CITATION: Ontario Place Protectors v. HMK in Right of Ontario 2024 ONSC 4194
COURT FILE NO.: CV-24-00719861-0000
DATE: 20240726

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ONTARIO PLACE PROTECTORS	
Applicant	*Eric K. Gillespie,* for the Applicant
– and –	
HIS MAJESTY THE KING IN RIGHT OF ONTARIO and ATTORNEY GENERAL FOR ONTARIO Respondents	*S, Zachary Green and Hera Evans* for the Respondents
	HEARD: July 19, 2024

L. BROWNSTONE J.

Overview

[1] The government of Ontario intends to redevelop Ontario Place in a manner to which many people object. Immediately following the launch of a previous application for judicial review in respect of the intended development, brought on the grounds that the required environmental assessment was not undertaken, the government passed the *Rebuilding Ontario Place Act, 2023*, S.O. 2023, c. 25, Sch. 2 ("ROPA"), as Schedule 2 to Bill 154, the *New Deal for Toronto Act, 2023*.

[2] ROPA vests prescribed land in the Crown and places it under ministerial control. The legislation establishes broad exemptions from the *Environmental Assessment Act*, R.S.O. 1990, c. E.18, the *Ontario Heritage Act*, R.S.O. 1990, c. O.18, and the City of Toronto's power to regulate and prohibit noise under the *City of Toronto Act, 2006*, S.O. 2006, c. 11. ROPA further extinguishes causes of action, removes remedies, and bars proceedings in respect of various activities undertaken in accordance with ROPA.

[3] The applicant challenges several provisions of ROPA on two grounds. First, it claims that by insulating actions taken in accordance with the legislation from judicial scrutiny and removing access to the courts, s. 17(2) violates s. 96 of the *Constitution Act, 1867* and should therefore be declared of no force and effect. Second, it argues that by exempting the application of the *Environmental Assessment Act*, the *Heritage Act*, and the City of Toronto's power to regulate

noise, and by removing judicial scrutiny, ss. 9, 10, 11, and 17(2) should be "declared a breach of public trust".

[4] The respondent argues on a preliminary basis that there is an inadequate factual basis for the constitutional challenge and for the court to determine standing. On the merits, it argues that s. 17(2) does not run afoul of s. 96 as the rights of judicial review and constitutional challenge remain, and that it is both unprecedented and unwarranted to declare a statute to be a breach of public trust.

[5] For the reasons that follow, the application is dismissed.

Preliminary issues - the evidence in support of the application and the issue of standing

[6] I will deal with these two preliminary issues together, as the respondent's objection on the standing issue is that there is no evidentiary foundation on which the court could base a determination of whether the applicant has standing. In addition, the respondent points out that much of the applicant's affidavit evidence does not meet admissibility rules.

[7] The applicant filed close to 20 affidavits in support of its application. The affidavits are from journalists, architects, a former Toronto mayor, conservation organisations, an emeritus professor, and community groups. The application records contain two affidavits sworn by an affiant who identifies herself as a director of the applicant. However, those affidavits contain no information about who the applicant is, whether it is a legal entity, what its purposes are, or why it is in a position to launch this application. The applicant was identified as a legal entity for the first time in an affidavit in support of the applicant's costs submissions, rather than on the merits, sworn the day before the hearing.

[8] The affidavits, other than the affidavit sworn in support of the costs submissions, each contain a single paragraph identifying the affiant, followed by a paragraph or paragraphs attaching various documents. The attachments generally comprise letters, articles, and photographs. In no case are the contents of the attachments sworn to be true.

[9] The attachments are replete with argument. They contend that the decision to transform Ontario Place into a spa and casino is "deeply flawed for legal and moral reasons", "shortsighted", "breaches the principles of public trust", "contravenes natural justice and procedural fairness and is unconstitutional", is "contrary to the principles of building a shared vision", is " a violation of the public's right to access common property", and that it "should have been subject [to] the [*Environmental Assessment Act*]" and has "broken the public trust". Many of the letters urge the government to listen to feedback and adopt a different process. The unsworn letters and articles speak of Ontario Place's importance as public land for cultural and architectural heritage, environment, and urban planning reasons. They raise concerns about the government's lack of public consultation and the precedential value of the legislation. They are replete with opinions which are generally inadmissible other than by way of properly qualified, properly tendered expert evidence, which this evidence was not.

