CITATION: St. Lawrence Neighbourhood Association v. Ontario (Minister of Government and Consumer Services), 2021 ONSC 762
DIVISIONAL COURT FILE NO.: 039/21
DATE: 20210129

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: ST. LAWRENCE NEIGHBOURHOOD ASSOCIATION, Applicant

AND:

ONTARIO)MINISTER OF GOVERNMENT AND CONSUMER SERVICES) et al., Respondents

BEFORE: D.L. Corbett J.

HEARD: By videoconference on January 27, 2021

COUNSEL: *Lianne Armstrong and Brandon Duewel*, for the Applicant

Marina Sampson, Meredith Bacal and Henry Machum, for Infrastructure Ontario

Darrel Kloeze, Joanna Chan and Mariam Gagi, for Ontario

Rodney Gill and Jared Wehrle, for City of Toronto

ENDORSEMENT

[1] This endorsement sets out my decision on an urgent motion brought by the applicant to stop demolition of four industrial buildings with heritage designations under the Ontario *Heritage Act* and which are listed on City of Toronto's registry of heritage properties. It also sets out scheduling directions for return of this application before a panel of three judges of the Divisional Court for argument of the application on the merits in late February 2021.

[2] For the reasons that follow, the motion is granted and an order shall issue pursuant to s.4 of the *Judicial Review Procedure Act* in the nature of an order of prohibition to prevent destruction or alteration of any heritage features of the heritage buildings pending final determination of this application or other court order.

Reasons

[3] On the record before me, a respondent or someone acting on a respondent's behalf has made serious mistakes here. It appears clear that the demolition began in contravention of the

Heritage Act, and in breach of Ontario's obligations under a subdivision agreement between Ontario and the City of Toronto.

[4] It is neither necessary nor desirable for me to undertake a detailed review of the merits of the application at this stage: three of my colleagues will do this on a complete record in less than four weeks. On the record before me:

a. The buildings are protected as heritage buildings pursuant to the Ontario *Heritage Act*.

b. In respect to the buildings at issue in this proceeding, the *Heritage Act* binds the Crown by its terms. That is, the Legislature, in its wisdom, has decided that Ontario is required to comply with the *Heritage Act* in these circumstances.

c. The *Heritage Act* requires, among other things, that a Heritage Assessment Report be obtained addressing heritage issues before these buildings can be demolished.

d. The *Heritage Act* also requires "public engagement" before demolishing these buildings.

e. Ontario and Toronto have entered into a subdivision agreement that covers the lands on which these buildings are located. In that agreement, Ontario agreed not to demolish heritage buildings in the area covered by the agreement (which includes these buildings) without first providing a Heritage Assessment Report to the Heritage Building Manager of the City, a Report that "satisfies" her.

f. Infrastructure Ontario did obtain a document that it calls a "Heritage Assessment Report" written by one if its employees. This Report was apparently completed in late 2020. It appears that it was not shown to anyone outside Infrastructure Ontario prior to mobilization of workers and equipment to demolish the heritage buildings. It was not sent to the Heritage Building Manager of the City before demolition commenced, in violation of the subdivision agreement.

g. Infrastructure Ontario decided to demolish the heritage buildings without first providing a Heritage Assessment Report to Toronto in accordance with the subdivision agreement, did not disclose publicly its intention to demolish the buildings, did not disclose publicly the Heritage Assessment Report written by one of its employees, and did not undertake any "public engagement" respecting demolition of the buildings.

[5] In the result, work crews showed up at the site and started to set up and begin work on the demolition, much to the surprise and consternation of City officials and some community members. After an initial flurry in the Superior Court last week, this case was directed to the Divisional Court on Monday January 25th. This motion was heard two days later. I reserved my

decision and advised I would deliver a "bottom line" decision today (Friday January 29th), even if I did not have time to provide reasons for my decision today.

[6] The Minister agreed to suspend demolition activities last week until the motion on January 27th and then, when advised that I would need a further two days to render a decision, the Minister voluntarily agreed to extend the suspension of demolition work until today.

[7] The circumstances, as summarized above, lead me to conclude, on the record before me, that someone responsible for the process leading to a decision to demolish the buildings simply forgot or overlooked the requirements that must be followed for heritage buildings. The record before me did not make it clear how this mistake was made.

[8] At this stage it seems more likely to me that these events happened by mistake rather than by decision-makers deliberately flouting the *Heritage Act* and Ontario's contractual obligations. However, these matters have now come to light. I am satisfied that it would be to flout the law to carry on with the demolition of these buildings until the matter is laid before a panel of my colleagues in late February.

[9] As discussed during the course of the hearing, the precise form of the order should be settled between counsel, if possible. Also as discussed during the hearing, there shall be no order for costs of this motion, but costs of preparing materials and doing research used on the underlying application may be addressed as part of the costs of the application.

