OHA+M (Ontario Heritage Act and more)

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Saturday, May 25, 2019

What to make of Bill 108

The most useful thing about a principle is that it can always be sacrificed to expedience. ~ W. Somerset Maugham

A foolish consistency is the hobgoblin of little minds… ~ Ralph Waldo Emerson

You would have to have been living under a rock not to have heard about the province's proposed changes to the Ontario Heritage Act. [1]

The proposals are part of a much bigger omnibus bill introduced on May 2, 2019. Bill 108, which may have already cleared Second Reading, is on a fast track and expected to be passed into law by June 6, the date the Legislature rises for the summer recess. [2]

The government is seeking comments on the bill via the Environmental Registry until June 1. [3] Since the bill's introduction, heritage groups, municipalities, the development industry and others have been scrambling to understand and assess the potential impacts of the proposed changes — to the OHA in particular — and to put together a response.

What should we make of these proposals?

The last significant changes to the Ontario Heritage Act were made in 2005 when the Act underwent a major overhaul. A common complaint up to that time was that the legislation had been amended very little since its passage in 1975 — a whole generation earlier. There was a justifiable feeling that legislation that is not periodically updated — not deemed worthy of taking up time on a government's busy legislative agenda — must not be seen as important. The neglect of the OHA, where needed changes were identified pretty much from the start, seemed indicative of a bigger neglect of cultural heritage and its conservation as a government priority.

The 2005 amendments to the OHA (combined with stronger heritage policies in the 2005 Provincial Policy Statement) changed that perception.

So in this sense it is a healthy thing that, 14 years after those long overdue reforms, the province is again turning its attention to heritage legislation and proposing significant changes.

But … unlike the 2005 changes it is clear the current proposals do not

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Dan Schneider is a heritage enthusiast, policy wonk, writer and professional heritage consultant. He was formerly senior policy advisor with the provincial culture ministry and has a long experience with the Ontario Heritage Act. A lawyer by training, he was lead policy expert on major changes to the Ontario Heritage Act in 2005 and 2006. His advice is frequently sought on questions and issues related to the policy intent and interpretation of the Act. Based in St. Marys, Ontario, Dan is principal of Dan Schneider Heritage Consulting. He can be reached at danschneider@live.ca.

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enjoy wide acceptance by those who will be most affected by them. Municipalities, heritage organizations, and development industry groups were all on-side with the last round of changes. This time … not so much.

Is it unrealistic to expect that the major stakeholders impacted by a government initiative will be happy about it, or at least accepting? Perhaps. *But the onus is on government to try hard to bring the different interests and those who represent them to that point.* Or is this an old-fashioned idea?

It certainly ain't happening with Bill 108. There was no meaningful consultation with the cultural heritage sector and municipalities on the proposals. A one month window to provide comments, *after* the legislation has already been introduced and where passage (done deal!) is anticipated within a week of the end of the comment period, is, well, woefully inadequate, if not a sham. [5]

Compounding the problem is that almost if not all the proposals appear to have come, pretty much unfiltered, from just one of the affected interest groups — the development industry.

It is of course perfectly legitimate for BILD (Building Industry and land Development Association) and the OHBA (Ontario Home Builders Association) to put forward their views and proposals on legislative and policy changes to government. [6] Arguably, since Bill 108, the *More Homes, More Choice Act, 2019*, is ostensibly about increasing housing supply, it may even make sense to *start* with the development industry's concerns and suggestions before involving other players in a broader policy-making process to address housing supply and related issues.

Unfortunately what happened here is that the government overreacted to the industry's concerns and plowed ahead with the industry's proposed changes — without in many cases giving careful consideration to their consequences and without the meaningful participation of the municipal and heritage stakeholders who might have helped ensure such consideration. Both a good process and, I would argue, sound public policy were sacrificed on the altar of expediency (aka just get the damn thing done and fast).

