The Doctrine of Public Dedication of Private Property in Quebec Civil and Statute Law

How secure is the right to own private property? Articles 406 and 407 of the *Civil Code* have frequently been declared to be the fundamental provisions of law which provide people with the absolute rights of *usus, abusus,* and *fructus.* It is therefore believed that one possesses the absolute right to use his property in any manner whatsoever, provided that no law or by-law is violated and that there is no intent to cause damage or annoyance to another.[1] From a reading of Article 407 of the *Civil Code* it appears that a property owner will be protected from expropriation without due and just indemnification. However, the doctrine of public dedication has crept almost unnoticed into the civil law system of Quebec, thereby contributing to the erosion of the once sanctified notion of absolute ownership. While it is true that the concept of public dedication has not been used in any major way for a number of years, certain recent developments have indicated that the provisions of law, both statute and otherwise, permitting expropriation without compensation will soon be revived. For example, in 1960 the *Charter of the City of Montreal* was revised,[2] but the section empowering the City to gratuitously acquire lands open to the public for ten years was omitted from the revision. The following year, this newly consolidated *Charter* was amended in order to correct the error, in spite of the fact that this power had apparently been dormant for a lengthy period of time.[3] Today, Article 36 (a) of the *Charter of the City of Montreal* reads as follows:

> Streets, lanes, highways and public squares continuously open to the public for ten years or more in the city or any territory annexed thereto, shall be considered to all intents and purposes the property of the city when the following formalities have been observed:
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> 1. By resolution of the executive committee, the city shall approve one or more plans showing the area and the site and giving the description of all streets, lanes, highways or public squares, or any part thereof, for which it wishes to avail itself of the provisions of this article.

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[1] See for example, *Drysdale* v. *Dugas,* (1896-97), 26 S.C.R. 20; *Canada Paper Co.* v. *Brown,* (1922), 63 S.C.R. 243; *Brodeur* v. *Choinière,* [1945] C.S. 334.

[2] *Charter of the City of Montreal, 1960,* 8-9 Eliz. II, S.Q. 1959-60, c. 102.

[3] *An Act to amend the Charter of the City of Montreal,* 9 Eliz. II and 9-10 Eliz. II, S.Q. 1960 and 1960-61, c. 97, s. 3.

2. The original of such plans shall be deposited in the archives of the public works department of the city and a copy certified by a land surveyor shall be deposited in the registry office of Montreal.

3. The city clerk shall publish twice in the *Quebec Official Gazette*, with an interval of at least three and not more than four months between each publication, a notice containing

a. the full text of this article;

b. a summary description of the streets, lanes, highways and public squares concerned;

c. a statement to the effect that the plans provided for in paragraph 1 have been approved and deposited according to paragraphs 1 and 2.

4. The notice provided for in paragraph 3 shall, during the month following each of its publications in the *Quebec Official Gazette*, be inserted in a French daily newspaper and in an English daily newspaper published in Montreal.

All rights which might be claimed by third parties respecting the ownership of the site of the said streets, lanes, highways and public squares appearing on the plans so deposited shall be extinguished and prescribed if not exercised by action before the competent court during the year following the last publication in the *Quebec Official Gazette* of the notice above provided for.

At the expiry of such delays. the city shall cause to be registered against every piece of land concerned a notarial declaration establishing the fulfilment of the formalities provided for above and such document so registered shall constitute to all intents and purposes conclusive proof of the fulfilment of such formalities. The registrar must accept the deposit of the plans and register the above-mentioned notarial declaration.

The fact that for over ten years a street, lane, highway or public square has been described and recorded in the register contemplated in article 36, or forms part of the plans and resolutions contemplated in article 37, shall be conclusive proof that such street, lane, highway or public square bas been open to the public for over ten years.

The city cannot avail itself of the provisions of this article with respect to land on which it has collected any taxes during the ten preceding years.

