Court File No. C68033

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

TWO SISTERS RESORTS CORP. and **SOLMAR (NIAGARA 2) INC.**

Applicants
(Appellants)

- and -

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE and **SORE ASSOCIATION**

Respondents
(Respondents in Appeal)

FACTUM OF THE RESPONDENT, SORE ASSOCIATION

July 13, 2020

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PART I. OVERVIEW

1. This is an appeal from an order dismissing an application to quash a by-law and resolution authorizing the issuance of four notices of intention to designate (**"NOIDs"**) under the *Ontario Heritage Act* the (**"*OHA*"**) concerning a historic estate in the Town of Niagara-on-the-Lake (the **"Town"**) known as the Rand Estate.[1]

2. The NOIDs were issued by the Town in the face of a significant development proposal made by the Appellants. The proposed heritage designation is but one aspect of the proposed development. The Appellants will need to obtain other approvals, in particular under the *Planning Act*, before being able to proceed with the proposed development. It is anticipated that many months, and potentially years, will elapse before all required approvals are obtained.

3. NOIDs have a specific role in a carefully-crafted statutory scheme. They are a precursor to a heritage designation by a municipality under the *OHA*; they are not designations themselves. The properties are not yet designated. The NOIDs trigger a process which includes the right of the affected property owner to a hearing before the Conservation Review Board (the **"CRB"**) concerning the merits of the proposed designation. At the conclusion of that statutory process, the municipality may or may not choose to proceed with a designation as contemplated by the NOID.

4. The Appellants have exercised their right to require a hearing by the CRB but it has not occurred yet. Rather than await the outcome of that process, the Appellants have chosen to commence this application, alleging that the by-laws authorizing the NOIDs are "illegal." This is the first known case under Ontario law in which a property owner has applied to quash a by-law authorizing a NOID instead of first participating in the statutory process and then applying to

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[1] R.S.O. 1990, c. O.18.

quash the designation bylaw itself.

5. The Appellants advanced three grounds of illegality in the Court below. The application judge rejected all three alleged grounds of illegality. She also concluded that the application was premature. The Appellants have abandoned two of their three grounds. They now assert only that the NOIDs are impermissibly vague. The application judge properly rejected this submission on the extensive evidence before her, and there is no question of law identified on appeal. The Appellants' own heritage expert has already interpreted and applied the heritage attributes which are now said to be too vague to understand. Moreover, the same expert conceded in cross-examination that the test for vagueness is not met. This appeal should be dismissed with costs.

PART II. SUMMARY OF FACTS

A. Background

6. This matter concerns four parcels of land in the Town known collectively as the Rand Estate: 144, 176, and 200 John Street East and 588 Charlotte Street.

7. The respondent SORE Association (**"SORE"**) is a federally-incorporated community organization whose sole corporate purpose is to advocate for the responsible care, maintenance, use and development of the Rand Estate.

8. The Appellants are two corporations owned by the same real estate developer. They bought the Rand Estate in 2017 and 2018 and now wish to redevelop it by adding a hotel, conference centre, a residential subdivision, and other amenities.

B. The Rand Estate and its heritage significance

9. It is undisputed that the Rand Estate is a heritage site worthy of protection under the *OHA*. In 1796, the properties were granted by the Crown to the Honourable Peter Russell, then

the Administrator for Upper Canada.[2] Sir Russell subsequently sold the properties to William Dickson, a member of the Legislative Council of Upper Canada. The properties stayed in the Dickson family for multiple generations throughout the 19th century.[3]

10. In 1905, the properties were acquired by George Rand I, a prominent American banker and philanthropist. Rand and his son, George Rand II, were chiefly responsible for the lasting cultural heritage landscape which would be developed on the site. They and their family expanded the existing houses on the site, added additional stables, milkhouses, a pool pavilion and other outbuildings, and they built a brick and stone wall themselves spanning the entire perimeter of the properties.[4]

11. The Rands also engaged the prominent landscape architecture firm known as Dunington-Grubb to develop an elaborate landscape plan for the properties.[5] Howard and Lorrie Dunington-Grubb, the married couple who led the firm, were well-known for founding Sheridan Nurseries and for their numerous other award-winning projects around Ontario.[6] A 2019 decision of the Local Planning Appeal Tribunal (**"LPAT"**) described Mr. Dunington-Grubb as "the father of landscape architecture in Canada" and noted that "few Dunington-Grubb residential gardens survive".[7]

12. Dunington-Grubb impressed their signature design on the Rand Estate grounds using a wide variety of tools and techniques, including landscaped gardens, trees, bridges, and

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[2] Heritage Impact Assessment Report prepared by Leah Wallace, p. 21 ("**Initial Wallace HIA**"), Compendium of the Respondent, SORE Association, tab 9 ("**Respondent's Compendium**").

[3] Initial Wallace HIA, pp. 22-24, Respondent's Compendium, tab 9.

[4] Initial Wallace HIA, pp. 24-25, Respondent's Compendium, tab 9.

[5] Cultural Heritage Evaluation Report prepared by Letourneau Heritage Consulting Inc., p. 37 ("**CHER**"), Respondent's Compendium, tab 11.

[6] CHER, pp. 37-38, Respondent's Compendium, tab 11.

[7] *Dale Inc. and Dale II Inc. v. Toronto (City)*, 2019 CanLII 62124 at para. 136 (ON LPAT).

pathways.[8] One of the hallmarks of the Dunington-Grubb design was their use of strong axial garden lines, which remain visible today. One recent analysis by heritage consultants stated as follows regarding the Rand Estate:

> The central axis of the garden is the most important feature of the landscape; the view from the gate is almost a personification of Randwood, and is a recognizable image of the property within the community of Niagara-on-the-Lake. The design of the axis was indubitably designed by the Dunington-Grubb firm and remains intact and consistent with image captured of the front of the garden circa 1924 […] While the living landscape material has been altered, the intent of the design still remains and the material used on the bridges, stairs and pond are untouched in their original design form.[9]

13. Other recent analyses of the properties confirm that despite some changes over the years, many features of the original Rand Estate have been preserved. This includes many of the main buildings and structures on site, and also key features of the Dunington-Grubb landscape. For example, their "circulation patterns" (groupings of plantings and open spaces which connected clusters of buildings) remain "purposeful and present,"[10] and the pathways and circulation route which connected the carriage and guest house to the original stable remain visible; "these pathways are lined with mature trees and defined by the adjacent open fields."[11]

14. Historical photographs show that the properties have always possessed a large tree canopy.[12] In 2017, landscape architect John Morley conducted a tree preservation plan and survey of the site. He identified 303 mature trees and assessed their health. He wrote:

> Randwood is by far the most outstanding estate property in Niagara. The site is characterized by a unique and botanically interesting collection of plant material as well as a tasteful amalgamation of eclectic design elements. […] The majority of the trees assessed on the site were initially planted under the supervision of Dunington-Grubb. Since the initial landscape development of Randwood, it does not appear that many desirable native or exotic tree species have been planted in the interim period.[13]

15. Other recent analyses identified "a number of exquisite specimens of Flowering

[8] CHER, p. 38, Respondent's Compendium, tab 11.

[9] EcoPlan Ltd. and Nexus Architects, 2010, as cited in CHER, p. 65, Respondent's Compendium, tab 11.

