

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LAW SOCIETY OF ONTARIO

Applicant

-and-

METROLINX

Respondent

**FACTUM OF THE APPLICANT,
LAW SOCIETY OF ONTARIO**

February 9, 2023

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PART I. OVERVIEW

1. Osgoode Hall is a pre-eminent heritage site in the Province of Ontario (and in Canada) and a symbol of justice and the rule of law. This Court should grant the interlocutory injunction sought in this application. If Metrolinx proceeds with its plan to construct on the Osgoode Hall site, it will permanently and irreparably change the heritage attributes of a unique heritage site. Without injunctive relief, this shared public good will be changed forever.

2. This urgent application arises in the context of building a new mass transit line in Toronto. Metrolinx proposes to perform construction work on the Osgoode Hall site and build a “headhouse” (i.e., a station pavilion). In trying to assess this proposal, the Law Society relied in good faith on representations by Metrolinx that it was open to and seriously considering alternative sites for an Ontario Line station. After months of inadequate consultation and opaqueness on the part of Metrolinx, there seemed to be a moment of collaboration. The City of Toronto announced that an independent third-party would review site selection for the Osgoode Hall site for the Ontario Line. In meetings with the Law Society, Metrolinx said that it would take the report seriously and “pivot” as necessary.

3. When that “pivot” came, however, it was unilateral and to the detriment of the Osgoode Hall site. Before even having a copy of the report, in February 2022, Metrolinx unilaterally declared that the time for consultation was over, it was fully set on using the Osgoode Hall site, and it would be immediately removing mature trees and dispatching with a portion of an urban forest. The Law Society urgently sought and was granted

interim injunctive relief. This application is to determine further injunctive relief on a proper record.

4. The Law Society meets the test for injunctive relief:

- (a) Having commenced an underlying application under section 33(1) of the *Ontario Heritage Act* before the Toronto City Council (“**Council**”), this Court has jurisdiction to grant injunctive relief pending the determination of the section 33(1) application;
- (b) There are serious issues to be tried in the underlying section 33(1) application. There is unchallenged expert evidence that should Metrolinx proceed with its plan, it will fundamentally alter the heritage character of the entire Osgoode Hall site. Heritage is a holistic public good that cannot be understood in a piecemeal way: what Metrolinx does in its parcel of the Osgoode Hall site affects the integrity, aesthetics, and heritage character of the entire site. These factors raise a novel but live question before the Council: can the Law Society permit Metrolinx’s proposal without the Council’s consent and does the body tasked with protecting heritage sites owned by private parties within the City have no jurisdiction to do anything to protect those heritage attributes when another body seeks to damage them?
- (c) Without the Court’s intervention, the Law Society will suffer irreparable harm as Metrolinx’s proposed plans will, among other things, remove mature

trees, permanently change the configuration of the heritage protected fences, and change the viewscape; and,

- (d) The balance of convenience favours granting injunctive relief given Metrolinx's failure to conduct further due diligence and the public interest in protecting vital heritage locations such as the Osgoode Hall site. The "evidence" of harm to Metrolinx is at best speculative and incapable of testing or proof before this Court.

2. For all of these reasons, the application should be granted.

PART II. FACTS

A. *The Parties*

3. Created by an act of the Legislative Assembly in 1797, the Law Society of Ontario ("**LSO**") governs Ontario's lawyers and paralegals in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence, and professional conduct. The LSO has a duty to protect the public interest, to maintain and advance the cause of justice and the rule of law, and to facilitate access to justice for the people of Ontario.

4. The LSO, licenses and regulates Ontario's more than 57,000 lawyers and over 10,000 licensed paralegals pursuant to the *Law Society Act* and the LSO's rules, regulations and guidelines.

5. Metrolinx, an agency of the Government of Ontario under the *Metrolinx Act, 2006*, was created to improve the coordination and integration of all modes of transportation in the Greater Toronto and Hamilton Area. Metrolinx is a Crown corporation under its enabling legislation. Metrolinx is authorized to plan for and build the Ontario Line.

B. The Osgoode Hall site is a landmark heritage location with multiple owners

6. The Osgoode Hall site has been “a symbol of justice in Ontario for almost 200 years.”¹ Named after the province's first chief justice, Osgoode Hall began as the headquarters of the Law Society of Upper Canada (as it was then) in 1829.² The East Wing was built by 1832, with the centre and west wing being added between 1844 and 1846. The centre section was reconstructed in “grand style” between 1856 and 1859.³ As such the Osgoode Hall site ranks “among Canada's architectural and historical treasures [emphasis added].”⁴ The Osgoode Hall site continues to house the LSO and has since 1846 been the seat of provincial courts, including the Court of Appeal for Ontario.

1. The Osgoode Hall Site has Federal and Municipal Heritage Designations

7. On November 15, 1979, the Osgoode Hall site was designated under the *Historic Sites and Monuments Act* as a National Heritage Site of Canada. In the “Character-

¹ Opinion letter of Christopher Borgal (dated February 6, 2023) [“**Opinion Letter**”], Affidavit of Christopher Borgal (affirmed February 6, 2023) [“**Borgal Affidavit**”], Application Record (“**AR**”) [Vol. 1], Tab 3, Exhibit B-1 at p. 190.

² “[Osgoode Hall National Historic Site of Canada](#)”, Directory of Federal Heritage Designation, Designation Date 11/15/1979.

³ “[Osgoode Hall National Historic Site of Canada](#)”, Directory of Federal Heritage Designation, Designation Date 11/15/1979.

⁴ “[Osgoode Hall National Historic Site of Canada](#)”, Directory of Federal Heritage Designation, Designation Date 11/15/1979 [emphasis added].

Defining Elements” of the Federal designation, the “contextual” elements which form the essential heritage characteristics of the Osgoode Hall site are described as follows:

Contextual elements: its formal setting, including the grassed lawn with Y-shaped walkways and traditional plantings, the decorative wrought iron fence along the perimeter of the property, and the Victorian, wrought-iron entrance gate; the presence, design and material of the wrought-iron fence; views of the building from the street; features establishing its landmark status within the urban environment, including its axial location heading York Street, its low height in a dense environment, the enclosure of its grounds, and the extent of open land around the building.⁵

8. On September 25, 1990, the City of Toronto passed By-law No. 477/90 (the “**By-law**”), which designated features comprising the Law Society’s property on the Osgoode Hall site to be “of historical and architectural value or interest.”⁶ This By-law is the basis on which the underlying administrative proceeding before the Council was commenced (as described further below).

9. Under the By-law, the East Wing and the Gardens of Osgoode Hall (which are owned by the LSO) were designated as protected heritage sites under Part IV of the *Ontario Heritage Act* (the “**Act**”). Schedule “B” of the By-law highlights the significance of

⁵ “[Osgoode Hall National Historic Site of Canada](#)”, Directory of Federal Heritage Designation, Designation Date 11/15/1979 [emphasis added].

⁶ [By-law No. 477/90](#) (September 25, 1990), Affidavit of Diana Miles (affirmed February 3, 2023) [“**Miles Affidavit**”], AR (Vol. I), Tab 2, Ex. A, at p. 38.

the Osgoode Hall site, including its extensions and landscaped grounds, as a site which is a historical landmark.⁷

10. Schedule “B” of the By-law provides a detailed history of the Osgoode Hall site, including the unique features of the buildings and the interior. Importantly, Schedule “B” observes the following about the grounds of Osgoode Hall:

The Law Society grounds consist of the land south of the principal facade to Queen Street and west to University Avenue. This area, with cobblestone driveway and landscaped lawns, was laid out by John G. Howard, architect and City Engineer, in 1843. It is partly enclosed by an ornate cast iron fence with six baffles, attributed to William Storm, cast by the St. Lawrence Foundry of Toronto, installed in 1866, and extended by a brick fence...