A similar provision is found in the Quebec *Cities and Town Act*,[4] as well as in numerous other statutes dealing with municipal corporations. The effect of these laws has been to give modified statutory expression to the common law doctrine of public dedication of real property.

Common law dedication consists of the appropriation of land by an implied "gift" from its owner to the public as represented by a municipal corporation. Roads, lanes, parks, playgrounds, recreation areas, wharfs, harbours, and market-places have been the objects of dedication, with the result that it is now generally accepted that

[4] R.S.Q. 1964, c. 193, s. 430.

any immoveable capable of use for public purposes may be dedicated. Where the owner of land makes use of it in such a way as to invite the public to use its facilities and to consider the land as its own, then he is deemed to have forfeited his title to it.[5] In order for these effects to occur, the owner must not merely have tolerated the presence of the public on his property, but he must have had the intention to render it to them.[6] This intention will be irrebuttably proven where he has left his property open to the public for its unrestricted use, and has set aside those parts of the lots for parks and streets according to a registered subdivision plan.[7] Secondly, the public must have accepted this gift by making actual use of the land and the facilities located thereon. It is only when both of the aforementioned conditions have not been met that the proprietor will be able to claim with facility that he did not intend to dedicate the immoveable in question.

The principle of public dedication differs from the rules and substance of acquisitive prescription in several important respects. The operation of dedication does not necessarily depend upon a lapse of time, but rather is based upon the implied intention, and in some cases the deemed intention of the owner of land. The notes of Mr. Justice Mignault as reported in *Lord.* v. *La Ville de Saint-Jean* [8] serve as an illustration of this submission:

> De plus, alors que, pour la prescription, il faut que la possession ait duré pendant une période fixée qui peut être interrompue, l'abandon ou destination pour l'usage du public est complet et définitif dès son acceptation, et sans que la possession du public ait duré pendant une période déterminée *a priori.*[9]

Nor does dedication depend upon the good or bad faith of the parties. It exists independently of any motive other than the intention to make a gift to the public, and frequently this intention is simply construed from the facts placed before the courts. Finally, dedication differs from extinctive prescription in that it is not designed to be

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[5] See for example, *Piette* v. *St. Maurice Light & Power Co.*, (1907), 13 R. de J. 237.

[6] *Corporation of the Township of Onslow* v. *McCough*, (1906), 30 C.S. 256.

[7] Proudhon, *Traité de domaine public*, vol. 2, p. 183; *Childs* v. *La Cité de Montréal*, (1890), 13 L.N. 355; *Rhodes* v. *Pérusse*, (1909), 41 S.C.R. 264; *Storey* v. *Cook*, (1904), 26 C.S. 203. However, see *contra*, *Warmington* v. *La Ville de Westmount*, (1895), 8 C.S. 44, (1898), 7 B.R. 234, where the Court as a question of fact could find no *animus dedicandi* on the part of the owner of the land, nor acceptance by the municipality since it had levied taxes upon the property, hence indicating that it had not yet acquired title.

[8] (1921), 61 S.C.R. 535.

[9] *Ibid.*, at p. 546.

a device enabling a possessor in bad faith to assert his claim to property against the rightful owner who may be deemed to have forfeited his land due to his negligence in not protecting his title, or to his prolonged inaction. Although a person who has used a tract of land as owner, and has fulfilled the other requirements of Article 2193 [10] of the *Civil Code* may eventually be vested with title to it, in spite of the fact that the registered proprietor has merely tolerated his presence during the prescriptive period, it will be seen that one can not lose his rights of ownership when he has merely tolerated the presence of the public upon his land. Due to the fact that dedication is a concept entirely distinct from prescription, Article 2220 [11] of the *Civil Code* will be inapplicable since it deals solely with questions of prescription. Its provisions will not shield an owner from those claims of a municipality which result from the valid operation of the rules of dedication, and in any event, Article 2220 is clearly intended to operate in favour of public authorities operating or maintaining the facilities therein enumerated.

