COURT OF APPEAL FOR ONTARIO

CITATION: Clublink Corporation ULC v. Oakville (Town), 2019 ONCA 827
DATE: 20191023
DOCKET: C66402

Doherty, Nordheimer and Harvison Young JJ.A.

BETWEEN

Clublink Corporation ULC and Clublink Holdings Limited

Applicants (Respondents)

and

The Corporation of the Town of Oakville

Respondent (Appellant)

J. Thomas Curry, Jessica Starck, Derek Knoke and Rodney Northey, for the appellant

Earl A. Cherniak, Q.C., Cynthia Kuehl, Mark Flowers and Lindsay Woods, for the respondents

Heard: May 23, 2019

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated December 11, 2018, with reasons reported at 2018 ONSC 7395, 143 O.R. (3d) 738.

Harvison Young J.A.:

A. OVERVIEW

[1] This is an appeal from an order quashing five municipal by-laws passed by the Corporation of the Town of Oakville (the "Town"), and a conservation plan in

respect of the Glen Abbey Golf Course property ("Glen Abbey") approved by resolution of the Town council, on the basis that they are *ultra vires*, or outside the statutory authority of the Town, were passed in bad faith, and are void for vagueness. The respondents, Clublink Corporation ULC and Clublink Holdings Limited (referred to collectively as "Clublink"), are the owners of Glen Abbey.

[2] This appeal was argued before this court during the same week as another appeal between the same parties, *Oakville (Town) v. Clublink Corporation ULC*, 2019 ONCA 826. As the background facts and context are set out at length in the course of that decision, they need not be set out in such detail here: see *Oakville* at paras. 6-19.

[3] As described below, the impugned instruments were passed following the Town's designation of Glen Abbey as a property of cultural heritage value or interest under the *Ontario Heritage Act*, R.S.O. 1990, c. O.18 (the "*OHA*"). The main by-law at issue authorizes the Town to prepare or require conservation plans for "cultural heritage landscapes" located on "protected heritage property": Town of Oakville, by-law 2018-019, *CHL Conservation Plan By-law* (30 January 2018) (the "CHL By-law"), ss. 2.1.1, 2.1.3.

[4] Pursuant to the CHL By-law, Town council subsequently passed a resolution (the "conservation plan resolution") approving a conservation plan in respect of Glen Abbey (the "conservation plan"). The conservation plan is purportedly

directed at preserving the cultural heritage value associated with Glen Abbey. It requires Clublink to seek permission from the Town prior to making certain changes to the golf course.

[5] The application judge held that the Town lacked the jurisdiction to make all the impugned by-laws and the conservation plan because they constituted by-laws "respecting services or things" in relation to "[c]ulture, parks, recreation and heritage", contrary to s. 11(8)5 of the *Municipal Act, 2001,* S.O. 2001, c. 25 (the "*Municipal Act*"). In the application judge's view, the effect of the by-laws and the conservation plan was to require Clublink to continue to operate a championship-calibre golf course.

[6] The application judge also found that the by-laws and the conservation plan were passed in bad faith. The evidence led on the application suggested that the impugned by-laws and the conservation plan had been directed at, and enforced against, Clublink alone. In the application judge's view, the Town had failed to consider Clublink's economic interests and had, in effect, expropriated Glen Abbey to a public use in a manner that amounted to bad faith.

[7] Finally, the application judge found that the by-laws were void for vagueness. The application judge noted that the CHL By-law required a conservation plan for all properties that fall within a "cultural heritage landscape in or on a protected heritage property." However, in his view, it was unclear from the

terms of the CHL By-law which properties require a conservation plan and what the contents of the plan must be. The application judge concluded that this vagueness risked transforming the applicable standards into subjective value judgments.

[8] The Town now appeals to this court. In its submission, the application judge erred in all three of his conclusions.

[9] For the reasons that follow, I would allow the appeal in part. The Town had statutory authority to pass all the impugned by-laws, they were not passed in bad faith and they are not void for vagueness. However, the Town did not have the authority to approve the conservation plan. In my view, its purpose and effect are to compel Clublink to provide a service, contrary to s. 11(8)5 of the *Municipal Act*. Having found that the conservation plan resolution is a nullity on this basis, I decline to consider whether the conservation plan was approved in bad faith or was impermissibly vague.