[10] CHER, p. 57, Respondent's Compendium, tab 11.

[11] CHER, p. 47, Respondent's Compendium, tab 11.

[12] CHER, p. 58, Respondent's Compendium, tab 11.

[13] Morley & Associates, 2017, as cited in CHER, p. 58, Respondent's Compendium, tab 11.

Dogwood" trees on the 144 John Street property,[14] and indicated that "many of these original tree lined pathways [on the properties] are now clearly defined with large mature trees."[15] The Appellants' heritage conservation expert, Leah Wallace, has also noted the heritage significance of the mature trees on the properties: in her view, the "significant components of the Rand Estate cultural heritage landscape" include the "evolving picturesque landscape with its mature trees and plantings, One Mile Creek" and "the boxwood hedge."[16]

C. The scheme of the OHA and the function of a NOID

16. The NOIDs at issue were made under Part IV of the *OHA*, which provides for the designation by municipalities of properties with cultural heritage attributes.

(a) The two prerequisites for designation: subsection 29(1)

17. The municipal designating power is found in subsection 29(1).[17] This power is subject to two statutory prerequisites, one substantive and the other procedural:[18]

> **29** (1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,
>
> (a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
>
> (b) the designation is made in accordance with the process set out in this section.

18. The criteria contemplated by s. 29(1)(a) are prescribed by Regulation 9/06 made under the *OHA*. There are three broad primary criteria relating to the design, historical, and contextual value of the property.[19]

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[14] CHER, p. 62, Respondent's Compendium, tab 11.
[15] CHER, p. 57, Respondent's Compendium, tab 11.
[16] Initial Wallace HIA, p. 34, Respondent's Compendium, Tab 9.
[17] The Minister also has the power to designate under Part IV: see *OHA* s. 34.5.
[18] The Appellants do not assert that the NOIDs here do not conform with the s. 29(1) requirements.
[19] The entire text of Regulation 9/06 is appended in Schedule B hereto.

(b) The designation process: section 29(1)(b)

19. The first procedural step in the designation process by a municipality is the issuance of a NOID.[20] A NOID must contain certain information prescribed by the *OHA*: the cultural heritage value or interest of the property, a description of the heritage attributes of the property, and certain other minor details. There are specific, limited statutory prerequisites to the issuance of a NOID pertaining to consultation with certain municipal committees, service and publication, and specified content in the NOID itself.[21]

20. Once a NOID is served, interested parties have a right to file an objection.[22] If an objection is filed, the matter must be referred to the CRB for a hearing "to determine whether the property in question should be designated."[23] The Appellants exercised this right in September, 2018, some four months before deciding to commence this application.

21. At a CRB hearing, there are no limits imposed on the types of evidence and issues the CRB may consider. In addition to finding that a property should or should not be designated, the CRB can make findings that certain heritage attributes set out in the NOID at issue should be clarified or refined, or that only some of the heritage attributes are appropriate.[24]

22. The uncontradicted evidence in this case is that heritage attributes set out in NOIDs can be clarified or refined between the issuance of the NOID and the passage of a designation by-law by a municipality, whether it be through the CRB process or through direct engagement between

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[20] *OHA*, s. 29(1.1).
[21] *OHA*, s. 29(2)-(4).
[22] *OHA*, s. 29(5).
[23] *OHA*, s. 29(8).
[24] See Transcript of the cross-examination of Leah Wallace held September 6, 2019 (**"Wallace Cross"**), p. 44, q. 222-23 and p. 74, q. 381, Respondent's Compendium, tab 5.

a property owner and a municipality.[25] SORE's expert heritage conservation witness, Michael McClelland, provided a number of examples of this occurring in his experience.

23. After its hearing, the CRB is required to deliver its findings to Council. Council may then either designate the property based on whatever heritage attributes it believes appropriate, or withdraw the NOID.[26]

24. A designation of the property can only occur "by by-law."[27] This requirement ensures that once a property is designated, the property owner will always have the available remedy of section 273 of the *Municipal Act, 2001*, which empowers a Court to quash any municipal by-law in whole or part on the basis of illegality.[28]

(c) Effect of designation: sections 33-34

25. Properties designated under section 29 are subject to two key restrictions: municipal consent is required for demolitions or removals of any structures on the property,[29] and for any alteration which are "likely to affect the property's heritage attributes."[30] Pursuant to the "interim control" provisions of s. 30(2), these two restrictions apply to a property once a NOID is issued until the subsequent designation by-law is passed or the NOID is withdrawn.

D. 2009-2011: the original development proposal

26. In 2009-2011, the previous owners of the Rand Estate applied for and obtained the

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[25] Affidavit of Michael McClelland sworn April 12, 2018 (**"McClelland Affidavit"**), Respondent's Compendium, tab 7.

[26] *OHA*, s. 29(7), (12), (14). The Appellants' heritage expert, Leah Wallace, initially opined that heritage attributes set out in a NOID "are not to be changed prior to the passage of the designation by-law": Second Affidavit of Leah Wallace sworn September 3, 2019 (**"Second Wallace Affidavit"**), para. 16(b), Respondent's Compendium, tab 3. She then effectively withdrew this opinion in cross-examination, agreeing that it is an "available outcome" for Council to re-draft a NOID after the CRB process, and that her opinion ought to have been qualified to allow for this possibility: Wallace Cross, pp. 75-76, q. 384-89, Respondent's Compendium, tab 5.

[27] *OHA*, s. 29(1).

[28] *Municipal Act, 2001*, S.O. 2001, c. 25, s. 273(1).

[29] *OHA*, s. 34(1).

[30] *OHA*, s. 33(1).

Official Plan designation and zoning of the properties for the development of a boutique hotel and conference centre on 144 and 176 John Street (the **"Romance Inn"**).[31]

27. However, the proposed development did not proceed and the Appellants instead acquired the Rand Estate properties in 2017 and 2018.

E. 2017-2018: the process and studies leading to the NOIDs

28. In November, 2017, the Appellants filed applications to amend the existing approvals, and for site plan approval for a significantly modified and expanded version of the prior development proposal. In support of these applications, the Appellants prepared and filed certain heritage-related reports.

1. The Initial Wallace HIA

29. The first heritage report of significance is a Heritage Impact Assessment report dated October 30, 2017 with respect to all four of the Rand Estate properties, prepared by Leah Wallace, the Town's planner at the time of the 2009-2011 Romance Inn proposal, now retained by the Appellants (the **"Initial Wallace HIA"**).[32] The Initial Wallace HIA analyzed the heritage significance of all four Rand Estate properties. It set out the following conclusions:

(a) 144 and 176 John St. contain significant built heritage resources and are "a cultural heritage landscape of considerable value" that is "worthy of designation under the *OHA*";[33]

(b) A significant component of that cultural heritage landscape is the "remnants of the designed landscape developed by the landscape architecture firm of Dunington-Grubb";[34]

(c) 200 John Street also contains structures designed by the Dunington-Grubb firm which "are

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[31] First Affidavit of Guiseppe Paolicelli sworn February 14, 2019 (**"First Paolicelli Affidavit"**), Respondent's Compendium, tab 1.

[32] AR vol. 2, tab 3E, Respondent's Compendium, tab 9.

[33] Initial Wallace HIA, p. 436, AR vol. II, tab 3E, Respondent's Compendium, tab 9.