The ordinary meaning of the words employed in Article 583 [12] of the *Code* appears to allow for the acquisition of title to land by the operation of public dedication as it is stated that ownership may be procured by the "prehension or occupation" of property. These terms do not refer to prescription since this method of obtaining rights is separately enumerated elsewhere in the Article. In any event, it is submitted that Article 583 C.C. is enumerative, and hence is capable of liberal interpretation. Therefore, even if one can argue that public dedication is not specifically included in Article 583 C.C., he cannot also maintain that this omission precludes the existence of the notion of dedication in the civil law of Quebec.

It is submitted that Article 404 [13] of the *Code* also allows for the operation of public dedication. The wording of this provision can only be given full meaning if this view is accepted, notwithstanding this article's French origin. Furthermore, each section of the *Code* must

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[10] Art. 2193 C.C. provides: "For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor."

[11] Art. 2220 C.C.: "Roads, streets, wharfs, landing-places, squares, markets and other places of like nature, possessed for the general use of the public, cannot be acquired by prescription, so long as their destination has not been changed otherwise than by tolerating the encroachment."

[12] Art. 583 C.C.: "Ownership in property is acquired by prehension or occupation, by accession, by descent, by will, by contract, by prescription, and otherwise, by the effect of law and obligations."

[13] Art. 404 C.C. reads: "The property of municipalities and other corporations is that to which or to the use of which those bodies have an acquired right."

be read in conjunction with every other section and be given its meaning as a part of the entire framework of the law. In this case, special attention must be given to Article 399 of the *Code*[14] where it is stated that public property is regulated by administrative law. Since the doctrine of public dedication is a part of British administrative or public law, then it must apply in Quebec, in virtue of this article, until such time as its operation is specifically excluded by statute. No such exclusion exists. Article 407 C.C.[15] cannot be said to be such an exclusion since it deals with expropriation, a concept entirely apart and distinct from dedication as it concerns the forcible taking of property for public use, not the "voluntary" cession of property for public benefit. The rule of Article 776 of the *Code* requiring gifts *inter vivos* to be executed in notarial form has been held not to affect the operation of dedication in Quebec law.[16]

The Supreme Court of Canada has, in at least three different instances, discussed the problem of whether the rules of common law dedication do apply in the Quebec Civil Law system.[17] However, at no time did the Court mention that the reasons for its findings rested upon the type of analysis which has been made above. It was in these cases that the earlier jurisprudence, which had considered as almost self-evident the fact that common law dedication did apply in Quebec, was questioned and reviewed.[18]

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[14] Art. 399 C.C. states: "Property belongs either to the Crown, or to municipalities or other corporations, or to individuals.

That of the first kind is governed by public or administrative law.

That of the second is subject, in certain respects as to its administration, its acquisition and its alienation, to certain rules and formalities which are peculiar to it. As to individuals, they have the free disposal of the things belonging to them under the modifications established by law."

[15] Art. 407 C.C.: "No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid."

[16] *Michaud* v. *La Cité de Montréal*, (1921), 30 B.R. 46, confirmed on appeal (1923), 35 B.R. 295 (P.C.), [1923] 3 D.L.R. 487, (1923), 129 L.T. 417; *Mignerand dit Myrand* v. *Légaré*, (1880), 6 Q.L.R. 120; *Guy* v. *The City of Montreal*, (1880), 3 L.N. 402; *The Town of Westmount* v. *Warmington*, (1900), 9 B.R. 101. See *contra* the notes of Brodeur, J., in *Lord* v. *La Ville de Saint-Jean*, (1921), 61 S.C.R. 535, at pp. 541-542. This opinion, as seen in the discussion of the position of the Supreme Court *supra*, is, it is submitted, erroneous.

[17] *Harvey* v. *Dominion Textile Co.*, (1917-19), 59 S.C.R. 508; *Gauvreau* v. *Pagé*, (1920), 60 S.C.R. 181; *Lord* v. *La ville de Saint-Jean*, (1921), 61 S.C.R. 535.

