

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

THE CITY OF TORONTO

Moving Party

- and -

**457 RICHMOND STREET WEST LIMITED and the GARMENT DISTRICT
NEIGHBOURHOOD ASSOCIATION**

Respondents

**FACTUM OF THE RESPONDENT
457 RICHMOND STREET WEST LIMITED**

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PART I – OVERVIEW

1. This is a case where the City of Toronto (the “**City**”) is seeking leave to appeal a decision of the Local Planning Appeal Tribunal (“**LPAT**” or “**Tribunal**”) because, quite simply, the City does not like the result.

2. In its decision dated July 15, 2019 (the “**Decision**”), the Tribunal exercised its jurisdiction under the *Planning Act*¹ to consider, and allow in part, the appeal by the Respondent, 457 Richmond Street West Limited (“**457**”), of its zoning by-law amendment application (“**ZBA Application**”) to permit the development of a 19-storey building on the property located at 451-457 Richmond Street West (the “**Property**”). In arriving at its Decision, the Tribunal heard extensive and competing expert heritage, land use planning, urban design and transportation evidence. Ultimately, it preferred the evidence of 457’s experts over the City’s and other parties’ witnesses.

¹ *Planning Act*, R.S.O. 1990, c. P.13 [“*Planning Act*”].

3. The City has not raised any question of law. Alternatively, and if the Court determines that the City has raised a question of law, then it is not of sufficient importance to warrant the attention of the Divisional Court. In this respect, the Decision is consistent with the LPAT's Decision in *Dale Inc. v. Toronto*² [*"Dale (LPAT)"*] (cited by the City) and the Divisional Court's recent ruling regarding that case.³

4. The issues raised by the City in the context of this case required the Tribunal to determine the heritage value of the Property (if any) and to assess conservation, in accordance with the Tribunal's mandate under the *Planning Act*. The Tribunal did this. In summary, the Decision involves the application, by a specialized tribunal operating under its home statutes, of the very planning policies it was designed to apply to a specific fact situation. On this basis, the Decision is entitled to significant deference.

5. The City's motion invites this Court to equate the status of a "listed" property under the *Ontario Heritage Act*⁴ (the "*OHA*") with one that is "designated" and therefore protected under that Act. The City's position fundamentally distorts and mischaracterizes what it means for a property to be "listed" under the *OHA*, and the LPAT's jurisdiction to consider heritage matters under its *Planning Act* jurisdiction.

6. The City is further inviting this Honourable Court to conclude that the Tribunal should have deferred to Council's decisions on cultural heritage matters under the *OHA*.⁵ As a result of the recent Divisional Court decision in *Dale*, this position is clearly wrong.

² *Dale Inc. v. Toronto (City)*, (2019), 2019 CarswellOnt 11209 (LPAT) [*"Dale (LPAT)"*], City's Book of Authorities [*"City's BOA"*], Tab 9.

³ *My Rosedale Neighbourhood v. Dale Inc.*, 2019 ONSC 6631 (Div. Ct.). [*"Dale (Divisional Court)"*], City's Supplementary Book of Authorities [*"City's Supplementary BOA"*], Tab 15.

⁴ *Ontario Heritage Act*, R.S.O. 1990, c. O.18 [*"OHA"*].

⁵ City's Factum, para. 53; City's Supplementary Factum, para. 3.

7. The City's Factum reads out the word "significant" and mischaracterizes the word "conserved" for the purposes of the provincial planning and policy framework. This framework, including the *Planning Act*, contemplates redevelopment of properties that contain significant heritage resources, where those significant heritage resources are "conserved". In this case, the City posits an incorrect and unduly narrow position that "conserve" can only mean retention of the Building *in situ*. To this end, the City's Factum purports to quote the definition of "conserved" from the relevant provincial policy documents but it omits the latter portion of the definition which specifically allows for the method of conservation that 457 proposed, and the Tribunal accepted.

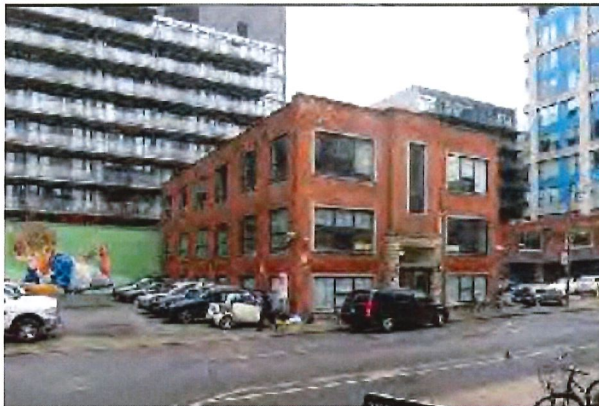
8. The City's complaint that the LPAT conducted a hearing on a different question than was identified in the Tribunal's Procedural Order is a complete red herring. The City raised the issue of whether 457's redevelopment proposal conserves the heritage resource on the Property. In order to adjudicate this issue, LPAT necessarily had to identify and evaluate the heritage resource on the Property, and consider whether 457's proposed method of conservation addressed provincial and municipal policy. The Tribunal heard competing expert witness opinion on this matter and preferred 457's evidence.

9. The Tribunal's Decision reflects its factual and policy findings, which are highly fact specific, have no precedential import, and are not appealable since they do not raise questions of law alone that give rise to a question of general importance. Accordingly, this Court should dismiss the City's motion for leave to appeal.

PART II – FACTS

The Property, the Building and its Context

10. The Property is located mid-block on Richmond Street West between Spadina Avenue and Bathurst Street at the municipal addresses 451-457 Richmond Street West. The Property is designated “Regeneration Area (RA)” in the City’s Official Plan, an area where intensification is encouraged.⁶ The Property is currently occupied by the 2.5-3-storey former manufacturing Building constructed in the 1950s, and a surface commercial parking lot. A photo of the Building (from across Richmond Street West, looking south) is below:⁷



11. The Property is located within a broader mixed use area that has undergone significant redevelopment. Built forms in the area vary from low to high rise buildings.⁸

457’s Redevelopment Proposal

12. 457 proposes to redevelop the Property with a 19-storey mixed-use retail and residential project comprised of a 7-storey tower atop a 12-story podium, including a mezzanine.⁹ The

⁶ Decision, para. 7; City’s MR, Tab 2, p. 13.

⁷ Witness Statement of Philip Goldsmith, City’s MR, Tab 18, p. 366.

⁸ Witness Statement of Paul Stagl, p. 8; 457 Richmond Street West Limited Responding Motion Record [“457’s Responding MR”], Tab 8, p. 90.

⁹ Witness Statement of Paul Stagl, p. 12, 457’s Responding MR, Tab 8, pp. 93-94.

redevelopment proposes approximately 138 residential condominium units and 93 square metres of retail and service space at grade level (the “**Proposal**”).¹⁰

13. The Proposal exceeds certain development regulations in the applicable zoning by-law, including height and density. Accordingly, on December 21, 2016, 457 submitted a complete ZBA Application to the City to permit the Proposal. One of the supporting studies filed in support of the application was a Heritage Impact Statement prepared on behalf of 457, assessing the heritage attributes and value of the Building.¹¹

14. At the time of application, the Property was neither “designated” under Part IV of the *OHA* nor “listed” on the City’s Heritage Register. On July 27, 2017, 457 appealed its ZBA Application to the Ontario Municipal Board (“**Board**”) (now the LPAT), pursuant to s. 34(11) of the *Planning Act*. After the appeal was filed, the City passed a by-law to designate the proposed King-Spadina Heritage Conservation District (the “**HCD**”) and to adopt the related King-Spadina Heritage Conservation District Plan (“**HCD Plan**”). Later still, it adopted a mass, or “batch”, listing of properties considered to be “contributing” in the HCD Plan.

Proposed HCD and HCD Plan¹²

15. The HCD includes the area generally located within the boundaries of Richmond Street West to the north (including the Property), Simcoe Street to the east, Front Street West to the south, and Bathurst Street to the west.

16. Within the proposed HCD Plan, a portion of the Property (457 Richmond Street West) is identified as “contributing” to the HCD’s cultural heritage value and a portion of the Property (451 Richmond Street West) is identified as non-contributing.¹³

¹⁰ Witness Statement of Paul Stagl, p. 12, 457’s Responding MR, Tab 8, p. 94.

¹¹ Heritage Impact Assessment, 457’s Responding MR, Tab 6, p. 27.

¹² Adopted October 24, 2017 and amended November 9, 2017.

¹³ HCD Plan, City’s MR, Tab 10, pp. 203-204.