[34] *Ibid*., p. 439.

a significant remnant of the cultural heritage landscape";[35] and

(d) The 588 Charlotte Street property contains a number of buildings and features "which may be cultural heritage resources".[36]

30. The Initial Wallace HIA also contained a set of draft proposed heritage attributes which included "the designed Dunington-Grubb landscape including the walkway, lily pond, sculpture, stone bridges and walls and any remaining shrubs or plantings," and "remnants of the picturesque natural landscape including mature native and specimen trees, plants and shrubs."[37]

2. The Updated Wallace HIA

31. Ms. Wallace prepared an addendum to the Initial Wallace HIA in May, 2018 (the **"Updated Wallace HIA")**. This report responded to questions posed by Town staff regarding the Initial Wallace HIA, and contained further heritage analysis of the properties including a comprehensive analysis of the applicability of Regulation 9/06 to each of the four properties.

32. In this report, Ms. Wallace concluded that each of the four properties are appropriate for heritage designation, and opined that "the design or physical value of the Rand Estate lies mainly in the remnants of the Dunington-Grubb landscape."[38]

33. The Updated Wallace HIA also contains charts setting out the specific heritage attributes which are referable to the "Designed Landscape" of Dunington-Grubb on each property.[39]

34. Although the Updated Wallace HIA was prepared in May, 2018, the Appellants did not disclose it or acknowledge its existence to the Town while the NOID process was underway. It

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[35] *Ibid*., p. 442.
[36] *Ibid.*, p. 442.
[37] Draft Statement of Significance, Appendix V to the Initial Wallace HIA, p. 475, Respondent's Compendium, tab 9 [underlines added].
[38] Updated Wallace HIA, p. 19, Respondent's Compendium, tab 10.
[39] Updated Wallace HIA, pp. 21, 28, Respondent's Compendium, tab 10.

was first disclosed in December, 2018 and even then, it was disclosed only by way of inclusion as an exhibit to an affidavit in a motion record in response to an injunction proceeding in relation to the Appellants' clear-cutting of trees on the Rand Estate. The Appellants never specifically provided the Updated Wallace HIA to the Town through the ordinary channels even though it was directly responsive to the issues raised in a February, 2018 staff report.

35. The Appellants also did not mention or attach the Updated Wallace HIA in their application record in this proceeding, even though it contains a comprehensive Regulation 9/06 analysis. One of the main grounds advanced in this application (which is not pursued on appeal) was an alleged absence of sufficient analysis under Regulation 9/06 at the time the NOIDs were issued. The existence of the Updated Wallace HIA was mentioned in passing in the Appellants' reply evidence in the court below. The report itself was only produced for the first time in this application in the Appellants' answers to undertakings.

F. The NOIDs

36. On August 13, 2018, the Town passed a resolution and by-law which authorized the issuance of NOIDs in respect of each of the four Rand Estate Properties (together, the **"Impugned Instruments"**). Each NOID specifies a list of heritage attributes which are protected under the *OHA*, such as "the long central axis from John Street East," "the red brick pillars which mark the entrance [of 144 John Street]," and "the Coach House: one and half storey massing; the steep gable roof with decorative bargeboard trim; and the early windows on the ground floor north elevation and the first and second floor east elevation and south elevations."

37. Only three heritage attributes in the NOIDs remain subject to challenge by the Appellants in this appeal on the basis that they are impermissibly vague:

(a) "The surviving elements of the Dunington-Grubb landscape" (144, 176, and 200

John Street);

(b) "The mature trees and plantings" (144 John Street); and

(c) The use of the word "including" in the following phrase: "The surviving elements of the Dunington-Grubb landscape including the formal stone path, sunken lily pond with sculpture, arched stone bridges" (176 John Street).

38. Notably, each of these three attributes is virtually identical to the heritage attributes proposed in Ms. Wallace's HIAs, despite the Appellants' claim in this litigation that the attributes are too vague to be understood.

G. Events post-dating the NOIDs

1. No attempt to use available mechanisms to mitigate alleged prejudice

39. Since the issuance of the NOIDs, the Appellants have not availed themselves of key mechanisms available to them to mitigate the ongoing prejudice they allege:

(a) the Appellants have never applied under ss. 33 or 34 of the *OHA* for permission to alter or remove any heritage feature on the properties,[40] and as of the cross-examinations they had not even consulted their heritage planner on whether such an application would be advisable;[41] and

(b) the Appellants have accepted the CRB's deferral of the hearing of its objections to the NOIDs under s. 29 of the *OHA*,[42] which is the proper forum to hear disputes regarding the scope or content of the NOIDs' heritage attributes, pending the determination of this proceeding. In December, 2019, the CRB convened a pre-hearing conference on its own initiative, and has since set a hearing date for December 2020.

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[40] Cross-Examination of Giuseppe Paolicelli, p. 19, q. 76 ("**Paolicelli Cross**"), Respondent's Compendium, tab 6.
[41] Wallace Cross, p. 104, q. 518, Respondent's Compendium, tab 5.
[42] Paolicelli Answer to Undertaking, #3, Respondent's Compendium, tab 15.

40. Instead, the Appellants first appealed to the CRB in September, 2018 and then waited some four months until January, 2019 to commence this application.

41. The Appellants' decision to pursue this litigation instead of engaging collaboratively with the Town is particularly noteworthy in light of the unchallenged expert evidence in this case that the specific scope, definition, and content of heritage attributes can be refined between the time a NOID is issued and the final designation by-law is passed.[43] There is no reason to think that such a process could not have occurred in this case.

2. The Appellants clear-cut the properties

42. In November, 2018, the Appellants extensively clear-cut the landscape and mature trees on 200 John and 588 Charlotte.[44] This occurred ostensibly on the strength of a tree-cutting permit which had been expired for a year and which was granted for a different purpose.[45] These actions reinforce SORE's belief that it was and is appropriate for the Town to take a robust and proactive approach to fulfilling its mandate under the *OHA* to ensure the proper conservation of the important heritage resources on the Rand Estate.

3. The Appellants' undertaking to the Town

43. In December, 2018, in the context of an application by the Town for an injunction against the Appellants regarding clear-cutting of trees, the Appellants provided an undertaking to the Town "not to alter the properties in such a way that is likely to affect the property's Heritage

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[43] McClelland Affidavit, paras. 44-47, Respondent's Compendium, tab 2; Cross-Examination of Marcus Letourneau, p. 26, q. 104 ("**Letourneau Cross**"), Respondent's Compendium, tab 8. Ms. Wallace also agreed that this is an "available outcome" of the CRB process: Wallace Cross, pp. 75-76, q. 384-88, Respondent's Compendium, tab 5.

[44] Compare the before and after aerial photos at Exhibits A and B, Respondent's Compendium, tab 12, to the Wallace Cross, Respondent's compendium, tab 5.

[45] The permit is Exhibit 1 to the Paolicelli Cross. Its expiry date is November 13, 2017. Paolicelli confirmed that this was the permit relied on by the Appellants in connection with the November 2018 tree-cutting: Paolicelli Cross, p. 39, q. 185-86, Respondent's Compendium, tab 6.

