

[8] The NCC advised the applicants that if they did not agree with the decision, they should challenge the eviction notice before the Régie du logement, Quebec's rental board, [TRANSLATION] "and ask it to rule on whether demolition of the property is appropriate". The applicants decided not to vacate the premises at the end of the lease. They instituted proceedings before the Régie du logement. Their case was to be heard on March 9, 2010.

[9] In a dramatic turn of events, two weeks before the hearing, counsel for the applicants received a copy of the impugned decision dated March 9, 2009, which was disclosed to him at that time as an exhibit on which counsel for the NCC intended to rely before the Régie. The

hearing was suspended, and these judicial review proceedings were instituted in April 2010 to challenge the legality of the impugned decision.

[10] In their application for judicial review, the applicants submit that the Executive Director did not have the legal authority to approve the proponent's proposal and order the residence's demolition. Since this is a jurisdictional issue that involves interpreting the Act, the correctness standard must be used in reviewing the legality of the impugned decision.

[11] The impugned decision was made by the Executive Director on behalf of the Commission under the supposed authority of section 12 of the Act, which provides as follows:

Development proposals	Présentation des projets
12. (1) Where	12. (1) Doivent être soumis à la Commission, pour approbation préalable, les projets visant :
(a) any department proposes to erect, alter, extend or demolish a building or other work on any lands in the National Capital Region,	a) des travaux, par un ministère, de construction, de modification, d'agrandissement ou de démolition d'un bâtiment ou autre ouvrage sur des terrains de la région de la capitale nationale;
(b) any person proposes to erect, alter, extend or demolish a building or other work on public lands in the National Capital Region, or	b) des travaux, par une personne, de construction, de modification, d'agrandissement ou de démolition d'un bâtiment ou autre ouvrage sur des terrains publics de la région de la capitale nationale;
(c) any department or person proposes to change the use of public lands in the National Capital Region, the department	c) le changement, par un

or person shall, prior to the commencement of the project, submit a proposal therefor to the Commission for approval.

ministère ou une personne, de l'affectation de terrains publics dans la région de la capitale nationale.

Approval of proposals

(2) In determining whether to approve a proposal submitted under subsection (1), the Commission shall consider the following:

Approbation des projets

(2) Dans l'examen des projets, la Commission tient compte des éléments suivants :

(a) in the case of a proposal to erect, alter or extend a building or other work, the site, location, design and plans thereof and the use to be made of the building or other work as erected, altered or extended;

a) l'emplacement, la situation, la conception, les plans et l'utilisation envisagée, en cas de construction, de modification ou d'agrandissement d'un bâtiment ou autre ouvrage;

(b) in the case of a proposal to demolish a building or other work, the site, location, design and use made of the building or other work and the plans for the demolition; and

b) en cas de démolition, les modalités de celle-ci, ainsi que l'emplacement, la situation, la conception et l'utilisation du bâtiment et autre ouvrage;

(c) in the case of a proposal to change the use of public lands, the site, location, existing use and proposed use of the lands.

c) l'emplacement, la situation et l'utilisation actuelle et envisagée, en cas de changement d'affectation de terrains publics.

Prohibition

(3) No department or person shall commence any project in relation to which a proposal is required to be submitted to the Commission under subsection (1) unless a proposal has been so submitted and has been approved by the Commission.

Interdiction

(3) Il est interdit de procéder à la réalisation des projets visés au paragraphe (1) sans avoir préalablement obtenu l'approbation de la Commission.

Interior alterations

(4) This section does not apply to any alteration of the interior of a building or other work unless the alteration is made to accommodate a change in the use of the building or work.

Modifications intérieures

(4) Dans le cas d'un bâtiment ou autre ouvrage, le présent article ne s'applique aux modifications intérieures que si elles sont liées à un changement d'affectation.

[12] In the present case, it must be determined whether the Executive Director could review and approve the proponent's demolition proposal without the Commission itself or, as the case may be, its Executive Committee, described at section 9 of the Act, having reviewed and approved such a proposal.