* * *

The need for speed, combined with some fuzzy thinking, also meant that many important "details" of the changes had to wait for a later day. Ironically for a government that should be ideologically averse to greater regulation, many — too many — of the changes have been effectively pushed off onto implementing regulations that will come sometime later this year. Bill 108, if you haven't noticed, enables a truly staggering number of regulations, including this jaw-dropper: "prescribing or otherwise providing for anything that is required or permitted under this Act to be prescribed or otherwise provided for in the regulations, including governing anything required or permitted to be done in accordance with the regulations." [7]

The Ministry of Tourism, Culture and Sport, which will be saddled with the writing of this slew of regulations, gamely assures stakeholders that there will be opportunity to participate in their development. One wonders if they know what they're in for.

Please note: Just because there is a reg-making power doesn't mean that a reg has to be put in place. In several cases the no-reg-at-all option would be the best outcome.

To wit, the bone-headed idea of "principles" to be prescribed to guide municipal decisions under certain sections of Parts IV and V of the Act (to be prescribed of course).

An argument might be made that the Act lacks a clear purpose statement and that its use, primarily by municipalities but others too, might benefit from some lofty wording about, say, the value of our cultural heritage and its contribution to Ontario's social, economic and other goals. Something like this would go right up front.

Instead we'll have some other kind of statements to be enacted not by the Legislature but later by cabinet via regulation: "Principles" that municipalities will have to "consider." However innocuous the principles turn out to be (in a best case scenario), this approach reflects a paternalistic attitude toward municipal governments and is, as far as I know, unprecedented in municipal enabling legislation. The principles are likely to further inhibit designations and other conservation decisions, simply because their mandatory consideration will introduce another tedious (and pointless) step in the decision-making process — one that municipal heritage committees, municipal staff and councils will all have to deal with.

Ditto for the new requirements, also coming soon in regulation, for the contents of designation by-laws. Any issues with statements of significance and descriptions of heritage attributes should be addressed by revising — and better promoting — provincial guidance in the Ontario Heritage Toolkit. Maybe tinker with the Act's definition of "heritage attributes." But as a general rule: "Legislate if necessary, but don't necessarily legislate." A rule sadly not followed in Bill 108.

* * *

Before moving on to the most significant change in the bill … here are things I *do* like in the proposals:

- Notice to owners of listed properties — listing acquired legal implications when the 90 day notice period was added in 2006; it is reasonable then to require notice, a best practice recommended by the Toolkit and already followed by most municipalities. Problem though: As proposed, objections to listing are open-ended allowing any current/future owners to object and spur a review at any time.
- Alteration appeals to LPAT — this overdue change recognizes that many "alterations", like those in façadist redevelopment, involve major, significant changes to designated property more akin to demolition/removal. Sending appeals to LPAT is also consistent with alteration appeals in heritage conservation districts.
- Complete application timelines — these are modelled on recent changes to procedures in the Planning Act and should, if the details are right, help expedite the heritage approvals process.
- Timelines for Part IV designations — the introduction of some time limit for designation is appropriate in situations where the

property is the subject of planning applications. Problem though: Pushing the definition of "prescribed events" off to the regulations seems lazy and will just add perplexity to a process that is complicated enough. It is clear this proposal has not been adequately thought through; for instance, is 90 days appropriate for all "events"?

* * *

The really big reform here is the change to the appeal process for Part IV designations. Instead of review of a proposed designation by the Conservation Review Board, we'll have a *binding* appeal to the Local Planning Appeal Tribunal. Local councils will no longer have the last word on a) what constitutes a cultural heritage property of value to the community, and b) the recognition and protection of that resource.

This is a radical departure from the way designation has worked in Ontario for almost 45 years.

I believe this change is misguided: It will further discourage heritage protection and conservation while doing nothing to improve or streamline the designation process.

How to best handle objections to heritage designation is admittedly a tricky and complex issue. It requires very careful consideration and the input of all interested parties.

The government (specifically the Ministry of Tourism, Culture and Sport and the Ministry of the Attorney General) appears to have been seduced by a simplistic analysis — one that goes something like this:

- we have one statute with two kinds of appeals (review and final/binding) and two appeal bodies (CRB and LPAT)
- the development industry wants one kind of each
- the Planning Act has one kind of each
- district designation under Part V of the OHA has one kind of each
- so, based on consistency, efficiency and fairness to property owners, let's have just one kind of each — by ditching the current CRB process and sending designation appeals to the LPAT for a binding result.