B. THE FACTS

[10] In January 2014, the Town adopted a strategy to conserve cultural heritage landscapes (the “CHL strategy”). The CHL strategy outlined a process to identify and protect cultural heritage landscapes in the Town, including by designating such properties under Part IV of the *OHA*. The Town identified 63 potential cultural

heritage landscapes, including Glen Abbey. Experts retained by the Town visited Glen Abbey in September 2015.

[11] In October 2015, Clublink advised the Town that it intended to redevelop Glen Abbey into a residential and mixed-use community. In particular, Clublink advised that it proposed to build approximately 3,000 to 3,200 residential units and approximately 140,000 to 170,000 square feet of office and retail space.

[12] In August 2017, the Town issued a notice of intention to designate Glen Abbey as being of cultural heritage value or interest under s. 29 of the *OHA* (the "NOID"). The NOID described Glen Abbey's heritage attributes as including:

> The historic use and ongoing ability of the property to be used for championship, tournament and recreational golf;
>
> The historic use and ongoing ability to host championship and other major golf tournaments, such as the Canadian Open; [and]
>
> The close and ongoing association of the course design with Jack Nicklaus/Nicklaus Design[.]

[13] On December 20, 2017, the Town passed a by-law designating Glen Abbey as being of cultural heritage value or interest under s. 29 of the *OHA*: Town of Oakville, by-law 2017-138, *A by-law to designate the Glen Abbey Golf Course Property located at 1333 Dorval Drive* (20 December 2017) (the "Designation By-law"). The Designation By-law contains largely the same description of Glen Abbey's heritage attributes as identified in the NOID.

[14] Clublink has brought an application to quash the Designation By-law, which is currently pending before the Superior Court of Justice. The Designation By-law was not challenged before the application judge and its validity is therefore not in issue on this appeal.

[15] Subsequent to the passing of the Designation By-law, the Town passed five further by-laws, stated to be of general application (collectively the "impugned by-laws"):

1. The CHL By-law: The CHL By-law authorizes the Town to prepare or require a conservation plan for "significant cultural heritage landscapes". It defines the "cultural heritage value or interest" and "heritage attributes" of a property in reference to the statement contained in the applicable *OHA* designation by-law.
2. Town of Oakville, by-law 2018-020, *A by-law to delegate Council's power under Parts IV and V of the Ontario Heritage Act to address proposed alterations of protected heritage properties and to repeal By-law 2011-115, as amended* (30 January 2018) (the "Delegation By-law"): This by-law delegates certain decision making in respect of ss. 33 and 42 of the *OHA* to Town staff.
3. Town of Oakville, by-law 2018-042, *A by-law to amend the Property Standards By-law 2017-007* (27 February 2018) (the "Property Standards By-law"): This by-law amends the Town's existing property standards by-law

to enable Town council to prescribe minimum standards for the maintenance of heritage attributes of a property designated under the *OHA*.

4. Town of Oakville, by-law 2018-043, *A by-law to amend the Private Tree Protection By-law 2017-038* (27 February 2018) (the "Tree Protection By-law"): This by-law amends the existing private tree protection by-law to address trees of relevance to the heritage value of a property.
5. Town of Oakville, by-law 2018-044, *A by-law to amend the Site Alteration By-law 2003-021* (27 February 2018) (the "Site Alteration By-law"): This by-law amends the existing site alteration by-law to require Town approval of alterations to existing cultural heritage properties.

[16] In addition, the Town approved the conservation plan by resolution. The conservation plan reproduces the heritage attributes as identified in the NOID and the Designation By-law and requires Town consent for any alteration of Glen Abbey that is likely to affect its heritage attributes. Under the terms of the conservation plan, Clublink is required to seek the approval of Town staff before making certain "Category B" alterations to Glen Abbey, which include the addition, removal or replacement of parking lots, patios, gazebos, the addition or removal of up to four trees, and changes to water bodies, bunkers, mounds, berms, greens, fairways, tees and rough. The approval of Town council is required before making certain "Category C" alterations, which include the addition or removal of more

than four trees, and the addition or removal of a water body, hole, tee or the internal road.

