

Resolving Heritage Disputes Before the Ontario Municipal Board and the Conservation Review Board

Presentation to the Niagara Heritage Alliance Conference

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Purpose of Presentation

- Outline the jurisdiction which the Ontario Municipal (OMB) and Conservation Review Board (CRB) exercise in heritage matters
- Discuss the implications of the new Environment and Land Tribunals Ontario (ELTO) cluster with specific reference to strengthening the capacity of both Boards in this very important area

Jurisdiction and Workload: Conservation Review Board

- CRB, obtains its authority from the *Ontario Heritage Act, 2005 (OHA)*. It does not have the jurisdiction to make a binding decision. Instead, it hears appeals and then makes recommendations to the local Council or the Minister of Culture (the approval authority) in the following matters:
 - Decisions by an approval authority in relation to the designation or alteration of a property of cultural heritage value or interest
 - Decisions by the Minister of Culture on archaeological licenses and matters relating to archaeological resources
- The CRB has been receiving about 15-20 cases a year, and generally succeeds in settling most of them at pre-hearing conferences. The Board makes a recommendation to the local Council on about three cases per year.
- Majority of the CRB's work involves objections to a municipality's Notice of Intention to Designate (Notice) a property under ss. 29(5) of the *OHA*.
- Section 29 gives local Council the authority to designate real property to be of cultural heritage value or interest (as defined by Regulation 9/06).
- The *OHA* requires local Council to provide notice of its intention to designate.
- If Council has a Municipal Heritage Committee, Council must consult with it before issuing a Notice.
- Council can designate a property without the owner's permission.

- Issuing a Notice voids all existing permits for the property (building, demolition) and governs the property as if by bylaw.
- Anyone can object to the Notice within the 30 day period following the Notice. If an objection is filed, the CRB will commence a proceeding unless the matter is settled.
- Following a hearing, the CRB will make a recommendation to the approval authority

Overview of CRB Procedures

- Hearings are open to the public
- Pre-hearing conferences (PHC) are mandatory under the CRB Rules of Practice and Procedure
- CRB engages in settlement discussions in each PHC, can issue Orders to compel action of parties, but cannot participate in binding mediation
- If the matter does not settle, the CRB holds a hearing and submits a non-binding report with recommendations to the approval authority (Council or Minister of Culture)

Jurisdiction and Workload:

Ontario Municipal Board

- The *Ontario Heritage Act, 2005* provides that OMB is to hear appeals on certain matters under the *Act* and that the OMB's decisions on these matters are final and binding (subject to review by the Courts). These *OHA* appeals are often consolidated with appeals of applications that may be filed under the *Planning Act* to develop land. In relation to heritage, the OMB deals with:
 - Appeals concerning the demolition or removal of a structure under subsection 34.1(1) of the *Ontario Heritage Act, 2005 (OHA 2005)*
 - Appeals concerning by-laws to establish heritage conservation districts (HCD) (and their boundaries) and appeals of heritage district plans. The *OHA* requires a HCD to have a plan: these HCD plans are distinct from Official Plan policies that deal with heritage matters.
 - *Planning Act* appeals of Official Plans that may establish policies for heritage protection, conservation or visual design to protect and conserve the unique features of heritage properties.
- The OMB decides approximately 1400 cases per year, of which roughly 75 may involve a heritage issue. This number has been increasing in recent years.

OMB Procedures

- Board will generally hold a pre-hearing conference to organize the proceedings and determine the parties and participants
- Board offers mediation – mediation is voluntary
- Parties must submit list of issues, make disclosure, exchange witness reports prior to a hearing, and attend the full hearing
- Members of the public may choose to be participants, as opposed to parties

Implications of these Statutory Arrangements

- The Legislature has given two different Boards jurisdiction over appeals of heritage issues, each with its own area of responsibility and with very different powers in those areas.
- The Boards must seek to provide, to those who bring heritage matters to them:
 - Fair, accessible, timely and expert adjudication services,
 - Consistency in the application of the *OHA*, subject to differing facts and to the development of the law.

Potential Impact of ELTO

What is ELTO

- Under the Adjudicative Tribunals Accountability Governance and Appointments Act, 2009 (Tribunals Act), the government may designate two or more tribunals as a cluster
- The government may cluster two or more tribunals where it has looked at the subject matters they deal with and has determined that there is something about those subject matters that can be better dealt with in a clustered structure
- ELTO, Ontario's first cluster, is composed of the following Boards in addition to the OMB and CRB: Environmental Review Tribunal, Assessment Review Board and the Board of Negotiation
- All of these tribunals deal with land and issues affecting land. The jurisdiction which the OMB and the CRB have in relation to heritage is a leading example of closely linked subject matters within the ELTO cluster

ELTO's Challenge

- Improve the effectiveness of both Boards in dealing with issues such as heritage
- Work to understand issues and concerns as they arise at the community level
- Work within the legislation which governs heritage and land use planning issues in the province, and give effect to applicable law and policy

- Enhance the expertise and capacity of the OMB and CRB in terms of adjudication skills and substantive issues such as heritage
- Provide fair, accessible, timely and expert dispute resolution
- Provide clear, concise and reasoned decisions, based on the relevant facts and law

Initiatives of ELTO Aimed at Meeting the Challenges

Recruitment and cross-appointment

- The recent Tribunals Act requires that all appointments of adjudicators be made through a competitive, merit-based process
- Appointments and reappointments are made by the government on the recommendation of the Chair (for ELTO, the Executive Chair)
- ELTO will seek to recruit individuals who:
 - have specific expertise in the Boards' subject areas
 - have capacity to conduct accessible, impartial and fair hearings, and to mediate matters effectively,
 - have the overall competencies to make good adjudicators
- Selective and strategic cross-appointments will permit ELTO to enhance the expertise and perspective which each tribunal can bring to heritage matters

Training

- Having the tribunals under one roof and one leadership team means that ELTO can more easily design and deliver training programs which address issues which face more than one of its tribunals
- ELTO has established a pan-ELTO Professional Development Committee which will plan the training for all tribunals in the cluster

Joint Stakeholder Engagement

- ELTO will work to increase stakeholder engagement, taking a very expansive view of who its stakeholders are – they do not just consist of the lawyers who practice before ELTO
- ELTO will also establish user committees. These will be chaired by those who regularly use the services of our tribunals, and will be built around their needs and interests.

Potential Procedural Reforms

- In consultation with our stakeholders, over the next year we will be exploring ways to enhance the hearing process, to make it more efficient, cost effective, fair and accessible
- For example, we will be reflecting on:

- Role of experts
- More active role for adjudicators
- Enhanced mediation opportunities