[18] See for example the following cases where the applicability of the rules of common law dedication was accepted without detailed logical reasoning: *Guy* v. *The City of Montreal*, (1880), 3 L.N. 402; *Mignerand dit Mayrand* v. *Légaré*, (1880), 6 Q.L.R. 120; *De la Chevrotière* v. *La Cité de Montréal*, (1886), 12 A.C. 149; *Childs* v. *La Cité de Montréal*, (1890), 13 L.N. 355; *The Town of Westmount* v. *Warminton*, (1900), 9 B.R. 101.

Chief Justice Fitzpatrick, in *Harvey* v. *Dominion Textile Co.*,[19] held that common law rules of dedication did operate in Quebec, but his reasoning, as will appear from the extract of his notes to be quoted, lacked logical substance.

> Were it not for the judgment of the Court of Queen's Bench in *Mignerand dit Myrand* v. *Légaré*, (1880), 6 Q.L.R. 120, I would be disposed to doubt that the principle of dedication as applied in English law is known to the civil law, and to hold that, in the absence of statuto, the right of road in Quebec must be based upon the fact of user by the public, as a matter of right, for the full period of the long prescription, thirty years. ... But the rule in *Mignerand dit Myrand* v. *Légaré* has been adopted and followed in Quebec Courts so universally and for such a length of time that it must now be accepted as definitely fixing the law and I feel bound to hold that a public right of way may be constituted in Quebec by direct or indirect dedication.[20]

The foregoing passage illustrates Chief Justice Fitzpatrick's reluctance to deny the effect of dedication in Quebec because of its general acceptance in previous decisions of lower courts, an acceptance which, in Chief Justice Fitzpatrick's opinion, was contrary to law. However, his remarks proved to be the commencement of a long line of opinions on the subject.

Mr. Justice Anglin, in *Gauvreau* v. *Pagé*,[21] became the next to rule that dedication could exist in Quebec law:

> While I incline to the view that it is sufficiently established that under the law of Quebec a highway may be created by dedication, (*De la Chevrotière* v. *Cité de Montréal*; *Mignerand dit Myrand* v. *Légaré*; *Rhodes* v. *Pérusse*; *Harvey* v. *Dominion Textile Co.*); I am clearly of the opinion that the evidence in this case falls short of what would be necessary to establish the existence of the necessary *animus dedicandi* on the part of the plaintiff or his predecessors in title.[22]

Mr. Justice Anglin therefore accepted the principle of dedication on the grounds that ample authority permitted him to do so, but he did not discuss any other reasons for his stand.

An argument against the existence of dedication in Quebec law was set forth by Mr. Justice Brodeur in the *Pagé* case, but it was expressed without reference to the *Code*, and without an analysis similar to that made in the earlier paragraphs of this work.

> S'il n'y avait aucune disposition formelle dans nos codes sur la matière, je comprendrais la force de l'opinion que la "*dedication*" peut être invoquée. Mais les corporations municipales sont régies, comme je l'ai déjà dit, par les lois affectant les individus; et elles n'ont pas d'autres privilèges que

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[19] (1917-18), 59 S.C.R. 508.
[20] *Ibid.*, at pp. 509-510.
[21] (1920), 60 S.C.R. 181.
[22] *Ibid.*, at p. 183.

> ceux qui leur sont reconnus formellement par la loi et les droits incompatibles avec une disposition de nos lois ne sauraient être réclamés par elles.[23]

He erroneously assumed that dedication is a concept which is repugnant to the provisions of the *Code*. Furthermore, he had not considered the wording of Article 399 C.C. which opens the door to the applicability of English public law in the Quebec legal framework, and more particularly in the field of municipal law. It is only in the later case of *Lord* v. *La Ville de Saint-Jean*,[24] that Brodeur, J., implied that the opinion he had previously expressed rested upon Article 776 of the *Code*.