[17] On February 6, 2018, Clublink commenced an application to quash the impugned by-laws and the conservation plan, on the basis that they were *ultra vires* the Town's jurisdiction under the *Municipal Act* and the *OHA*, passed in bad faith and void for vagueness.

C. THE REASONS BELOW

[18] First, the application judge held that all the impugned by-laws and the conservation plan were *ultra vires* as they violated s. 11(8)5 of the *Municipal Act*. He quashed the impugned by-laws and conservation plan on this basis.

[19] The application judge referred to the Town's general jurisdiction under s. 8 and its sphere of jurisdiction to pass by-laws in respect of culture, parks, recreation and heritage under s. 11(3)5 of the *Municipal Act*. He also noted that this sphere of jurisdiction is expressly limited at s. 11(8)5 of the *Municipal Act* to exclude "except as otherwise provided, … the power to pass a by-law respecting services or things provided by any person, other than the municipality or a municipal service board of the municipality".

[20] The application judge concluded that the conservation plan and the impugned by-laws were *ultra vires* to the Town's jurisdiction under the *Municipal Act*, because they constituted by-laws respecting "services or things" in relation to

"[c]ulture, parks, recreation and heritage": at paras. 35-37. Specifically, the application judge found that the conservation plan defined the heritage value of Glen Abbey in relation to its continued operation as a championship golf course. Thus, "[i]t is the service business of the [g]olf [c]ourse – 'continuing to host tournament, championship and recreational golf' – that is preserved under the [c]onservation [p]lan": at para. 22. According to the application judge, while the heritage attributes of Glen Abbey are defined, in part, in relation to its physical features, if Clublink were to exit the business of running a golf course, without making any physical alterations to Glen Abbey, it would still be in violation of the terms of the conservation plan and the enabling CHL By-law. The application judge also found that the conservation plan required Clublink to provide "things" in a manner contrary to the *Municipal Act*.

[21] The application judge accepted that the CHL By-law and the conservation plan were intended to accomplish indirectly what the Town did not have the power to do directly, namely, to use a heritage designation to compel a particular use of Glen Abbey. In the application judge's view, there was nothing of inherent cultural value in a tee, green, or fairway once these "things" were divorced from the service of providing a golf course.

[22] Second, the application judge concluded, in *obiter*, that the conservation plan resolution and impugned by-laws were passed in bad faith. A by-law is illegal where it is passed in bad faith: *Equity Waste Management of Canada v. Halton*

Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.). In this context, the application judge noted that bad faith connotes a lack of "candour, frankness and impartiality": at para. 41. He considered whether there were badges or indicia of bad faith, which may include questionable timing, lack of notice, or a by-law that singles out one individual or property, citing *Toronto Taxi Alliance Inc. v. City of Toronto*, 2015 ONSC 685, 33 M.P.L.R. (5th) 103.

[23] The application judge accepted Clublink's submission that the Town had acted in bad faith because, while the CHL By-law is purportedly applicable to all cultural heritage landscapes in Oakville, its application had been aimed solely at Glen Abbey. At that time, only Clublink had been required to adhere to a conservation plan. Similarly, the application judge noted that a press release issued upon passing of the CHL By-law expressly stated that the Town intended to "conserve the cultural heritage value and attributes of the Glen Abbey Golf Course": at para. 43. The application judge also inferred bad faith from the timing of the passing of the CHL By-law which followed closely from Clublink's application under s. 34 of the *OHA* to demolish the golf course. In addition, the application judge found that the conservation plan sought to reinforce the Town's position that Clublink was required to apply under s. 33 of the *OHA*, rather than s. 34 of the *OHA*, to make the proposed changes.

[24] The application judge further found that the Town had acted in bad faith by disregarding the financial implications of the conservation plan and the CHL By-

law for Clublink. The application judge found that the Town was aware of the financial implications for Clublink at the time it passed the CHL By-law and approved the conservation plan, as it had already received Clublink's proposal to redevelop Glen Abbey. Similarly, the Town had previously acknowledged, through its municipal tax assessment process, that continuing to use Glen Abbey as a golf course did not represent the highest and best use for the property. Nevertheless, there was no evidence of recognition or balancing in respect of Clublink's financial interest in the conservation plan or the CHL By-law.