Attributes as set out in the [NOIDs]."[46] In his affidavit in this application, Mr. Paolicelli swore that the undertaking "remains in place, and the [Appellants] intend to honour it."[47]

4. Current status of development process

44. In addition to the heritage conservation matters being heard by this Court and the CRB, the Appellants have also applied for a zoning by-law amendment and site plan approval in respect of 144 and 176 John Street.[48] Those matters were appealed to LPAT. The Appellants withdrew the appeal after the introduction of significant legislative changes to the *Planning Act*, and have since refiled the same appeal. The matter has not yet been heard or decided by LPAT.

H. This application and the Reasons for Decision

45. The Appellants commenced this application in January, 2019, seeking an order quashing the Impugned Instruments under the authority of section 273 of the *Municipal Act, 2001*, which authorizes a Court to quash a municipal by-law on the basis of "illegality."

46. It is undisputed that this application is the first known instance in Ontario law of any person applying to quash a by-law authorizing a NOID for illegality, as opposed to applying to quash a designating bylaw itself following the completion of the CRB hearing and the designation process under the *OHA*.

47. In the Court below, the Appellants alleged three distinct grounds of illegality: vagueness, "non-compliance with the *OHA*" and non-compliance with the official plan amendment applicable to the properties.

48. Each of the Appellants, the Town, and SORE tendered expert evidence about the issues

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[46] Confidential Undertaking from Two Sisters and Solmar to the Town of Niagara-on-the-Lake, Respondent's Compendium, tab 14 ("**Undertaking**").

[47] Paolicelli Reply Affidavit, para. 8(d), Respondent's Compendium, tab 4.

[48] First Paolicelli Affidavit, para. 17, Respondent's Compendium, tab 1.

in the application, including the alleged vagueness of the heritage attributes. The substance of the evidence is summarized in detail below.

49. After a two-day hearing, the application judge, Walters J., released reasons for decision on January 10, 2019 (the **"Reasons"**) in which she dismissed the application in its entirety. The application judge rejected each of the Appellants' three alleged grounds of illegality, and also concluded that the application was premature in the absence of a hearing by the CRB on the merits of the issues raised by the Appellants.

50. The application judge held that even if she found the Impugned Instruments were illegal, she nonetheless would have exercised her discretion to decline to grant a remedy on the facts of the case because of the "comprehensive statutory scheme set out in the *OHA*. The appropriateness of the [NOIDs] can and should be considered using this statutory process, including a hearing by the CRB."[49]

51. The Appellants have now abandoned two of their three grounds and appeal only on the issue of vagueness.

PART III. ISSUES, LAW & ARGUMENT

A. Prematurity: the Appellants had an adequate alternative remedy

52. The application judge afforded appropriate weight to the scheme set out in the *OHA* for the determination of the issues raised by the Appellants. A review of the statutory framework as a whole indicates that the Appellants had available to them an adequate alternative remedy which justified the Court's decision to decline to exercise jurisdiction.

1. The governing authorities

53. The two key authorities on the adequate alternative remedy principle are the Federal

[49] Reasons, paras. 67-68.

Court of Appeal's 2010 decision in *Canada (Border Services Agency) v. CB Powell Limited*[50] (**"*CB Powell*"**) and the Supreme Court of Canada's 2015 decision in *Strickland v. Canada (Attorney General)* (**"*Strickland*"**).[51]

54. In *CB Powell*, Stratas J.A. summarized the law as follows:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point. [...]
>
> [A]bsent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. […] Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted. […]
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway. […] Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience.[52]

55. In *Strickland*, Cromwell J. discussed these legal principles, emphasizing the importance of respect for the design of the applicable statutory framework:

> In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3:2100 (emphasis added [*by Cromwell J.*]).
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> […] Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).

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[50] 2010 FCA 61.

[51] 2015 SCC 37.

[52] *CB Powell* at paras. 30-32 [references omitted].

> This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., Matsqui, at paras. 41-46; Harelkin, at p. 595. David Mullan captured the breadth of the inquiry well:
>
> > While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief. [Emphasis added (*by Cromwell J.*); p. 447.]

2. The application judge's findings

56. The application judge's conclusions are consistent with the above principles. She paid respectful attention to the statutory processes which still remain to unfold, finding as follows:

> [T]here is good policy reason why the court should not intervene at this juncture until such time as the statutory process has been completed. At this juncture we are not aware what, if any, recommendations the CRB will make to council and what, if any, decision council will make after receiving the report. If ultimately the applicants are still unhappy with the decision of council, they will then have recourse to the courts. There are not exceptional circumstances to warrant the court using its discretion to hear this matter now.[53]

57. This analysis is correct. The scheme set out in the *OHA* contemplates that any issues as to the appropriateness of the NOIDs will be considered in the first instance by the CRB, an expert tribunal. As set out in *Strickland*, the question of whether an alternative remedy is adequate "focus[es] on the question of whether the application for relief is appropriately respectful of the statutory framework […] and the normal processes provided by that framework". This is precisely the analysis undertaken by the application judge.

58. Contrary to the Appellants' submissions, the CRB's inability to grant an order quashing the NOIDs does not mean that the Appellants' alternative remedy of participating in the *OHA* process is inadequate. The relevant alternative remedy is not the CRB hearing in isolation, but the entirety of the designation process including the availability of an application to quash the designating bylaw itself, if and when it is passed, in consideration of the CRB's findings. It is no

[53] Reasons for Decision, paras. 48-49.

coincidence that this case is the first time anyone has ever sought to quash a NOID; the Court will be better-positioned to consider whether the heritage attributes for the properties are impermissibly vague once the CRB has provided its expert perspective on the evidence, and once the Town has decided whether to refine the heritage attributes in light of the CRB's recommendations, if and when it passes the designation bylaws.

59. The merit of the application judge's decision to let the statutory process run its course is reinforced by the fact that the nature of the Appellants' vagueness argument in this Court is so intertwined with the issues the CRB will be called upon to consider. The question of whether any of the heritage attributes in the NOIDs should be refined or clarified is squarely within the mandate of the CRB, as the Appellants' heritage expert acknowledged. As Stratas J.A. put it in *CB Powell*, the Courts should wait until the administrative process is completed in order to gain the benefit of the tribunal's findings on the merits of the Appellants' vagueness challenge, which findings will be "suffused with expertise, legitimate policy judgments and valuable regulatory experience."[54] The CRB's findings will be valuable to any court reviewing the Council's ultimate designation, regardless of whether it chooses to accept those findings, or not.

3. Limitations argument raised by the Appellants is meritless

60. The Appellants argue that their application could not have been premature because if they had first gone to the CRB, their limitation period for commencing this application to quash would expire before the CRB process ran its course.[55] The Appellants allege that the application judge committed a "serious legal error" by failing to so find.

61. The Appellants never even put this argument to the application judge. It is raised for the first time on appeal, even though the prematurity issue was fully briefed in the Court below. The

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[54] *CB Powell* at para. 32.

[55] Appellants' Factum, paras. 48-49.

limitations argument should not be entertained in this Court.[56]

62. In any event, the argument is meritless. The Appellants could simply have commenced this application to preserve their limitation period, then held it in abeyance until the end of the CRB process.[57] In fact, the Appellants chose the opposite: they commenced both the CRB appeal and, several months later, this application, well within the timelines prescribed for each, and then advanced the court application while leaving the CRB matter in abeyance. That strategic choice has nothing to do with limitations.

