CITATION: Ontario Place for All Inc. v. Ontario (Ministry of Infrastructure)
2024 ONSC 1783
DIVISIONAL COURT FILE NO.: 647/23
DATE: 2024-03-27

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
ONTARIO PLACE FOR ALL INC. Applicant	*Donald D. Eady, Andrew Lewis Greta Hoaken and Jessica Roher*, for the Applicant
– and –	*Mark Wiffen* , for the Respondent, for Ontario Ministry of Infrastructure
ONTARIO MINISTRY OF INFRASTRUCTURE, INFRASTRUCTURE ONTARIO, ONTARIO MINISTRY OF TOURISM, CULTURE AND SPORT, AND ATTORNEY GENERAL OF ONTARIO Respondents	*Byron Shaw,* for the Respondent, Infrastructure Ontario *Michael Sims,* for the Respondent, Ontario Ministry of Tourism, Culture and Sport *Karlson Leung,* for the Respondent, Attorney General of Ontario
	HEARD at Toronto by Videoconference: March 19, 2024

BACKHOUSE J.

Endorsement

[1] The applicant, Ontario Place For All Inc. ("OP4A") is a not-for-profit grassroots citizen-led entity with over 30,000 active supporters. On November 9, 2023 it commenced an application for judicial review of the respondents' decision not to include the redevelopment of Ontario Place's West Island in the Category C Public Work Class Environmental Assessment of the Ontario Place Redevelopment Project pursuant to the *Environmental Assessment Act*, RSO 1990, c.E.18 ("*EAA*").

[2] The respondents, Ontario Ministry of Infrastructure, Ontario Ministry of Tourism, Culture and Sport and Infrastructure Ontario (collectively "Ontario") move to quash this application for judicial review.

[3] In its amended notice of application, OP4A alleged the following:

> The Government of Ontario plans to destroy the Ontario Place West Island by cutting down 840 trees, levelling a globally recognized cultural heritage landscape, and filling in portions of the lakefront, all so a massive glass waterfront Spa can be built which will benefit a foreign-owned corporation. The respondents intend to redevelop the West Island without including these activities in the environmental assessment conducted respecting the other components of the Ontario Place Redevelopment Project, based on the false assertion that it is a private undertaking, not a public undertaking. In making this false assertion, they are keeping secret the contractual arrangements that would disclose the true nature of the West Island Redevelopment project.

[4] Among other relief, in its amended notice of application OP4A claims the following relief:

> "1(e) An order of mandamus requiring the respondents to conduct a Category C Public Work Class Environmental Assessment pursuant to the *EAA* of the entire Ontario Place Redevelopment Project that includes the redevelopment of Ontario Place's West Island; and
>
> 1(f) A declaration that the respondents' failure to include the redevelopment of Ontario Place's West Island in the Category C Public Work Class Environmental Assessment of the Ontario Place Redevelopment is contrary to section 3 of the *EAA* and is therefore unlawful."

[5] One week after the OP4A's judicial review application was served on Ontario, in what OP4A characterizes as "a transparent effort to avoid the destruction of the West Island being scrutinized by this court", the Government of Ontario tabled the *Rebuilding Ontario Place Act, 2023* ("*ROPA*") which received royal assent on December 6, 2023 and brought this motion to quash the application. Ontario submits that *ROPA* and regulations passed thereunder exempt the redevelopment of the West Island at Ontario Place from the *EAA* which makes it plain and obvious that OP4A's application cannot succeed. Alternatively, it submits that the application should be quashed because it has become moot as a result of the passage of *ROPA*.

The Ontario Place West Island Redevelopment

[6] The application for judicial review relates to the proposed redevelopment of the Provincial Heritage Property, Ontario Place. Ontario Place is a 63 hectare property (28 hectare land, 35 hectare water) at 955 Lake Shore Boulevard West, Toronto, on the shore of Lake Ontario, which was initially opened in 1971. The Ontario Place lands are undergoing redevelopment.