[25] The application judge further characterized the conservation plan as a form of disguised expropriation, citing *Lorraine (Ville) v. 2646-8926 Québec inc*., 2018 SCC 35, [2018] 2 S.C.R. 577, at para. 27. He found that the conservation plan requires Clublink to apply to the Town to make minor changes to the property and effectively requires Clublink to continue to operate a championship-level golf course, notwithstanding that this was a "money-losing proposition" for Clublink: at para. 67. In this vein, the application judge found that for the impugned by-laws and conservation plan "to ignore the economic impact on the property owner, and to effectively require a property owner not only to maintain its property but to stay in business, all for the benefit of other residents of the Town, is to reflect bad faith decision[ ]making": at para. 72.

[26] Third, the application judge concluded that the impugned by-laws were void for vagueness, citing *Wainfleet Wind Energy Inc. v. Wainfleet (Township)*, 2013

ONSC 2194, 115 O.R. (3d) 64. The application judge noted that the CHL By-law requires a conservation plan for all properties that fall within a cultural heritage landscape in or on a protected heritage property. In his view, it is unclear from the terms of the CHL By-law which properties require a conservation plan and what the contents of each plan must be. The application judge concluded that this vagueness risks transforming the applicable standards into subjective value judgments.

[27] The application judge further found that the vagueness of the impugned by-laws was intertwined with the Town's bad faith. In his view, "[the] municipal instruments appear to suffer from an attempt to bury specifically targeted policies within general language…. [The impugned by-laws] are unintelligible because they attempt to speak in general terms about a policy that is arguably specific to Glen Abbey": at para. 83.

D. THE ISSUES AND ANALYSIS

[28] This appeal raises the following issues:

1. Did the application judge err in failing to consider the legality of each impugned by-law and the conservation plan resolution separately?
2. Did the application judge err in concluding that the impugned by-laws and the conservation plan resolution were outside the Town's statutory authority?

3. Did the application judge err in concluding that the impugned by-laws and the conservation plan resolution were passed in bad faith?
4. Did the application judge err in concluding that the impugned by-laws were void for vagueness?

[29] I begin by addressing the first issue. I then consider the remaining issues, which all concern the legality of the Town's actions. I consider these first in relation to the impugned by-laws and then in relation to the conservation plan.

(1) The Legality of Each Impugned By-law and the Conservation Plan Resolution Must be Analyzed Separately

[30] The application judge, correctly in my view, set out the analytical framework as requiring a consideration of each of the impugned by-laws as separate legal documents, though informed by the broader context of the scheme as a whole. However, he fell into error by allowing his findings regarding some of the impugned documents to draw conclusions about the others without adequate consideration of their respective purposes, content, and effects. In the course of his analysis, the application judge focused primarily on the CHL By-law, and to a lesser extent, on the conservation plan. He treated any finding as to the legality of the CHL By-law as determining the legality of the remaining instruments. Not only are the impugned by-laws all of general application, but each instrument also relies on differing sources of statutory authority.

[31] The application judge's approach is not compatible with the presumption of validity that by-laws enjoy: see *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)* (2005), 258 D.L.R. (4th) 447 (Ont. C.A.), at para. 3, leave to appeal refused, [2006] S.C.C.A. No. 45. A by-law or resolution should not be quashed unless the presumption is overturned based on that instrument and the illegality of related instruments does not logically, in itself, rebut this presumption.

(2) The Impugned By-laws are Valid

[32] The Town had the statutory authority to pass all the impugned by-laws, but it did not have the authority to approve the conservation plan. Viewed as a whole and practically, the conservation plan resolution's purpose and effect are to require Clublink to provide a service by continuing to operate the property as a golf course, which is contrary to s. 11(8)5 of the *Municipal Act*. For this reason, it was outside the Town's jurisdiction and cannot stand.

[33] I begin with an overview of the relevant principles in determining whether the Town had jurisdiction to pass or approve the impugned instruments. I then consider whether the municipality had that power with respect to each of them in turn.