The East Wing of Osgoode Hall with its extensions and landscaped grounds are an outstanding record of the continuing evolution of architectural styles in Canada from the early 19th century to present day, and are examples of the work of several of the most important architects in Toronto during this

⁷ [By-law No. 477/90](#), September 25, 1990, Miles Affidavit, AR (Vol. I), Tab 2, Ex. A, at p. 38.

period. The site is an historical landmark in the development of the legal profession in Canada [emphasis added].⁸

2. Multiple Ownership of the Osgoode Hall Site

11. At present, the Osgoode Hall site has three owners: the Province of Ontario, the LSO, and Metrolinx.⁹

12. Until recently, the Osgoode Hall site had dual ownership. The LSO's property consists of the easterly portion of the Osgoode Hall building as well as the south facing landscaped lawns (with mature trees) abutting Queen Street West and running westerly to University Avenue. The remainder of the site was (and is) owned by the Province of Ontario.¹⁰

13. In or around November 2021, Metrolinx initiated a process to expropriate a portion of the Osgoode Hall site owned by the LSO (at the southwest corner of the property at the corner of Queen Street West and University Avenue) along with a strip along the southern frontage to facilitate the construction of a subway station and related infrastructure (as described below).¹¹ On November 30, 2022, Metrolinx formally took possession of the expropriated land and is the legal owner of this portion of the Osgoode Hall site.

⁸ [By-law No. 477/90](#), September 25, 1990, Miles Affidavit, AR (Vol. I), Tab 2, Ex. A., at p. 38.

⁹ Letter from Metrolinx re Minister's consent (dated June 24, 2021), Affidavit of Diana Miles (affirmed February 7, 2023) [**"Miles Responding Affidavit"**], AR (Vol. II), Tab 4, Ex. B, at p. 227

¹⁰ Letter from Metrolinx re Minister's consent (dated June 24, 2021), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. B, at p. 227

¹¹ Affidavit of Michael Hodge (affirmed February 4, 2023) [**"Hodge Affidavit"**] at para 30, Respondent's Record [**"RR"**] (Vol. I), Tab 1, at p B-1-18.

C. Metrolinx plan to use the Osgoode Hall site for the Ontario Line

14. Metrolinx is responsible for the construction of the Ontario Line, a new subway line that will run through the City of Toronto from Exhibition Place to the Ontario Science Centre. Metrolinx plans to locate a station near the existing “Osgoode” TTC subway station at Queen Street West and University Avenue, and in particular on the land expropriated from the Law Society.¹²

15. Metrolinx intends to use the expropriated property to build the “keyhole” and the “headhouse.”¹³ The “keyhole” is a deep shaft dug into the ground, in this case including a below ground station directly underneath a large portion of the lawn, through which heavy construction equipment and workers can perform excavation work and will ultimately be used as the entryway from ground level for passengers to enter the subway system. A “headhouse” is the structure or station building at surface level through which passengers will gain access to the keyhole entryway to the system.¹⁴

16. It is undisputed that Metrolinx’s proposed plan for the Osgoode Hall site will have, at minimum, the following impacts on the heritage attributes of the Osgoode Hall Site:

- a. A portion of the wrought iron fence will be removed and reinstated around the new station entrance (permanent impact);¹⁵

¹² Miles Affidavit at para 6, AR (Vol. I), Tab 2, at p. 23.

¹³ Miles Affidavit at para 7, AR (Vol. I), Tab 2, at p. 23.

¹⁴ Miles Affidavit at para 8, AR (Vol. I), Tab 2, at p. 23.

¹⁵ Metrolinx’s slide deck (dated February 12, 2021), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. A, at p. 221

- b. Temporary removal of walkways, formal gardens, lawn, and plantings in the grounds at the front of the property to facilitate construction staging and laydown areas;¹⁶
- c. Permanent removal of mature trees at the south west corner of the property to allow for construction of permanent station entrance building; and,¹⁷
- d. Insertion of an incompatible pavilion at the southwest corner of the site.¹⁸

D. Metrolinx was not transparent about its plans and repeatedly told the Law Society that it would consider other sites

17. The following paragraphs are an abridged chronology of Metrolinx's conduct, which are unified by one theme: a lack of transparency and a culture of leading on community partners like the Law Society to believe that it was still open to influence and to considering other sites.

18. Contrary to the impression Metrolinx tries to present in its evidence, it was the Law Society – not Metrolinx – that initiated the first discussion concerning the use of the Osgoode Hall site. After the Law Society independently learned of the Ontario Line, the Law Society first reached out to Metrolinx to discuss the project and possible impacts in or around July 2020.¹⁹

¹⁶ Letter from Metrolinx re Minister's consent (dated June 24, 2021), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. B, at p. 227.

¹⁷ Letter from Metrolinx re Minister's consent (dated June 24, 2021), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. B, at p. 228.

¹⁸ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Exhibit B-1 at p. 188.

¹⁹ Miles Responding Affidavit at para 5(a), AR (Vol. II), Tab 4, at p. 202; Cross-Examination of Micheal Hodge (February 8, 2023), at pp. 12-13, qq. 19-20.

19. The first meeting between the two parties (which the Law Society initiated) took place on August 11, 2020. At that time, Metrolinx gave no indication that it had any plan to expropriate a portion of the Osgoode Hall site.²⁰ On the contrary, Metrolinx indicated that it was conducting an Environmental Impact Assessment and requested some information from the Law Society, namely, who owned what portions of the Osgoode Hall site. After this meeting, Metrolinx did not engage with the Law Society in any other significant discussions until early 2021.²¹

20. On or about February 12, 2021, Metrolinx made a presentation to the Law Society about its plans to use the Osgoode Hall site for the headhouse and for constructing the Ontario Line. This was the first time that the Law Society heard about Metrolinx's plan to use the Osgoode Hall site. Metrolinx implied at the meeting that obtaining Consent from the Minister for Heritage, Sport, Tourism, and Culture Industries (the "**Minister**" or "**Ministry**") to undertake the construction in light of heritage concerns was a foregone conclusion.²² That said, Metrolinx stressed that the decision to construct on the Osgoode Hall site was (a) not final; and (b) was based on "early studies". It was open to finding alternative solutions and engaging with stakeholders, including the Law Society.²³ Metrolinx did not inform the Law Society that it would be seeking the Minister's approval the following week.

²⁰ Miles Responding Affidavit at para 5(a), AR (Vol. II), Tab 4, at p. 202; Cross-Examination of Micheal Hodge (February 8, 2023), at pp. 13-14, q. 23.

²¹ Miles Responding Affidavit at para 5(a), AR (Vol. II), Tab 4, at p. 203.

²² Miles Responding Affidavit at para 5(b)(iii), AR (Vol. II), Tab 4, at p. 203.

²³ Miles Responding Affidavit at para 5(b)(v), AR (Vol. II), Tab 4, at p. 204.

21. It did. On February 19, 2021, Metrolinx applied to obtain the Minister's Consent.²⁴ There was no opportunity for the Law Society to participate in this application which it did not even know was being submitted.

22. The Minister granted her Consent on March 18, 2021.²⁵ At the time it sought and received the Consent, Metrolinx did not have a heritage impact report from its consultant, Stantech.²⁶

23. Metrolinx did not provide the Law Society with a copy of its application or supporting materials, nor a copy of the Consent once obtained,²⁷ until after the Law Society had initiated these proceedings.

²⁴ Request for Minister of Heritage, Sport, Tourism and Culture Industries' Consent, Hodge Affidavit, RR, Ex. D at p B-1-38

²⁵ Consent of the Minister of Heritage (dated March 18, 2021), Hodge Affidavit, RR (Vol. I), Tab 1, Ex. E, at p. B-1-185.

²⁶ Environmental Impact Assessment Review (dated April 2022), Hodge Affidavit, RR (Vol. I), Tab 1, Ex. K, at p. B-1-238; Cross-Examination of Micheal Hodge (February 8, 2023) at pp. 13-14, q. 23.

²⁷ Cross-Examination of Micheal Hodge (February 8, 2023), at pp. 19-21, qq. 45-46, 50-51.

24. On March 31, 2021, the Treasurer of the Law Society wrote to Mayor John Tory. In the letter, the Law Society noted that it was surprised to learn Metrolinx had proposed to place the main entrance to the Osgoode Station on the southwest corner of the Osgoode Hall site. The Law Society stressed that it was not “clear from Metrolinx’s presentation, and despite subsequent requests for more information, that options other than the Osgoode Hall grounds have been thoroughly investigated.” Nevertheless, the Law Society noted that it remained committed to working on finding a solution by working with both Metrolinx and government partners.²⁸

25. On or about April 6, 2021, the Law Society had another meeting with Metrolinx. At this meeting, Metrolinx declared that it had obtained the Minister’s Consent to build on the Osgoode Hall site. The Law Society “was very surprised to learn this” as it “did not think the Minister would proceed with such a step without first hearing from the owners of the Osgoode Hall site.” At this meeting, Metrolinx also provided some further details about the proposed project and the purported flaws with the alternative locations. Again, at this meeting, Metrolinx did not say that the Osgoode Hall site was the only available location nor that it was fully settled on using this location for the construction or station entrance location.²⁹

²⁸ Miles Responding Affidavit at para 5(d), AR (Vol. II), Tab 4, at pp. 204-205; Letter to Metrolinx from Diana Miles (dated November 28, 2022), Miles Affidavit, AR (Vol. I), Tab 4, Ex G., at p. 121

²⁹ Miles Responding Affidavit at para 5(e), AR (Vol. II), Tab 4, at p. 205.