> La défenderesse prétend qu'il y a eu *dedication* (abandon) du terrain en litige... J'ai déjà exprimé longuement mon opinion à ce sujet dans la cause de *Gauvreau* v. *Pagé* et j'en suis venu à la conclusion que la doctrine de *dedication* du droit anglais n'est pas en force dans [le] Québec et qu'un abandon d'immeuble à titre gratuit ne pouvait pas se faire sans titre, vu qu'un acte portant donation entre vifs doit être notarié et porter minute à peine de nullité (art. 776 c.c.).

However, Mr. Justice Brodeur's view as expressed in *Gauvreau* v. *Pagé* and in *Lord* v. *La Ville de Saint-Jean* basically resulted from his disapproval of the Privy Council's judgment in *De la Chevrotière* v. *La Cité de Montréal*,[25] a judgment which was then binding upon the Supreme Court, and which clearly decided in favour of the applicability of common law dedication in Quebec. It is most unfortunate that no other studies of this problem were conducted by other members of the Supreme Court in the *Lord* and *Pagé* decisions. In fact, Mignault, J., actually refused to deal specifically with this problem in the *Pagé* case,[26] but a complete reading of his notes can only lead one to conclude that he saw the principle of dedication as being an integral part of the civil law of Quebec. Finally, in his dissenting opinion in the *Lord* decision, Duff, J., stated abruptly and without setting forth any reasons:

> I have not been able to convince myself that the principle of dedication as understood in common law is a part of the law of Quebec.[27]

The preceding analysis of the three Supreme Court decisions of *Harvey* v. *Dominion Textile*, *Gauvreau* v. *Pagé*, and *Lord* v. *La Ville de Saint-Jean* reveals that the weight of authority favours the opinion that common law dedication forms a part of Quebec law. Only Brodeur and Duff, JJ., have categorically held the contrary view.

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[23] *Ibid.*, at p. 190.
[24] *Supra*, n. 8, at pp. 541-542.
[25] (1886), 12 A.C. 149.
[26] *Supra*, n. 21, at p. 199.
[27] *Lord* v. *La Ville de Saint-Jean*, *supra*, n. 24, at p. 536.

Although it is true that the judges maintaining the applicability of dedication in Quebec may not have based their decisions upon flawless reasoning, it is submitted that until a Supreme Court judgment specifically reversing their stand is rendered, dedication will operate in Quebec as a matter of law. Meanwhile, property owners would be most unwise to act as if the doctrine of dedication did not apply, and not to take measures to prevent the untramelled use of their property by the public.

The burden of proving that in a particular fact situation dedication has occurred will lie upon the party which claims the dedication. Laurent expressed this rule in the following manner:

> Il faut que la commune prouve que le chemin est public. Le fait que les habitants ont passé par le chemin ne suffit pas pour qu'il soit public, puisque le passage peut n'être qu'un passage de servitude, c'est-à-dire de tolérance.[28]

The notes of Mr. Justice Anglin in the *Harvey* case further illustrate the difficulty of proving dedication.

> Long continued user by the public is only evidence of the intention to dedicate. Its value depends on the circumstances... Abandonment or dedication to the public will not be lightly presumed.
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> Viewed most favourably to the defendant, the facts here in evidence are as consistent with an intention not to dedicate as with an intention to dedicate: and that will not suffice.[29]

It would therefore appear that dedication will only operate where a proprietor has committed certain unequivocal acts displaying, or deemed to display, his intention to cede his property.[30] Merely permitting or tolerating the public to pass over a private approach to a store or residence will not in itself constitute such an unequivocal act.[31] The party alleging dedication will have to prove it by some positive evidence where the facts do not give rise to presumptions which fulfill the requirements of being "graves, précises, et concordantes".[32] The proof that there is heavy traffic upon the land will not in itself create a presumption favouring dedication.[33] However,

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[28] Laurent, F., *Principes de Droit civil*, 5th ed., vol. 8, No. 218, p. 269.