[10] In oral argument, the applicant submitted that the opinions contained in the affidavit materials are not there for the truth of their contents. Rather, the affidavits that express opinions

are submitted to demonstrate that there is a high level of concern and public engagement about the legislation and the proposed development. It submits that the facts included in the materials, such as that the site has hundreds of trees and is of architectural and cultural significance, are not contentious.

[11] Given the way the challenge is framed, there is little that turns on the evidence. Despite the evidentiary frailties, I am prepared to accept that Ontario Place enjoys some renown, has received awards and designations, and that there are people and groups who care deeply about its fate.

[12] That does not answer the question of whether the applicant has standing to argue this application.

[13] There is no evidence in the record that the applicant's private rights are at stake or that it is specially affected by the legislation it impugns. Therefore, it would have to seek public interest standing.

[14] This matter came on quickly. The applicant's record was served five days after the case conference, which itself occurred only three weeks before the hearing date. The respondent had no information about the evidence that would be submitted in relation to the applicant's standing until it received the application records on July 3, 2024. It therefore argues it had no basis upon which to make inquiries, including no basis to ask whether the applicant was even a proper legal entity, until it received the record. The applicant states that it had no reason to believe standing was an issue until it received the respondent's factum on July 17, 2024.

[15] It is an applicant's obligation to make its case for standing: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 37. Even if a respondent does not raise the issue of standing, an applicant should expect that the court will raise the issue. Rule 14 creates a procedural mechanism for applications to be brought; it does not create free-standing substantive rights for individuals or organisations to commence litigation regarding legislation they find objectionable. I do not accept the applicant's submission that the entire purpose of the law of standing is to ensure access to justice. Indeed, the applicant concedes that not every person or party has standing to launch every imaginable claim or application. In the words of the Supreme Court of Canada in *Downtown Eastside*, at para. 1:

> The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government …

[16] The law of standing is designed to balance access to courts with the preservation of judicial resources, and to ensure that proper parties are before the court to argue matters. It both facilitates

and limits the granting of standing. If an applicant wishes to obtain public interest standing, it needs to demonstrate that it has a genuine interest in the matter at issue, that the application is a reasonable and effective means of bringing the case to court, and that the case raises a serious justiciable issue: *Downtown Eastside*, at para. 20.

[17] There are factors that militate in favour of granting standing and factors that militate in favour of limiting it. Giving effect to the principle of legality and ensuring access to justice are factors that favour granting standing. Factors that favour limiting standing are efficiently allocating scarce resources and screening out "busybody" litigants, ensuring the courts have before them contending points of view of those most directly affected, and ensuring the courts play their proper role within our democratic system: *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, 470 D.L.R. (4th) 289, at paras. 29-30.

[18] I do not accept the applicant's argument that to require applicants to adduce evidence and make argument to satisfy the test for standing is an undue burden. It is the burden parties are required to fulfill if they wish to involve the courts in their disputes as a public interest litigant. I agree with Centa J. that public interest standing is not to be granted lightly by the courts: *Fair Change v. His Majesty the King in Right of Ontario*, 2024 ONSC 1895, 170 O.R. (3d) 561, at para. 26.

[19] There is insufficient evidence in the record about the applicant to determine whether it has a genuine interest in the matter. The applicant asks the court to presume that it does, given the support it was able to garner in its affidavit materials. This is insufficient to meet the first branch of the test. However, even if I presume that this branch of the test is met, and further find that the matter before the court is justiciable, the applicant falters on the third branch of the test. This challenge would better be brought to court by a party that wishes to assert a cause of action that is extinguished by s. 17(2). This would enable the court to analyse the provision's impact within a proper factual matrix. It would provide the court with contending points of view of those most directly affected. The paucity of facts adversely affects the level of analysis the court is able to undertake, as I explain more fully below.

[20] I would not grant the applicant public interest standing for this reason.

[21] As indicated above, the matter arose quickly. There is considerable interest in it. The application was argued on its merits. Therefore, in the event I am incorrect in my conclusion about standing, I will consider the substantive issues.

[22] Before doing so, I address one further procedural issue, the possibility of an adjournment. At various times during argument the applicant suggested the matter would need to be adjourned for it to respond to certain issues. These include issues about the manner in which its affidavit evidence was put forward, its response to the issue of standing, and the doctrine of presumptive constitutional validity expressed in *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, referred to by the respondent in argument but not included in its factum. The first two matters are, as I have indicated, matters the applicant had responsibility to raise and address. The third is a well-known constitutional principle. None of the issues warranted adjourning a matter

that was brought urgently by the applicant, for which the Court provided a full day for argument on short notice.