[7] OP4A states that the respondent the Ministry of Infrastructure ("MOI"), is the owner of the majority of Ontario Place. A sliver of Ontario Place is owned by the City of Toronto but will be vested in the Crown on a date to be prescribed by regulation. OP4A states: that the respondent, Infrastructure Ontario ("IO"), is an agency of the Government of Ontario under the purview of the MOI; IO is responsible for facilitating and directing the redevelopment of Ontario Place mandated by the MOI and more generally the Government of Ontario; and the respondent Ministry of Tourism, Culture and Sport has also been involved in the redevelopment of Ontario Place undertaken by the Government of Ontario in its role of protecting provincial heritage properties.

Environmental Assessment Act

[8] Section 2 of the *EAA* provides that the purpose of the *EAA* is the "protection, conservation and wise management in Ontario of the environment".[1]

[9] Environmental assessments in Ontario are governed by the *EAA*.[2] The *EAA* applies automatically to all projects undertaken by the Crown pursuant to s.3:

> 3. This Act applies to, (a) enterprises or activities or proposals, plans or programs in respect of enterprises or activities on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities.

[10] A project that engages the provisions of the *EAA* is described as an "undertaking", which is a defined term in the *EAA* that uses similar language to s. 3:

> 1 (1) In this Act,
>
> …
>
> Undertaking means,
>
> (a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities, …

[1] *Environmental Assessment Act*, R.S.O. 1990, c. E.18, s. 2 ("*EAA*").
[2] Amendments to the *EAA* have been passed but are not yet in force. The noted references to the *EAA* are based on the in-force version.

[11] The *EAA* imposes various obligations on the proponent of an undertaking, generally involving a requirement to consult with interested persons and assess environmental impacts before being authorized to proceed with the undertaking. The nature of these obligations will depend on various factors, such as the type and scope of the undertaking.

[12] The Amended Notice of Application seeks an order requiring a specific form of environmental assessment: a "Category C Public Work Class Environmental Assessment". This form of environmental assessment can be broken down into three constituent parts for the purpose of understanding what is involved:

> a) A "Class Environmental Assessment" is one of two types of assessment governed by the *EAA*, with the other being an "individual environmental assessment".
>
> b) "Public Work" refers to a particular form of class environmental assessment which is applicable to provincial government realty actions and public works projects. Public Work Class Environmental Assessments follow a document setting out the assessment and consultation requirements applicable to this class of projects.
>
> c) "Category C" refers to a specific category of the types of undertakings within the Public Work Class Environmental Assessment. Projects that are classified as a Public Works Class Environmental Assessment project are subdivided into categories based on an assessment of a project's size, scope and estimated environmental impact. Category C is for those projects which have the potential for the most significant environmental effects, and require more rigorous assessment and consultation requirements.

[13] Although each different type and category of project engages varying obligations under the Public Work Class Environmental Assessment, all are governed by the provisions of the *EAA*.

[14] The *EAA* requires the proponent of a project to comply with the applicable class environmental assessment. Section 15.1.1(1) of the *EAA* provides that "[n]o person shall proceed with an undertaking [in respect of which an approved class environmental assessment applies] unless the person does so in accordance with the class environmental assessment...

Undertakings are to be assessed as a whole and not piecemealed

[15] The Public Work Class Environmental Assessment document as it existed at the date of issuance of the Notice of Application states:

> 1.2.3 Undertakings are Not Divisible
>
> When an undertaking is subjected to an EA, the entire undertaking must be assessed at one time. To ensure that undertakings are not broken down inappropriately, the following requirements apply:

> 1) All foreseeable interdependent actions of an undertaking must be assessed at the same time. Therefore even though undertakings may be broken down into individual activities, they are all subjected to EA.
>
> 2) If an undertaking consists of several activities that have different EA Categories, all activities within the undertaking must be assessed at the highest EA Category applicable to the individual activities. Section 1.3.4 provides further details on EA Categories.[3]