[13] It should be noted that the Commission consists of 15 members, including the Chairperson and the Chief Executive Officer (subsection 3(1) of the Act), while the Executive Committee consists of the Chairperson, the Chief Executive Officer and three other members to be appointed by the Commission, at least one of whom shall be from the Province of Quebec (subsection 9(1) of the Act).

[14] Pursuant to paragraph 10(1)(a) of the Act, the objects and purposes of the Commission are to prepare plans for and assist in the development, conservation and improvement of public lands in the region. It is a policy role that the Commission carries out, having regard to the three general objectives set out in the abovementioned provision. In this respect, it could be said that the Commission performs a quasi-legislative role in the development of public lands in the

National Capital Region, a role that must of course be carried out in a coordinated manner with provincial and municipal authorities (section 11 of the Act).

[15] Section 12 of the Act is a jurisdiction-granting provision that provides that certain types of development projects in the National Capital Region must first be reviewed and approved by the Commission before they are carried out. It is a provision that goes well beyond the Commission's internal administration and corporate affairs and gives the Commission control over third-party proposals for lands—or, as the case may be, public lands—located in the National Capital Region. These proposals can be initiated by any government department (including the NCC itself) or by any person, that is, a third party.

[16] The Commission must review each proposal on its own merits. Although subsection 12(1) of the Act gives the Commission a degree of discretion, the exercise of that discretion is circumscribed by the general criteria set out in subsection 12(2) of the Act and varies according to the type of proposal. In addition, any approval given by the Commission may be subject to such terms and conditions as the Commission deems desirable (subsection 12.2(2) of the Act).

[17] Furthermore, the Commission does not always have the final say, as Parliament has provided for a sort of right of appeal to Cabinet where the Commission does not give its approval to a proposal. Under subsection 12.2(1) of the Act, the Governor in Council may give approval to any proposal refused by the Commission under section 12 of the Act (or section 12.1 of the Act). In such a case, any approval given by the Governor in Council may be subject to such

terms and conditions as are considered desirable by the Governor in Council (subsection 12.2(2) of the Act).

[18] In the impugned decision, the Executive Director does not make any explicit references to paragraph (a), (b) or (c) of subsection 12(2) of the Act. At first glance, the authorization appears to be for the demolition of a residence (paragraphs 12(1)(a) and (2)(b) of the Act). However, in response to the Court's questions at the hearing, counsel for the respondent submitted that the impugned decision was actually an exercise of the Commission's authority under paragraph 12(1)(c) of the Act, that is, the authority to approve a proposal by a department or person to change the use of public lands in the National Capital Region.

[19] The Commission has already established general development plans for public lands in the National Capital Region, including policy plans, master and sector plans and area plans. The residence rented to the applicants is located inside an "R-1 – Extensive Recreation" zone described in the Gatineau Park Master Plan, May 2005 (the Master Plan).

[20] Essentially, right from the beginning of this case, the NCC's Real Estate Management Division has been proposing to demolish the residence rented by the applicants, given that the residence has not been designated as a heritage building and requires major renovations. In this case, there was a mandatory requirement to submit the demolition proposal to the Commission for approval first, as provided in paragraph 12(1)(a) of the Act.

[21] At first glance, this is not a matter of changing the zoning or use of the lands in the R-1 zone lands. The public lands on which the residence stands are located inside Gatineau Park. The “green” nature of the Park is already enshrined in the Master Plan. Once the property has been demolished, the current site will be reclaimed, becoming indistinguishable from the surrounding land in the Park.

[22] Be that as it may, if as the respondent suggests the use also has to be changed for the public lands on which the property rented by the applicants stands, the proposal to change the use too would have to be submitted to the Commission for approval first, as required by paragraph 12(1)(c) of the Act.

[23] The respondent acknowledges that under section 12 of the Act, it is up to the Commission to approve any proposal to demolish a building and/or change the use of public lands in the National Capital Region. However, the respondent argues that the Commission can delegate its decision-making powers under section 12 of the Act to its Executive Committee pursuant to a resolution adopted by the Commission under subsection 9(2) of the Act. Moreover, subsection 9(3) of the Act provides that the Commission may establish a national capital planning committee and such other committees as it considers necessary or desirable for the administration of the Act.