Issue One: Does s. 17(2) of ROPA violate s. 96 of the *Constitution Act, 1867*?

[23] ROPA received royal assent on December 6, 2023, about nine days after its first reading. The applicant challenges s. 17(2), which must be understood in context. Section 2 of ROPA, with which the applicant does not take issue, vests prescribed land in the Crown and places it under ministerial control. The full text of s. 17 provides:

> **17** (1) No cause of action arises against the Crown, the Corporation, any current or former member of the Executive Council or any current or former employee, officer or agent of or advisor to the Crown or the Corporation as a direct or indirect result of,
>
> (a) the enactment, amendment or repeal of any provision of this Act;
>
> (b) the making, amendment or revocation of any provision of a regulation, order, directive, notice, report or other instrument under this Act;
>
> (c) anything done or not done in accordance with this Act, or a regulation, order, directive, notice, report or other instrument under this Act;
>
> (d) any modification, revocation, cessation or termination of rights in real property, contractual rights or other rights resulting from anything referred to in clauses (a) to (c); or
>
> (e) any representation or other conduct that is related, directly or indirectly, to the actual or potential transfer of vested real property or any part thereof, whether the representation or other conduct occurred before or after section 2 of Schedule 2 to the *New Deal for Toronto Act, 2023* came into force.
>
> (2) Except as otherwise provided under section 4, in an order under section 13 or in a regulation under clause 19 (c), if any, no costs, compensation or damages, including for loss of revenues or loss of profit, are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any equitable remedy or any remedy under any statute, is available to any person in connection with anything referred to in subsection (1) against any person referred to in that subsection.
>
> (3) No proceeding that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against any person referred to in that subsection.
>
> (4) Subsection (3) does not apply with respect to an application for judicial review, but does apply with respect to any other court, administrative or arbitral proceeding claiming any remedy or relief, including specific performance, injunction,

> declaratory relief or the enforcement of a judgment, order or award made outside Ontario.
>
> (5) Subsections (1) to (3) apply regardless of whether the cause of action on which a proceeding is purportedly based arose before, on or after the day this subsection came into force.
>
> (6) No costs shall be awarded against any person in respect of a proceeding that cannot be brought or maintained under subsection (3).
>
> (7) This section does not apply to a cause of action that arises from any aboriginal or treaty right that is recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> (8) Nothing referred to in subsection (1) constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.
>
> (9) This section does not apply with respect to proceedings brought by the Crown.

[24] The applicant frames its argument that s. 17(2) of ROPA violates s. 96 of the *Constitution Act, 1867* as having two aspects. It argues that the provision is unconstitutional first by removing the superior court's jurisdiction to grant remedies under any Ontario statute, and second by removing all claims for costs, compensation, or damages relating to Ontario Place. It describes the first as an impermissible removal of authority from the courts, and the second as an impermissible removal of access to justice from the citizenry. I view these as two sides of the same argument and will consider them together.

[25] It is common ground that provincial superior courts play a significant role in the proper functioning of our democratic systems. There are a number of appellate decisions in which the jurisdiction of the superior courts is carefully safeguarded. Legislation that has sought to create tribunals or courts with parallel jurisdiction to superior courts, and to remove a superior court's jurisdiction over matters that go to the core of the superior court's jurisdiction, have been found to run afoul of s. 96 and been prohibited: *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 S.C.R. 291.

[26] Legislation that denies access to justice has met a similar fate: *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31.

[27] However, the inherent jurisdiction of superior courts does not equate to limitless jurisdiction. The legislature has broad authority to enact legislation, repeal legislation, create significant immunity from litigation for various actors, and extinguish causes of action: *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172 at para. 48.

[28] The parties agree on the parameters of the analysis. On one hand, the legislature has wide latitude to enact legislation, even draconian legislation, within permissible constitutional limits. The remedy for the public's disapproval of such laws lies at the ballot box. On the other hand, the

legislature may not interfere impermissibly with the exercise of core jurisdiction by, for example, circumscribing it to the point of "maim[ing]" the superior courts in their very essence: *MacMillan Bloedel*, at para. 37; *Reference re Code of Civil Procedure (Que.), art. 35; Poorkid Investments* at paras. 27-28. The core jurisdiction of the court has been described as including review of the constitutional validity of laws, enforcing court orders, controlling the court's process, and its residual jurisdiction as a court of original general jurisdiction: *Reference re Code of Civil Procedure (Que.), art. 35*., at para. 68.