26. On April 9, 2021, the Treasurer of the Law Society wrote to the Minister. The Law Society stressed that it was “first advised of Metrolinx’s plans at an informational meeting on February 12. Following this meeting, both the Law Society and the Chief Justices of the Courts registered significant concerns about the impacts of this proposal, which would alter and compromise the integrity of the character-defining elements of Osgoode Hall’s heritage designation.” The Law Society advised that it had first learned on April 6, 2021 that Metrolinx had proceeded with the application for Consent without “including our strong objections or permitting us to make our own and direct submission.” Despite all of this, the LSO stated that was committed to finding a solution through collaborative means.³⁰

27. There were further meetings on June 23rd and June 30th, 2021, at which the Law Society raised its concerns about the Osgoode Hall site and asked for additional information concerning the Ministerial Consent. At the June 30th meeting, Metrolinx finally provided the Law Society with its summary of its application and of the Consent (dated June 24, 2021),³¹ but not the application or the Consent itself.

³⁰ Miles Responding Affidavit at para 5(f), AR (Vol. II), Tab 4, at pp. 205-206

³¹ Miles Responding Affidavit at para 5(c), AR (Vol. II), Tab 4, at pp. 204-205; Cross-Examination of Micheal Hodge (February 8, 2023), at p. 22, q. 55.

28. At a meeting on August 9, 2021, the Law Society presented various options for the proposed location of the Ontario Line Osgoode subway station other than the Osgoode Hall site. This was the first meeting at which the parties discussed alternative sites and it was at the Law Society's urging, and included materials prepared by heritage experts retained by the Law Society. Again, at this stage, Metrolinx still had no heritage impact report. At this meeting, the Law Society's focus was again on finding a collaborative solution.³² Metrolinx did not state that alternative sites were "off the table."

29. It took Metrolinx three months to respond to the Law Society's proposals for alternative sites. In its letter dated November 9, 2021, Metrolinx indicated that the Osgoode Hall site continues to be the "best solution." However, the letter does not say that this is Metrolinx's final determination or that it was not open to considering other sites.³³

³² Miles Responding Affidavit at para 5(g), AR (Vol. II), Tab 4, at p. 207.

³³ Miles Responding Affidavit at para 5(h), AR (Vol. II), Tab 4, at p. 207; Metrolinx's memo re Minister's consent (dated November 9, 2021), Miles Responding Affidavit AR (Vol. II), Tab 4, Ex. H, at pp. 343-344.

30. In the same letter, Metrolinx raised the possibility of expropriation of the Law Society's property for the first time. Importantly, Metrolinx did not present expropriation as its ultimate plan. Rather, it said "[d]ue to the timelines for the project, we will likely initiate the expropriation process as a backstop to protect the project schedule in parallel with our negotiations. Please know that we are committed to continuing acquisition negotiations and will continue to share information with you throughout the process." The Law Society understood the November 9 letter to mean that Metrolinx was still not 100% settled on what it would do – although it preferred the Osgoode Hall site – and that expropriation was a precautionary step while it engaged in genuine consultation and negotiation with the Law Society.³⁴

31. On November 26, 2021, Metrolinx served its Notice of Application for Approval of Expropriation, followed by its Expropriation Information Sheet on December 13, 2021.³⁵

32. Given Metrolinx's opaque approach to the Minister's Consent, the Law Society was concerned about the proposed expropriation. It wanted to make sure it was heard as part of this process, an opportunity the Law Society had been denied with respect to the Consent due to Metrolinx's approach, and it wanted to be part of the collaborative solution that Metrolinx had repeatedly said it was committed to pursuing.³⁶

³⁴ Miles Responding Affidavit at para 5(h), AR (Vol. II), at p. 207; Metrolinx's memo re Minister's consent (dated November 9, 2021), Miles Responding Affidavit AR (Vol. II), Ex. H, at pp. 343-344.

³⁵ Miles Responding Affidavit at para 5(i), AR (Vol. II), Tab 4, at p. 208; Miles Responding Affidavit AR (Vol. II), Tab 4, Exs. I-J, at pp. 352-367.

³⁶ Miles Responding Affidavit at para 5(j), AR (Vol. II), Tab 4, at p. 208.

33. On January 6, 2022, the Law Society provided its submission to the Minister responsible for expropriation matters.³⁷ Between January and August of 2022, Metrolinx continued to proceed further with its expropriation process, including the Ontario Line Technical Advisor completing its Environmental Impact Assessment and Metrolinx obtaining approval to expropriate a portion of the Osgoode Hall site from the Ministry of Transportation for Ontario.

34. Throughout this time, the Law Society took Metrolinx at its word – that it preferred the Osgoode site, but that its mind was not made up. This impression Metrolinx had sown was confirmed at a meeting with Metrolinx on August 9, 2022. At that meeting, Richard Borbridge, Subway Program Director of the City of Toronto, advised attendees that the City was in the process of finalizing a scope of work to retain a third-party engineering firm to prepare a report: a critical review of Metrolinx’s proposed site and of alternative locations for the Osgoode Hall keyhole and headhouse.³⁸

35. In response to the City’s proposal, Malcolm MacKay, Program Sponsor of the Ontario Line at Metrolinx, said on behalf of Metrolinx the following at the meeting as reorded in Metrolinx’s meeting notes:

We will receive the report and we would welcome the comments, then evaluate and pivot as necessary and make sure we arrive at the best outcome. Time is of the essence to

³⁷ Miles Responding Affidavit at para 5(j), AR (Vol. II), Tab 4, at p. 208; Miles Responding Affidavit AR (Vol. II), Tab 4, Ex. K, at p. 369.

³⁸ Miles Affidavit at para 12, AR (Vol. I), Tab 2, at p. 208; Email from Ross Andersen Miles (dated August 16, 2022), Miles Affidavit AR (Vol. I), Tab 2, Ex. E, at p 75.

influence, but we have great confidence with the work we've undertaken...³⁹

36. In or around October 2022, the City retained Parsons Corporation (“**Parsons**”) to conduct this third-party review (discussed in detail further below) [the “**Report**”].

37. In or around November 2022, notwithstanding its commitment to await the Report that Metrolinx had made, the Law Society learned from community representatives and then later from Metrolinx that Metrolinx was starting to make preparations to cut down mature trees on the Osgoode Hall site while the Report was still being prepared. This caused a great deal of outcry in the community.⁴⁰

38. On November 28, 2022, the Law Society met with Metrolinx at a hastily called meeting Metrolinx had convened. The Law Society insisted that Metrolinx abide by its promise of not taking any actions on the Osgoode Hall grounds until the Report was released and considered by City Council and the community. Metrolinx agreed to await the Report. It also stated that it had “good news”: the trees did not have to be removed at the moment and Metrolinx could do the archaeological dig without removing the trees, despite the notice it had provided previously. This work was scheduled to begin on December 5, 2022 but was delayed.⁴¹

39. Meanwhile, the Law Society and other stakeholders eagerly awaited the Report’s release. On or about January 27, 2023, Metrolinx reached out to arrange a meeting with

³⁹ Email from Ross Andersen Miles (dated August 16, 2022), Miles Affidavit, AR (Vol. I), Tab 2, Ex. E, at p 75.

⁴⁰ Miles Affidavit at para. 16, AR (Vol. I), Tab 2, at p. 25.

⁴¹ Miles Affidavit at paras. 17-18, AR (Vol. I), Tab 2, at pp. 25-26.

the Law Society and other stakeholders for February 1, 2023 with community representatives (the “**February Meeting**”).⁴² The meeting agenda indicated it was to provide an update on the Report. It did not indicate the Report had been finalized or that its conclusions would be presented at this meeting.

