

## **IMPACT OF PROPOSED AMENDMENTS TO THE ONTARIO HERITAGE ACT ON CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS**

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### **A. INTRODUCTION**

On November 2, 2004, *An Act to Amend the Ontario Heritage Act* (“Bill 60”)<sup>1</sup> received second reading in the Ontario legislature. Bill 60 has since been amended by the Justice Policy Committee and is expected to receive Third Reading when the legislature resumes in February 2005.<sup>2</sup> The amendments proposed in Bill 60 are part of a larger objective to strengthen and improve heritage protection in Ontario. If passed, Bill 60 will expand municipal powers, provide for new provincial powers to identify and designate properties that are of heritage significance, enhance the jurisdiction of the Ontario Municipal Board (the “OMB”), and provide for enhanced demolition controls over designated properties.

As a result of the expanded designating powers, it is likely that Bill 60 will increase the number of buildings designated as having “cultural heritage value or interest.” In this regard, owners of properties that may have cultural heritage value or interest (for example, older churches and cathedrals) which are not presently designated under the *Ontario Heritage Act* (the “Act”),<sup>3</sup> may become designated when Bill 60 comes into

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<sup>1</sup> The full text of Bill 60 is available at: [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/Session1/b060\\_e.htm](http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b060_e.htm).

<sup>2</sup> The Justice Policy Committee Report on Bill 60 was released on December 2, 2004. Further details are available at <http://www.ontla.on.ca/library/bills/381/60381.htm>.

<sup>3</sup> *Ontario Heritage Act*, R.S.O. 1990, c. O.18

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force. The proposed amendments have been applauded in the heritage community. However, given that more buildings will be designated and given that municipalities will have by-law making powers to impose minimum standards for maintenance and upkeep on designated property owners, complying with the standards, may become a financial burden for many designated property owners. In addition, charitable and not-for-profit organizations could find that designation will further restrict the development potential of their properties and therefore curtail the market for, as well as the market value of, these properties. As a result, charitable and not-for-profit organizations with limited operating budgets that may not be able to continue to maintain their designated properties may also find themselves in the difficult position of finding a decreased number of potential purchasers, should they decide to sell a property that has been designated. This *Charity Law Bulletin* summarizes the proposed changes to Part IV of the Act, in relation to the designation process, enhanced demolition controls, and the effects that this will have on charities and not-for-profit organizations that currently own designated property or own property that may be designated in the future.

## **B. THE CURRENT ONTARIO HERITAGE ACT**

### **1. Property Identification and Designation**

Under the existing Act, only the council of a municipality (“Council”) can designate a property within its jurisdiction as being of “cultural heritage value or interest.”<sup>4</sup> If the Council intends to designate a property, it will inform the property owner and the Ontario Heritage Foundation,<sup>5</sup> publish its intent to designate in a local newspaper<sup>6</sup> and enact a by-law designating the property as being of “cultural heritage value or interest.”

### **2. Effect of the Notice of Designation**

There are two main effects that arise as a result of serving and publishing the notice of designation on the property owner. Serving the notice:

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<sup>4</sup> *Supra* note 3, subsection 29(1)

<sup>5</sup> The Ontario Heritage Foundation is a non-share capital corporation that advises the Minister of Culture in the administration of the *Ontario Heritage Act* regarding the conservation, protection and preservation of the heritage of Ontario. The powers of the Foundation are detailed in sections 9 and 10 of the Act. Under Bill 60, the Ontario Heritage Foundation will be renamed the Ontario Heritage Trust.