[34] Municipalities are creatures of provincial legislation and a municipality's law-making authority is limited to the powers conferred on it by the provincial legislature: see *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732, at

para. 1; *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, 110 O.R. (3d) 1, at para. 12. The issue of whether the passing of a particular by-law is within a municipality's power is therefore, at its core, a question of statutory interpretation. Applying the modern approach to statutory interpretation, "the words of an Act 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 [the legislator]": *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[35] The interpretive exercise must, however, also be attentive to the important role of municipal governments. As Feldman J.A. observed in *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 329, the *Municipal Act* is intended to give municipalities in Ontario "the tools they need to tackle the challenges of governing in the 21st century" and, as a consequence, municipal powers are to be "interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality": at paras. 34, 37; see also *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802, 122 O.R. (3d) 401, at para. 76, leave to appeal refused, [2015] S.C.C.A. No. 43. The provincial legislator has made clear that it intends for municipal powers to be interpreted broadly by expressly stating as much at s. 8 of the *Municipal Act*.

[36] Further, as I mention above, municipal by-laws and resolutions benefit from a presumption of validity. The onus is on the applicant to prove that the enactment falls outside of the municipality's powers: *Ontario Restaurant*, at para. 3. Courts require a "clear demonstration" before concluding a municipality's decision was made without jurisdiction: *Friends of Lansdowne*, at para. 14.

[37] In assessing whether a municipality has acted within their statutory authority, it is necessary to have regard both to the stated purpose and actual substance of the impugned instrument. This point was made by Doherty J.A. in *Barrick Gold Corp. v. Ontario (Minister of Municipal Affairs and Housing)* (2000), 51 O.R. (3d) 194 (C.A.), at para. 59:

> Municipalities must, however, do more than conform with the strict letter of the law in order to remain within the boundaries of their lawmaking powers. As indicated in *R. v. Greenbaum*, *supra*, the purpose of the provincial enabling legislation also constrains the municipal lawmaking power. In Rogers, *The Law of Canadian Municipal Corporations*, *supra* at 1021, it is put this way:
>
> > A by-law which is ostensibly within the authority of a council to enact may be set aside or declared invalid if its real purpose and attempt is to accomplish by indirect means an object which is beyond its authority. ... Hence, the court must always 'in examining a by-law, see that it is passed for the purpose allowed by a statute and that such purpose is not resorted to as a pretext to cover an evasion of a clear statutory duty'.
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> [Emphasis in original.]

[38] I appreciate that *Barrick Gold* was decided prior to the enactment of the *Municipal Act*. In my view, however, the foregoing remains an accurate statement of the law. It follows logically from the principle that municipal powers find their source in statutes that are interpreted purposively applying the modern approach. Where the legislator has evidenced its intention to set limits on otherwise expansive municipal authority, municipalities cannot rely on broad grants of power to escape these constraints.

[39] The question of whether a by-law is *ultra vires* a municipality is a question of law, reviewed on a standard of correctness: *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, 86 O.R. (3d) 401, at para. 20; *Friends of Lansdowne*, at para. 14. At the same time, an appellate court must give the usual deference owed to an application judge's factual findings and the inferences drawn from those facts.

[40] Here, the jurisdictional questions turn primarily on the interpretation of the *Municipal Act*. Section 11 of the *Municipal Act* provides a general grant of powers to a municipality in respect of certain spheres of jurisdiction. Of particular relevance is s. 11(3) which provides that lower-tier and upper-tier municipalities can pass by-laws respecting a number of broad "spheres of jurisdiction", which include transportation systems, parking, animals, waste management, and "[c]ulture, parks, recreation and heritage."

[41] The authority granted by s. 11(3) in respect of heritage is, however, expressly limited by s. 11(8)5 to exclude by-laws respecting services or things provided by persons other than the municipality and its service boards:

> The power of a municipality to pass a by-law under subsection (3) under the following spheres of jurisdiction does not, except as otherwise provided, include the power to pass a by-law respecting services or things provided by any person, other than the municipality or a municipal service board of the municipality, of the type authorized by that sphere:
>
> …
>
> 5. Culture, parks, recreation and heritage.
>
> [Emphasis added.]