[16] Ontario conducted a Category C Public Work Class Environmental Assessment on certain components of the Ontario Place Redevelopment Project (the "Current EA"). OP4A alleges that Ontario wrongfully failed to include the West Island Redevelopment on the false assertion that the redevelopment of the West Island is a private undertaking. Ontario does not assert on this motion that the West Island redevelopment is a private undertaking not covered by the *EAA* but relies on the exemption of the Ontario Place Redevelopment Project by the passage of *ROPA.*

Rebuilding Ontario Place Act, 2023 (ROPA)

[17] Section 9 of *ROPA* contains various provisions that define the scope of the Ontario Place carve-out from the application of the *EAA*. Subsections 9(1) and 9(2) exempt from the *EAA* any "undertakings" carried out at the Ontario Place site. These provisions state:

> **9** (1) The following are exempt from the *Environmental Assessment Act*:
>
> 1. Any undertaking carried out at the site described in subsection (2).
>
> […]
>
> (2) The site mentioned in subsection (1) is comprised of,
>
> (a) the land identified by the Property Identification Numbers set out in Schedule 3; and
>
> (b) prescribed land, if any, that is part of the land identified by the Property Identification Numbers set out in Schedule 1.
>
> (3) An exemption in subsection (1) does not apply in respect of,
>
> (a) an undertaking for which a notice of completion has been issued on or before July 4, 2023 under the Public Work Class Environmental Assessment; or
>
> (b) such other undertakings as may be prescribed.

[3] Public Work Class EA, p.3.

(4) Any change to an undertaking described in clause (3) (a) is exempt from the *Environmental Assessment Act*.

[18] OP4A does not contest that the land to which *ROPA* applies includes the West Island. However, it submits that the West Island Redevelopment is exempt from the application of ss. 9(1) and (2) pursuant to s. 9(3) of *ROPA.*

Jurisdiction of Single Judge of Divisional Court

[19] Section 21(3) of the *Courts of Justice Act,* R.S.O. 1990, c.C.3 provides that a motion in the Divisional Court shall be heard and determined by one judge. Pursuant to s. 21(4), a judge assigned to hear and determine a motion may adjourn it to a panel of the Divisional Court. Pursuant to s. 21(5), a panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion.

Test on a Motion to Quash

[20] The test on a motion to quash an application for judicial review is whether it is "plain and obvious" or "beyond doubt" that the application cannot succeed: *Ye v. Toronto District School Board*, 2023 ONSC 2918 at para.18.

[21] Alternatively, to the extent that there is no longer a tangible and concrete dispute between the parties, a single judge can quash an application on the basis of mootness.

Ontario's Position

[22] Ontario makes the following submissions.

[23] The government of Ontario can enact new legislation retroactively repairing any potential non-compliance with a statute.[4] Barring a constitutional challenge, where the change in the law prevents the court from ordering the relief sought, it is plain and obvious that the claim or application cannot succeed.[5]

[24] *ROPA* exempts the redevelopment of the West Island from the application of the *EAA*. OP4A does not challenge the constitutionality of *ROPA*. *ROPA* is therefore presumed to be valid and is a complete answer to the issues raised by OP4A.[6] The court could not issue the order for mandamus sought by OP4A.

[25] Ontario argues that the request for declaratory relief is moot because s. 9 of *ROPA* unequivocally exempts the redevelopment of the West Island from the application of the *EAA*. Even if the redevelopment of Ontario Place's West Island had previously required a Category C assessment, it argues that *ROPA* unambiguously provides that no such

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[4] *Greenpeace Canada (2471256 Canada Inc) v. Minister of the Environment, Conservation and Parks et* al, 2019 ONSC 5629 at paras.78, 102 ("*Greenpeace 1*").
[5] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at paras. 68-72; *Abdulle v. Canada (Attorney General*), 2022 FC 1307, at para.28.
[6] *Greenpeace 1*, *supra* at para.100.

assessment is now required. In this context, the declaration sought would "serve no purpose[7] as it would have no practical effect on the right of any of the parties or any collateral consequences for the parties.[8]

[26] Both counsel for Ontario in their oral submissions submitted that if the court found that it was plain and obvious that the claim could not succeed, the court need not go on to consider the mootness issue. Both factums filed by Ontario acknowledge that a court may nonetheless elect to address a moot issue if the circumstances warrant but submit that the court should decline to exercise its discretion to hear this moot case.