[29] The parties also agree that removing the court's ability to undertake judicial review would be impermissible: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220. They disagree, however, on whether ROPA removes the right of judicial review.

[30] The applicant argues that s. 17(2) on its face prohibits all remedies, legal or equitable, under any statutes, and that this includes judicial review remedies. Subsection 17(3) prohibits bringing or maintaining any proceeding. While s. 17(4) excludes an application for judicial review from the bar on proceedings in s. 17(3), it does not exclude it from the ambit of s. 17(2). Therefore, argues the applicant, an application for judicial review could be commenced, but no remedy would be available. The applicant notes that, had the legislature wished to permit applications for judicial review to proceed, it could have drafted s. 17(4) to state, "this section does not apply", as it did in s. 17(7) with respect to s. 35 of the *Constitution Act, 1982* and in s. 17(9) with respect to proceedings brought by the Crown.

[31] The respondent argues that s. 17 maintains the availability of judicial review on the following bases. The prerogative writs are neither equitable nor statutory remedies; they are a separate category of public law remedy and therefore not precluded by s. 17(2). Indeed, s. 17(2) has been neither argued nor found to preclude judicial review in an application for review under ROPA: *Ontario Place for All Inc. v. Ontario Ministry of Infrastructure*, 2024 ONSC 3327. In the alternative, if there is statutory ambiguity, it is a well-established principle that legislation should be read in a manner consistent with the constitution: *Siemens*, at para. 33. Finally, in the further alternative, the court could read the legislation down and state that s. 17(2) does not prohibit judicial review.

[32] I find that s. 17(2) does not preclude an application for judicial review. A fundamental principle of statutory interpretation is that statutory provisions must be read in their entire contexts, harmoniously within the legislative scheme: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. To accede to the applicant's interpretation would render s. 17(4) either meaningless (an application for judicial review is prohibited) or absurd (the application for judicial review is permitted, but no remedy can be obtained). I do not accept that argument and I find that the legislation permits applications for judicial review.

[33] The remaining question is whether s. 17(2) offends s. 96 of the *Constitution Act, 1867* by removing all non-judicial review and non-constitutional proceedings that would have arisen from activities set out in s. 17(1).

[34] The applicant argues that the breadth of s. 17(2) is so sweeping that it removes the court's adjudicative function and the citizenry's access to remedies in an unprecedented and impermissible

way. The respondent concedes that, while there might be legislative action that goes so far that it amounts to an impermissible interference with the court's core jurisdiction, the subsection in issue is "a long way" from that. It denies that there is anything improper about removing access to remedies.

[35] The applicant submits that the case of *Just v. British Columbia*, [1989] 2 S.C.R. 1228, stands for the broad proposition that it is impermissible to immunize the Crown from liability. I do not agree.

[36] *Just* considered the distinction between Crown immunity for matters of policy and Crown liability for operational matters. The legislation at issue in *Just* provided that the Crown is subject to all those liabilities to which it would be liable if it were a person. However, it was not subject in its capacity as a highway authority to any greater liability than that to which a municipal corporation is subject in that capacity. The Court read the legislation as placing "an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads."

[37] The applicant relies on the following comment of the Court, at para. 16: "The early governmental immunity from tortious liability became intolerable". The Court made this comment in the course of explaining the historical evolution of proceedings against the Crown. It was not a broad pronouncement on whether the Crown could choose to immunize itself statutorily. Indeed, the decision acknowledges the possibility of statutory exemptions from liability several times: at paras. 12, 27, and 28. *Just* does not stand for the broad proposition that the Crown cannot statutorily exempt itself from liability.

[38] The applicant urges the court to read s. 17(2) as being so broad that to give effect to it would be to shut down the superior court.

[39] I agree with the applicant that legislation cannot prevent general access to the superior courts without running afoul of s. 96. As the Supreme Court described in *Trial Lawyers Assn.*, at para. 32:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*.

[40] However, ROPA does not remove general access to the courts or grant immunity to the Crown at large. Rather, it extinguishes specific causes of action and grants immunity in a single context. Given that there is no evidence that the applicant has or could have a legal cause of action or claim for compensation or other remedy, the analysis is necessarily general and abstract.