[24] NCC By-Law #1, which addresses general issues relating to the Commission’s organization, sets out the general executive powers of the directors and provides that the Commission may, by resolution, create committees, appoint members to those committees and

establish the terms of reference of each committee. That said, although the Commission has the power to create a capital planning committee, to date, it does not appear to have done so.

[25] In fact, on September 26, 2001, the Commission adopted Resolution I-5, which delegates certain powers to its Executive Committee. Pursuant to paragraphs 1(c) and (k) of Resolution I-5, the Executive Committee may, among other things,

(c) approve proposals on the erection, alteration, extension or demolition of any building or work by any person, a department and the Commission on public lands or on lands, as the case may be, in the National Capital Region;

...

(k) consider management recommendation and approve sector and area plans, and modifications to policy, sector, master and area plans;

...

(Emphasis added.)

[26] Upon reading Resolution I-5, it becomes clear that, pursuant to subsection 9(2) of the Act, the Commission has specifically delegated to the Executive Committee the power to review and approve the types of development proposals described in subsection 12(1). Furthermore, since the Commission has not created a planning committee, it falls to the Executive Committee to seek out, as it deems necessary, the opinions of such officers, employees, consultants and advisers in its employ.

[27] Needless to say, under paragraph 8(3)(a) of the Act, the Governor in Council may approve a plan of organization for the establishment and classification of the continuing positions necessary for the proper functioning of the Commission. In this particular context,

subsection 8(2) of the Act provides that the Commission may employ such officers and employees and such consultants and advisers as it deems necessary for the purpose of this Act.

[28] And yet, in the case under review, the decision to demolish the residence and, if need be, change the use of the public lands on which it is located was not made by the Commission or its Executive Committee, but by the Real Estate Management Division of the NCC (the proponent) or by the Capital Planning Branch, depending on whether the decision is viewed as having been made on September 9, 2008, when the eviction notice was sent to the applicants, or March 16, 2009, when the Capital Planning Branch allowed the proponent to go ahead with the demolition of the residence subject to the conditions set by the Executive Director.

[29] And therein lies the problem, for the applicants submit that, as qualified and competent as the Commission's officers and employees may be, only the Commission's members themselves could legally make the impugned decision, at a regular or special meeting of the Commission or its Executive Committee during which the proponent's proposal could have been reviewed and debated, which did not happen in this case.

[30] Although the Commission itself and, as the case may be, its Executive Committee have authority under subsections 12(1) and 9(2) of the Act, respectively, to review and approve the proponent's proposal, the respondent submits that such authority to approve the proposal may be legally subdelegated to the Capital Planning Branch or any designated executive pursuant to section 19 of the Act, provided that any administrative discretion thereby granted to officers or certain employees has been properly circumscribed by the Commission. .

[31] The respondent therefore submits that, under section 2 of Resolution I-5, a development project of the type described at subsection 12(1) of the Act does not need to be submitted for approval by the Executive Committee or by the Commission itself where the conditions described in By-Law #2 Governing the Management and Performance of Commission Activities and Business (By-Law #2) have been met.

[32] In this regard, the respondent refers to the section of By-Law #2 entitled “III – Approvals Pursuant to Sections 12 and 12.1 of the Act”. Sections 30 and 31 of By-Law #2 are relevant:

Approvals Pursuant to Paragraph 12(1)(a) & (b) of the Act

30. When a proposal to erect, alter or extend any building or other work made by a person in respect of any public lands in the National Capital Region or by a department in respect of any lands in the National Capital Region is minor in nature, conforms to the Plan for Canada’s Capital, and:

the conceptual design of the building or other work is not changed by the proposal;
the environment of the site is not significantly changed by the proposal;
the proposal is of minor significance in the context of the national capital,

the Vice-President having responsibility for capital planning or the Director

Approbations en vertu des paragraphes 12(1)(a) et (b) de la Loi

30. Le présent article régit les approbations relatives à des projets qui sont présentés par une personne ou un ministère; qui visent la construction, la modification ou l’agrandissement d’un bâtiment ou d’un autre ouvrage sur un terrain public de la Région de la capitale nationale; et qui, premièrement, impliquent des travaux mineurs et, deuxièmement, respectent les modalités du Plan de la capitale du Canada.