17. 457 (and other appellants) appealed the HCD and related Plan to the LPAT, pursuant to s. 41(4) of the *OHA*.¹⁴ A hearing of the appeals of the HCD and HCD Plan is scheduled to be heard commencing on April 6, 2020. The City is a Respondent Party to those appeals and at all times was well aware of the timing associated with that separate hearing.

18. Until such time as the appeals are finally disposed of, the HCD and the HCD Plan are not in force and effect.¹⁵ Contrary to the suggestion in paragraph 6 of the City's Factum, the Property is therefore not designated under the *OHA*. Contrary to paragraph 5 of the City's Supplementary Factum, it was open to the City to designate the Property under s. 29 of the *OHA* at any time (and not only in response to an Owner's request to demolish) but the City has chosen not to do so.

"Batch" Listing of Properties within the Proposed HCD

19. On December 5, 2017, City Council added approximately 94 properties, including the Property, to the City's Heritage Register in a new practice known as "batch-listing," or the mass listing of properties due to their location within the adopted HCD.¹⁶ This was done a year after 457's complete development application was filed with the City and after the HCD was appealed.

20. The process of "batch listing" permits a municipality to make a quick assessment of properties that may have heritage significance, and to delay demolition of any building on the property until a full heritage assessment can take place and a determination made as to whether the "listed" property should be "designated" pursuant to the *OHA*. A listing is therefore very different than a designation under the *OHA*.

21. It does not necessarily follow that just because a property has been listed, it has cultural heritage value or interest. It may have these values, but further study, evaluation and analysis is

¹⁴ 457 Notice of Appeal of King-Spadina Heritage Conservation District, City's MR, Tab 13, pp. 233-240.

¹⁵ *OHA*, s. 41(10).

¹⁶ Witness Statement of Kathryn Anderson, City's MR, Tab 19, pp. 374-375, paras. 12, 15 and 16.

required in order to determine if it does, what that value(s) is and how any such value(s) can be appropriately conserved.

22. The City's evidence acknowledged the relatively limited research and analysis that goes into a batch-listing of multiple properties in the context of a Council-adopted HCD Plan.¹⁷ The Tribunal acknowledged this, and found that the potential significance of a particular property, can only derive from a more in-depth and individualized assessment of a property's relative heritage worth when a development application is brought forward.¹⁸ The Tribunal found as a fact that:

The City's own limitations in "batching" dispel the notion that an automatic "value" is ascribed to the properties so batch Listed, or that there is some sort of right to protect these *ab initio*.¹⁹

Steps Leading Up to the Hearing of 457's Appeal of its ZBA Application

23. The Tribunal held two Prehearing Conferences prior to the hearing. At the second Prehearing Conference, all Parties consented to the terms of the Procedural Order, which set out the Parties' issues as well as procedural requirements, including the requirement for exchange and filing of written evidence prior to the hearing and the right to respond to the written evidence filed, again prior to the commencement of the hearing.²⁰

24. The City placed a number of heritage-related issues directly before the Tribunal for adjudication, including the following:

2. Is the Proposal consistent with Section 2 of the Planning Act, in particular, Section 2(d)²¹...?

3. Is the Proposal consistent with the Provincial Policy Statement, 2014 and in particular the following policies: ... 2.6.1, 2.6.3...

¹⁷ Witness Statement of Kathryn Anderson, City's MR, Tab 19, p. 375, para. 16.

¹⁸ Decision, para. 59; City's MR, Tab 2, pp. 28-29.

¹⁹ Decision, para. 59; City's MR, Tab 2, pp. 28-29.

²⁰ Decision of LPAT dated March 16, 2018, City's MR, Tab 14.

²¹ Section 2(d) of the *Planning Act* states, in relevant part: "The Minister, the council of a municipality, a local board, a planning board and the Tribunal, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as, ... (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;..."

4. Does the Proposal conform to or not conflict with, the [Growth Plan 2017] and in particular the following policies: ... 4.2.7.1...

5. Does the Proposal conform to the policies of the City of Toronto Official Plan and in particular the following policies: ... 3.1.5...

6. Does the Proposal conserve the heritage resource located at 457 Richmond Street W.²²

25. The City's issues list also contemplated the appropriate conditions to be imposed on the issuance of any approval order, should the Tribunal decide to approve the Proposal. In this regard, the City also placed the following additional heritage issue on the issues list:

15. If the Proposal is approved, should the Board withhold its order until such time as the following are completed by the Owner:

(d) Submit full documentation of the existing heritage property located at 457 Richmond Street W. to the satisfaction of the Senior Manager, Heritage Preservation Services.²³

26. The City was served with 457's expert evidence six weeks prior to the hearing and was aware of the scope and substance of 457's evidence responding to the City's heritage issues. The City filed no reply evidence.

27. The City did not (either prior to or at any time during the hearing) bring a motion to challenge the appropriateness of 457's evidence, or to challenge the Tribunal's jurisdiction to consider this evidence in the context of 457's *Planning Act* appeal.²⁴

28. The City did not raise any issue of prematurity nor did it seek to challenge LPAT's jurisdiction to proceed with the hearing of the *Planning Act* appeal in advance of the HCD appeal.

The Hearing and the Tribunal's Decision

29. At the hearing, the Tribunal heard extensive expert evidence from three heritage experts, as well as expert evidence from witnesses in the fields of land use planning, urban

²² Decision of LPAT dated March 16, 2018, City's MR, Tab 14, p. 252.

²³ Decision of LPAT dated March 16, 2018, City's MR, Tab 14, p. 253.

²⁴ Affidavit of Eileen Costello, para 5, 457's Responding MR, Tab 1, p. 2.

design and transportation. After considering all the evidence in the context of the issues before it, the Tribunal issued its Decision, with detailed reasons, allowing the appeal in part.

30. The Tribunal determined that the 457 Proposal, with revisions, represents an appropriate redevelopment of the Property in the context of its jurisdiction pursuant to s. 34 of the *Planning Act*. The Tribunal Order is to issue upon certain conditions (including the condition identified in the City's issue 15) being satisfied.²⁵

PART III – ISSUES AND THE LAW

The Issues

31. The issues on this motion for leave to appeal are as follows:

- (a) Does the City's motion raise a question of law?
- (b) What is the standard of review?
- (c) If there is a question of law, is it of sufficient importance to merit the attention of this Honourable Court?²⁶

Overview of the Law

32. In accordance with s. 37 of the *Local Planning Appeal Tribunal Act, 2017*²⁷, an appeal lies from a Tribunal decision to the Divisional Court, with leave, on a question of law.²⁸ The Divisional Court will not consider questions of fact, questions of mixed fact and law or mixed fact and policy, or questions about the exercise of the Board's discretion.²⁹

²⁵ Decision, paras 97, 108; City's MR, Tab 2, pp. 42 and 45; See also List of conditions in Hearing Exhibit 18; 457's Responding MR, Tab 9, p. 208.

²⁶ *Ajax (Town) v Pickering (City)*, 2018 ONSC 3622, paras 10-11, 457 Richmond Street West Limited Brief of Authorities ["457's BOA"] Tab 1.

²⁷ *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1 ["LPATA"].

²⁸ LPATA, s. 37(1).

²⁹ *Residents for Sustainable Development in Guelph v. 6 & 7 Developments Ltd.*, 2005 CanLII 63751 (ON SC), para. 9, 457's BOA, Tab 2. See also: *Concerned Residents Assn of North Dumfries v. Preston Sand and Gravel Co*, 2015 ONSC 2086, para 21, 457's BOA, Tab 3.

33. Even where a question of law is raised, leave to appeal will only be granted if the question of law is of sufficient importance to warrant the attention of the Divisional Court and there is some reason to doubt the reasonableness of the decision.³⁰

PART IV – ARGUMENT

The City's Motion Fails to Raise a Question of Law

34. The City's Factum raises three questions for appeal:

1. Did the LPAT err by finding in a Planning Act appeal that 457 Richmond Street West ought not to have been listed, or is not "contributing" to the District, under ss. 27 and 41 of the Ontario Heritage Act?

2. Did the LPAT err by finding that the Developer's proposal was in conformity with the PPS, 2014, the Growth Plan, 2019, and the City's Official Plan, when 457 Richmond Street West is a property identified and inventoried by an official source as being listed on a municipality's heritage register, and therefore is to be conserved pursuant to:

(a) s. 2.6.1 and s 6.0 of the PPS, 2014;

(b) s. 4.2.7.1 and s. 7 of the Growth Plan, 2019; and

(c) s. 3.1.5(4) and s 3.1.5(26) of the City's Official Plan?