<sup>6</sup> *Supra* note 3, subsection 29(3)

- stays all demolition and alteration permits that were previously issued by the municipality for that property;<sup>7</sup>
- restricts the property owner's right to alter, renovate, demolish or remove the heritage attributes of the property without consent from Council.<sup>8</sup>

### 3. Property Owners Automatic Right to Demolish Designated Property

In light of the above, property owners that wish to demolish designated buildings are required to apply to Council for approval. Under the current Act, even if Council denies this application, the property owner has an automatic right to demolish the property 180 days after Council's refusal, as long as the property owner has obtained a building permit to erect a new building in its place. This means that Council's power to prevent the demolition is only an interim control and it ultimately cannot prevent the demolition.<sup>9</sup>

## C. PROPOSED CHANGES TO THE *ONTARIO HERITAGE ACT*

### 1. Expanded Identification and Designation Process

One of the most significant changes to Part IV of the Act proposed in Bill 60, will result in properties being subject to not only municipal designation but to provincial designation as well, provided that the Minister of Culture (the "Minister") believes the property in question has "cultural heritage value or interest to the province." In addition, with regards to municipal designation, section 29 of the Act will be amended to ensure that where criteria are prescribed by regulations, only those properties that meet the prescribed criteria will be designated. With regards to prescribing criteria for provincial designation, the language is more definitive and suggests that criteria will be prescribed by regulation to indicate which properties may be designated by the Minister.<sup>10</sup>

In general, provisions in Bill 60 that will apply to municipally designated properties will likewise apply to provincially designated properties. As a result, provincially designated property owners will be able,

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<sup>7</sup> *Supra* note 3, section. 30

<sup>8</sup> *Supra* note 3, sections.33 & 34

<sup>9</sup> *Supra* note 3, subsection 34(5)

<sup>10</sup> *Supra* note 1, subsection 34.5(1)(a). See also Explanatory Note to the Ontario Heritage Amendment Act, 2004. This is also available at : [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/Session1/b060\\_e.htm](http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b060_e.htm).

for example, to make demolition requests and in doing so will be subject to the same review, and appeals processes that would apply for municipally designated properties. Further, it is reasonable to predict that the introduction of provincial designation will increase the sphere in which designations can be made and in the larger context will result in more properties of “cultural heritage value or interest” being targeted, preserved and protected in the province.

2. Effect of Notice of Designation

A notice of intention to designate, whether municipally or provincially, will continue to void all permits obtained prior to designation that would allow the property owner to alter or demolish the property, and will give Council<sup>11</sup> or the Minister<sup>12</sup> interim control over alteration, demolition and removal of the property to be designated.

3. De-designation

Another integral component of the larger objective to protect heritage resources is reflected in Bill 60’s proposed amendments making it more onerous for designated property owners to repeal a municipal by-law designating the property as being of “cultural heritage value or interest.” Property owners will still be able to object to their property being designated. However, the proposed section 32(14) will allow “any person” to object to the removal of the designation. This amendment will modify the de-designation process, which currently does not allow third party objections to a property owner’s application to remove the designation.<sup>13</sup>

4. Extended Demolition Controls under Bill 60

Another significant amendment proposed in Bill 60 will give municipalities the right not just to delay, but to prohibit the demolition of buildings that are of cultural interest to the community. Under Bill 60, designated property owners will no longer have an automatic right to override a Council decision that a designated property should not be demolished. As discussed earlier, under the Act, even though Council can deny a property owner’s demolition request, it cannot ultimately prevent the demolition,

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<sup>11</sup> *Supra* note 1, subsection 30(2)

<sup>12</sup> *Supra* note 1, subsection 35.5(4)

<sup>13</sup> *Supra* note 3, subsections 31(5) and 29(5)

since owners reserve the right to demolish after 180 days has passed from the date the Council denied the demolition application. Therefore, with this amendment, Bill 60 will remove private property rights, and extend demolition controls by municipalities, and in doing so will create a tension in terms of balancing the needs and rights of property owners and the community interest. Bill 60 partially addresses this reduction in property rights by introducing a new appeals mechanism for property owners and enhancing the jurisdiction of the OMB to preside over these appeals. This is discussed below.

