CITATION: Ontario Place for All Inc. v. Ontario Ministry of Infrastructure, 2024 ONSC 3327
DIVISIONAL COURT FILE NO.: DC-23-00000647-00JR
DATE: 20240611

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Myers, Davies, and O'Brien JJ

BETWEEN:	
ONTARIO PLACE FOR ALL INC. Applicant	*D. Eady, A Lewis, J. Roher, and G. Hoaken,* for the Applicant
– and –	
ONTARIO MINISTRY OF INFRASTRUCTURE, INFRASTRUCTURE ONTARIO AND ONTARIO MINISTRY OF TOURISM, CULTURE AND SPORT	*M. Wiffen, M. Sims, and K. Leung* for the Respondents, Ontario Ministry of Infrastructure and Ontario Ministry of Tourism, Culture and Sport
Respondents	*B. Shaw and A. Delage,* for the Respondent, Infrastructure Ontario
	HEARD: May 13, 2024

O'BRIEN J.

REASONS FOR DECISION

Overview

[1] The applicant, Ontario Place for All, is a grassroots organization with over 30,000 active supporters. It opposes the Ontario government's plan to redevelop a portion of the Ontario Place property called the West Island. While the government intends to redevelop all of Ontario Place, an environmental assessment was completed only for the part of the property excluding the West Island.

[2] In its application for judicial review, Ontario Place for All alleges the respondent ministries and Infrastructure Ontario were required to include the redevelopment of the West Island in the environmental assessment. It says an environmental assessment is important because the West Island redevelopment project involves the construction of a "gigantic spa facility" with private entities including a foreign owned company called Therme. According to the applicant, the plan

to redevelop the West Island will involve cutting down a substantial number of trees, levelling a cultural heritage landscape, and filling in portions of the lakefront.

[3] Before the start of this application, the respondents took the position that the West Island redevelopment was a private undertaking to which the *Environmental Assessment Act*, R.S.O. 1990, c. E.18 ("EAA") did not apply. The applicant disputed this. The applicant alleged the relevant documents, including the lease and other contractual arrangements, once disclosed, would reveal that the West Island redevelopment is on behalf of the Ontario Government and falls within the EAA.

[4] However, new legislation, *Rebuilding Ontario Place Act, 2023*, S.O. 2023, c. 25, Sched. 2[1] ("ROPA"), was tabled a week after the notice of application was served and was quickly passed. The respondents submit ROPA exempts the West Island from the EAA and therefore nullifies the remedies sought in the application. The applicant acknowledges in its factum the government introduced and passed the legislation "to defeat this application for judicial review." Because of ROPA, the respondents now bring a motion to quash the application for judicial review.[2]

[5] The question for the court is whether it is plain and obvious the application cannot succeed in the face of ROPA. The respondents also submit, in the alternative, that because of ROPA, the application is moot. For the following reasons, I conclude it is plain and obvious the application cannot succeed. I also find that the question of whether to issue a declaration is moot and that the court should not exercise its discretion to decide it.

Analysis

Is it plain and obvious the application cannot succeed?

[6] The court may quash an application for judicial review where it is plain and obvious or beyond doubt that the application cannot succeed: *Democracy Watch v. Ontario Integrity Commissioner*, 2021, ONSC 7383, at para. 27; *Ye v. Toronto District School Board*, 2023 ONSC 2918, at para. 18.

[7] By way of background, the notice of application seeks, among other things: (1) an order for mandamus requiring the respondents to conduct a Category C Public Work Class environmental assessment[3] for the entire Ontario Place redevelopment project, including the West

[1] Schedule 2 to the *New Deal for Toronto Act, 2023*, S.O. 2023, c. 25.