3. Did the LPAT err by depriving the City of natural justice, procedural fairness, and notice of the case it had to meet by considering whether the property at 457 Richmond Street West had heritage value and was "contributing" to the District, when the issue before the LPAT was whether the proposed development conserved the heritage resource?³¹

35. Each of these questions either misstate what the Tribunal did or reflect the Tribunal's factual findings or application of law/policy to the specific facts before it. There is no appeal of the Tribunal's determination in respect of these matters.

36. The Supreme Court of Canada (the "**SCC**") has settled the distinction between questions of law, questions of fact, and questions of mixed fact and law as follows:

"Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and **questions of mixed fact and law are questions about whether the facts satisfy the legal tests.**"³² [emphasis added]

³⁰ *Ajax (Town) v. Pickering (City)*, 2018 ONSC 3622, 2018 CarswellOnt 9334 (Div. Ct.), paras. 10-11, 457's BOA, Tab 1. See also: *Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 2016 CarswellOnt 18671 (Div. Ct.), paras. 31-34, 457's BOA, Tab 4 and *Train v. Weir*, 2012 ONSC 5157, 2012 CarswellOnt 14145 (Div. Ct.), paras. 6-7, 457's BOA, Tab 5.

³¹ City's Factum, para. 39.

³² *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 SCR 748, para 35 457's BOA, Tab 6.

37. On appeals under s. 34(11) of the *Planning Act*, the Tribunal routinely applies the policies of the PPS, the Growth Plan and the City's Official Plan to the particular facts before it to determine whether the policies have been addressed. Ultimately, these are questions of mixed fact and law or mixed fact and policy.

38. While the Court has held that the interpretation of an Official Plan is a question of law³³, the interpretation and application of an Official Plan policy to a specific set of facts is a question of mixed fact and law or mixed fact and policy. Similarly, the interpretation and application of provincial policies to a specific set of facts is a question of mixed fact and law and does not raise a question of law. These legal principles have been confirmed by this Court. For example, in *Cardinal v. Windmill Green Fund LPV*³⁴, the Divisional Court found:

23. "... the question of conformance with the Policy Statement raises questions of mixed fact and law.

26. The Board member's conclusion that the consultation process adequately engage the Algonquin First Nation was based on the following findings:

(a) A finding of mixed fact and law that the City of Ottawa's Official Plan commits to an engagement with First Nations, in particular the Algonquins of Ontario ("AOO").

(c) A finding of mixed fact and law that the process of engagement followed by Windmill with the First Nations was:

Consistent with the City's requirements as set out in the Official Plan which, in turn, identifies the AOO as a stakeholder to be engaged with respect to planning for the future use of Chaudiere and Albert Islands.

(e) A finding of mixed fact and law that "[t]he consultation that was undertaken in this case was in line with the type of consultation that is customary and contemplated under the PPS as well as the City's Official Plan".

(h) A findings of mixed fact and law that, with respect to s. 2.6.5. of the Policy Statement, that

(i) "*the proposed development has had input from the AOO and the Algonquins of Kitigan Zibi*" and "*considered the history of the lands*" and highlights them in the development; and

(ii) The amendment seeks to raise "*awareness of the cultural heritage of the site*" and addresses archaeological resources that may be identified through the ordered assessments prior to development occurring.

³³ *Niagara River Coalition v. Niagara-on-the-Lake*, 2010 ONCA 173, para 43, City's BOA, Tab 6.

³⁴ *Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456, 2016 CarswellOnt 8284 (Div. Ct.), paras 21-27, 457's BOA, Tab 7.

39. Similarly, in *583753 Ontario Ltd. v. York (Regional Municipality)*³⁵, the Divisional Court considered and denied leave to appeal on a matter related to the interpretation and application of the Greenbelt Plan. The Divisional Court held:

My own view is that in relation to this secondary plan, for this difficult area, the O.M.B. decisions re parkland are reasonable, in the context of the whole decision, and supported by the policies and objectives of the Greenbelt Plan. **Much more importantly, the decisions are policy decisions, not decisions on questions of law; decisions within the expertise of the O.M.B., and exempt from appeal.**³⁶ [emphasis added]

40. As noted, *Dale* (LPAT), which is cited by the City in its Factum, was the subject of a recent motion for leave to appeal to the Divisional Court. In *Dale* (Divisional Court)³⁷, the Divisional Court considered the Tribunal's determination that the redevelopment proposal was an appropriate conservation approach under the heritage policies of the PPS, the Growth Pan and the City's Official Plan. In dismissing the motion for leave to appeal, the Divisional Court found that "applying the law as interpreted to the facts as found is quintessentially a mixed question of fact and law".³⁸ The Divisional Court further found that:

What they are challenging is the decision to find that the land itself provides the heritage value rather than the houses on the land. **This is a finding of fact or one of mixed fact and law.... As such, the applicants' concerns are really with the tribunal's acceptance of the evidence of one expert over the other. This does not amount to an error of law.**³⁹ [emphasis added]

41. Ultimately, the City's motion in this case is a challenge to the manner in which the Tribunal weighed the written and *viva voce* evidence and to the Tribunal's preference for the evidence of 457's heritage expert over the City's experts.

42. After considering and weighing the totality of the evidence, and after applying the facts and evidence to the relevant policies that comprise the Test, the Tribunal approved the Proposal in principle and gave direction for certain revisions to the amended zoning by-law for the

³⁵ *583753 Ontario Ltd. v. York (Regional Municipality)*, [2007] O.J. No. 3705 (Div. Ct.), paras. 9, 11 and 14, 457's BOA, Tab 8.

³⁶ *583753 Ontario Ltd. v. York (Regional Municipality)*, [2007] O.J. No. 3705 (Div. Ct.), para. 11, 457's BOA, Tab 8. See also *Stone v. Prince Edward (County)*, [2008] O.J. No. 2588 (Div. Ct.), paras. 14-20, 457's BOA, Tab 9.

³⁷ *Dale* (Divisional Court), City's Supplementary BOA, Tab 15.

³⁸ *Dale* (LPAT), para. 11, City's BOA, Tab 9.

³⁹ *Dale* (LPAT), para. 29, City's BOA, Tab 9.

Property. The exercise involved the unique expertise of the Tribunal with respect to its home statutes.⁴⁰

43. The Decision does not predetermine any *OHA* applications or appeals. In fact, the Decision imposed conditions as sought by the City.

The Tribunal's Mandate and Jurisdiction on a s. 34(11) *Planning Act* Appeal

44. On an appeal under s. 34(11) of the *Planning Act*, the Tribunal is required to:

- (a) have regard to matters of provincial interest under s. 2 of the *Planning Act*, such as (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest”;
- (b) be consistent with provincial policy statements as required by s. 3(5)(a) of the *Planning Act*, in this case the *Provincial Policy Statement (2014)* (the “**PPS**”);
- (c) conform to, or not conflict with, provincial plans that are in effect, in this case the *A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019* (“**Growth Plan**”); and⁴¹
- (d) conform to the City's Official Plan enacted and in force under section 16, and as required by subsection 24(1) of the *Planning Act* (collectively, the “**Tests**”).

45. As noted in *Dale* (Divisional Court), in the context of the overall Tests under Provincial and City policy/guidelines, it is up to the Tribunal to determine the nature of the heritage value of the Property and then assess the conservation steps required⁴².

⁴⁰ *Train v. Weir*, 2012 ONSC 5157, 2012 CarswellOnt 14145 (Div. Ct.), para. 3, 457's BOA, Tab 5. See also *R&G Realty Management Inc. v. North York (City)*, 2009 CarswellOnt 4717 (Div. Ct.), paras. 5-7, 457's BOA, Tab 10. See also *OHA*, s. 34.1 which provides an appeal right to the Tribunal and, accordingly, indicates that the *OHA* is also a home statute of the Tribunal.

⁴¹ The Growth Plan was issued under section 7 of the *Places to Grow Act*, S.O. 2005, c. 13.

⁴² *Dale* (Divisional Court), para. 16, City's Supplementary BOA, Tab 15.

46. Upon consideration of whether the Tests have been met, the LPAT's powers to dispose of an appeal under s. 34(11) of the *Planning Act* are prescribed by s. 34(11.0.2) of the *Planning Act*. In this regard, the Tribunal may:

- (a) Dismiss the appeal;
- (b) Amend the by-law in such manner as the Tribunal may determine; or
- (c) Direct that the by-law be amended in the accordance with the Tribunal's order.