E. Metrolinx decides to proceed, without the Report

40. At the February Meeting, the following occurred:

- a. The City of Toronto presented a slide deck prepared by Parsons, the City’s third-party reviewer. The summary included in the presentation deck indicated that the Report had concluded that the Osgoode Hall site appeared to be the most suitable location.
- b. However, the presentation slides used during the February Meeting appear to contradict Metrolinx’s conclusions that Osgoode Hall is the only feasible site.
- c. Metrolinx declared at the February Meeting that consultation with stakeholders was now over, despite the fact that none of the community representatives (including the Law Society) had seen the Report. Furthermore, Metrolinx stated that a Construction Liaison Committee would be struck and that it intended to move forward quickly with the Ontario Line project at the Osgoode Hall site.⁴³

41. The February Meeting was the first time that Metrolinx definitively said it would be proceeding with the Osgoode Hall site. Until that meeting, and based on the Law Society’s

⁴² Miles Affidavit at para. 20, AR (Vol. I), Tab 2, at p. 26.

⁴³ Miles Affidavit at paras. 23(a)-23(b), 26, AR (Vol. I), Tab 4, at pp. 26-28.

discussions with Metrolinx, the Law Society understood the best avenue to affect the outcome was through collaboration and discussion, and that Metrolinx would take the Parsons Report seriously.⁴⁴

42. As the Law Society later learned through these proceedings, Metrolinx had not even received a copy of the Report when it announced definitively that it would be proceeding on the Osgoode Hall site.⁴⁵

F. The Parsons Report Recommended More Analysis of Alternative Sites

43. The Report raises significant questions about the adequacy of Metrolinx's due diligence. Several of its key findings are set out below:

- a. As part of Parsons' analysis of the "Built Heritage Review," the Report identifies 10 "items" that "should be added to the impact and mitigation measure discussions." These are 10 heritage-related items that Metrolinx has not adequately considered in the documents Parsons reviewed. One of the items is: "[h]eritage rationale for the removal of the 200 [year] old trees, and a clarification of the mitigation measure – rehabilitating the landscaping." Further, the Report concluded: "[t]he results of location on some of the heritage resources could be deemed irreversible. Views will be irreparably lost, and heritable materials will be lost. These impacts will lead to diminished integrity of the heritage resource."⁴⁶

⁴⁴ Miles Responding Affidavit at para. 6, AR (Vol. II), Tab 4, at p. 209.

⁴⁵ Miles Responding Affidavit at para. 7, AR (Vol. II), Tab 4, at pp. 209-210.

⁴⁶ "[Ontario Line Osgoode Station Headhouse Location Review](#)", Parsons Corporation (dated February 1, 2023) at p. 28-29.

- b. The Report found in effect that Metrolinx has not adequately studied emergency egress for Location A (i.e., the Osgoode Hall site). More specifically, Metrolinx’s “technical advisors” conducted a “TTC Performance Level Evaluation Methodology” to “determine the need for additional emergency egress from the existing TTC mezzanine. The evaluation indicates that an additional emergency egress is required, however the analysis only accounts for opening day ridership (2030) and does not build in any capacity for ridership growth using the design year of 2077 as has been used in other studies. This additional need for mezzanine to surface capacity does not appear to be addressed in any of the proposed design solutions.”⁴⁷
- c. The “Conclusion” of the Report states (among other things):
- i. “Location A [Osgoode Hall site] causes irreversible damage to the integrity of the heritage resource, Osgoode Hall. There will be permanent loss of the heritage boundary, natural heritage, prominent views, and heritage fabric...It should be recognized that there is a loss to this Federally, Provincially and Municipally recognized heritage resource.”⁴⁸
 - ii. “The graphic material provided by Metrolinx for ‘Location B – Campbell House Site’ would suggest this site would benefit by a more fulsome review of the northwest corner site as a reasonable alternate location for

⁴⁷ “[Ontario Line Osgoode Station Headhouse Location Review](#)”, Parsons Corporation (dated February 1, 2023) at p. 20.

⁴⁸ “[Ontario Line Osgoode Station Headhouse Location Review](#)”, Parsons Corporation (dated February 1, 2023) at p. 34.

the station building for Osgoode Station. The material review provided by Metrolinx states categorically that the keyhole excavation cannot fit on the site as shown and shows the keyhole excavation site and the laydown space unmoved from their original location on Osgoode Hall property. It is suggested that Metrolinx provide a design that relies on the same design criteria used by 'Location A – Osgoode Hall Site) [*sic*] that proves its lack of suitability, and thereby continues to rely on the Osgoode Hall site as a site for keyhole excavation and construction laydown activities.⁴⁹

44. In other words, a core finding of the Report is that Metrolinx's heritage analysis of the Osgoode Hall site is deficient, and that the Campbell House location has been understudied.

G. Metrolinx starts cutting down trees and the LSO urgently seeks judicial intervention

45. Metrolinx did not notify the Law Society that tree clearing would begin the weekend February 4-5, 2023, but the Law Society was aware the work would commence soon, despite Metrolinx not having even reviewed (or received) a copy of the Parsons Report.

46. As a result, the Law Society filed an application to City Council on February 3, 2023 under section 33(1) of the *Ontario Heritage Act* (discussed further in the "Law & Argument" section). That same day, the Law Society also commenced this application

⁴⁹ "[Ontario Line Osgoode Station Headhouse Location Review](#)", Parsons Corporation (dated February 1, 2023) at p. 34.

and brought a motion for an interim injunction on the basis of the underlying proceeding before the Council.⁵⁰

47. On February 3, 2023, the Court convened an urgent case conference for 10:00 am the following morning on Saturday, February 4, 2023 before Justice Chalmers.

48. It was only on the morning of February 4, 2023, at approximately 8:45 am, that the Law Society learned that Metrolinx intended to clear the trees that weekend when crews arrived with chainsaws and other tree removal equipment. At 9:21 am (a mere 39 minutes before the case conference), counsel for the LSO emailed Metrolinx's counsel indicating there was news that trees would be removed while the case conference was happening. In response, Metrolinx refused to stand down and said as follows:⁵¹

...Our client is lawfully proceeding, with Ministerial permission granted almost two years ago. Your client chose the timing of its injunction and you chose the timing of this 10am case conference, knowing the timing of the tree cutting was to be this morning.

There is no basis to impose an interim injunction...⁵²

⁵⁰ LSO's Submissions re Section 33(1) Application, Miles Affidavit, AR (Vol. I), Tab 4, Ex. L, at p. 143.

⁵¹ Email between counsel for Metrolinx and Law Society of Ontario (dated February 4, 2023), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. O, at p. 467.

⁵² Email between counsel for Metrolinx and Law Society of Ontario (dated February 4, 2023), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. O, at p. 467.

49. Metrolinx ultimately stood down its crews pending the hearing for interim injunctive relief before Justice Chalmers, which was heard the afternoon of February 4th, but not before Metrolinx had felled one tree and cut down large branches from several others. Justice Chalmers granted the interim injunction sought by the Law Society, in force until midnight on February 10, 2023.

PART III. ISSUE

50. The sole issue to determine on this application is whether the LSO should be granted injunctive relief. For the reasons set out below, the answer to this question is “yes.”

PART IV. LAW & ARGUMENT

A. *This Court Has Jurisdiction to Grant Injunctive Relief*

51. The within application for injunctive relief arises in the context of a pending administrative proceeding before City Council. In such a context, this Court has residual jurisdiction to grant injunctive relief.

52. The Supreme Court of Canada has affirmed that a superior court has jurisdiction to award an interlocutory injunction to avoid an injustice even where jurisdiction to determine the ultimate issue has been assigned to another tribunal. In *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, the Supreme Court explained as follows:

Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined. This accords with the more general recognition throughout Canada that the court may

grant interim relief where final relief will be granted in another forum [internal citations omitted].⁵³

53. The foregoing proposition has been followed in recent cases of public interest. For example, in *Cardinal v Cleveland Indians Baseball Company Limited Partnership*, the applicant commenced two applications, respectively, before the Canadian Human Rights Commission and the Human Rights Tribunal of Ontario seeking orders enjoining the Cleveland Indians Baseball Company Limited Partnership (as they were then known), Major League Baseball and Rogers Communications Inc from, among other things, broadcasting or using the word “Indian” within Canada in relation to the Cleveland Indians and the “Chief Wahoo” logo. As here, the administrative bodies did not have the explicit authority to grant injunctive relief under their respective enabling legislation. Accordingly, the applicant sought injunctive relief before the Superior Court. The Court found that it had jurisdiction substantially for similar reasons as those identified in the Supreme Court judgment above.⁵⁴

54. In this application, City Council does not have authority to grant injunctive relief. Without such relief, Metrolinx intends to proceed with further construction work on the Osgoode Hall site which would render the issues at stake in the administrative proceeding nugatory. In these circumstances the Court has jurisdiction to exercise its discretion to grant injunctive relief.