B. Discretionary decision to decline to quash

63. Another preliminary obstacle for the Appellants' is the application judge's discretionary decision to decline to grant judicial review, even if she had found illegality. As set out above, the application judge held that the appropriateness of the NOIDs should be first considered using the ordinary statutory process, including a hearing by the CRB.

64. It is undisputed that the application judge had the authority to decline to quash the bylaws even if she found illegality, and that this authority was discretionary. The grounds for appellate intervention on this issue are therefore very narrow; the Appellants must demonstrate an error in principle or a palpable and overriding error.[58]

65. No such error has been identified. It was open to the application judge to consider the availability of the statutory scheme under the *OHA* in her exercise of discretion. Under the case law cited by the Appellants, one of the factors relevant to the discretion to quash a by-law is "the

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[56] *Kaiman v. Graham*, 2009 ONCA 77 at para. 18.

[57] See e.g. *Hydro One Networks Inc. v. Ontario Energy Board*, order dated April 30, 2019 (unreported, attached as Schedule C to this factum).

[58] See e.g. *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 46 ("As with any exercise of discretion, an appellate court should not interfere unless the trial judge's decision evinces an error in principle or is plainly wrong"); see also *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 at para. 35.

nature of the by-law in question."[59] The application judge appropriately found that in this case, the by-laws in issue represent only the very beginning of a statutory process. Her Honour's emphasis on this factor was consistent with the fundamental public law values described in *Strickland* and *CB Powell*, as set out above.

66. The other issues raised by the Appellants regarding the application judge's exercise of discretion are meritless, especially on such a restrictive standard of review. They baldly assert that the seriousness of the illegality is high and that the consequences of the illegality are "serious and significant." The Appellants made these precise arguments to the application judge, who considered and rejected them.

67. There is no error of principle in the fact that the application judge was not persuaded that the NOIDs' interim control obligations constitute a "serious and significant" illegality. The Appellants have never applied for an alteration permit under the interim control provisions, and the Appellants' proposed development still has not received the zoning and site plan approvals it requires to proceed. The NOIDs have caused no genuine prejudice to the Appellants.

68. Finally, the Appellants suggest that the application judge's decision to decline relief on discretionary grounds may have only been intended to apply to her analysis of one of the grounds not under appeal. This is incorrect. It is apparent from the application judge's reasoning that her exercise of discretion was intended to apply to the entire application, including the vagueness issue. Her conclusion on discretion was framed generally: "the appropriateness of the [NOIDs] can and should be considered using this statutory process, including a hearing by the CRB." This is plainly intended to encompass the vagueness issue; as the application judge expressly recognized elsewhere in her decision, the vagueness issue must be assessed "in light of the

[59] *RSJ Holdings Inc. v. London (City)*, 2007 SCC 29 at para. 39, cited in Appellants' Factum at para. 59.

ability to have those areas of concern discussed and debated at the CRB."[60]

C. Vagueness: no reversible error

1. The standard of review is deferential

69. The Appellants are wrong to propose a correctness standard on the vagueness issue. There was no dispute in the Court below about the applicable legal principles and there is no error of law alleged on appeal. The Court identified and applied the relevant authorities and principles. The Appellants' complaint is with the Court's application of those principles to the language of the NOIDs, in the context of the properties to which they apply. That is a question of mixed fact and law, to which the standard of palpable and overriding error applies.

70. The nature of the impugned language in the NOIDs is critical to appreciating the interpretive task before the application judge. The Appellants' challenge was to descriptions of specific heritage attributes on specific properties. This contrasts with most vagueness cases, which tend to concern challenges to the drafting of laws or bylaws that apply generally to the entire community.[61] In this case, however, the NOIDs were drafted with a specific factual context in mind. They cannot be interpreted without regard for that factual context: the properties themselves, their heritage characteristics, and the expert evidence regarding how those heritage attributes are defined and understood.

71. The issues for the application judge were primarily factual: can one reasonably apply the heritage attributes defined in the NOIDs to the factual matrix of the Properties themselves? Can the Appellants understand the nature of the obligations imposed upon them by the Impugned Instruments? Do the Impugned Instruments provide an adequate basis for reasoned analysis?

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[60] Reasons, para. 86.

[61] See e.g. *Wainfleet Wind Energy Inc. v. Township of Wainfleet*, 2013 ONSC 2194 at paras. 35-38; *2312460 Ontario Ltd. et al. v. Toronto (City)*, 2013 ONSC 1279 at paras. 16-19, 36-37; *Apartments Legacy One Ltd. v. Vernon (City)*, 2018 BCCA 447 at paras. 20, 36.

72. The application judge properly decided these issues based on the evidence before her. She relied on the expert testimony regarding their respective interpretations of the NOIDS,[62] and the evidence of the factual matrix and the Appellants' conduct in relation to the NOIDs.[63]

73. The Appellants' standard of review argument cites contract interpretation cases which hold that despite a general rule in favour of deference, extricable questions of law will be reviewed for correctness. That analysis is not relevant here. The Appellants have not actually identified any extricable question of law in their submissions on vagueness. Instead, their factum refers extensively to the affidavits and cross-examination transcripts of the various witnesses. But the Appellants have neither alleged nor demonstrated any palpable and overriding error; they are effectively asking this Court to reweigh and reinterpret the evidence considered by the application judge. This Court should decline that request.

2. The NOIDs are not vague: no error on any standard of review

74. Regardless of the standard of review, the application judge's findings on vagueness are unassailable. There was significant evidence before the Court relevant to the test for vagueness. The application judge's reasons show that she properly considered that evidence in light of the applicable test, as set out below.

3. The Appellants faced an onerous standard

75. It was common ground at the application that the Appellants faced an onerous standard in establishing that the Impugned Instruments are impermissibly vague. As set out in the leading Supreme Court authority, *R. v. Nova Scotia Pharmaceutical Society*, the Appellants' onus was to show that the Impugned Instruments "do not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. […] This

[62] Reasons for Decision, para. 87.
[63] Reasons for Decision, paras. 86, 88.

is an exacting standard, going beyond semantics."[64]

76. Another recent Superior Court decision summarized the *R. v. Nova Scotia Pharmaceutical Society* ruling into a three-factor analysis:

> A by-law is invalid for vagueness and uncertainty if: (a) it is not sufficiently intelligible to provide an adequate basis for legal debate and reasoned analysis; (b) it fails to sufficiently delineate any area of risk; **and**, (c) it offers "no grasp" for courts to perform their interpretive function. This standard is exacting, and the onus is on the applicant to establish that the by-law should be declared invalid.[65] [emphasis added]

77. This test was not met.

4. The extensive evidence before the application judge

78. There was significant evidence in the record regarding the vagueness issue, both from experts who testified about the proper professional approach to the interpretation of the NOIDs, and fact evidence which served to bely the Appellants' claims that they were unable to understand the NOIDs.

(a) The expert evidence

79. Mr. McClelland, SORE's expert heritage witness, opined that the impugned portions of the NOID are capable of being given meaning using the ordinary tools of his profession. He applied these tools in his report and elaborated on his assessment in cross-examination. His report referenced drawings and photographs of the Rand Estate which evidence the presence of designed landscape elements from the Dunington-Grubb period.[66] In cross-examination, he identified specific features of the landscape in aerial photographs which, in his view as a professional, were clearly surviving features of the Dunington-Grubb design.[67]

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[64] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.).