Les approbations de tels projets peuvent être signées par le vice-président responsable de l’aménagement de la capitale ou le directeur responsable de l’aménagement de la capitale ou le directeur

having responsibility for design and land use approvals may sign the approval for such proposal either with or without the imposition of conditions.

responsable du design et de l'utilisation du sol, avec ou sans imposition de conditions relativement à la signature, pourvu que, selon le cas, chacune des conditions suivantes soient respectées :

le projet ne modifie pas la conception du bâtiment ou de l'ouvrage visé;
le projet ne modifie pas de façon importante l'environnement de l'emplacement;
les travaux proposés font partie d'un projet dont la conception a déjà été approuvée par la Société;
les travaux proposés sont d'importance mineure en fonction du contexte de la capitale nationale.

Approvals Pursuant to Paragraph 12(1)(c) of the Act

31. When a change in the use of public lands in the National Capital Region, including a proposal to demolish any building or structure or other works affecting the use of public lands, is proposed by any department or person, and

Approbations en vertu de l'article 12(1)c) de la Loi

31. Le présent article régit les approbations relatives aux projets présentés par une personne ou un ministère et visant à modifier l'affectation de terrains publics de la Région de la capitale nationale, notamment les projets visant à démolir un bâtiment ou une structure érigé sur un terrain public.
Les approbations relatives à de tels projets peuvent être signés par le vice-président responsable de l'aménagement de la capitale ou le directeur responsable du design et de l'utilisation du sol, avec ou sans imposition de conditions,

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|---|--|
| <p>(i) the proposed change conforms to the Plan for Canada's Capital;</p> <p>(ii) the proposed change is not likely to cause significant adverse environmental effects;</p> <p>(iii) the proposed change does not impact significantly on the surrounding urban fabric or municipal infrastructure;</p> <p>(iv) in the case of a demolition, the building or structure has no heritage significance or designation following review by the Federal Heritage Buildings Review Office;</p> <p>the Vice-President having responsibility for capital planning or the Director having responsibility for design and land use approvals may sign the approval for such change in use either with or without the imposition of conditions.</p> | <p>pourvu que chacune des conditions suivantes soient respectées :</p> <p>(i) la modification proposée respecte les modalités du Plan de la capitale du Canada;</p> <p>(ii) il est peu probable que les travaux projetés aient un effet néfaste sur l'environnement;</p> <p>(iii) les travaux projetés n'auront pas un impact important sur le tissu urbain ou infrastructure municipale du pourtour de l'emplacement;</p> <p>(iv) dans le cas d'une demande de démolition, le bâtiment ou la structure visés ne possèdent aucune valeur ni désignation patrimoniale suivant une revue par le Bureau d'examen des édifices fédéraux du patrimoine.</p> |
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[33] In fact, the decision to demolish the residence was made and officially announced on September 9, 2008, by Robert Parent, Real Property Portfolio Manager, Real Estate Management. It is therefore reasonable to ask whether the respondent can now raise sections 30 and 31 of By-Law #2 after the fact to argue that the impugned decision dated March 16, 2009, signed by François Lapointe, Executive Director, Capital Planning Branch (the Executive Director) is indeed legal.

[34] Although the Executive Director mentions section 12 of the Act, the impugned decision makes no reference whatsoever to section 30 of By-Law #2, which deals with approvals under paragraphs 12(1)(a) and (b) of the Act, or to section 31 of By-Law #2, which deals with approvals under paragraph 12(1)(c) of the Act and on which the respondent now relies in this case.