[29] *Harvey* v. *Dominion Textile Co.*, *supra*, n. 19, at p. 525.

[30] *La Cité de Montréal* v. *Kerry*, (1920), 29 B.R. 242.

[31] *Harvey* v. *Dominion Textile Co.*, (1917-19), 59 S.C.R. 508, (1916), 25 B.R. 294; *Gauvreau* v. *Pagé*, (1920), 60 S.C.R. 181; *The Corporation of the Township of Onslow* v. *McGough*, (1906), 30 C.S. 256; *Walsh* v. *La Corporation de Cascapediac*, (1898), 7 B.R. 290.

[32] An example of the rigid evidentiary requirements appears in *Corporation of Saint-Martin* v. *Cantin*, (1879), 2 L.N. 14.

[33] *Alain* v. *Cité de Lévis*, (1930), 68 C.S. 314; *Kearns* v. *The Corporation of the Township of Low*, (1923), 35 B.R. 54; *Grenier* v. *La Corporation de Saint-Elzéar*, [1953] C.S. 11.

if the owner of the land has maintained it and a public authority has not undertaken that task at the time when dedication is alleged to have occurred, then the party invoking dedication will be permitted to prove that the owner had the intention to dedicate.[34]

Although the common law rules of dedication have required that the owner have a voluntary intention to dedicate, certain Quebec jurisprudence has held property to be dedicated where a by-law or homologated line prevented a person from completely using his land or enclosing it. In *Piette* v. *St. Maurice Light and Power Company*,[35] it was held that the owner of a lot who built a sidewalk when so obliged by a municipal by-law was presumed to have accepted the line between the sidewalk and his land as being the line between his land and the public road. The public was held to have been justified in considering the sidewalk as a part of the road, and the owner was presumed to have abandoned a strip of land separating the sidewalk and the road by dedication.

Since dedication is a gratuitous disposition of property, it was held at common law that the rules pertaining to gifts and alienations generally would apply. For example, the law would not support a claim that dedication had occurred where the purported "dedicator" had no power to alienate.[36] At the time of the alleged dedication, the "dedicator" had to be the absolute owner, in fact and in law, of the land, and some decisions went so far as to dismiss an action to have property declared to have been dedicated where the owner had granted another a real right in his property.[37]

The "offer" made by an owner to the public, either by declaring his intention to dedicate or by opening the land to public use, will have to be "accepted" during the lifetime of the proprietor.[38] The jurisprudence indicates that the existence or non-existence of dedication will be a consideration of fact, to be determined in the ordinary manner from the circumstances viewed as a whole.[39] Thus, although one of the main requirements of dedication is that the public be given

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[34] *Bélanger* v. *La Corporation de la Paroisse de Saint-Thuribe*, (1920), 57 C.S. 193, (1920), 58 C.S. 1 (Ct. of Rev.); *Grenier* v. *La Corporation de Saint-Elzéar*, [1953] C.S. 11.

[35] (1907), 13 R. de J. 237, also applied in *Ville de Jacques-Cartier* v. *Lamarre*, [1959] B.R. 175.

[36] *C.P.R.* v. *The City of Vancouver*, (1890-93), 2 B.C. 306.

[37] *Fitzgibbon* v. *The Corporation of the City of Toronto*, (1865), 25 U.C.Q.B. 137.

[38] *La Cité de Montréal* v. *O'Flaherty*, (1916), 49 C.S. 521.