The full counterargument to this is beyond the scope of this post. Let's just consider the following:

- The current CRB review process has served Ontario well since 1975.
- The CRB has never been busier, putting the lie to the claim that owners don't bother with it because it can't provide a binding result.
- Respecting local autonomy and democratic decision-making, the CRB process works through persuasion — and in almost all cases (whether to designate *or not to designate*) the municipal council follows the Board's recommendations. [8]
- The CRB is a special purpose tribunal; its near-single focus on designation has made it the de facto expert on the interpretation and application of the criteria for designation in O. Reg. 9/06. This expertise resides with current CRB members and will be lost or

hopelessly diluted in LPAT members, however well-intentioned.
- The CRB has a stellar record in resolving designation disputes at the pre-hearing stage; it is less formal, less expensive for the parties, and deals with matters more expeditiously compared to the LPAT.
- The Planning Act measures that are often compared to designation don't work the same way — Official Plan policies and zoning by-laws are *prescriptive* (you can do this, you can't do that) while designation is *permissive* (you can do anything if you get the okay). This means that *the true comparators to planning controls are alteration and demolition control powers under sections 33 and 34,* both of which, as proposed in Bill 108, include appeals to the LPAT.
- The Part V consistency argument also isn't valid. A review of appeals of HCDs to the LPAT shows that appeals *are not on the merits of the designation as a whole* but focus on the district's boundaries, provisions of the HCD plan and other details.
- The development industry concerns about delays and non-binding decisions *are already being largely addressed through proposed new time limits on designation and changes to alteration appeals.*
- In situations that also involve planning appeals the CRB has made concerted efforts to co-ordinate with the LPAT to avoid undue delays. Has anyone looked closely at how this is working and what adjustments might be made?
- In short, if it ain't broke ...

There is more to say but it would stretch the reader's patience even further!

* * *

What should happen here?

Schedule 11 of Bill 108 should be withdrawn. Ontarians deserve better. There is wide consensus that changes to the Ontario Heritage Act need to be made to improve approval processes and enhance fairness for property owners. But the current proposals about how to do this have many flaws and leave too many questions unanswered.

Using the proposed changes as a starting point, and harnessing the current level of attention, a time-limited consultation process involving key leaders from the development industry, municipalities and the heritage sector would yield surprisingly good results. And give Ministers Clark and Tibollo a win they would be proud of.

Note 1: Bill 108 amends 13 statues. The changes to the OHA are in Schedule 11.
https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108

Note 2: The OHA changes will come into force not on passage of the bill but on the date of proclamation. This will likely be this fall, once key regulations have been developed and arrangements made for the transfer of Conservation Review Board functions to the Local Planning Appeal Tribunal.

Note 3: The ER posting is here:
https://ero.ontario.ca/notice/019-0021

Note 4: ACO's comments (still draft at time of writing) can be seen here:
https://acontario.ca/show_res.php?r_id=53. Full disclosure: I chair ACO's policy committee which developed these comments.

Note 5: As for consideration of the bill in committee, when changes, if any, to the legislation would be made, the one day (May 31) set aside for public hearings on the whole of the bill unfortunately coincide with the annual Ontario Heritage Conference (this year in Goderich-Bluewater) when many leading heritage advocates will be out of town.

Note 6: Specifically BILD's submission of January 25, 2019 on the Housing Supply Action Plan. In the interests of full

disclosure, I have been retained since 2017 by an owner/developer that is a BILD member and was privy to some discussions regarding input into BILD's submission.

Note 7: Compare the extensive 2005 amendments to the OHA, which included only three new regulations, including O. Reg. 9/06 and O. Reg.10/06. The direction at the time was that for every one new regulation required two existing regulations would have to be repealed!

Note 8: it would be important to closely analyze municipal reaction and response to Conservation Review Board decisions and recommendations. To my knowledge this has not been done.

Posted by Dan Schneider at 3:19 PM

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