[65] *Wainfleet Wind Energy Inc. v. Township of Wainfleet*, 2013 ONSC 2194 at para. 31. Note that the test is conjunctive – all three elements must be demonstrated.

[66] McClelland Affidavit, para. 41, Respondent's Compendium, tab 2.

[67] McClelland Cross, pp. 96-100, q. 353-367, Respondent's Compendium, tab 7.

80. Mr. McClelland also opined that heritage attributes set out in NOIDs are often clarified or refined between the issuance of the NOID and the passage of a designation by-law, whether it be through the CRB process or through collaborative engagement between a property owner and a municipality. He gave a number of examples of this occurring in his experience. Mr. McClelland was not cross-examined on this aspect of his evidence.

81. Dr. Letourneau, the Town's heritage expert, gave similar evidence regarding his understanding of the heritage attributes in the NOIDs:

(a) He agreed with Mr. McLelland's assessment that the landscaped axial route running through 200 John St. and 176 John St. were surviving elements of the Dunington-Grubb landscape and, more generally, referenced the availability of Dunington-Grubb's drawings as one tool he would use to identify the surviving remnants of their designs.[68]

(b) With respect to the "mature trees and plantings" heritage attribute, he testified that the trees were not defined with specificity because "they are a living thing and they do change," but that the intent of the statement is that "we want to see that mature component conserved."[69]

82. The Appellants claim that Dr. Letourneau and his colleague, Ms. Barnes, were "still unable to definitively identify [in their affidavits] what is to be protected in accordance with the NOIDs."[70] That is incorrect. Dr. Letourneau and Ms. Barnes have taken a clear position on the features they believe are to be protected under the NOIDs. They published a comprehensive Cultural Heritage Evaluation Report on the four properties in September, 2018. It is

[68] Letourneau Cross, pp. 66, q. 274 and pp. 72-73, q. 299-307; see also p. 82-82, q. 363-366, Respondent's Compendium, tab 8.
[69] Letourneau Cross, pp. 59-60, q. 250-254, Respondent's Compendium, tab 8.
[70] Appellants' Factum, para. 76.

exhaustively-researched and runs over 100 pages. It includes detailed analyses of the history and heritage features of each of the four properties, and contains specific, itemized statements of the heritage attributes present on each property.[71]

83. Finally, even the evidence of the Appellants' own heritage expert, Leah Wallace, supported the conclusion that there is ample basis to interpret and understand the NOIDs.

84. The heritage assessment reports authored by Ms. Wallace in 2017 and 2019 used language that substantially tracked the NOIDs themselves. In the Initial Wallace HIA, Ms. Wallace:

(a) concluded that the significant components of the Rand Estate cultural heritage landscape include the "remnants of the designed landscape developed by the landscape architecture firm of Dunington-Grubb" and "the evolving picturesque landscape with its mature trees and plantings".[72]

(b) identified a number of the elements of the properties which, in her view, were remnants of the Dunington-Grubb landscape such as "the entrance gate, a formal stone path, sunken lily pond with sculpture, arched stone bridges that span a tributary of One Mile Creek, and a low stone wall."[73]

(c) included a set of proposed heritage attributes which are almost identical to the NOIDs now in issue, such as "the designed Dunington-Grubb landscape <u>including</u> the walkway, lily pond, sculpture, stone bridges and walls <u>and any remaining shrubs or plantings</u>," and "remnants of the picturesque natural landscape

[71] See CHER at s. 8.1.2.4 (Heritage Attributes for 144 John Street), s. 8.2.2.4 (Heritage Attributes for 176 John Street), s. 8.3.2.4 (Heritage Attributes for 200 John Street), and s. 8.4.2.4 (Heritage Attributes for 588 Charlotte Street), Respondent's Compendium, tab 11.

[72] Initial Wallace HIA, p. 439, Respondent's Compendium, tab 9.

[73] *Ibid*.

including mature native and specimen trees, plants and shrubs."[74]

85. In the Updated Wallace HIA, Ms. Wallace opined:

(a) "The design or physical value of the Rand Estate lies mainly in the remnants of the Dunington-Grubb landscape";[75]

(b) "Analysis of the cultural heritage value or interest inherent in the property at 200 John Street indicates that any design or associative value is linked closely with the remnants of the designed Dunington-Grubb landscape on the property".[76]

(c) Ms. Wallace also included charts setting out the specific heritage attributes which are referable to the "Designed Landscape" of Dunington-Grubb on each property.

86. In cross-examination, Ms. Wallace's evidence was that she understands the opinions of Dr. Letourneau and Ms. Barnes regarding the identifiable heritage attributes on the Subject Properties, and simply disagrees with those opinions; she agreed that this is a "reasonable debate of professional opinion."[77]

(b) The fact evidence on vagueness

87. In addition to the expert testimony, there were three other key pieces of fact evidence before the application judge which undermined the Appellants' claims regarding vagueness.

88. First, as set out above, the Appellants provided an undertaking to the Town in December, 2018 "not to alter the properties in such a way that is likely to affect the property's Heritage

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[74] Draft Statement of Significance, Appendix V to the Initial Wallace HIA, p. 475, Respondent's Compendium, tab 9 [underlines added].

[75] Updated Wallace HIA, p. 19, Respondent's Compendium, tab 10.

[76] *Ibid*., p. 27.

[77] Wallace Cross, p. 43-44, q. 219-21, Respondent's Compendium, tab 5.

Attributes as set out in the [NOIDs]."[78]

89. This commitment is inconsistent with the Appellants' claim in this litigation that they do not even understand what these heritage attributes are, and do not understand how to comply with the NOIDs. The Appellants surely would not have provided a formal undertaking in a court proceeding that they had no intention of honouring or did not know how to honour.

90. Second, the Appellants have never applied to the Town under sections 33 or 34 of the *OHA* for permission to alter or demolish any part of the Subject Properties. It is thus apparent that the wording of the NOIDs has not caused any prejudice to the Appellants. If the Appellants need or want to modify the property for maintenance or other reasons and are concerned that the breadth of the NOIDs may pose an obstacle, they may simply apply to the Town for directions under the *OHA*. The fact that this has not yet happened speaks to the artificiality of the Appellants' claim in their factum that the NOIDs do not appropriately "delineate an area of risk".[79] This complaint is hypothetical in the absence of any actual or apprehended need to modify the properties, and in the absence of any plausible suggestion that the application procedure under the *OHA* is insufficient to provide the Appellants with the guidance they might need in the future.

91. Third, the Appellants chose not to disclose the Updated Wallace HIA to the Town when it was prepared, even though it was a direct response to questions asked of Ms. Wallace in a February, 2018 staff report. That non-disclosure is telling, given that the Updated Wallace HIA contained extensive analysis of what, in Ms. Wallace's view, constitutes the "remnants of the Dunington-Grubb landscape" on the properties. In other words, the Updated Wallace HIA contains the very analysis of this heritage attribute that the Appellants now say cannot be

[78] Undertaking, Respondent's Compendium, tab 14.
[79] See e.g. Appellants' factum at para. 84(b).

undertaken. The Appellants' choice not to share this report with the Town at the time speaks to their preference to manufacture issues for litigation rather than to participate collaboratively in the designation process.