Other Issues on the Motion

[10] I am not going to address every detail of the arguments made before me. I do note the following:

a. I heard argument on the proper test for granting interim relief against the respondents. I do not find it necessary to review and analyse that law in detail because I am satisfied that on the basis of the high test suggested by Ontario, an interim order ought to issue pursuant to s.4 of the *JRPA*. I am satisfied that it would be to flout the law for the demolition to proceed pending determination of this application, and despite the additional costs that may result from delays in demolition (if the demolition is permitted to proceed after the application is decided), these costs arise from what appears to me to be mistakes made by respondents. It is clear that there will be irreparable harm if the buildings are demolished before the application is heard. Taking everything into account, including the high test on the merits to order interim relief against the respondents, I am satisfied that the balance of convenience weighs in favour of granting the requested relief.

b. For the purposes of this motion, I am satisfied that the applicant is a public interest litigant. Had it not been for the swift action of this group, there is every chance that these buildings would have been destroyed before legal proceedings were brought

to identify the issues that will be decided in this application. Governments do not have a monopoly on the public interest, as this case demonstrates. I do not decide this issue on a final basis, and it may be pursued at the return of the application, but on the materials before me it does not appear to be a real concern in this case.

c. I accept that the applicant does not have standing to enforce the subdivision agreement between the City and Ontario. However, the fact that it appears that Ontario breached that agreement may be considered in assessing the overall facts before this court. That fact strongly reinforces my view that, likely by mistake, respondents failed to follow the requirements that have to be met before respondents can demolish these buildings because of the heritage designations.

d. I do not accept that rezoning of these properties in 2020 and application for a permit from Toronto's Transportation Department demonstrates compliance with heritage buildings requirements. This argument is as if to say "because we did not do everything wrong, we did nothing wrong".

e. I say nothing about the merits of the underlying decision to demolish the heritage buildings. The substance of the decision is not something for the court to decide. The issue on this application is not whether the buildings should be demolished, whether they should be preserved, or what use should be made of these lands. The issue is whether the processes that must be followed in reaching and then implementing decisions on these issues were followed, and if they were not, what should be done about that now.

f. Respondents have adduced evidence that interruption of the schedule for demolition could result in substantial additional costs for respondents. These are material facts weighing on the consideration of the balance of convenience. From the evidence before me, the case on the merits is so strong that these additional costs are a consequence of the mistakes that appear to have been made. I see no unfairness of the costs of those mistakes being borne by respondents. The court has sought to minimize those costs by expediting the hearing of the underlying application to an early date shortly after the parties complete their exchange of materials.

g. I acknowledge a factual dispute as to whether the Report prepared by Infrastructure Ontario complies with Ontario's guidelines for Heritage Assessment Reports. It is clear that this Report should have been provided to Toronto before demolition began (it was not delivered until six days after demolition began, in response to objections from the City) , and the requirement that the Report be to the satisfaction of Toronto personnel implies that the Report be provided sufficiently in advance of a decision to demolish to enable the City to determine whether it is "satisfied", and, if not, to sort out with Ontario what to do about that. I find that Toronto's substantive objections to the Report appear to have some merit – that is – there is a

sustained principled explanation for these objections. It will be for the panel hearing the application to delve into this issue further, to the extent that it is material to the panel's decision.

h. I will not require the applicant to give an undertaking for damages. Such an undertaking is generally the "price" of an injunction in private law disputes between private parties, but it occupies a different position in public law disputes. If Ontario had complied with the subdivision agreement, then the primary antagonist with Ontario in this case would likely be the City, and, indeed, there might be no basis for the applicant to have standing to bring this case to court. The City needed until next Tuesday to obtain instructions from City Council to pursue this matter, and Ontario was not prepared to stand down demolition and delay matters until those instructions could be obtained. In all of these circumstances, I will not order that the applicant be exposed to financial hazard by way of an undertaking as to damages.

[11] I commend counsel for preparing helpful materials for the court in short order and their assistance during oral argument.

[12] On another point, Ontario notes that the Minister of Government and Consumer Services is responsible for the lands in issue. The title of proceedings is ordered amended accordingly.

Case Management Directions

[13] As stated during the hearing, the parties shall follow this schedule:

a. Responding materials shall be served by February 8, 2021.

b. Reply materials shall be served by February 12, 2021.

c. If cross examinations are required they shall be scheduled on February 15, 2021.

d. Factums shall be served by February 19, 2021.

e. All materials (including costs materials and counsel sheets) shall be uploaded to CaseLines by February 19, 2021.

f. The application shall be heard by a panel of three judges of the Divisional Court on February 26, 2021, for an estimated 1.0 day. The hearing shall be streamed by Youtube.

[14] If there are any procedural issues that arise before the hearing, the parties may seek further directions from me

D.L. Corbett J.

Date: January 29, 2021