How to Understand The Tribunal's Findings and Comments re: the Property's Heritage Value

47. Under provincial policy, not every building with heritage value or interest is significant. The Tribunal reasonably and correctly found that the fact that a given property is listed on the City's Heritage Register does not *necessarily* mean that it has *significant* cultural/heritage value.⁴³ The Tribunal was required to look beyond the fact that the Property had been part of a batch listing of properties in order to answer the issues the City placed before the Tribunal and exercise its jurisdiction under the *Planning Act*. As the Tribunal found:

The assumption that a building is a significant built heritage resource, or that it is a contributing property or that it represents a "significant" cultural heritage resource, must be tested per each development application, which was done both expertly and professionally by the Applicant's heritage expert.⁴⁴

48. In order to assess whether the Tests had been met by 457's Proposal, the Tribunal needed to understand and evaluate the Property's cultural heritage value or interest and whether the method of conservation proposed by 457, through its heritage expert's Heritage Impact Assessment, would meet the Tests.

49. For example, PPS policy 2.6.1 states that "*significant built heritage resources and significant cultural heritage landscapes shall be conserved.*" The PPS definition of "significant"

⁴³ Decision, para. 59, City's MR, Tab 2, pp. 28-29.

⁴⁴ Decision, para. 60, City's MR, Tab 2, p. 29.

recognizes that the significance of some built heritage resources can only be determined after evaluation.⁴⁵ Under the PPS, if a heritage resource is not significant, it need not be conserved. If it is significant, it shall be conserved; but conservation can take a variety of forms – not just retention *in situ*. In this case, the Tribunal determined that the Building is not significant and is not required to be conserved but, in any event, the method of conservation proposed by 457 (even though not required) was appropriate.

50. Similarly, as set out in Schedule C to this Responding Factum, the Growth Plan policy 4.2.7.1 states that “*cultural heritage resources will be conserved* in order to foster a sense of place and benefit communities, particularly in *strategic growth areas*”. The City argues that the Tribunal “read in” the word “significant” into Growth Plan policy 4.2.7.1 and that this was unreasonable.⁴⁶ However, the definition of *cultural heritage resources* under the Growth Plan expressly imports and incorporates the PPS concept of “significant” into the definition.

51. Similar to PPS policy 2.6.1, Growth Plan policy 4.2.7.1 provides that not all heritage resources are required to be conserved. Where a heritage resource is required to be conserved, however, “in order to foster a sense of place and benefit communities”, conservation can take a variety of forms – not just retention *in situ*.⁴⁷

52. The foregoing is entirely consistent with the Tribunal’s approach in *Dale* (LPAT), which was confirmed by the Divisional Court. In *Dale* (Divisional Court) the Court recognized the exercise of judgment that is involved in applying the policies of the PPS:

I note that in identifying the culturally significant elements of a property within a Heritage Conservation District, the Provincial Policy Statement requires the exercise of judgment. In *Re PROUD Port Dalhousie*, 2009 CarswellOnt 1096 at para. 93, the OMB discussed the task as follows:

As with a heritage structure, not every element of a heritage district is of equal significance. The significant attributes of the heritage district should be identified in the district plan or in the case at hand, the District Guidelines. **The PPS in defining**

⁴⁵ PPS, definition of “significant”, City’s MR, Tab 3, pp. 64-65.

⁴⁶ City’s Factum, para. 67.

⁴⁷ See Schedule “C” to this Factum which contains excerpts of relevant policies from the PPS, Growth Plan and City’s Official Plan.

“significant” necessarily calls for judgment to be used in determining significance. In calling for the conservation of “significant built heritage resources” and “significant cultural heritage landscapes”, the PPS implicitly acknowledges that there may be built heritage resources and cultural heritage landscapes which are not significant and which do not warrant conservation. Such an interpretation allows for the balancing of a variety of provincial interests as mandated by the PPS. [emphasis added]

53. In the City’s Supplementary Factum, the City asserts that this Honourable Court’s reliance on *Re Proud* must be approached with caution⁴⁸. 457 disagrees. That fact that *Re Proud* was a consolidated hearing is irrelevant as the provincial policy quoted above applies regardless of what is before the Tribunal for adjudication and therefore the interpretation is a general one.

54. In *Dale* (LPAT), the appeals arose only under the *Planning Act*, as they do in this case. Based on the evidence before it as applied to the relevant provincial and municipal policy documents, the Tribunal Member found in *Dale* (LPAT) that the building at issue had “middling interest” despite its inclusion as a contributing property in an in-force HCD.

55. In the case at hand, the Tribunal’s approach was entirely consistent with *Dale* (LPAT): The member weighed the expert opinion evidence with respect to how provincial policy applies to the facts, including evidence from the City’s and 457’s heritage experts, in order to understand the Property’s heritage value or interest. The Tribunal was not persuaded that the Building had sufficient heritage value (by association or context) to warrant refusal of the zoning appeal.

56. The Tribunal’s path to understanding and evaluating the heritage value of the Property, and weighing the evidence, is clearly set out in the Decision. Ultimately the Tribunal found:

[67] For all these reasons, the Tribunal prefers the heritage evidence of Mr. Goldsmith to the City’s witnesses. The existing building is not a “significant” cultural heritage resource that should be retained in the particular circumstances of this application.⁴⁹

⁴⁸ City’s Supplementary Factum, para. 4.

⁴⁹ Decision, para. 67, City’s MR, Tab 2, p. 31.

57. It was in the context of the Tribunal weighing the evidence, and assessing it in the context of the Tests, that the Tribunal commented that:

The Tribunal is not persuaded that there existed sufficient evidence for the City to rate the subject building as a significant or contributing building as it does not appear from the evidence to make an important contribution to our understanding of the history of a place, an event, or a people. The Tribunal finds persuasive Mr. Goldsmith's opinion that the subject building should not have been Listed on the City's Heritage Register as part of the City's batch Listing exercise given the above-cited references.⁵⁰

58. This is not an error of law. The Tribunal applied the facts to the relevant policies and weighed the competing expert evidence. The Tribunal concluded that simply because the Property was (1) identified as contributing to the (under appeal) HCD; and (2) included in a "batch" listing on that basis, the Tribunal was not precluded from considering and approving the *Planning Act* application before it.

59. The City's case is that the mere fact that the Property was listed was sufficient to demonstrate its significance and cultural heritage value. The Tribunal's observation that the Property should not have been listed does not have the legal effect of removing the Property from the Heritage Register. These comments are obiter and are, in fact, a response to the evidence proffered by the City in support of the alleged significant of the Building.

60. The Tribunal's findings with respect to the heritage value of the Property were in relation to and within the context of the *Planning Act* appeal before it, engaging the PPS, Growth Plan and the City's Official Plan all of which require the Tribunal to engage in a determination of whether there is a significant heritage resource on the property that is required to be conserved and, if there is, what the appropriate form of conservation is.

61. Therefore, the City's proposed question at paragraph 39(a) of its Factum does not raise a question of law upon which the Court could grant leave.

⁵⁰ Decision, para. 30, City's MR, Tab 2, p. 20.

What it Means for a Property to be “Listed” on the City’s Heritage Register

62. The City’s position is that the Tribunal was “bound” to defer to the City’s listing of the Property and find that the heritage resource on the Property was significant as that term is found in provincial policy.⁵¹.

63. The effect of the City’s position⁵² is to suggest that the Tribunal must defer to the City’s listing of the Property as conclusively deciding the heritage value of the property notwithstanding the Tribunal’s obligation to consider the Tests and make its own findings under the PPS, Growth Plan and the City’s Official Plan.

64. The Divisional Court in *Dale* confirmed that this approach would likely raise an error of law:

[18] Relying on these paragraphs, the applicants argue that the tribunal drew its assessment of the heritage value of the properties and the appropriateness of the conservation measures solely from the City’s approval under the Ontario Heritage Act. **As noted above, if this were the case, I would likely find that the appeal raises a question of law.**

[19] However, the applicants have focused on a very few paragraphs from among a much larger analysis. **Looking at the full decision, it is apparent that the tribunal engaged in a much broader inquiry.**

[22] The applicants agreed below that the identification of the heritage value for conservation was not simply a matter of looking at the ratings in the 2002 study but rather looked at all available evidence in 2019. **The approval of demolition by City Council was one such factor.** [emphasis added]

65. In paragraph 3 of its Supplementary Factum, the City now argues that in *Dale* (LPAT), the Tribunal was exercising a very narrow jurisdiction i.e., to consider whether additional conservation was merited. That is simply incorrect. In *Dale* (LPAT), the Tribunal did not affirm” Council’s decision to issue a demolition permit as that matter was not before the Tribunal. The Tribunal reviewed what heritage resources were on the property and whether they were significant and what conservation was necessitated pursuant to provincial and municipal policy. The Tribunal’s review in *Dale* (LPAT) was not as narrow as the City now tries to suggest.