[42] Reading the text of these provisions in the context of the *Municipal Act* as a whole, the legislator clearly intended to grant broad powers to municipalities in respect of culture, parks, recreation and heritage. At the same time, however, it explicitly held back the ability of municipalities to exercise this power to regulate the provision of goods and services by persons other than the municipality and its service boards.

[43] On the application below, the application judge focused primarily on the CHL By-law. He concluded that the CHL By-law was outside the Town's jurisdiction because it was passed without a proper purpose and mandated the ongoing provision of "services or things" by a private landowner in respect of "[c]ulture, parks, recreation and heritage": at para. 37.

[44] In my view, and respectfully, the application judge erred in this conclusion. The CHL By-law finds its statutory authority in s. 11(3)5 of the *Municipal Act* and the *OHA* and there is nothing in the CHL By-law that requires a property owner to provide services or things in respect of culture, parks, recreation or heritage.

[45] In assessing the validity of the CHL By-law, it is important to consider the actual substance of the instrument. It purports to apply to all "cultural heritage landscapes contained or included in or on a protected heritage property": s. 2.1.1. The term "protected heritage property" is defined to mean a property subject to a designation under the *OHA* or a property in respect of which a designation is pending: s. 1.1.1. The CHL By-law prohibits a property owner from altering a cultural heritage landscape without a conservation plan having first been prepared for the property, from altering the protected heritage property in a manner contrary to a conservation plan and from altering the property in a manner that is likely to affect the heritage attributes of the property: s. 2.2.

[46] The CHL By-law also specifies a process whereby the property owner may apply to alter a cultural heritage landscape on a protected property: s. 5.1. The property owner is to apply to the Town's Director of Planning Services (or their designate), who in turn categorizes the proposed action. If the proposed action will not affect the cultural heritage attributes of the property, "Category A", it does not require municipal approval. A s. 33 application in respect of a "Category B alteration" may be submitted to, and decided by, the Town's Director of Planning

Services, whereas an application in respect of a “Category C alteration” must be submitted to Town council.

[47] The CHL By-law does not specify, in any detail, the contents of a conservation plan to be developed in respect of a given cultural heritage landscape. Section 1.1.1 of the CHL By-law provides only general guidance as to the contents of a conservation plan. It provides no operational detail as to what a property owner may or may not do in respect of a cultural heritage landscape or designated property, beyond the general prohibition against altering the cultural heritage landscape without having a conservation plan. Further, the “cultural heritage attributes” associated with a specific protected property do not flow from the CHL By-law, but rather from the by-law designating the property under s. 29 of the *OHA.* Similarly, the CHL By-law does not delineate between Category A, B or C changes in respect of a given property; it authorizes the preparation of a conservation plan that imposes such classifications.

[48] Considering the content and substance of the CHL By-Law leads me to the conclusion that the Town had the statutory authority to pass it. The CHL By-law is plainly a municipal by-law in respect of culture and heritage within the meaning of s. 11(3)5 of the *Municipal Act*. Authority for the CHL By-law is also found at s. 35.3 of the *OHA*, which empowers a municipality to prescribe minimum standards for the maintenance of heritage attributes of a property designated under s. 29. Similarly, ss. 33(15), 33(16), 42(16) and 42(17) provided authority for those

portions of the CHL By-law that provide for the exercise of delegated authority by Town staff.

[49] Contrary to the application judge's conclusion, the CHL By-law does not, on its own, run contrary to s. 11(8)5 of the *Municipal Act*. It is not a by-law respecting the provision of a service or thing. As enabling legislation of general application, the CHL By-law is entirely neutral as to the requirements imposed in respect of a specific property. It applies to a wide range of properties, in respect of which the cultural heritage attributes contained in the designating by-law may have no relation to any service or thing in respect of culture, parks, recreation or heritage. It does not compel any particular use of a given property, nor purport to regulate the provision of a service at that property.

[50] For these reasons, and with respect, the application judge erred in holding that the CHL By-law was passed without jurisdiction. The CHL By-law was properly within the Town's jurisdiction.

[51] A similar analysis applies to the remaining impugned by-laws. An examination of the actual substance of each by-law leads me to the conclusion that the Town had the statutory authority to make each of them. They are all by-laws of general application. They all fall within the sphere of culture, parks, recreation and heritage at s. 11(3)5 of the *Municipal Act*. Nothing in any of the impugned by-laws regulates the provision of "services or things".