[35] However, there is no need to analyze either the reasonableness of the impugned decision or the applicants' argument that procedural fairness has been breached. In this Court's view, the impugned decision must be quashed simply because the Act does not allow the Commission to delegate the powers set out at section 12 of the Act to its officers and employees or to the consultants and advisors it employs.

[36] So beyond the practical problems raised by the interaction of section 2 of Resolution I-5 with sections 30 and 31 of By-Law #2, it is clear that the Commission's subject-matter jurisdiction over reviewing and approving development proposals described at subsection 12(1) of the Act must be exercised by the Commission pursuant to section 12, or by the Governor in Council pursuant to section 12.2 of the Act where a proposal has been rejected by the Commission.

[37] As regards development proposals described at section 12 of the Act, given the general scheme and the provisions of the Act that the Court has already reviewed, it appears that the role of the Capital Planning Branch is more modest. Essentially, its role is to make recommendations

to the Commission, not to act in the Commission's stead. It is important to bear in mind that the authority to approve development proposals made by a department or a person, thus by third parties, is within the scope of the Commission's general corporate powers under subsection 10(2) of the Act.

[38] Parliament does not speak in vain; the Act's provisions must be interpreted in accordance with their purpose and place within the Act. Sections 11 to 13 are part of a special chapter entitled "Development". As regards the Commission, a decision-making authority as significant as the one provided for at section 12 of the Act must be exercised by the constituent members of the Commission pursuant to subsection 3(1) of the Act, unless that authority has been delegated to an Executive Committee created pursuant to subsection 9(2) of the Act.

[39] Furthermore, to carry out the Commission's objects and purposes under section 10 of the Act, it is imperative that the decision-making process set out at section 12 of the Act remain transparent and that the Commission always be held accountable to the government for decisions affecting the public interest in development projects by a department or person on lands or public lands in the National Capital Region, particularly where the project involves changing the use of those public lands.

[40] That said, section 1 of Resolution I-5, which delegates the powers under section 12 of the Act to the Executive Committee, is in this Court's view perfectly consistent with the general scheme of the Act. After all, subsection 9(2) of the Act requires the Executive Committee to

submit at each meeting of the Commission minutes of its proceedings since the last meeting, which ultimately ensures that the Executive Committee remains accountable to the Commission.

[41] However, section 2 of Resolution I-5 is illegal. Its sole purpose is to subdelegate to public servants the plenary power of the Commission—or, as the case may be, its Executive Committee—to approve proposals pursuant to the Act (particularly under section 12 of the Act in cases mentioned in By-Law #2). Sections 29, 30 and 31 of By-Law #2, which must be read together with section 2 of Resolution I-5, are also *ultra vires* the Commission’s powers under the Act and constitute an illegal subdelegation of authority.

[42] In this respect, section 19 of the Act does not have the legal scope that the respondent claims it does. What is more, the Commission may “make by-laws for the conduct and management of its activities and for carrying out the purposes and provisions of this Act”. In the name of flexibility, these by-laws do not have force of law, are not made public and can be amended or replaced at any time by the Commission.

[43] The authority to make “by-laws” (“règlements administratifs”) set out at section 19 of the Act is of course incompatible with the existence of a regulatory authority in the broad sense, that is, where Parliament has authorized the so-called “regulatory” authority to adopt mandatory rules (“regulations”) governing the conduct of others (such as section 20 of the Act, in the case of regulations made by the Governor in Council).

[44] Thus, for the “conduct and management of its activities”, it is entirely open to the Commission to adopt by-laws setting internal authority levels for financial matters and designating the officers and employees who can sign agreements on behalf of the Commission. These are simply internal management rules—no more, no less. Although the Commission can adopt by-laws governing the corporate activities set out at subsection 10(2) of the Act, the same cannot be said where the Commission exercises its powers over development.

[45] The authority to “[carry] out the purposes and provisions of this Act” does not include the power to delegate the Commission’s powers respecting the review of proposals described at subsection 12(1) of the Act. The Commission cannot “legislate” through internal rules (sections 30 and 31 of By-Law #2) on criteria for approval, nor can it waive its discretion to approve proposals by delegating this function to the Capital Planning Branch and its employees.