⁵¹ City’s Factum, para. 19.

⁵² City’s Factum, para. 19.

66. The City argues in this case that, by extension, conservation means the Building on listed Property must be preserved *in situ*.⁵³

67. The listing of a property is not the same as a designation of property under the *OHA*. Under the *OHA*, properties may be “listed” on a municipality’s heritage register pursuant to s. 27, or “designated” (and therefore protected) in accordance with s. 29 of the *OHA*.

68. A municipality’s heritage register may include listed property that has not been designated but that the council of the municipality *believes* to be of cultural heritage value or interest”.⁵⁴ As set out in the Ontario Heritage Tool Kit,

Listing a property of cultural heritage value or interest is the first step a municipality should take in the identification and evaluation of a property **that may warrant some form of heritage conservation, recognition and/or long-term protection such as designation**.

In many cases, listed (non-designated) properties are candidates for protection under section 29 of the *OHA*. These require further research and an assessment using a more comprehensive evaluation that is consistent with Ontario Regulation 9/06 prescribing criteria for determining property of cultural heritage value or interest.

Although listing non-designated properties does not offer any protection under the *OHA*, section 2 of the PPS of the Planning Act acknowledges listed properties.⁵⁵

The register is essentially a work-in-progress that is revised and updated as needed... No final decision about the cultural heritage value or interest of a property on the register should be made without undertaking further historical research and site analysis of that specific property.⁵⁶ [emphasis added]

69. Pursuant to s. 29 of the *OHA*, Council may designate a property to be of cultural heritage value or interest only if (a) criteria for determining whether a property is of cultural heritage value or interest have been prescribed by regulation and the property meets the prescribed criteria; and (b) if the strict process outlined in the s. 29 of the *OHA* (including notice provisions) is followed⁵⁷.

⁵³ City’s Supplementary Factum, para. 3.

⁵⁴ *OHA*, s. 27(1.2).

⁵⁵ Ontario Heritage Tool Kit, Heritage Property Evaluation: A Guide to Listing, Research and Evaluating Cultural Heritage Property in Ontario Communities [“Tool Kit”], City’s MR, Tab 16, p. 297.

⁵⁶ Tool Kit, City’s MR, Tab 16, p. 305.

⁵⁷ *OHA*, s. 29(1).

70. It is only once a property is designated by Council, that Council consent is required for demolition or removal, which decision itself is appealable to LPAT.⁵⁸ The *OHA* contemplates that even a designated property can be demolished.

71. There is nothing in the *Planning Act*, the *OHA*, the PPS, the Growth Plan or the City's Official Plan that would preclude owners of properties that have been listed on the City's heritage register from making applications under the *Planning Act*. If there was, one would have expected the City to draw this to the Tribunal's attention, by way of motion, at one of the two pre-hearing conferences or even at the outset of the hearing. The City did not do this. In fact, the City routinely makes decisions on *Planning Act* applications with respect to "listed" properties and, similarly, the LPAT routinely considers appeals in respect of applications.⁵⁹

The Meaning of "Conserved" Under Provincial and City Policy

72. The City, unreasonably and incorrectly, interprets the word "conserved" under the PPS, Growth Plan and the City's Official Plan as meaning "retention of a building *in situ*".

73. In fact, "conserved", as defined in those documents, contemplates other methods of conservation, beyond retention *in situ*. In this regard, the PPS definition of "conserved", which is adopted in the Growth Plan and the City's Official Plan, is as follows:

Conserved The identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the Ontario Heritage Act. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.⁶⁰ [emphasis added]

⁵⁸ *OHA*, s. 34.1(6) and 34.1(7).

⁶⁰ PPS, City's MR, Tab 3, p. 63.

74. The City's own Official Plan contains policies with respect to new construction on properties that are listed or designated on the heritage register⁶¹, such as policy 3.1.5.26:

New construction on, or adjacent to, a property on the Heritage Register will be designed to **conserve the cultural heritage values, attributes and character** of that property and to mitigate visual and physical impact on it.⁶² [emphasis added]

75. Further, the City's Official Plan contains direction with respect to heritage impact assessments, which are a recognized conservation method under the PPS and which shall be considered when determining how a heritage property is to be *conserved*⁶³:

Heritage Impact Assessments enable the City to obtain information about the **potential** impacts a development or alteration may have on a property on the Heritage Register. A Heritage Impact Assessment shall consider and have regard for the property's cultural heritage values and attributes as identified by Council and will provide a basis for establishing how impacts may be mitigated or avoided, whether the impacts are acceptable, and how the cultural heritage values and attributes will be conserved.⁶⁴ [emphasis added]

76. The Tribunal had expert opinion evidence that the form of conservation proposed by 457, an interpretation plan, was appropriate for the heritage resource and consistent with conservation measures undertaken in other instances in the City⁶⁵. The Tribunal's determination that retention of the building *in situ* is not required to meet the Tests⁶⁶, and that conservation can take the form of a photographic or interpretation plan⁶⁷, engages questions of mixed fact and law and mixed fact and policy that are entitled to significant deference and, in any event, are both reasonable and correct.

77. As found by the Tribunal in *Dale*, "if conservation were to be taken as no alterations being permitted, our communities would be frozen in amber".⁶⁸ The City agreed with that finding.

⁶¹ Policy 3.1.5.1 of the City's Official Plan provides that the Heritage Register includes both listed and designated properties. See City's MR, Tab 5, p. 93.

⁶² City Official Plan, City's MR, Tab 5, p. 96.

⁶³ City Official Plan, City's MR, Tab 5, p. 95, policy 3.1.5.22.

⁶⁴ City Official Plan, City's MR, Tab 5, p. 96, side bar.

⁶⁵ Decision, para. 42, City's MR, Tab 2, p. 24.

⁶⁶ Decision, paras. 65 and 79, City's MR, Tab 2, pp. 30-31 and 35-36.

⁶⁷ Decision, para. 66, City's MR, Tab 2, p. 31.

⁶⁸ *Dale* (LPAT), para. 126, City's BOA, Tab 9. See also para. 127 of *Dale* (LPAT) City's BOA, Tab 9.

78. On the motion for leave to appeal in *Dale*, all parties agreed that conservation did not necessarily mean “retain *in situ*” for purposes of provincial or city policy.⁶⁹

79. For the reasons outlined above, the City’s proposed question at paragraph 39(b) of its Factum does not raise a question of law upon which the Court could grant leave.

The City Was Not Deprived of Natural Justice, Procedural Fairness or Notice

80. There is absolutely no merit to the City’s claim that it was deprived of natural justice, procedural fairness or notice.

81. The City’s assertion that the Tribunal “conducted a hearing on a different question” than that which was identified in the Procedural Order is incorrect at best and misleading at worst.

82. The City raised 5 issues before the Tribunal which required the Tribunal to hear evidence about heritage matters, including whether the Tests were satisfied and whether the Proposal conserves the heritage resource located at 457 Richmond Street West.⁷⁰ The City also raised issues that contemplated that the Tribunal might determine to approve the Proposal.⁷¹

83. In order to assess whether the Proposal meets the Tests, the Tribunal needed to understand and evaluate the cultural heritage value of the Property, and consider what was “significant” in order to determine if that was conserved.

84. Further, in order to assess whether the Proposal conserves the heritage resource located at the Property (and whether such conservation is appropriate), the Tribunal needed to engage in a broad inquiry to understand what heritage value or resource, if any, needs to be conserved (again, as contemplated by the relevant planning policy documents). In this regard, the Tribunal was required to test the assumption, embedded in the issue, that the Building is a “heritage resource.” This involved an assessment of the City’s purported reasons for listing the

⁶⁹ *Dale* (Divisional Court), paras. 11 and 29, City’s Supplementary BOA, Tab 15.

⁷⁰ Issues 2-6 on the Procedural Order, City’s MR, Tab 14, p. 252.

⁷¹ Issue 15 on the Procedural Order, City’s MR, Tab 14, p. 253.

Building on the heritage register, as well as its cultural heritage value and interest. In the circumstances of the Building, and the Proposal in particular, the City's reasons were that it "contributed" to the HCD.

85. If the Tribunal had limited its inquiry to the mere fact of the City's listing of the Property, the Tribunal would have erred. The Tribunal must necessarily review all available evidence. The City's listing was only one such factor⁷²

86. If the City had any concerns about the LPAT hearing 457's appeal in advance of the hearing of the HCD appeals, it was open for the City to bring a motion for an adjournment before the Tribunal, either prior to or at the outset of the hearing. It did not do so.