Position of OP4A

[27] As noted above, OP4A does not concede that *ROPA* applies to make the West Island Redevelopment exempt from the *EAA*.

[28] In short, OP4A's argument is that the West Island Redevelopment was always properly part of the undertaking to which the Current EA applied and the exemption from the *EAA* therefore does not apply pursuant to s. 9(3) of *ROPA*. The argument follows that this would not be a "change to an undertaking" and therefore exempt from the *EAA* under s.9(4) because at all times the undertaking was the entire Ontario Place Redevelopment Project. It argues that it is therefore clear that the application does have a chance of success and should not be quashed.

[29] OP4A argues Section 3 of the *EAA* is still in force and, despite Ontario's assertion that the application is moot because *ROPA* exempts the West Island Redevelopment from the *EAA*, the core issue is whether it was unlawful for Ontario to have excluded the West Island Redevelopment from the Current EA in the first place. Ontario submits that the court should be alarmed by the legislature's willingness to enact *ROPA* in the face of this judicial review application with the intent of circumventing the accountability it seeks. Consequently, even if only declaratory relief is available to OP4A, a declaration serves a purpose—to hold the government accountable.

Conclusion

[30] It is pleaded in this application that the West Island Redevelopment will destroy the naturalized ecosystem on the West Island, including the removal of every tree (approximately 840 trees, of which over 600 are mature trees), all vegetation, level the internationally recognized Michael Hough landscape, contour and fill the lagoons and small waterways on the West Island, destroy the existing approximately 36,000 square metres of aquatic habitat and add a 12+ acre extension of the footprint of the West Island through 36,000 square metres of lake-filling above water and 25,500 square metres of lake-filling below water.

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[7] *Greenpeace 1*, *supra* at para.109.
[8] *Stewart v. Office of the Independent Police Review Director*, 2013, ONSC 7907, at paras.18-19, aff'd 2014 ONSC 6150.

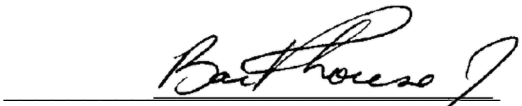
[31] The purpose of the *EAA* is "the protection, conservation and wise management in Ontario of the environment".[9] OP4A submits that the environmental process as set out in the *EAA* is a crucial commitment to protecting Ontario's environment, and public consultation is an integral component of that process. It appears that Ontario's view was that it did not need to comply with the *EAA* and that the project could be piecemealed contrary to its own process.

[32] The scope of the *EAA*'s application to a public redevelopment project is an important question of public interest, as it speaks to the scope of an environmental law which has the potential of encompassing broad environmental protection and directly affects the public's interest in being appropriately consulted.

[33] Decisions on the merits, in Divisional Court, are to be made by a panel of three judges. Where a proceeding is vexatious or demonstrably without merit, a single judge may quash or dismiss it on motion-- a decision that is reviewable as of right before a panel. It may be that at the end of the day as argued by Ontario, the will of the legislature must prevail, even if expressed retroactively. However, it cannot be said that OP4A's concerns about governance in defiance of environmental legislation are frivolous or unworthy of argument before a panel of the court, notwithstanding the passage of legislation which purports to retroactively sanitize the initial allegedly unlawful conduct. Where, as here, the questions are legal issues of first impression, in a context of significant public law interest and concern, the issue is more appropriately dealt with by a panel than by a single judge.

[34] Accordingly, I adjourn this matter to a full panel of the Divisional Court in accordance with s.21(4) of the *Courts of Justice Act*.

[35] Costs of this motion shall be reserved to the Panel hearing the matter.



Backhouse J.

Released: March 27, 2024

[9] *EAA*, s.2.