[39] *Geoffrion* v. *Montreal Park and Island Railroad Co.*, (1901), 20 C.S. 559; *Scalan* v. *La Cité de Montréal*, (1900), 17 C.S. 363.

unrestricted use of the land,[40] the courts will not support the contention that public user by itself creates a presumption of the owner's *animus dedicandi*.[41] Frequently the courts will clearly rationalize that the facts indicate a public user which was merely casual and desultory, even though it would appear on the whole that dedication had in fact occurred.[42] Dedication will be deemed not to have taken place where the testimony of members of the general public sufficiently reveals that it was common knowledge that the land was private property.[43] It is submitted that these examples of the reluctance of courts to permit the easy proof of dedication serve as an important safeguard of private rights. Were it not for these rules, it would be possible for the public to make a strong argument in favour of dedication of land where cars are freely parked for unlimited lengths of time by anyone so desiring, or where vacationers stop at certain roadside areas for picnic lunches or to camp because those particular locations just happen to be pleasant spots.

Statutes dealing with municipal corporations frequently provide that the city may accept the land which is gratuitously ceded to it; for example, Article 957 of the *Charter of the City of Montreal* states:

> The City is authorized to accept the gratuitous cession of any land required for the opening or widening of a street or lane.

In *De la Chevrotière* v. *La Cité de Montréal*,[44] a decision rendered by the Privy Council before the enactment of what is now Article 957 of the *Charter of the City of Montreal*, Lord Fitzgerald discussed the question relating to which public body could accept the dedication:

> The Canadian law agrees rather with the law of Scotland, which is founded on civil law, namely, that when a street or road becomes a public highway the soil of the road is vested in the Crown if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then it is in that corporate body in trust for the public use.[45]

Although the foregoing dictum confuses Quebec and Canadian law, it would appear that it pronounces the law on the problem of which

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[40] *Plante* v. *La Corporation de Princeville*, (1919), 55 C.S. 210; *La Corporation de Cartierville* v. *Jasmin*, (1920), 58 C.S. 490; *Nolin* v. *Gosselin*, (1915), 24 B.R. 289; *Corporation de Saint-Pierre* v. *Corporation de Notre-Dame-du-Lac*, (1933), 71 C.S. 302.

[41] *La Cie des Chars Urbains de Montréal* v. *Les Commissaires du Havre de Montréal*, (1915), 24 B.R. 503.

[42] See for example, *Corporation du Canton de Stanstead* v. *MacPherson*, [1949] B.R. 449, at p. 452.

[43] *Harvey* v. *Dominion Textile Co.*, (1917-19), 59 S.C.R. 508; *La Municipalité de la Paroisse de Saint-Hubert* v. *David*, (1919), R.L. n.s. 413; *Alain* v. *Cité de Lévis*, (1930), 68 C.S. 314; *Cantin* v. *Martineau*, [1960] C.S. 154.

[44] *Supra*, n. 25.

[45] *Ibid.*, at p. 159.

body is deemed to accept on behalf of the public those lands which have been dedicated, no other decision relating to this problem having been rendered. However, regardless of which corporate entity will be said to have accepted the dedication, no formal means of acceptance will be required and free use of the property by the public will constitute sufficient acceptance.[46]

There will be a problem concerning the applicability of the common law rules of dedication where statutes setting forth particular enactments regulating the express or implied cession of land by its owner to the public are in effect. Examples of this type of statutory provision are to be found in the *Charter of the City of Montreal,*[47] and in the *Cities and Towns Act.*[48] When will the statute prevent the operation of common law dedication? At common law the failure of a public authority to fully comply with the statutory requirements for dedication did not preclude that authority from contending successfully that the common law rules had operated and hence the land was then public. It was, therefore, held that unless the very terms of the statute excluded the common law rules, then those rules continued to apply and the statute merely created an alternate method of bringing private property into the public domain.[49] No Quebec decision has specifically dealt with the foregoing question, but it is submitted that Quebec courts, if faced with the problem of reconciling common law dedication and statutory dedication, would follow the reasoning of the common law jurists, the rules of statutory interpretation of Quebec law being similar to those of the common law. One may, therefore, conclude that common law dedication will not apply only where it is expressly excluded, or where by necessary implication it can be shown that the enactment of the statute was intended to operate as a complete replacement of the common law rules.