87. It was also open to the City to raise this issue by including it on the issues list. It did not do so.

88. If the City felt that the HCD appeals ought to proceed before, or at the same times as, 457's Planning Act appeal, it could have sought an adjournment of the ZBA Application hearing or it could have sought to consolidate the two appeal proceedings.⁷³ Such a motion could have been brought at any point prior to the hearing, or during the hearing.⁷⁴ The City's failure to avail itself of such steps cannot be said to be a violation of procedural fairness.

89. Notably, the City's and 457's expert witnesses exchanged witness statements identifying their evidence nearly six weeks prior to the hearing. If the City had concerns with the way in which 457's heritage expert understood or responded to the City's heritage issues then those concerns should have been addressed through reply evidence and should have been raised with counsel or with the Tribunal before the hearing. The City did not do so.

⁷² Dale (Divisional Court), para. 22, City's Supplementary BOA, Tab 15.

⁷³ Local Planning Appeal Tribunal Rules of Practice and Procedure, Rule 16 and Rule 10.10; Schedule "B" to 457's Factum.

⁷⁴ Local Planning Appeal Tribunal Rules of Practice and Procedure, Rules 17.3 and 17.5, and Rule 10.10; Schedule "B" to 457's Factum.

90. In paragraph 34 of its Factum, the City indicates that it raised an objection and the Tribunal recorded its disposition. The City cites no evidence to support this assertion and this is expressly refuted by the affidavit of Eileen Costello, sworn November 25, 2019.⁷⁵ Therefore, the City's proposed question at paragraph 39(c) of its Factum does not raise a question of law upon which the Court could grant leave.

There is No Reason to Doubt the Reasonableness of the Decision

91. To the extent this Court accepts the City's submissions that the Tribunal's Decision engages a question of law, the appropriate standard of review is reasonableness.⁷⁶ Appeals under s. 34(11) of the *Planning Act* engage the Tribunal's policy expertise and involve its "home" statute.⁷⁷ As an expert administrative tribunal operating under the very policies it was design to interpret and apply, the Tribunal is entitled to significant deference.

92. As noted in *Ajax (Town) v. Pickering (City)*:

It is significant that the test for leave to appeal requires the court to consider whether there is good reason to doubt the "reasonableness" of the decision under review, as opposed to the "correctness" of that decision. In *Train, Lauwers J.* (as he then was), stated, at paras. 6 and 7:

The advent of *Dunsmuir* obliges the court to take into account the reasonableness standard even in deciding applications for leave to appeal . . .

The Supreme Court requires reviewing courts to keep in mind two basic things. The first is that the Legislature's choice to confer decision making power in a particular area on a tribunal must be respected. The second is that the right decision is often not glaringly obvious, and the tribunal's expertise and "field sensitivity" in making the decision must also be respected. The reasonableness principle is set out in *Dunsmuir* at para. 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: **certain questions that come before administrative tribunals do not lend themselves to one specific, particular result.** Instead, they may give rise to a number of possible, reasonable conclusions. **Tribunals have a margin of appreciation within the range of acceptable and rational solutions.** A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. **In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.** But it is also concerned with whether the decision

⁷⁵ Affidavit of Eileen Costello, 457's Responding MR, Tab 1, paras. 4-5; *Grushman v. Ottawa (City)*, [2001] O.J. No. 4642 (Div. Ct.), 457's BOA, Tab 11.

⁷⁶ *Ajax (Town) v. Pickering (City)*, 2018 ONSC 3622, 2018 CarswellOnt 9334 (Div. Ct.), para. 10, 457's BOA, Tab 1.

⁷⁷ *Oakville (Town) v. ClubLink Corp. ULC*, 2018 ONSC 589, paras. 18-19, City's BOA Tab 1.

falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.⁷⁸ [emphasis added]

93. The *Planning Act*, as well as the PPS, Growth Plan and Official Plans, are recognized as LPAT's home statutes.⁷⁹ The *OHA* is also a home statute of the Tribunal.⁸⁰

No "True Question of Jurisdiction" as the City Alleges

94. The City argues that "whether the LPAT was entitled to consider and decide *OHA* matters in the context of a *Planning Act* appeal" is a "true question of jurisdiction or vires" and that the standard of review is, therefore, correctness.⁸¹

95. Firstly, this is a different question than the three proposed questions for the Divisional Court, if leave is granted, that are listed at paragraph 39 of the City's Factum. Secondly, and in any event, the LPAT did not consider and decide any matters under the *OHA*.⁸² It recognized that heritage matters arise in the context of the *Planning Act* and the *OHA* but it reasonably and correctly confined itself to its *Planning Act* jurisdiction for the purposes of its Decision. The manner in which the Tribunal approached the heritage issues before it is consistent with the Tribunal's approach in *Dale*. Only the underlying facts are distinct.

96. On the leave motion in *Dale*, the Divisional Court found:

It is apparent that **the first two issues of law raised by the applicants do not arise on the facts of this case.** The tribunal certainly considered City's Council's approval of the demolition among the facts that it considered. **But it plainly went on to set out the correct tests and to explicitly make the required legal findings. There is no point hearing an appeal on the issue of whether the tribunal was entitled to abdicate its role to that of the City or to subordinate the Planning Act tests to the Ontario Heritage Act when on the face of the decision it did neither of those things.**⁸³ [emphasis added]

97. Notably, the SCC recently had this to say about "true questions of jurisdiction":

⁷⁸ *Ajax (Town) v. Pickering (City)*, 2018 ONSC 3622, 2018 CarswellOnt 9334 (Div. Ct.), para. 11, 457's BOA, Tab 1.

⁷⁹ *Train v. Weir*, 2012 ONSC 5157, 2012 CarswellOnt 14145 (Div. Ct.), para. 3, 457's BOA, Tab 5. See also *R&G Realty Management Inc. v. North York (City)*, 2009 CarswellOnt 4717 (Div. Ct.), paras. 5-7, 457's BOA, Tab 10.

⁸⁰ *OHA*, s. 34.1.

⁸¹ City's Factum, para. 41.

⁸² The Tribunal's powers to make determinations under the *OHA* with respect to HCD appeals are set out in s. 41(7) of the *OHA*.

⁸³ *Dale* (LPAT), para. 27, City's BOA, Tab 9.

Nonetheless, in *Alberta Teachers*, the majority stayed its hand and instead emphasized that, if they exist, “[t]rue questions of jurisdiction are narrow and will be exceptional” (para. 39). It was left to future litigants to overcome the heavy burden of establishing that they have indeed discovered a true question of *vires* (para. 42). Yet, to date, no litigant has met this challenge before us.

Since *Alberta Teachers*, the search for true questions of *vires* has, in fact, been fruitless... It is now 10 years from *Dunsmuir* and the search remains just as hopeless. In applying *Dunsmuir*, our Court has been unable to identify a single instance where this category was found to be applicable.

The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted....⁸⁴ [emphasis added]

98. 457 submits that these comments apply in this instance. The City’s alleged errors of law simply do not arise on the face of the Decision.

The Tribunal’s Findings Were Entirely Within Its Jurisdiction

99. The Tribunal was expressly cognizant of the limits on its powers on appeal under the *Planning Act*. The Tribunal stated:

[17] It is also important to note that the King-Spadina HCD remains under appeal, and the Applicant is a Party to that appeal. That matter is a separate process from these matters and although the heritage witnesses made various references to the HCD and the Act, **the Tribunal has appropriately confined its assessment and evaluation of the evidence and opinions on both sides to the relevant in-force planning instruments alone.** [emphasis added]

100. The Tribunal’s findings in the Decision were limited to the appeal that was properly before it pursuant to the *Planning Act*. The Tribunal did not make any decision that would in any way usurp or influence the authority of the Tribunal in any future HCD appeal. The Tribunal did not direct the City to remove the property from the City’s Heritage Register, nor did it make a ruling as to the rights and obligations of 457 pursuant to the *OHA* if and when it seeks a permit to demolish the Building on the Property pursuant to s. 34 of the *OHA*.

⁸⁴ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] S.C.J. No. 31 (S.C.C.), paras. 36, 37, 41, City’s BOA, Tab 2.