[2] The motion was initially brought before a single judge. In an endorsement dated March 27, 2024 *(Ontario Place for All Inc. v. Ontario (Ministry of Infrastructure)*, 2024 ONSC 1783), Backhouse J. adjourned the matter to a full panel in accordance with s. 21(4) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

[3] Under the EAA, a "class" environmental assessment is subject to the requirements of Part II.1 of the EAA and is to be distinguished from an "individual" environmental assessment. A "public work" refers to a particular form of class environmental assessment that is applicable to provincial government realty actions and public works projects. This terminology in the EAA has been amended since the application was started. "Category C" refers to a specific category of the types of undertakings within the public work class. Category C is for those projects, which, according to the respondent ministries' factum, "have the potential for the most significant environmental effects and require more rigorous assessment and consultation requirements."

Island; and (2) a declaration that the failure to include the redevelopment of the West Island in the environmental assessment already completed is contrary to s. 3 of the EAA and therefore unlawful.

[8] Subsection 3(a) of the EAA as it read at the time the application was brought defined the public projects captured by the act. The EAA applied to public "undertakings", specifically "enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities." Section 3 was repealed on February 22, 2024.

[9] The respondents rely on s. 9 of ROPA, which states, in part, as follows:

> 9(1) The following are exempt from the *Environmental Assessment Act*:
>
> Any undertaking carried out at the site described in subsection (2).

[10] There is no dispute between the parties that the land described in s. 9(2) covers the entirety of Ontario Place. The respondents therefore submit it is plain and obvious the EAA does not apply to the West Island and the application cannot succeed.

[11] The applicant relies on s. 9(3)(a) to submit the West Island is *not* exempt from the EAA. It provides:

> 9(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;

[12] The parties agree a notice of completion was issued on July 4, 2023 for the environmental assessment that has already been completed for the Ontario Place redevelopment.

[13] According to the applicant, its notice of application pleads the West Island is part of the same "undertaking" as the rest of Ontario Place and, as a result, the July 4, 2023 notice of completion included the West Island. It emphasizes that the pleading must be taken as true for the purposes of this motion. In the applicant's submission, because the notice of completion was issued for that "undertaking" and included the West Island, the West Island is not exempt from the EAA under s. 9(3) of ROPA.

[14] I disagree. First, the applicant has not pleaded the West Island formed part of the same undertaking. The notice of application pleads the West Island redevelopment is not a private undertaking and instead falls within the public undertaking definition in the EAA. It does not go further than saying the West Island redevelopment is "an enterprise or activity or proposal, plan or program in respect of an enterprise or activity by [or] on behalf of the Government of Ontario." That is not the same as saying it is part of the *same* public undertaking as the rest of the Ontario Place redevelopment. The thrust of the notice of application is that the completed environmental assessment *excluded* the West Island, not that an environmental assessment was completed for an undertaking that included the West Island.

[15] Second and more importantly, the applicant's argument leads to an absurd interpretation of s. 9. Subsection 9(2) exempts the entirety of the lands that make up Ontario Place from the requirements of the EAA. Subsection 9(3)(a) then states the exemption does not apply to those portions of Ontario Place for which a notice of completion was issued on July 4, 2023. If subsection 9(3)(a) was intended to capture the entirety of the Ontario Place lands, there would be no purpose or effect to s. 9(2). Section 9 would both exempt the entirety of the Ontario Place lands from the EAA while at the same time excluding the entirety of those lands from the exemption. In other words, s. 9(3) would render s. 9(2) meaningless.

[16] Third, the applicant's submission that an "undertaking" must be determined objectively does not assist. Even if an undertaking is to be determined objectively rather than by the proponent ministry in charge of the project (an issue I do not need to determine), the circumstances of this case require an interpretation of the "undertaking" that is specifically referenced in s. 9(3)(a). Reading s. 9 as a whole, the only available interpretation is that the undertaking referenced in s. 9(3)(a) does not include the West Island.

[17] Finally, if the applicant's position is accepted, there is no route for it to obtain the primary remedy it seeks, which is an order for mandamus requiring an environmental assessment that includes the West Island. If the West Island forms part of the undertaking captured by s. 9(3)(a), a notice of completion has already been issued for the environmental assessment. If the environmental assessment for that undertaking needs to be reopened, the notice of completion no longer applies, which means the s. 9(3)(a) exemption is no longer available. To the extent the applicant seeks instead to add to or change the undertaking that has received the benefit of the notice of completion, subsection 9(4) provides that "[a]ny change to an undertaking described in clause (3)(a) is exempt from the Environmental Assessment Act."