[46] In such cases, the Commission is required, for each proposal covered by subsection 12(1), to consider the factors set out in subsection 12(2) of the Act before making a decision relating to development. Each proposal must be reviewed on its merits by the members of the Commission or, as the case may be, by the Executive Committee; otherwise, the decision is not enforceable against the proponent, any department or any person, or against the public.

[47] If Parliament had intended that the Commission be able to make by-laws setting the criteria or conditions for approving proposals of the type described at section 12 of the Act, it would have expressly provided for that in section 12 or elsewhere in the Act. For example, Parliament took the trouble to enact section 20 of the Act, which expressly allows the Governor

in Council to make regulations for the protection of any property of the Commission and for preserving order or preventing accidents on any property of the Commission.

[48] Likewise, if Parliament had intended that the decision-making powers granted to the Commission by section 12 of the Act could be delegated, it would have expressly provided so. For example, Parliament went to the trouble of enacting subsection 9(2) of the Act, which provides that the Executive Committee exercises the powers and performs the functions delegated to it by the Commission.

[49] The Court also does not agree with the respondent's argument that this is an instance where the case law permits subdelegation to an administrative official. On the one hand, the will of Parliament must be upheld. On the other hand, the case law suggests that there can be no discretion, and such is not the case here.

[50] While it is true that sections 30 and 31 of By-Law #2 set out certain conditions, the administrative decision maker nevertheless has full discretion to make an approval subject to such conditions he or she considers desirable. This power mirrors the discretion granted by section 12.2 of the Act to the Commission or the Governor in Council.

[51] Again, the connection between, on the one hand, the conditions set out in sections 30 and 31 of By-Law #2 and, on the other, the criteria stated in subsection 12(2) of the Act is not obvious and, in this Court's view, is highly tenuous. Given the vagueness of certain conditions,

the administrative decision maker has a degree of discretion, which will lead him or her to make choices or decisions.

[52] For example, section 12 of the Act makes no distinction between minor and major work. However, in this Court's view, the assessment of the relative scale of the development work, as set out in section 30 of By-Law #2, is somewhat subjective and open to a degree of discretion on the part of the administrative decision maker. The same can be said for the assessment authority under section 31 of By-Law #2, when assessing whether "the proposed change is not likely to cause significant adverse environmental effects", or whether "the proposed change does not impact significantly on the surrounding urban fabric or municipal infrastructure".

[53] Finally section 29 of By-Law #2 grants the administrative decision maker an ongoing authority that he or she can continue to exercise even after proposals have been approved under section 12 of the Act. Section 29 of By-Law #2 delegates to the administrative decision maker "the authority to reconsider, revoke, amend or extend the approvals and to attach conditions to such approvals".

[54] No such delegation of authority is permitted by the Act or by the case law.

[55] In conclusion, the Real Estate Management Division, or the Capital Planning Branch, was obligated to refer the proposal to demolish the residence to the Commission or its Executive Committee, as the case may be.

[56] For these reasons, the application for judicial review is allowed. The Court declares that section 2 of Resolution I-5 and sections 29, 30 and 31 of By-Law #2 are *ultra vires* the powers of the Commission. The Court quashes the decision of the Capital Planning Branch approving the demolition of the residence. Given the outcome, costs will go to the applicants.

JUDGMENT

THE COURT DECLARES AND ORDERS that:

1. The application for judicial review is allowed;
2. Section 2 of Resolution I-5 and sections 29, 30 and 31 of By-Law #2 are *ultra vires* the powers of the Commission;
3. The decision of the Capital Planning Branch, dated March 16, 2009, approving the demolition of the residence rented to the applicants is quashed; and
4. The applicants are entitled to costs.

“Luc Martineau”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-427-10

STYLE OF CAUSE: JEAN-FRANÇOIS BONIN AND MANON
LAPOINTE AND ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 22, 2010

REASONS FOR JUDGMENT: MARTINEAU J.

DATED: December 20, 2010

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