Where a party invokes dedication by reason of some statute, then a court will rule that statutory dedication has occurred only where each and every formality of the statute has been observed. The slightest deviation from the requirements of the invoked legislation will cause the absolute nullity of the dedication.[50] However, it is submitted that a null statutory dedication should not preclude the

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[46] *Childs* v. *La Cité de Montréal,* (1890), 13 L.N. 355.

[47] *Supra,* n. 3.

[48] *Supra,* n. 4.

[49] A similar view was taken by the Court in: *Pedlow* v. *The Corporation of the Town of Renfrew,* (1900), 31 O.R. 499. American decisions also support this position, as seen in: *Smith* v. *City of Hollister,* (1958), 238 S.W. 2d. 457.

[50] *Williams* v. *The City of Montreal,* (1921), 59 C.S. 354.

court from ruling that the dedication is valid by the common law rules, if those rules continue to operate.

There are numerous practical consequences which arise from the admissibility of the doctrine of dedication into Quebec law. For example, if a person were to fall because of icy pavement and then sue the supposed owner of the land for a large sum, the owner who is insufficiently insured could try to escape liability on the grounds that he was not the proprietor of the pathway, the road being a public passage to which he had lost title by public dedication and whose maintenance was the responsibility of the municipality. A second possible situation exists where a person parks his car on a lot, only to find that it has been damaged by ice which has fallen from the roof of a neighbouring building. The owner of the car will be unable to recover if he had been at fault by trespassing upon the land, and had parked there without permission, but he may attempt to show that he had parked on a lot which had become public property by the rules of dedication, and that he therefore had a right to be present thereon.[51] Finally, one who has a paved strip in front of his building may be unable to claim indemnification from a government authority which decides to widen a road, and then incorporates that paved strip or the land on which it is situated into the new road. The government may be able to successfully contend that the owner had had the intention to dedicate that strip, and that the public had used it. The public authority may have little difficulty in showing that the presence of that strip was not necessary for the conducting of the commercial activities of the building, or to serve as an approach to the building, and hence the pavement had been built solely to benefit the public. Thus, the public authority will attempt to reduce expropriation costs by a careful reliance on the doctrine of dedication. This is not a far-fetched possibility: expropriation costs have become so prohibitive that government will soon find itself compelled to seek opportunities to obtain land gratuitously, or to build arguments which force proprietors to settle for inadequate compensation for their land, rather than engage in lengthy litigation and risk a complete loss of their case.

Proprietors should not rely upon the fact that in the past the courts have been loath to freely apply the doctrine of dedication; the law is presently being interpreted by judges who are becoming more and more concerned with the public need, and are less bent upon protecting the rights of a few individual proprietors. As has been demonstrated, the decision that dedication has occurred is pri-

[51] *Bouliane* v. *Le Séminaire de Québec*, [1960] C.S. 167.

marily the result of an evaluation of facts; therefore, the personal biases of a judge are apt to have a greater influence upon the result of the litigation then if that result was to be derived from a strict application of absolute, clear, and unequivocal principles of law. It is easier to appeal a judgment which misinterprets or misapplies law than it is to appeal a ruling on pure questions of fact, these matters of fact being generally left to the appreciation of the lower court judge. Since the acts of the proprietor constitute one of the determining factors in establishing the intention to dedicate, the proprietor should periodically interrupt public use of his land in order to display his lack of *animus dedicandi*. He should also erect signs and take such other measures as are necessary or appropriate to inform the public that they are on private property. He should indicate that he is merely tolerating the presence of the public, and where possible, as in the case of shopping-centre parking lots, the owner should close the facilities to the public during non-business hours. The foregoing measures, it is submitted, will serve to protect the title of the owner from loss due to the effect of public dedication, regardless of the period of time the public has used the property, because the owner has committed acts which are unequivocally indicative of his intention to retain his private rights.[52]

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[52] This principle is illustrated in: *McGinnis* v. *Létourneau*, (1891), M.L.R. 7 C.S. 278.

* B.C.L. (McGill).