⁵³ *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [\[1996\] 2 SCR 495](#) at para. 16.

⁵⁴ *Cardinal v. Cleveland Indians Baseball Company Limited Partnership*, [2016 ONSC 6929](#) at para. 16, citing to *Canada (Human Rights Commission) v. Canadian Liberty Net*, [\[1998\] 1 S.C.R. 626](#).

B. The Test for Injunctive Relief

55. The test for an interlocutory injunction is set out in *RJR MacDonald Inc. v. Canada (Attorney-General)*.⁵⁵ The moving party must demonstrate that:

- a. there is a serious issue to be tried;
- b. irreparable harm will result if the relief is not granted; and
- c. the balance of convenience favours the moving party.

56. The test is not to be rigidly applied. It is to be considered as a whole. Strength in one part of the test can make up for a weakness in another. The Court is to consider, in light of the three parts of the test, whether injunctive relief is appropriate.⁵⁶

C. There are Serious Issues to be Tried

1. The Threshold for “Serious Issues to be Tried”

57. The threshold of “serious issues to be tried” is low. The Court must bear in mind the *degree* to which it is low. In *RJR-MacDonald*, the Supreme Court explained the probing nature of the standard as follows: “[w]hether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits [emphasis added].”⁵⁷ Unless “the case on the merits is frivolous or vexatious”, the court must consider the second and third step of the test.

⁵⁵ *RJR MacDonald Inc. v. Canada (Attorney-General)* [1994] 1 SCR 311 at paras. 77-80.

⁵⁶ *Wendy Sokoloff Professional Corporation et al. v. Chorney et al.*, 2021 ONSC 8497 at para. 26.

⁵⁷ *RJR MacDonald Inc. v. Canada (Attorney-General)* [1994] 1 SCR 311 at para. 83.

2. The Law Society Raises Novel and Live Questions in its section 33(1) Application to the Council

58. In its section 33(1) application under the *Ontario Heritage Act* (the “**Act**”), the Law Society raises novel questions before City Council which require determination by the Council.

59. Section 33(1) of the *Act* requires an owner of a heritage property (such as the Law Society) to apply to the Council for permission prior to that owner altering or permitting an alteration to the property’s heritage attributes. Section 33(1) provides as follows:

33 (1) No owner of property designated under section 29 shall alter the property or permit the alteration of the property if the alteration is likely to affect the property’s heritage attributes, as set out in the description of the property’s heritage attributes in the by-law that was required to be registered under clause 29 (12) (b) or subsection 29 (19), as the case may be, unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the alteration. 2019, c. 9, Sched. 11, s. 11.⁵⁸

60. The *Act* defines alteration as “to change in any manner and includes to restore, renovate, repair or disturb.”⁵⁹

61. In this case, there is undisputed evidence that if Metrolinx proceeds with its plans for the Osgoode Hall site, there will be direct and lasting harm to its overall heritage character.⁶⁰ Certainly such harm would amount to an “alteration.” “Heritage” is a holistic and indivisible assessment, not merely an issue of legal title. The unchallenged evidence from Mr. Borgal, a heritage architect whose projects include work on both the

⁵⁸ [Ontario Heritage Act](#), RSO 1990, c O.18, s. 33(1).

⁵⁹ [Ontario Heritage Act](#), RSO 1990, c O.18, s. 1.

⁶⁰ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex B-1, at p. 188.

refurbishment of Massey Hall and of the Parliament Buildings, amongst many other heritage projects, is clear on this point:

- a. "...the proposed entrance will block the view of Osgoode Hall from the corner of University Avenue and Queen Street, see the removal of several mature trees of various species, reconfigure the cast-iron fence enclosure which, in itself, is an important heritage artefact in the city, and introduce a design element to the original grounds that is at odds with the aesthetics of the original building and site;"⁶¹
- b. "[t]he site is a small cultural heritage landscape which incorporates the perimeter fence, the grounds with mature trees and plantings, and the building, of various periods dating as far back as 1832;"⁶²
- c. "the attributes of the site include the landscaped portion of the site facing Queen Street and they have been considered as a whole rather than simply a grouping of parts. Removal of one end of the front yard, in this case by expropriation, diminishes the overall composition and integrity of the site as an historical complex. Such an act undermines the overall heritage qualities of the site. Insertion of an incompatible pavilion at the southwest corner of the site will have a profoundly adverse heritage impact on the perception of the site as a whole. It will interfere with historical views to and from the site which have been in place for almost 200 years, and degrade the symbolic presence of the

⁶¹ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex B-1, at p. 185.

⁶² Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex B-1, at p. 187.

site within the City. It is therefore vitally important that cultural heritage values and their preservation be included as a part of the design parameters for the location and appearance of such an intrusion on a significant heritage property.”⁶³

- d. “It must be made clear that a Designation under the *Ontario Heritage Act* applies to the property rather than to individual components of a property. Heritage issues cannot be understood in a piecemeal way. It is rare that in a historic and important site such as Osgoode Hall, there are three legal owners of the various parcels of land. But the heritage considerations of this site cannot be divided in a formalistic way, where the three owners may wish to pursue whatever they want for their own properties to the exclusion of a consideration of the impact it may have on those adjacent. Indeed what one owner does affects the overall heritage attributes of the site. Either the site’s heritage attributes survives as a whole or it is tarnished based on what an individual owner does.”⁶⁴
- e. “There is no question, in my opinion, that the proposed use for the expropriated land will have a significant adverse heritage impact on the attributes located on the un-expropriated land....In my opinion, the entire site comprising Osgoode Hall, the landscaped areas, and the iron fence, are of a piece in their heritage importance. Slicing a corner from the site and placing an inappropriate transit

⁶³ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 188.

⁶⁴ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 188.

pavilion there is, in my opinion, tantamount to drawing a cartoon in the corner of a painting done by a great master such as Turner or Constable.”⁶⁵

62. The Law Society acknowledges that the application of section 33(1) in this case would be a novel one. However, this is a novel case: it raises issues concerning a unique and pre-eminent heritage property with a unique multiple ownership structure. Importantly, the novelty of this issue is not a basis to find that an issue is not “a serious issue to be tried.”⁶⁶

63. There is no dispute that the *Act* has two parallel schemes: one for prescribed public bodies (such as Metrolinx) and another for ordinary property owners (such as the Law Society). Section 33(1) falls in the latter part of the legislative scheme. However, given the unique constellation of factors in this case, Section 33(1) can still apply to Metrolinx. Specifically, the Law Society, which is the property owner and not a prescribed body, is applying to the Council in its section 33(1) application. Metrolinx is engaged in that application because the Law Society submits Metrolinx’s proposed conduct will adversely affect the heritage attributes of a single indivisible heritage site, including the property remaining under the Law Society’s ownership.

64. Effectively, the issue on the merits is whether under the *Act*, a municipality which has designated lands as heritage under the *Act* is wholly powerless to prevent conduct which would result in irreparable harm to the heritage attributes of those lands, in a case

⁶⁵ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 190.

⁶⁶ *2788610 Ontario Inc. v. Bhagwani et al.*, [2022 ONSC 905](#) at para. 15.

where the offending conduct is being undertaken by a person other than the immediate owner of the designated lands.

65. While this is a novel application of Section 33(1), the Law Society submits the legislation is open to this interpretation and application, and the Council should be given the opportunity to determine that issue. Administrative bodies are presumed to be competent to interpret their legislation and should determine them at first instance. As the Federal Court recently stated, “[i]t is the administrative decision maker’s role to interpret the provisions first, subject to later review...”⁶⁷

66. Moreover, the Council can provide an appropriate remedy in these circumstances. Section 33(6) provides that the Council may “consent”, “consent with terms and conditions”, or “refuse” an application. Nothing on the face of this provision precludes, for example, as part of consenting or consenting with terms, the Council from determining the owner who is adversely affecting the heritage property (in this case, Metrolinx) must cease that activity, or at a minimum to engage with the owner of the affected lands to prevent adverse effect on the heritage attributes of the designated property. While the Council has not had this question arise before it, the Law Society submits that the Council is the entity with the statutory responsibility to answer it (at least at first instance), and Council should be given the opportunity to decide it.