[18] In short, it is plain and obvious the Legislature passed s. 9 to preserve the environmental assessment that has already been completed on Ontario Place but otherwise exempt the Ontario Place lands from the EAA. There is no challenge to the constitutionality of ROPA and it therefore governs. The applicant's request for an order requiring the respondents to conduct an environmental assessment of the West Island redevelopment cannot succeed.

Should the court hear the application to address the request for a declaration that the respondents' actions were unlawful?

[19] The respondents also resist the request for the court to hear the request for a declaration that the government's conduct was unlawful prior to the passage of ROPA. They submit the question is moot and the court should not exercise its discretion to hear this issue. The applicant does not agree the issue is moot and, in any event, states the court should exercise its discretion to allow the judicial review to proceed.

[20] The question of whether the respondents acted unlawfully in failing to obtain an environmental assessment before the passage of ROPA is moot. A moot case is one in which "no present live controversy exists which affects the rights of the parties," or "the required tangible and concrete dispute has disappeared and the issues have become academic"; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353. Because I have concluded s. 9 unequivocally

exempts the redevelopment of the West Island from the EAA, a declaration would serve no practical purpose.

[21] *Borowski* provides that a court may exercise its discretion to hear a case even if it finds it to be moot. In my view, the court should not do so here. *Greenpeace Canada (2471256 Canada Inc.) v. Minister of the Environment*, 2019 ONSC 670, which the applicant relies on, is distinguishable. There, the Minister argued he was not required to comply with the public consultation process under the Environmental Bill of Rights with respect to an environmental regulation because the recent Ontario election had been a substantially equivalent process of public consultation. While the regulation was subsequently revoked, the consultation provisions in the Environmental Bill of Rights remained the law. The court decided the application was not moot because there remained a live issue: The Minister could take the same view in the future about the provincial election being "substantially equivalent" to public participation in respect of other environmental policies or regulations.

[22] Here, there is no similar concern. The situation is fact-specific and unlikely to recur. Second 3 of the EAA as it read at the time the application was started has been revoked. Any interpretation of whether and how it applies to the circumstances of this case therefore will have little public interest value.

[23] Further, the court's conclusion in this case would be highly fact-dependent. To determine whether the redevelopment of the West Island constituted an "undertaking" to which a Category C Public Work Class Environmental Assessment applied before ROPA, the applicant has requested production of the "Lease and any other contractual arrangements with Therme, along with any business case for the Spa and West Island Redevelopment." It alleges the lease and contractual arrangements with Therme contain terms making it clear the West Island redevelopment was not a private undertaking. In other words, the applicant's case relies on the specific relationship between the parties and other details of the business case. Any declaration issued by the court would be fact-specific and would not address any identifiable principles for future cases.

[24] One of the factors for the court to consider in exercising its discretion is whether deciding the issue would be inconsistent with the institutional role of the court: *Borowski*, at pp. 362-363. In my view, it would overstep the court's role to decide the issue of a declaration when there is no ongoing live dispute and no principle that is likely to recur.

Disposition

[25] The motion is allowed and the application is quashed.

Costs

[26] Ontario Place for All is a public interest litigant with no personal interest in this litigation. Its goal was to conserve the natural environment and hold the government accountable for environmental requirements when redeveloping important public lands. I agree with its position that, if unsuccessful on the motion, it should not be required to pay costs.

[27] The respondents submit the applicant should be required to pay at least some costs because it became unreasonable to pursue the application once ROPA was passed. I would not order costs on this basis. After ROPA was passed, the applicant invited the respondents to bring a motion to quash the application. Given the hasty passage of ROPA after the application had been started, this was not an unreasonable approach. It allowed the court to rule on the impact of ROPA in an efficient manner and before a full application record was compiled. In these circumstances, no costs are ordered.

O'Brien J.

I agree

Myers, J

I agree

Davies, J

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