101. Just as the Tribunal in *Dale* (LPAT) was not required to defer its assessment of heritage issues to Council's decision to issue a demolition permit (it was but one fact among many)⁸⁵, the Tribunal in 457 considered Council's listing of the property as part of its assessment of the heritage policies but it was not bound by such listing and was not required to defer to it. The Tribunal was statutorily required to consider and determine 457's appeal. As noted by the LPAT's predecessor, the Board:

The necessity for approvals under legislation other than the Planning Act, which guides the Board, is not a basis upon which to find the project is pre-mature. The Board is statutorily required to deal with any appeals that are made and come to a determination as to whether, among other things, the instruments represent good planning. The Board has indicated on numerous occasions that **it has an obligation to hear an appeal and the fact that a different, but related, approval might be required should not deter the Board from proceeding with its mandate...** [citations omitted, emphasis added]⁸⁶

102. As noted earlier, the Tribunal's final Order is being withheld until a number of conditions are satisfied, including submission of a complete application to demolish the property and full documentation of the property (the latter as requested in City issue 15).

Any Reasonable Decision Required Consideration of Whether the Building was "Significant" or "Contributing"

103. Any reasonable decision necessarily required the Tribunal to consider whether the Building was "significant" or "contributing" to the HCD. The City listed the Property because it was alleged to be "contributing" to the HCD. This was one fact, among many, that the Tribunal weighed and considered (similar to the manner in which the Tribunal, in *Dale* (LPAT), considered City's Council's approval of demolition among the many facts that it considered before going on to set out the correct tests and explicitly make the required legal findings).⁸⁷

⁸⁵ *Dale* (LPAT), para. 22, City's BOA, Tab 9.

⁸⁶ *Kimvar Enterprises Inc. v Simcoe (County)*, [2007] O.M.B.D. No. 1178, para 58 (O.M.B), 457's BOA, Tab 12.

⁸⁷ *Dale* (Divisional Court), para. 27, City's Supplementary BOA, Tab 15.

104. Furthermore, the reasons underlying the City's listing necessarily needed to be considered by the Tribunal in determining whether the Building is a "significant" "built heritage resource" under the relevant provincial policies. Had the Tribunal not considered these points, it would have acted unreasonably and incorrectly in ignoring the evidence before it. Accordingly, there is no reason to doubt the reasonableness or correctness of the Decision.

No Question of Law of Sufficient Importance to Warrant the Attention of the Court

105. To the extent that the City's motion raises a question of law, which 457 expressly denies, it does not raise a question of law of sufficient importance to warrant the attention of the Divisional Court. It does not raise a matter of general importance "beyond the obvious importance to the parties"⁸⁸. The Decision is highly fact specific, and involves the interpretation and application of policy to these highly specific facts. The Decision, therefore, does not carry precedential value. Furthermore, as noted, unlike the Courts, the Tribunal is not bound governed by the principle of *stare decisis*. Accordingly, there is no reason for the Divisional Court to intervene.

106. The City's Factum references the LPAT's decision in *Dale* and argues that "there are inconsistent LPAT decisions regarding the consideration and role of heritage conservation in *Planning Act* appeals that are before it, suggesting that guidance from this Court would be assistance".⁸⁹

107. First, as the Tribunal correctly noted in its Decision, whether and how a proposal appropriately addresses the pertinent heritage planning policies "must be tested per each development application."⁹⁰ There is no "one size fits all" approach.

⁸⁸ *Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 2016 CarswellOnt 18671 (Div. Ct.), para. 35, 457's BOA, Tab 4.

⁸⁹ City's Factum, para. 51.

⁹⁰ Decision, para. 60; City's MR, Tab 2, p. 29.

108. Second, contrary to the City's submissions, *Dale* (LPAT) did not "arrive at an opposite conclusion regarding the LPAT's role in heritage matters". While the facts of *Dale* are different from the facts that were before the Tribunal in this case, the approach taken by the Tribunal in both cases is consistent.

109. In refusing to grant leave in *Dale*, this Honourable Court held:

In planning cases such as this one, the role of the court is to ensure that the law is understood and applied appropriately by those charged with the tasks of making the planning decisions. It is well understood that planning matters involve policy decisions as much or more than legal ones. It is not the role of the court to balance competing policies, weigh subjective aesthetics, or to make the political compromises that underlie planning decisions.

In this case, I am not making any determination about the heritage value of the proposed development. Rather, I am considering the court's role as overseer of the legality of the process and make the sole finding that the applicants have not raised any issues of law that arise for decision in this case for which leave to appeal to the Divisional Court may be granted.⁹¹

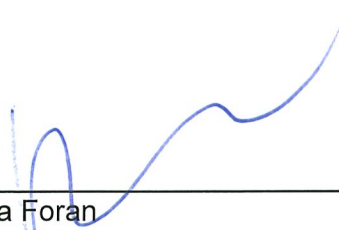
110. 457 respectfully requests that the City's motion be dismissed, with costs payable to 457 on a partial indemnity basis, and any other relief that this Honourable Court deems just.

⁹¹ *Dale* (Divisional Court), paras. 32-33, City's Supplementary BOA, Tab 15.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of December, 2019.



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457 Richmond Street West Limited**

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Ajax (Town) v. Pickering (City)*, 2018 ONSC 3622, 2018 CarswellOnt 9334 (Div. Ct.)
2. *Residents for Sustainable Development in Guelph v. 6 & 7 Developments Ltd.*, 2005 CanLII 63751 (ON SC)
3. *Concerned Residents Assn of North Dumfries v. Preston Sand and Gravel Co*, 2015 ONSC 2086
4. *Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 2016 CarswellOnt 18671
5. *Train v. Weir*, 2012 ONSC 5157, 2012 CarswellOnt 14145 (Div. Ct.)
6. *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748
7. *Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456, 2016 CarswellOnt 8284 (Div. Ct.)
8. *583753 Ontario Ltd. v. York (Regional Municipality)*, [2007] O.J. No. 3705 (Div. Ct.)
9. *Stone v. Prince Edward (County)*, [2008] O.J. No. 2588 (Div. Ct.)
10. *R&G Realty Management Inc. v. North York (City)*, 2009 CarswellOnt 4717 (Div. Ct.)
11. *Grushman v. Ottawa (City)*, [2001] O.J. No. 4642 (ON SC)
12. *Kimvar Enterprises Inc. v. Simcoe (County)*, [2007] O.M.B.D. No. 1178 (O.M.B.)

TAB B

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. **Ontario Heritage Act, R.S.O. 1990, c. O.18**

Register

27 (1.2) In addition to the property listed in the register under subsection (1.1), the register may include property that has not been designated under this Part but that the council of the municipality believes to be of cultural heritage value or interest and shall contain, with respect to such property, a description of the property that is sufficient to readily ascertain the property. 2005, c. 6, s. 15.

Designation by municipal by-law

29 (1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,
(a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
(b) the designation is made in accordance with the process set out in this section. 2005, c. 6, s. 17 (1).

Appeal to Tribunal

34.1 (1) If the council of a municipality consents to an application subject to terms and conditions under subclause 34 (2) (a) (i.1) or refuses an application under subclause 34 (2) (a) (ii), the owner of the property that was the subject of the application may appeal the council's decision to the Tribunal within 30 days of the day the owner received notice of the council's decision. 2017, c. 23, Sched. 5, s. 64.

Notice of appeal

(2) An owner of property who wishes to appeal the decision of the council of a municipality shall, within 30 days of the day the owner received notice of the council's decision, give notice of appeal to the Tribunal and to the clerk of the municipality. 2017, c. 23, Sched. 5, s. 64.

Content of notice

(3) A notice of appeal shall set out the reasons for the objection to the decision of the council of the municipality and be accompanied by the fee charged under the *Local Planning Appeal Tribunal Act, 2017*. 2017, c. 23, Sched. 5, s. 64.

Hearing

(4) Upon receiving notice of an appeal, the Tribunal shall set a time and place for hearing the appeal and give notice of the hearing to the owner of the property and to such other persons or bodies as the Tribunal may determine. 2017, c. 23, Sched. 5, s. 64.

Notice of hearing

(5) The Tribunal shall give notice of a hearing in such manner as the Tribunal determines necessary. 2017, c. 23, Sched. 5, s. 64.

Powers of Tribunal

(6) After holding a hearing, the Tribunal may order,
(a) that the appeal be dismissed; or

(b) that the municipality consent to the demolition or removal of a building or structure without terms and conditions or with such terms and conditions as the Tribunal may specify in the order. 2017, c. 23, Sched. 5, s. 64.

Decision final

(7) The decision of the Tribunal is final. 2017, c. 23, Sched. 5, s. 64.