3. The Act should be given a large and liberal interpretation

67. Applying and determining the scope of section 33(1) is a question of statutory interpretation. Under the modern principle of statutory interpretation, provisions of “an Act

⁶⁷ *Phan v. Canada (Citizenship and Immigration)*, [2022 FC 916](#) at para. 62.

are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”⁶⁸ A key aspect to this analysis is understanding the object of the legislation and ensuring that is furthered. As the Supreme Court reminded in *Bell ExpressVu*, “the preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute.”⁶⁹

68. In the context of the *Act*, both the Supreme Court of Canada and the Ontario Court of Appeal have recognized that the legislation (including section 33) must be liberally interpreted to further its purpose. In the 2019 decision of *Oakville (Town) v. Clublink Corporation ULC*, Justice Nordheimer (in dissent but not on these issues) provided a helpful summary of how appellate courts have viewed the *Ontario Heritage Act*:

[100] The purpose of the *OHA* was discussed by the *Supreme Court of Canada* in *St. Peter's Evangelical Lutheran Church (Ottawa) v. Ottawa (City)*, 1982 CanLII 60 (SCC), [1982] 2 S.C.R. 616, [1982] S.C.J. No. 90. In that case, McIntyre J., at p. 625 S.C.R., adopted the purpose as expressed by MacKinnon A.C.J.O. in this court, from which the appeal had been taken...

It is to preserve and conserve for the citizens of this country inter alia, properties of historical and architectural importance. The Act is a remedial one and should be given a fair and liberal interpretation to achieve those public purposes which I have recited.

[101] This purpose of the *OHA* was reiterated by this court in *Toronto College Street Centre Ltd. v. Toronto (City)* (1986), 1986 CanLII 2472 (ON CA), 56 O.R. (2d) 522, [1986] O.J. No. 962 (C.A.), leave to appeal to S.C.C. dismissed (1987), 1987 CanLII 4343 (ON SC), 61 O.R. (2d) 669n, [1987] S.C.C.A. No. 135, where Cory J.A. said, at p. 531 O.R.:

⁶⁸ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.

⁶⁹ *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 27.

The aim of the *Ontario Heritage Act* is to conserve, protect and preserve the heritage of Ontario.

[102] This court then went on to consider the purpose of s. 33 itself. On that point, Cory J.A. said, at p. 534 O.R.:

A reading of the *Ontario Heritage Act* as a whole makes it clear that s. 33 must be given a wide and liberal interpretation. To do otherwise would frustrate the very purpose and intent of the *Act*.⁷⁰

69. Justice Nordheimer further elucidated the purpose of heritage designation:

...it will be self-evident that a heritage designation will, by definition, interfere and limit a property owner's rights because it will restrict the use to which a property owner can put its property. This very point was made by McIntyre J. in *St. Peter's Evangelical Lutheran Church (Ottawa)* when he said, at p. 626 S.C.R.

To protect the heritage of Ontario the municipalities were given power to designate property of their choice and to suspend thereby many of the rights of private ownership.⁷¹

70. Moreover, in a decision interpreting an earlier but similar section of heritage legislation to section 33(1) of the current *Act*, the Ontario Court of Appeal held as follows:

It was earlier indicated that the definition of "alter" and "alteration" is very wide. In addition, the use of the word "likely" in s. 33 requires that the section be given a broad and liberal interpretation. It is a word that denies a narrow approach to the scope of the reasons for the designation.

There are other provisions of the *Ontario Heritage Act* which indicate that a broad meaning must be attributed to s. 33 and to any "reason for the designation" given pursuant to that section.⁷²

71. The consequence of the foregoing case law is this: both the *Act* and section 33 in particular must be interpreted broadly to give effect to the public good that heritage

⁷⁰ *Oakville (Town) v. Clublink Corporation ULC*, [2019 ONCA 826](#) at paras. 100-102.

⁷¹ *Oakville (Town) v. Clublink Corporation ULC*, [2019 ONCA 826](#) at para. 117.

⁷² *Re Toronto College Street Centre Ltd. and City of Toronto et al.*, [1986 CanLII 2472](#) (Ont. CA).

legislation seeks to protect. Otherwise, the very purpose of the legislation is frustrated. In this application, that means that a novel application of section 33 is not foreclosed. On the contrary, if there is a genuine heritage site in danger, section 33 is flexible and broad enough to at least invite Council's review and oversight.

4. Expert evidence, the decisions of specialized tribunals, and the site's federal heritage designation all support the fact that Osgoode Hall is an indivisible site and therefore there is a serious issue to be tried

72. The Law Society's application under section 33(1) is rooted in both expert evidence and support from the case law.

73. With respect to evidence, Mr. Borgal provided unchallenged expert evidence that (a) Metrolinx's proposed plan will damage the heritage attributes of the entire Osgoode Hall site; (b) that the site itself is indivisible from the perspective of heritage protection; and (c) because it is indivisible, Metrolinx's conduct will directly bear on the heritage character of the LSO's property.⁷³ Put plainly, on an extremely limited review that this Court must provide, there is evidence directly attesting to the issue raised before the Council.

74. As Mr. Borgal noted, it is rare for a historic landmark site to have three owners.⁷⁴ As such, the law on the issue raised before the Council is sparse. However, there are some analogous circumstances that are instructive from decisions of specialized tribunals which affirm that the LSO is raising a serious issue to be tried.

⁷³ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 188.

⁷⁴ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 188.

75. For example, a 2011 Ontario Conservation Review Board decision of *Re Ottawa (City)*. In that case, the City of Ottawa wanted to move a 1914 Horticultural building from one location within Lansdowne Park to another location. The Horticultural building was contained on a separate parcel of land within the park that was owned by the City. Under the applicable Bylaw, only the plot of land on which the horticultural building stood was designated as a Heritage Site under the *Act*.⁷⁵ As such, to move the Building, the City issued notice that it would be repealing the designation under section 29 of the *Act*. That notice resulted in the hearing before the administrative board.

76. After hearing much evidence about the relationship between the cultural heritage value of the Horticultural Building and Lansdowne Park more generally, the board concluded that the heritage value of the building came from its *historic location in the park*, and as such rejected the City's s. 29 application to repeal its historical designation. The board made two important and relevant findings in this process:

1. The board found that the Horticultural Building's heritage value was tied to its location *in situ* in the park, such that relocating the building within the park (even if no other changes were made) would amount to "alteration" under section 33, and that removing the horticultural building from the park entirely would amount to demolition under section 34.⁷⁶
2. The cultural heritage value of the Horticultural building was tied to its specific location within the Lansdowne park, and would be diminished if it was moved,

⁷⁵ *Re Ottawa (City)*, [2011 CarswellOnt 11802](#) at para; 27, Book of Authorities ["**BOA**"], Tab 1.

⁷⁶ *Re Ottawa (City)*, [2011 CarswellOnt 11802](#) at para. 151, BOA, Tab 1.

notwithstanding that the surrounding park land was not a protected heritage site:⁷⁷

“much of the argument by Heritage Ottawa was that relocation of a heritage building is not a heritage conservation strategy that meets the intent of the PPS or the principles of the Standards and Guidelines. The primary reason is that "history happens in a place." ⁷⁸ Based on the evidence heard, it is the *in situ* location of the Horticulture Building at the traditional hub of exhibition and sports activity within Lansdowne Park that is its authentic environment. This is apart from its proximity to Aberdeen Pavilion. Its cultural heritage values or interests, notably contextual, are best protected in its original site. Relocation to a site farther east will lessen, and in the case of contextual [sic] will remove, these values or interests”.⁷⁹

77. While the decision does not use the language of indivisibility, the logic is similar. Moving the Horticultural Building would amount to changing the fundamental heritage character of the site just as placing an “incompatible” headhouse would significantly alter the Osgoode Hall site. Again, on a preliminary assessment, there is some case law support for the issues that the Council must address.

78. Further, the Osgoode Hall site has also been designated under the *Historic Site and Monuments Act* as a National Heritage Site of Canada. This Federal designation is unitary – it treats the Osgoode Hall site as a whole and recognizes all parts of it as a

⁷⁷ *Re Ottawa (City)*, [2011 CarswellOnt 11802](#) at paras. 169-171, BOA, Tab 1.