[41] I find the applicant's position vastly overstates the effect of the immunity provided in s. 17(2), at least in the factual vacuum in which this case is being argued. The legislature has decided

that it wishes to develop Ontario Place. It has decided that it wishes to do so without exposing itself to causes of action. The legislature is free to enact immunity clauses and has done so not uncommonly, including in the following statutes: *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, s. 38; *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A, s. 30; *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 203-204(2); *Clean Water Act, 2006*, S.O. 2006, c. 22, s. 98; *Broader Public Sector Accountability Act, 2010*, S.O. 2010, c. 25, s. 22; *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25, s. 41.2; *Mining Act*, R.S.O. 1990, c. M.14, s. 38.4.

[42] Such provisions do not *per se* improperly violate s. 96. Perhaps there are circumstances in which such a provision goes too far. However, no such circumstance is apparent in this application. At this stage, the applicant, who seeks to bring no action that is prohibited by s. 17(2), asks the court to declare theoretically in a vacuum that s. 17(2) goes too far. I find no basis for doing so on the record before me.

[43] In addition to immunizing itself from liability, a legislature is free to extinguish existing causes of action, even individual vested property rights, if it uses clear and explicit statutory language: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 41; *Clitheroe v. Hydro One Inc.*, 2010 ONCA 458, 82 C.C.P.B. 181, at para. 1, aff'g 2009 CanLII 33029 (Ont. S.C.), at paras. 31-33, leave to appeal refused, [2010] S.C.C.A. No. 316; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40. There is no doubt that clear and explicit language was used here. Again, in the factual vacuum where no specific cause of action is being asserted by the applicant and prohibited by ROPA, there is no basis for a broad declaration that the legislature has gone too far.

[44] The day this matter was argued, the Supreme Court of Canada released its decision in *Canada (Attorney General) v. Power*, 2024 SCC 26. The parties provided submissions in writing on the effect of *Power*. The applicant takes the position that *Power* resolves the matter in its favour. I do not agree. *Power* stands for the proposition that if legislation is found to be unconstitutional, the legislature does not enjoy absolute immunity and may be sued for *Charter* damages. It is not clear to me that, on its face, the wording of s. 17(2) would prohibit such litigation. That will be for a court to determine should such litigation arise. It does not assist the applicant here, where there is no underlying *Charter* claim.

[45] I conclude that the applicant has not demonstrated that s. 17(2) violates s. 96 of the *Constitution Act, 1867*.

Issue 2: Should ss. 9, 10, 11, and 17(2) of ROPA be declared a breach of public trust?

[46] The applicant argues that, in addition to s. 17(2), the provisions of ROPA that provide broad exemptions from the *Environmental Assessment Act*, the *Heritage Act*, and the City of Toronto's power to regulate and prohibit noise under the *City of Toronto Act* should be declared a breach of public trust.

[47] The applicant relied on its written submissions in support of this argument.

[48] Those submissions rely heavily on statements made by the majority of the Supreme Court of Canada in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74. In that case, the appellant Canfor was largely responsible for a fire in an area in which logging occurred, adversely affecting the price at which the now fire-damaged timber could be sold. The Court considered whether the Crown was limited to suing in its capacity as an ordinary landowner, or whether it could also sue as a representative of the public to enforce the public interest in an unspoiled environment.

[49] In considering this question, the Court referred to caselaw from other jurisdictions, including the United States, and left open the possibility of the public trust arguments being made in an appropriate case. The case before it, however, had been framed by the pleadings and in the courts below as the Crown seeking remedies as a private landowner, not as a case about public trust. Therefore, the Court limited its decision to the basis on which the case had been framed and did not "embark on a consideration of these difficult issues" of public trust: at para. 82.

[50] The public trust doctrine has subsequently been rejected by the Federal Court and Federal Court of Appeal when raised directly: *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, 464 N.R. 187; *La Rose v. Canada*, 2020 FC 1008, 477 C.R.R. (2d) 239, aff'd 2023 FCA 241.

[51] The applicant relies on comments of the courts in which municipalities have been referred to as trustees of the environment: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 27.

[52] The applicant contends that applying the doctrine of public trust is an incremental extension of the law in Canada. The Ontario Place land is a discrete piece of property; it is not as vast or amorphous as air or water, so the concerns expressed by the Federal Courts need not apply. It has received cultural heritage awards and designations. It is publicly owned.