(c) The application judge's findings are cogent and correct

92. In the context of the foregoing evidence, the application judge made no error in rejecting the Appellants' vagueness claim.

93. The application judge properly relied on Ms. Wallace's critical concession that her disagreement with the Town's heritage experts is a "reasonable debate of professional opinion." That admission goes to the heart of the test for vagueness. As reviewed above, the Appellants were required to prove that the Impugned Instruments were "not sufficiently intelligible to provide an adequate basis for legal debate and reasoned analysis."[80] Their own expert has admitted that this standard is not met. Indeed, Ms. Wallace's reports have interpreted and applied the heritage attributes in precisely the manner that the Appellants claim is impossible due to the supposed vagueness of the NOIDs.

94. The Appellants have ignored Ms. Wallace's concession almost entirely. The only reference to it in their factum is their assertion that "the fact that experts have different views is not evidence that the attributes are clear." This is a reinterpretation of the evidence, not a question of law. In any event, the Appellants' position is based on a straw man. The legal test is not "clarity" in the abstract. The test is whether there is sufficient clarity to permit reasoned analysis and debate. The Appellants' own evidence is that such analysis has been occurring. The application judge was correct to find as much.

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[80] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.).

95. In this Court, the Appellants continue to concede the critical point that reasoned analysis of the Impugned Instruments can occur and has occurred. Elsewhere in their factum, the Appellants emphasize that their expert, Ms. Wallace, is "the **only** expert involved in this matter who has" identified the specific architectural features she believes to be the remnants of the Dunington-Grubb landscape.[81] The very fact of Ms. Wallace's ability to analyze and apply the NOIDs in this manner is proof that the NOIDs offer the requisite "grasp" to enable appropriate interpretation and assessment, as the law requires.

96. On this record, the Appellants can show no reversible error in the application judge's finding that the NOIDs met the level of clarity required by law.

(d) Application judge considered all the relevant factors

97. The Appellants allege that the application judge erred in that she correctly stated the three-part test for vagueness, but then "considered only the first factor" of the test.

98. This argument is artificial and unduly technical. The application judge considered and applied the totality of the evidence. The three "factors" as summarized in a 2013 Superior Court decision—"adequate basis for legal debate," "delineation of area of risk," and "interpretive grasp"[82]—are not three distinct considerations or watertight compartments. Rather, they are three ways of articulating the same underlying legal concept, as the Supreme Court explained in *R. v. Nova Scotia Pharmaceutical Society*:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard

[81] Appellants' Factum, para. 25 [emphasis in original].

[82] *Wainfleet Wind Energy Inc. v. Township of Wainfleet*, 2013 ONSC 2194 at para. 31.

> and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. […]
>
> The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.[83] [underlines added]

99. In this context, it cannot be that the same bylaw could simultaneously succeed in "providing an adequate basis for legal debate" but fail in "offering interpretive grasp to the judiciary." The Appellants proceed from the mistaken premise that the application judge was required to independently analyze each of these "three factors" as though distinct considerations would be brought to bear on each factor. The proper analysis is holistic.

100. Even granting that the three factors are truly distinct, the Appellants' argument is still legally untenable. The case which summarized the three-factor test, as cited by the Appellants, articulated those factors conjunctively and cumulatively (i.e. they are joined by the term "and"). On that approach, it was the Appellants' onus to prove each of those three factors. The application judge's finding against the Appellants on the first factor was fatal, making it legally unnecessary to continue any further.

(e) Other specific issues raised by the Appellants

101. .The Appellants claim that they "still have not been able to obtain clear answers from the Town" regarding "what they can and cannot do on the Subject Properties".[84] This is disingenuous. The Appellants' own evidence was that they never contacted the Town to request any clarification upon receipt of the NOIDs;[85] they have never applied under the OHA for

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[83] *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.).

[84] Appellants' Factum, para. 80.

[85] See Paolicelli Cross, p. 18, q. 73-75, Respondent's Compendium, tab 6 (Mr. Paolicelli did not contact the Town upon receipt of the NOIDs) and Paolicelli Answers to Undertakings #5, Respondent's Compendium, tab 15 (no written record of any other representative of the Appellants contacting the town for clarification; Appellants unaware of any such verbal discussions).

permission to alter or remove any heritage feature on the Properties;[86] and they never even consulted their heritage planner about whether such an application would be advisable.[87]

PART IV. RELIEF REQUESTED

102. SORE requests an order dismissing this appeal in its entirety, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2020

Chris Paliare
Richard Stephenson
Daniel Rosenbluth
Paliare Roland LLP
Lawyers for the Respondent, SORE Association

[86] Paolicelli Cross, p. 19, q. 76, Respondent's Compendium, tab 6.
[87] Wallace Cross, p. 104, q. 518, Respondent's Compendium, tab 5.

SCHEDULE A
LIST OF AUTHORITIES

1. *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61
2. *Strickland v. Canada (Attorney General)*, 2015 SCC 37
3. *Kaiman v. Graham*, 2009 ONCA 77
4. *Hydro One Networks Inc. v. Ontario Energy Board*, order dated April 30, 2019
5. *Cowper-Smith v. Morgan*, 2017 SCC 61
6. *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31
7. *London (City) v. RSJ Holdings Inc.*, 2007 SCC 59
8. *Wainfleet Wind Energy Inc. v. Township of Wainfleet*, 2013 ONSC 2194
9. *2312460 Ontario Ltd. et al. v. Toronto (City)*, 2013 ONSC 1279
10. *Apartments Legacy One Ltd. v. Vernon (City)*, 2018 BCCA 447
11. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

SCHEDULE B
LIST OF STATUTORY AUTHORITIES

***Ontario Heritage Act*, R.S.O. 1990, c. O.18**

Designation by municipal by-law

29 (1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

(a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
(b) the designation is made in accordance with the process set out in this section.

Notice required

(1.1) Subject to subsection (2), if the council of a municipality intends to designate a property within the municipality to be of cultural heritage value or interest, it shall cause notice of intention to designate the property to be given by the clerk of the municipality in accordance with subsection (3).

Consultation

(2) Where the council of a municipality has appointed a municipal heritage committee, the council shall, before giving notice of its intention to designate a property under subsection (1), consult with its municipal heritage committee.

Notice of intention

(3) Notice of intention to designate under subsection (1) shall be,

(a) served on the owner of the property and on the Trust; and
(b) published in a newspaper having general circulation in the municipality.

Contents of notice

(4) Notice of intention to designate property that is served on the owner of property and on the Trust under clause (3) (a) shall contain,

(a) an adequate description of the property so that it may be readily ascertained;
(b) a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property; and
(c) a statement that notice of objection to the designation may be served on the clerk within 30 days after the date of publication of the notice of intention in a newspaper of general circulation in the municipality under clause (3) (b).

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Objection

(5) A person who objects to a proposed designation shall, within thirty days after the date of publication of the notice of intention, serve on the clerk of the municipality a notice of objection setting out the reason for the objection and all relevant facts.

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Referral to Review Board

(7) Where a notice of objection has been served under subsection (5), the council shall, upon expiration of the thirty-day period under subsection (4), refer the matter to the Review Board for a hearing and report.