⁷⁸ *Re Ottawa (City)*, [2011 CarswellOnt 11802](#) at para. 169, BOA, Tab 1.

⁷⁹ *Re Ottawa (City)*, [2011 CarswellOnt 11802](#) at para. 170, BOA, Tab 1.

heritage location. This further illustrates the notion that the Osgoode Hall site is indivisible and Metrolinx's conduct will affect the balance of the property.

5. The *Lis* should not be narrowly construed

79. This Court should not narrowly interpret the issue based on formalistic conceptions of *lis* applicable in the courts. At issue is an administrative process that is overseen and decided by a policymaking body (i.e. the Council). It is not a formal adjudicative process nor does it have the hallmarks of highly specialized tribunals. In regular circumstances, the *Act* envisages property owners seeking the Council's consent on permitting alteration to their property which affects its heritage attributes. In this application, that process is complicated by the rare situation where there is an indivisible heritage property but with three owners. In these unique circumstances, as long as there is:

(1) credible evidence that the conduct of one owner is imperilling the heritage character of the property writ large including the property of the LSO; and,

(2) such conduct is compelling an owner to seek the Council's review,

then that should qualify as an adequate adversarial process.

80. In this case, Metrolinx has already written to the Council, expressing its views on the Law Society's section 33 application. This, at minimum, demonstrates its engagement with the process and interest in protecting its rights.

D. Without injunctive relief, the LSO will suffer irreparable harm

81. "Irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot

be cured.⁸⁰ The law is clear that this Court should not take “a narrow view of irreparable harm.”⁸¹

82. In this case, there is both evidentiary and case law support that the LSO will suffer irreparable harms if injunctive relief is not granted. Based on Metrolinx’s admissions and presentations to the LSO, there will be at least the following harms to the Osgoode Hall site if Metrolinx is permitted to proceed with its plan:

- a. Permanent removal of mature trees (one of which has already been removed);
- b. Permanent redesign of the cast iron fence (it is planned to be temporarily removed and then placed along the new boundaries of the Osgoode Hall site);
- c. Permanent change in the viewscape, removing part of the urban forest, and replacing it with a headhouse in a historic landmark site; and,
- d. The totality of the foregoing changes permanently alters the core heritage character of the Osgoode Hall site.⁸²

83. Mr. Borgal’s unchallenged expert evidence attests to these very harms. For example, he observed that “the proposed entrance will block the view of Osgoode Hall from the corner of University Avenue and Queen Street, see the removal of several mature trees of various species, reconfigure the cast-iron fence enclosure which, in itself,

⁸⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [\[1994\] 1 SCR 311](#) at para. 64.

⁸¹ *Livent Inc v. Deloitte & Touche*, [2016 ONCA 395](#) at para. 10.

⁸² Letter from Metrolinx re Minister’s consent (dated June 24, 2021), Miles Responding Affidavit, AR (Vol. II), Tab 4, Ex. B, at p. 228; Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 188.

is an important heritage artefact in the city, and introduce a design element to the original grounds that is at odds with the aesthetics of the original building and site.”⁸³ In this view, the four harms outlined above would amount to slicing a treasured heritage site.

84. The harms that the LSO will suffer are permanent and non-compensable by pecuniary awards. The law recognizes this as particularized by the cases below:

- a. In *Lake Simcoe Region Conservation Authority v Eng*, the Ontario Superior Court found that the destruction of peat in a wetland was irreparable harm because it would take hundreds of years for it to reform: “in terms of irreparable harm, I am satisfied that the large-scale excavation of peat material from a protected wetland may cause extensive damage to a near irreplaceable environment asset. There is no “putting the genie back in the bottle” as the saying goes. Once the peat is gone, it is gone. It will take many hundreds of years to replace it. The harm in play is definitely, in my view, of an irreparable nature.”⁸⁴ In this case, the removal of trees coupled with the other permanent changes means that the Osgoode Hall site would be permanently modified in its heritage attributes;
- b. In *Markham (City) v Ross*, the Ontario Superior Court found that cutting down trees and destroying greenspace on land that was subject to a heritage easement would cause an irreparable harm, noting that “this was in the form of disturbance to the community within the neighbourhood and the existence of

⁸³ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 185.

⁸⁴ *Lake Simcoe Region Conservation Authority v. Eng*, [2021 ONSC 4425](#) at para. 35.

on-going negative interactions with City officials.” In other words, causing disturbance and/or deprivation of a public good can in certain circumstances rise to irreparable harm;⁸⁵

- c. In *South House Restoration Committee v Rothesay Collegiate School*, the New Brunswick Queen’s Bench granted an injunction to prevent the destruction of a historically significant building. Among other things the Court noted that “the permanent loss of a historic landmark is incapable of being compensated for,” and “[t]his type of loss cannot be quantified in monetary terms”. It also observed that the moving party “will suffer irreparable damages, since South House will be gone forever”. While the application at bar is not about demolition of a building, it comprises of permanent changes, including removing trees;⁸⁶ and,
- d. In *Friends of Point Pleasant Park v Canada (Attorney General)*, the Federal Court ruled that destruction of trees was irreparable harm noting that “trees could not be replaced in a person’s lifetime” and that because of the nature of the harm, it “could not be quantified in monetary terms” and issued an injunction to a public interest applicant.⁸⁷

85. While the specific details vary from case to case, they demonstrate a line of judicial authority holding that where there is permanent changes to the natural or human-made

⁸⁵ *Markham (City) v. Ross*, [2022 ONSC 6891](#) at para. 87.

⁸⁶ *South House Restoration Committee v. Rothesay Collegiate School*, [2006 NBQB 120](#) at para. 61.

⁸⁷ *Friends of Point Pleasant Park v. Canada (Attorney General)*, [2000 CanLII 15928](#) at para. 42 (Fed Ct).

aspects of a property, it can rise to the level of irreparable harm. In this case, removing the trees and portions of the iron fence, permanently reconfiguring the Osgoode Hall site, and constructing an incompatible headhouse on the southwest corner are irreparable harms that cannot be addressed by monetary awards.

E. The balance of convenience favours the granting of injunctive relief

86. The balance of convenience is measured by determining which of the parties will suffer greater harm from the granting or the refusal of injunctive relief, pending a determination of the merits. In most cases, including this one, the balance of convenience favours preserving the status quo.⁸⁸

87. The public interest favours granting injunctive relief to the Law Society. While there is no dispute that improving Toronto's mass transit system is an important public concern, so is ensuring that the city's landmark heritage sites are protected. Protection of heritage sites is a key public interest. Courts have recognized that "the preservation of historic buildings is a public good and one of the key purposes that the legislature sought to further

⁸⁸ *Alpha Neon (2012) Ltd. v. Ziskos*, [2014 BCSC 2326](#) at para. 20, citing to *American Cyanamid v. Ethicon Ltd.*, 1975 AC 396 (HL).

through the *Act*.”⁸⁹ In this case, it is not the protection of a mere building but an entire historic site that has been the symbol of justice in Ontario for close to 200 years.

88. Metrolinx’s conduct to date also tips the balance of convenience in favour of granting injunctive relief. At minimum, the Court should consider two aspects of Metrolinx’s conduct:

- a. While it indicated to take seriously the Parsons Report, Metrolinx – by its own admission – proceeded to declare that consultation with community stakeholders was over and construction was to start when it did not even have a copy of the Report;⁹⁰ and,
- b. The Report details that further research is needed into the Campbell House location, including “provid[ing] a design that relies on the same design criteria used by ‘Location A – Osgoode Hall Site) [sic] that proves its lack of suitability, and thereby continues to rely on the Osgoode Hall site as a site for keyhole excavation and construction laydown activities.”⁹¹ As the Report puts it, Metrolinx to date has “categorically” denied that such an option is possible without Metrolinx doing the necessary analysis and investigation.⁹²

⁸⁹ *House v Lincoln (Town)*, [2015 ONSC 6286](#) at para. 11.

⁹⁰ Email from Ross Andersen (dated August 16, 2022), Miles Affidavit, AR (Vol. I), Tab 2, Ex. E, at p. 75; Miles Affidavit at para. 26, AR (Vol. I), Tab 2, at pp. 27-28; Miles Responding Affidavit at para. 7, AR (Vol. II), Tab 4, at pp. 209-210.

⁹¹ “[Ontario Line Osgoode Station Headhouse Location Review](#)”, Parsons Corporation (dated February 1, 2023) at p. 34.