[53] The respondent notes that no Canadian court has ever declared a statute to be a breach of public trust. Further, the Supreme Court of Canada has held that the exercise of public law duties, legislatively or administratively, do not generally give rise to fiduciary relationships. The applicant has not demonstrated limited or special circumstances that would warrant a finding that the respondent stands in a trust-like legal relationship with it: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 37.

[54] As noted above, the applicant takes no issue with s. 2 of ROPA, which places ownership and control of the land in the ministry. The applicant does not explain how the public trust would co-exist with that section.

[55] An additional hurdle faced by the applicant is the remedy it seeks. The applicant asks the court for a declaration that ss. 9, 10, 11, 12, and 17(2) are a breach of the public trust. The applicant concedes that the doctrine of public trust is not a constitutional doctrine, written or unwritten. Therefore, even if the doctrine exists in Canadian law, it provides no basis for striking down legislation: *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1. A declaration "in the air" that the provisions breach public trust, without any remedy of striking them down, serves no purpose. That is, even if there were a doctrine of public trust, which is far from

certain, and even if the doctrine were to apply to Ontario Place, which is even less certain, there is nothing to be served by a declaration that the provisions in question are a breach of public trust. The court does not provide declarations that are "of merely academic importance and [have] no utility": *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363, 8 C.B.R. (7th) 22, at para. 64.

[56] I see no basis in fact or law to impose a trust on Ontario Place land. I see no basis upon which the impugned provisions of ROPA could be declared to breach the public trust.

Issue 3: Should the effect of this order be stayed? Should an injunction issue to stop activity at Ontario Place for five days following the release of this decision?

[57] At the case conference before Callaghan J. on June 28, 2024, the parties agreed that rather than schedule an interlocutory injunction, the application itself would be scheduled on a short timetable returnable July 19, 2024. Ontario voluntarily agreed that it would not cause or permit any permanent destruction of any trees, shrubs, or buildings at Ontario Place between the date of the appearance before Callaghan J. and July 19, 2024 at 6:00 p.m. As I reserved my decision at the end of argument on July 19, 2024, Ontario agreed, at my request, that it would voluntarily continue that undertaking until 6:00 p.m. on July 26, 2024, or until I released my decision, whichever came first.

[58] The applicant asked that I make an order extending that term until five days after the release of my decision.

[59] I agree with Ontario that there is no legal basis for me to do so. The applicant did not point to any circumstance that would allow it to obtain injunctive relief against the Crown in the face of s. 22 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17.

[60] I do not believe the application raises a serious legal issue in respect of the public trust argument.

[61] To the degree the applicant may satisfy that threshold in respect of the s. 96 argument and the breadth of s. 17(2), there is no irreparable harm from s. 17(2) taking immediate effect. None of the declaratory sought, even if granted, would have the effect of stopping activity at Ontario Place. If s. 17(2) were to be declared inoperative by virtue of s. 96 of the *Constitution Act, 1867*, the result would be that there would be no prohibition on remedies in respect of anything referred to in s. 17(1). The applicant did not seek to have s. 17(3), which bars any proceeding being brought or maintained in respect of anything referred to in s. 17(1), declared inoperative. The exemptions from the *Environmental Assessment Act* and *Heritage Act* would be unaffected. There is no basis to conclude that any urgent action is either permitted or prohibited by s. 17(2) remaining operative. I find there is no irreparable harm to the applicant by this decision taking immediate effect. For the same reason, I find the balance of convenience does not favour the granting of an injunction.

[62] The application is dismissed.

[63] The parties submitted costs outlines. They are encouraged to agree on costs. Should they be unable to do so, the respondent may provide costs submissions of no more than three pages double spaced, within seven days. The applicant shall have seven days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

Lisa Brownstone

Digitally signed by Lisa Brownstone
Date: 2024.07.26 08:44:23 -04'00'

L. Brownstone J.

Released: July 26, 2024

CITATION: Ontario Place Protectors v. HMK in Right of Ontario 2024 ONSC 4194
COURT FILE NO.: CV-24-00719861-0000
DATE: 20240726

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO PLACE PROTECTORS

Applicant

– and –

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
and ATTORNEY GENERAL FOR ONTARIO

Respondents

REASONS FOR JUDGMENT

L. Brownstone J.

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