Hearing

(8) Pursuant to a reference by the council under subsection (7), the Review Board, as soon as is practicable, shall hold a hearing open to the public to determine whether the property in question should be designated, and the council, the owner, any person who has filed an objection under subsection (5) and such other persons as the Review Board may specify, are parties to the hearing.

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Report

(12) Within thirty days after the conclusion of a hearing under subsection (8), the Review Board shall make a report to the council setting out its findings of fact, its recommendations as to whether or not the property should be designated under this Part and any information or knowledge used by it in reaching its recommendations, and the Review Board shall send a copy of its report to the other parties to the hearing.

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Decision of council

(14) After considering the report under subsection (12), the council, without a further hearing,

(a) shall,

(i) pass a by-law designating the property,
(ii) cause a copy of the by-law, together with a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property,

(A) to be served on the owner of the property and on the Trust, and
(B) to be registered against the property affected in the proper land registry office, and

(iii) publish notice of the by-law in a newspaper having general circulation in the municipality; or

(b) shall withdraw the notice of intention to designate the property by causing a notice of withdrawal,

(i) to be served on the owner of the property and on the Trust, and
(ii) to be published in a newspaper having general circulation in the municipality.

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Alteration of property

33 (1) No owner of property designated under section 29 shall alter the property or permit the alteration of the property if the alteration is likely to affect the property's heritage attributes, as set out in the description of the property's heritage attributes that was required to be served and registered under subsection 29 (6) or (14), as the case may be, unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the alteration.

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Demolition or removal of structure

34 (1) No owner of property designated under section 29 shall demolish or remove a building or structure on the property or permit the demolition or removal of a building or structure on the property unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the demolition or removal.

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Designation by Minister

34.5 (1) After consultation with the Trust, the Minister may, by order, designate any property within a municipality or in unorganized territory as property of cultural heritage value or interest of provincial significance if,

(a) the property meets the criteria prescribed by regulation; and
(b) the designation is made in accordance with the process set out in section 34.6.

Effect of designation

(2) If property is designated by the Minister under subsection (1), the owner of the property shall not,

(a) carry out or permit an alteration of the property of a kind described in subsection (3) unless the Minister consents to the alteration; or
(b) carry out or permit the demolition or removal of a building or structure on the property unless the Minister consents to the demolition or removal or the Tribunal orders the demolition or removal under subsection (6).

Alterations to property

(3) Clause (2) (a) applies in respect of alterations that are likely to affect the property's heritage attributes as described in the notice of intention to designate the property given under section 34.6.

Application for consent, alteration

(4) The owner of a property designated under subsection (1) may apply to the Minister for the Minister's consent to an alteration of the property and subsections 33 (2) to (14) apply with necessary modifications to such an application.

Same

(5) For the purposes of the application of subsection 33 (4) to an application for the Minister's consent made under subsection (4), subsection 33 (4) shall be deemed to require the Minister to consult with the Trust, and not with a municipal heritage committee, before rendering a decision under that subsection.

Same, demolition or removal

(6) The owner of a property designated under subsection (1) may apply to the Minister for the Minister's consent to the demolition or removal of a building or structure on the property.

Decision of Minister

(7) Within 90 days after receipt of an application under subsection (6), or within such longer period as is agreed upon by the owner and the Minister, the Minister, having consulted with the Trust, may,

(a) consent to the application;
(b) consent to the application, subject to such terms and conditions as may be specified by the Minister; or

(c) refuse the application.

Notice of decision

(8) The Minister shall, within the time period specified in subsection (7), give notice of its decision under subsection (7) to the owner of the property and to the Trust and,

(a) in the case of property situated in a municipality, shall publish the decision in a newspaper having general circulation in the municipality; and
(b) in the case of property situated in unorganized territory, shall publish its decision or otherwise make its decision known in a manner and at such times as the Minister considers adequate to give the public in the territory reasonable notice.

Deemed consent

(9) If the Minister fails to give notice of its decision to the owner within the time period specified in subsection (7), the Minister shall be deemed to have consented to the application. 2005, c. 6, s. 26.

Application, appeal to Tribunal

(10) Section 34.1 applies with necessary modifications where the Minister refuses an application for consent under clause (7) (c) or consents to the application, subject to terms and conditions specified by the Minister under clause (7) (b). 2005, c. 6, s. 26.

Delegation

(11) The Minister may delegate in writing his or her power to consent to the alteration of a property designated under subsection (1) and to consent to the demolition or removal of a building or structure on property designated under subsection (1),

(a) to the Trust, or to an official of the Trust designated by the Trust for the purposes of such a delegation; or
(b) in the case of property situated in a municipality, to the council of the municipality or to an official of the municipality designated by the council of the municipality for the purposes of such a delegation.

Scope of delegation

(12) The Minister may limit a delegation under subsection (11) so as to delegate the power to consent to only one of the types of changes to property described in subsection (11), or to such combination thereof as may be specified in the delegation, or to consent to such classes of alterations as are set out in the delegation.

O. Reg. 9/06: CRITERIA FOR DETERMINING CULTURAL HERITAGE VALUE OR INTEREST

Criteria

1. (1) The criteria set out in subsection (2) are prescribed for the purposes of clause 29 (1) (a) of the Act.

(2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

1. The property has design value or physical value because it,

i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
ii. displays a high degree of craftsmanship or artistic merit, or
iii. demonstrates a high degree of technical or scientific achievement.

2. The property has historical value or associative value because it,

i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,
ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

3. The property has contextual value because it,

i. is important in defining, maintaining or supporting the character of an area,
ii. is physically, functionally, visually or historically linked to its surroundings, or
iii. is a landmark.

Transition

2. This Regulation does not apply in respect of a property if notice of intention to designate it was given under subsection 29 (1.1) of the Act on or before January 24, 2006.

Municipal Act, 2001, S.O. 2001, c. 25

Application to quash by-law

273 (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

SCHEDULE C
Hydro One Networks Inc. v. Ontario Energy Board, order dated April 30, 2019

Court File No.: 199/19

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

The Hon. Mr. Justice F.L. Myers) TUESDAY , THE 30TH
)
)
) DAY OF APRIL , 2019

BETWEEN:

HYDRO ONE NETWORKS INC.

Appellant

- and -

ONTARIO ENERGY BOARD

ORDER

1. **THIS MOTION**, made by the Appellant for an order holding the appeal in abeyance until 60 days after the resolution of the motion for review and variance before the Ontario Energy Board in matter EB-2019-0122 (the "**Motion Decision**"), was read this day, at 130 Queen Street West, Toronto.

ON READING the notice of motion and the consent of the parties, filed,

2. **THIS COURT ORDERS** that the time to perfect this appeal is extended to 60 days after the date on which the Ontario Energy Board issues the Motion Decision.

3. **THIS COURT ORDERS** that within five days of the issuance of the Motion Decision, the Appellant shall advise the registrar of the court in writing of the date of the Motion Decision.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO. 27
LE / DANS LE REGISTRE NO. 130
MAY 01 2019
PER / PAR:

TWO SISTERS RESORTS CORP. and SOLMAR (NIAGARA 2) INC.

Applicants (Appellants)

-and-

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE and SORE ASSOCIATION

Respondents (Respondents in Appeal)

Court File No C68033

COURT OF APPEAL FOR ONTARIO

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