⁹² “[Ontario Line Osgoode Station Headhouse Location Review](#)”, Parsons Corporation (dated February 1, 2023) at p. 34.

89. Additionally, where the balance of convenience is between a public body's pursuit of its duty to protect the public interest and mere financial interests, considerations of justness weigh in favour of protecting the public interest. See, for example, the Ontario Superior Court's decision in *Lauzon v Ottawa (City)*, where the Court prevented the immediate demolition of a dilapidated heritage building in order to allow the City time to review the property and consider unique attributes can be properly considered.⁹³ Notwithstanding the applicants had already suffered an extensive delay which the City's review would only lengthen, the Court upheld that "the public interest ... [of] attempting to preserve a heritage building" outweighed the purely "economic interests" of the applicants.⁹⁴

90. Ultimately, one public interest should not come at the expense of the other. By not conducting adequate due diligence, Metrolinx is posing an impossible choice between better transit or protection of a treasured landmark. With respect, this is a false choice. Metrolinx must perform its additional analysis as suggested by an independent third-party review. As Mr. Borgal noted, other cities have been able to reconcile the need for mass transit with careful heritage protection.⁹⁵ Metrolinx must aspire to do the same.

91. Set against the above, Metrolinx raises two issues – delay to the project and the claims its contractors may make against it. The evidence of harm to Metrolinx in both these regards is speculative. Metrolinx has produced no documentary support

⁹³ *Lauzon c. Ville D'Ottawa*, [2014 ONCS 3511](#) (original decision in French; translation cited).

⁹⁴ *Lauzon c. Ville D'Ottawa*, [2014 ONCS 3511](#) at para. 28 (original decision in French; translation cited).

⁹⁵ Opinion Letter, Borgal Affidavit, AR (Vol. I), Tab 3, Ex. B-1, at p. 190.

whatsoever to establish that its schedule will be affected if it must perform further due diligence, other than the bald assertions of Metrolinx's affiant with no supporting documentary evidence such as a project schedule or any contractual terms regarding its obligations to hand over the site by May 31, 2023 to the constructor. Its damages claims are even more speculative and simply state what Metrolinx's contractors "could claim" and a few pages from a contract that is thousands of pages long with no analysis to justify the quantum in evidence. It is impossible to test either of these alleged harms, and they should therefore not weigh in favour of dismissing the injunction in the present case.

92. In such a context, the balance favours granting the injunctive relief.

F. This Court should exercise its discretion to relieve the obligation of the Law Society to give an undertaking as to damages

93. In the event the Law Society is successful on the application for injunctive relief, this Court should exercise its discretion to relieve against the undertaking as to damages for the period from February 10, 2023 at midnight onwards. The undertaking the Law Society provided is as follows:

The LSO undertakes to compensate Metrolinx for damages that the Court determines were necessarily and solely caused by the motion for interim injunctive relief and this application for injunctive relief to which Metrolinx has no other lawful recourse, including any relevant insurance proceeds from insurance either it or its contractors maintain on this project, and subject to the Court's residual determination as to whether it is in the interest of justice to enforce this undertaking and/or the quantum of any damages Metrolinx may suffer in the circumstances of this case.⁹⁶

94. In matters of public interest, Ontario courts have elected not to impose undertakings as to damages. For example, in granting an injunction against the "Freedom

⁹⁶ Miles Responding Affidavit at para 16, AR (Vol. II), Tab 4, at pp. 213-214.

Convoy” without an undertaking as to damages, the Ontario Superior Court noted that “there is authority that it is appropriate to waive the undertaking in cases which have broad public interest significance, or which are cases involving human rights.”⁹⁷ Similarly in *Cardinal* (discussed above), the Court exercised its discretion to relieve against the requirement of an undertaking as to damages due to the public interest issues at bar.⁹⁸

95. In this case, while the Law Society provided an undertaking for the period from February 4-10, 2023, that is not the end of the analysis. Given that injunctions are equitable remedies, the Court should consider whether enforcing such an undertaking is just in the circumstances if the application is granted. The Law Society submits that it is not.

96. The Law Society is a regulatory body working in the public interest to ensure that Ontarians are protected and have confidence in the legal professions. It has no pecuniary interest in the outcome of this proceeding, and is acting solely as a steward of the Osgoode Hall property. In such circumstances imposing an undertaking as to damages would disregard existing case law and result in an unjust outcome.

⁹⁷ *Li et al. v. Barber et. al.*, [2022 ONSC 1176](#) at para. 38.

⁹⁸ *Cardinal v. Cleveland Indians Baseball Company Limited Partnership*, [2016 ONSC 6929](#) at para. 28.

PART V. ORDER SOUGHT

97. The Law Society submits that this Court should grant the application for injunctive relief pending determination of the underlying administrative proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February, 2023.

A handwritten signature in black ink, appearing to read 'L. Rothstein', with a long horizontal flourish extending to the right.

Per: Linda R. Rothstein / Michael Fenrick /
Mannu Chowdhury

Schedule “A” – List of Authorities

1. *2788610 Ontario Inc. v. Bhagwani et al.*, [2022 ONSC 905](#)
2. *Alpha Neon (2012) Ltd. v. Ziskos*, [2014 BCSC 2326](#)
3. *Bell ExpressVu Limited Partnership v. Rex*, [2002 SCC 42](#)
4. *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd.*, [\[1996\] 2 SCR 495](#)
5. *Cardinal v Cleveland Indians Baseball Company Limited Partnership*, [2016 ONSC 6929](#)
6. *Friends of Point Pleasant Park v. Canada (AG)*, [2000 CanLII 15928](#) (Fed Ct.)
7. *House v Lincoln (Town)*, [2015 ONSC 6286](#)
8. *Kent County Council v. Batchelor (No. 2)*, [1979] 1 W.L.R. 213 (Q.B.) [UK]
9. *Lake Simcoe Region Conservation Authority v. Eng*, [2021 ONSC 4425](#)
10. *Lauzon c. Ville D'Ottawa*, [2014 ONCS 3511](#) (original decision in French; translation cited).
11. *Li et al. v. Barber et. al.*, [2022 ONSC 1176](#)
12. *Livent Inc v. Deloitte & Touche*, [2016 ONCA 395](#)
13. *Markham (City) v Ross*, [2022 ONSC 6891](#)
14. *Oakville (Town) v. Clublink Corporation ULC*, [2019 ONCA 826](#)
15. *Ottawa (City) (Re)*, [2011 CarswellOnt 11802](#) (Ont. Conservation Review Board)
16. *Phan v. Canada (Citizenship and Immigration)*, [2022 FC 916](#)
17. *Rizzo & Rizzo Shoes Ltd. (Re)*, [\[1998\] 1 SCR 27](#)
18. *RJR MacDonald Inc. v. Canada (AG)* [\[1994\] 1 SCR 311](#)
19. *South House Restoration Committee v. Rothesay Collegiate School*, [2006 NBQB 120](#)
20. *Toronto College Street Centre Ltd. and City of Toronto et al. (Re)*, [1986 CanLII 2472](#) (Ont. CA)

21. *Wendy Sokoloff Professional Corporation et al. v. Chorney et al.*, [2021 ONSC 8497](#)

Schedule “B” – Legislation and Secondary Sources

Ontario Heritage Act, [RSO 1990, c O.18](#)

Definitions

1 In this Act,

“alter” means to change in any manner and includes to restore, renovate, repair or disturb and “alteration” has a corresponding meaning; (“transformer”, “transformation”)

...

Alteration of property

33 (1) No owner of property designated under [section 29](#) shall alter the property or permit the alteration of the property if the alteration is likely to affect the property’s heritage attributes, as set out in the description of the property’s heritage attributes in the by-law that was required to be registered under [clause 29 \(12\)](#) (b) or [subsection 29 \(19\)](#), as the case may be, unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the alteration. 2019, c. 9, Sched. 11, [s. 11](#).

...

Decision of council

33 (6) The council, after consultation with its municipal heritage committee, if one is established, and within the time period determined under subsection (7),

(a) shall,

(i) consent to the application,

(ii) consent to the application on terms and conditions, or

(iii) refuse the application; and

(b) shall serve notice of its decision on the owner of the property and on the Trust. 2019, c. 9, Sched. 11, [s. 1](#)

Law Society of Ontario
Applicant

and **Metrolinx**

Respondent
Court File No: CV-23-
00694198-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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