Powers of Tribunal

41 (7) After holding the hearing, the Tribunal shall,

- (a) dismiss the appeal; or
- (b) allow the appeal in whole or in part and,
 - (i) repeal the by-law,
 - (ii) amend the by-law in such manner as the Tribunal may determine,
 - (iii) direct the council of the municipality to repeal the by-law, or
 - (iv) direct the council of the municipality to amend the by-law in accordance with the Tribunal's order. 2017, c. 23, Sched. 5, s. 66 (2).

Coming into force

41 (10) If one or more notices of appeal are given to the clerk within the time period specified in subsection (4),

- (a) the by-law comes into force when all of such appeals have been withdrawn or dismissed;
- (b) if the by-law is amended by the Tribunal under subclause (7) (b) (ii), the by-law, as amended by the Tribunal, comes into force on the day it is so amended; or
- (c) if the by-law is amended by the council pursuant to subclause (7) (b) (iv), the by-law, as amended by the council, comes into force on the day it is so amended. 2002, c. 18, Sched. F, s. 2 (25); 2017, c. 23, Sched. 5, s. 66 (3).

2. *Planning Act*, R.S.O. 1990, c. P.13

Provincial interest

2 The Minister, the council of a municipality, a local board, a planning board and the Tribunal, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

- d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;

3. *Local Planning Appeal Tribunal Act*, 2017, S.O. 2017, c. 23, Sched. 1

Appeal

37 (1) Subject to any general or special Act, an appeal lies from the Tribunal to the Divisional Court, with leave of the Divisional Court, on a question of law, except in respect of matters arising under Part IV.

4. *Local Planning Appeal Tribunal Rules of Practice and Procedure*

Rule 10.10 **Motions Made at Oral Hearing Events** A motion may be made at an oral hearing event with leave of and in accordance with any procedures ordered by the presiding Member.

CONSOLIDATION

Rule 16.1 Combining Proceedings or Hearing Matters Together The Tribunal may order that two or more proceedings or any part of them, be consolidated, heard at the same time, or heard one after the other, or stay or adjourn any matter until the determination of any other matter, subject to any applicable statutory or regulatory restrictions.

Rule 16.2 Effect of Consolidating Proceedings When two or more proceedings are consolidated,

- (a) statutory procedural requirements for any of the original separate proceedings apply, where appropriate, to the consolidated proceeding;
- (b) parties to each of the original separate proceedings are parties to the consolidated proceeding; and,
- (c) evidence to be presented in each of the separate proceedings is evidence in the consolidated proceeding.

Rule 16.2 Effect of Hearing Matters Together When two or more proceedings are heard together but not consolidated,

- (a) statutory requirements for each proceeding apply only to that particular proceeding and not to the others;
- (b) parties to the hearing are parties to their individual proceedings only and not parties to the other proceedings; and,
- (c) unless otherwise ordered by the Tribunal, evidence in the hearing is evidence in each proceeding to which it could apply.

Rule 16.2 Tribunal May Reverse Decision for Consolidated Proceedings The Tribunal may separate consolidated proceedings or matters heard together at any time if it finds that the proceedings have become unduly complicated, delayed or repetitive or a party is unduly prejudiced.

Rule 17.3 Requests for Adjournment without Consent If a party objects to an adjournment request, the party requesting the adjournment must bring a motion at least 15 days before the date set for the hearing event. If the reason for an adjournment arises less than 15 days before the date set for the hearing event, the party must give notice of the request to the Tribunal and to the other parties and serve their motion materials as soon as possible. If the Tribunal refuses to consider a late request, any motion for adjournment must be made in person, at the beginning of the hearing event.

Rule 17.5 Powers of the Tribunal upon Adjournment Request The Tribunal may,

- (a) grant the request;
- (b) grant the request and fix a new date or, where appropriate, the Tribunal will schedule a case management conference on the status of the matter;
- (c) grant a shorter adjournment than requested;
- (d) deny the request, even if all parties have consented;
- (e) direct that the hearing proceed as scheduled but with a different witness, or evidence on another issue;
- (f) grant an indefinite adjournment, if the Tribunal finds no substantial prejudice to the other parties or to the Tribunal's schedule and the Tribunal concludes the request is reasonable for the determination of the issues in dispute. In this case a party must make a request, or the Tribunal on its own initiative may direct, that the hearing be rescheduled or resumed as the case may be;
- (g) convert the scheduled date to a mediation or case management conference;

- (h) issue a Notice of Postponement, in the event the proceeding is an appeal of a *Planning Act* matter subject to O. Reg. 102/18 under LPATA; or
- (i) make any other appropriate order

TAB C

SCHEDULE "C"
RELEVANT EXTRACTS OF PROVINCIAL AND MUNICIPAL POLICIES

Provincial Policy Statement (2014)	
Policy	Definitions
<p>2.6 Cultural Heritage and Archaeology</p> <p>2.6.1 <i>Significant built heritage resources and significant cultural heritage landscapes shall be conserved.</i></p>	<p>Built heritage resource means a building, structure, monument, installation or any manufactured remnant that contributes to a property's cultural heritage value or interest as identified by a community, including an Aboriginal community. Built heritage resources are generally located on property that has been designated under Parts IV or V of the <i>Ontario Heritage Act</i>, or included on local, provincial and/or federal registers.</p>
	<p>"Significant": means...(e) in regard to cultural heritage and archaeology, resources that have been determined to have cultural heritage value or interest for the important contribution they make to our understanding of the history of a place, an event, or a people.</p> <p>Criteria for determining significance for the resources identified in sections (c)-(e) are recommended by the Province, but municipal approaches that achieve or exceed the same objective may also be used.</p> <p>While some significant resources may already be identified and inventoried by official sources, the significance of others can only be determined after evaluation.</p>
	<p>"Conserved": means the identification, protection, management and use of <i>built heritage resources, cultural heritage landscapes and archaeological resources</i> in a manner that ensures their cultural heritage value or interest is retained under the <i>Ontario Heritage Act</i>. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.</p>

Growth Plan (2019)	
Policy	Definitions
<p>4.2.7 Cultural Heritage Resources</p> <p>1. <i>Cultural heritage resources will be conserved in order to foster a sense of place and benefit communities, particularly in strategic growth areas.</i></p>	<p>Cultural Heritage Resources <i>Built heritage resources, cultural heritage landscapes and archaeological resources that have been determined to have cultural heritage value or interest for the important contribution they make to our understanding of the history of a place, an event, or a people. While some cultural heritage resources may already be identified and inventoried by official sources, the significance of others can only be determined after evaluation. (Greenbelt Plan)</i></p>
	<p>Built Heritage Resource <i>A building, structure, monument, installation or any manufactured remnant that contributes to a property's cultural heritage value or interest as identified by a community, including an Aboriginal community. Built heritage resources are generally located on property that has been designated under Parts IV or V of the Ontario Heritage Act, or included on local, provincial and/or federal registers. (PPS, 2014)</i></p>
	<p>Conserved <i>The identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the Ontario Heritage Act. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments. (PPS, 2014)</i></p>

City of Toronto Official Plan	
Policy	Definitions
3.1.5.4. Properties on the Heritage Register will be <i>conserved</i> and maintained consistent with the <i>Standards and Guidelines for the Conservation of Historic Places in Canada</i> , as revised from time to time and as adopted by Council.	Conserved: means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the Ontario Heritage Act. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment and/or Heritage Impact Assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments. Conservation and conserve have corresponding meanings.
3.1.5.26. New construction on, or <i>adjacent</i> to, a property on the Heritage Register will be designed to <i>conserve</i> the cultural heritage values , attributes and character of that property and to mitigate visual and physical impact on it.	Conserved: means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained under the Ontario Heritage Act. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment and/or Heritage Impact Assessment. Mitigative measures and/or alternative development approaches can be included in these plans and assessments. Conservation and conserve have corresponding meanings.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

THE CITY OF TORONTO

Moving Party

- and -


**457 RICHMOND STREET WEST LIMITED and THE GARMENT DISTRICT
NEIGHBOURHOOD ASSOCIATION**

Respondents


CERTIFICATE

On behalf of the Respondent, 457 Richmond Street West Limited, we estimate that 2.0 hours will be needed for our oral argument of the motion.

DATED AT Toronto, Ontario this 18th day of December, 2019.



Andrea Skinner



Patricia Foran

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THE CITY OF TORONTO

Moving Party

-and-

457 RICHMOND STREET WEST LIMITED and THE GARMENT DISTRICT
NEIGHBOURHOOD ASSOCIATION

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Divisional Court File No.426/19
LPAT File No. PL170832

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

PROCEEDING COMMENCED AT
TORONTO

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