It is important to note that Bill 60 will introduce onerous financial penalties for breaching a “no demolition” order. The amended legislation will allow for a \$1M fine to “any person” who contravenes sections 34, 34.5, 42, 48.1 of the Act – which prohibits demolition under specified circumstances. This penalty would also apply to any “director or officer” who “knowingly concurs in such an act by the corporation.”<sup>14</sup>

#### 5. New Appeal Mechanism and Extended Jurisdiction of the Ontario Municipal Board

Section 34 of the Act will be amended to allow designated property owners the option to appeal a Council’s refusal of a demolition request to the OMB. If Council does not consent to a property owner’s demolition request, or offers a conditional consent, the property owner will have the option to appeal to the OMB, within 30 days<sup>15</sup> of receiving the decision.<sup>16</sup> However, after holding a hearing, the OMB will be empowered to make a final decision<sup>17</sup> on the demolition request and may either allow the appeal with or without conditions or dismiss the appeal. Dismissing the property owner’s appeal will automatically prevent the demolition of the designated property. While an OMB decision does not preclude the property owner from making a demolition application in the future, the proposed expansion of demolition controls discussed above will take away the automatic demolition right property owners currently have under the Act.

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<sup>14</sup> *Supra* note 1, subsection 69(3)

<sup>15</sup> *Supra* note 1, subsection 34.1(2)

<sup>16</sup> *Supra* note 1, subsection 34.1(6)

<sup>17</sup> *Supra* note 1, subsection 34.1(7)

6. Maintenance Standards and Guidelines

Under Bill 60 property owners will be required to comply with minimum standards for the preservation and up-keep of designated buildings. As a result, Bill 60 will provide municipalities with new powers to make by-laws prescribing minimum standards for maintenance and upkeep of the heritage attributes of all designated buildings.<sup>18</sup> In addition, Bill 60 will require designated properties that do not comply with these standards to be repaired and maintained to conform with the required standards.<sup>19</sup>

7. Transitional matters

It is important to note that if passed, the new legislative provisions will apply during the transitional period, unless a designated building is in the process of being demolished at the time the Bill receives Royal Assent.<sup>20</sup> As a result, the new provisions under Bill 60, including extended demolition controls, will apply to demolition requests submitted or approved prior to Bill 60 receiving Royal Assent, as long as the demolition process has not commenced.

Property owners will then have a 30 day period within which to appeal Council's decision to the OMB or 90 days during the transition period for property owners who have lost the demolition right afforded under<sup>21</sup> the current Act.

8. Ministerial Oversight Powers

In addition to the various measures discussed above, Bill 60 will give the Minister sweeping oversight powers to issue stop orders<sup>22</sup> preventing alterations, demolitions, and the removal of "any property" the Minister believes to be of "cultural heritage value or interest" to the province. Based on the wording of this provision, this power appears to apply to undesignated properties as well, whether the property was provincially or municipally designated, and regardless of prior municipal approval to alter, demolish or remove the property.

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<sup>18</sup> *Supra* note 1, paragraph 35.3(1)(a)

<sup>19</sup> *Supra* note 1, paragraph 35.3(1)(b)

<sup>20</sup> *Supra* note 1, subsection 37(4)

<sup>21</sup> *Supra* note 1, subsection 34.2(1)

<sup>22</sup> *Supra* note 1, section 35.2

## 9. Conclusion

Owning properties with potential “cultural heritage value or interest” will likely become more costly when amendments to the *Ontario Heritage Act* proposed in Bill 60 come into force. Bill 60 will now allow the Minister, as well as municipalities, to identify and designate heritage properties, and will provide for greater demolition controls and by-law making powers regarding maintenance.

These amendments are intended to enhance the preservation of cultural sites for the good of the community. However, the costs associated with these amendments will fall on property owners who will be required to comply with minimum standards for preserving and up-keeping these buildings. At the same time, property owners will find it more difficult to obtain OMB approval to demolish these buildings. As a result, designation would have the effect of restricting the development potential of these properties, thereby severely curtailing the market for, as well as the market value of, these properties, while at the same time restricting the ways in which owners may utilize these properties. Charitable and not-for-profit organizations that may not be able to continue to own or maintain the designated properties and properties that could potentially be designated as such, and in some cases wish to divest some of these properties in order to supplement their budgets, will find it more challenging to do so under Bill 60.



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