[52] In addition, there are further sources of authority relevant to each of the impugned by-laws. The Delegation By-law was also authorized by ss. 33(15), 33(16), 42(16) and 42(17) of the *OHA*, which explicitly provides for the effected delegations, as well as s. 23.2(1)(c) of the *Municipal Act,* which empowers a municipality to delegate certain legislative and quasi-judicial powers to an individual who is an officer, employee or agent of the municipality. The Property Standards By-law, like the CHL By-law, was authorized by s. 35.3 of the *OHA*. The Tree Protection By-law was authorized by s. 135 of the *Municipal Act*, which confers upon municipalities the power to prohibit or regulate the destruction or injuring of trees. Finally, the Site Alteration By-law was authorized by s. 142 of the *Municipal Act,* which empowers a municipality to pass by-laws in respect of proposed site alterations.

[53] Overall then, and respectfully, the application judge erred in finding that the impugned by-laws were outside the Town's jurisdiction. Each by-law is of general application and they were all supported by clear grants of power, and none of them purport to regulate the provision of a service or thing. Given that there is no basis on which to rebut the presumption of validity for any of these by-laws, I conclude that they were validly passed by the Town.

[54] I would not find that the impugned by-laws were enacted in bad faith. As I have discussed, these by-laws are all of general application and they do not unfairly target Clublink. This includes the CHL By-law despite the fact that at the

time the application was heard only Glen Abbey's initial heritage condition assessment had been requested or prepared by the Town. The application judge's reasons focus primarily on the fact that the Town had disregarded Clublink's economic interests in favour of that of the neighbouring community by compelling them to run the golf course. This is achieved through the operation of the conservation plan, not the by-laws of general application. When each impugned by-law is given proper consideration and distinguished from the conservation plan, the record is insufficient to overturn the presumption that each by-law was enacted in good faith.

[55] Similarly, I would not find that the impugned by-laws are void for vagueness. As I have discussed, they are of general application and they are sufficiently clear when each by-law is considered on its own and in context. I agree with my colleague's analysis on this point and the conclusion he reaches.

(3) The Town Did Not Have the Statutory Authority to Approve the Conservation Plan

[56] The application judge concluded that approving the conservation plan was *ultra vires* the Town's jurisdiction, because it concerns the provision of "services or things" in respect of culture, parks, recreation or heritage. I agree.

[57] The application judge engaged in a close review of the conservation plan. Based on the evidentiary record before the application judge, I am not satisfied that he erred in concluding that both the purpose and effect of the conservation

plan are to require Clublink to continue to operate Glen Abbey as a golf course. There are a number of aspects of the conservation plan and its context that support this conclusion.

[58] First, the "Scope of Work" document, produced September 26, 2017, by the Heritage Oakville Advisory Committee to set the parameters of the conservation plan, states that the purpose of the conservation plan is to "address how Glen Abbey can be managed and used as a golf course for championship and recreational play" (emphasis added).

[59] Second, the stated purpose of the conservation plan is to "guide future alterations of Glen Abbey that are likely to affect the cultural heritage attributes of the property." While the conservation plan expressly states that it "is not a maintenance plan … [n]or is it an operational plan", it lists the cultural heritage attributes as including the "ongoing ability to host championship and other major tournaments, such as the Canadian Open" and the "ongoing ability of the property to be used for championship, tournament and recreational golf". Given these cultural heritage attributes, any change or alteration to Glen Abbey that would impact its current readiness to host championship, tournament and recreational golf requires Town approval as set out in the conservation plan.

[60] Third, the conservation plan's focus on preserving the ongoing operation of Glen Abbey as a golf course is evident in its categorization of which actions require

Town review. Even a minor alteration to the location of a tee or the shape of a bunker triggers the need for the approval of Town staff, as these are classified as Category B alterations. Removing a single tee or a single water hazard, as Category C alterations, triggers the need for the approval of Town council. This classification means, in effect, that any change to Glen Abbey that affects the way a round of golf is played there is subject to Town approval. The conservation plan very closely regulates Glen Abbey and seeks to subject any meaningful change to the course to public scrutiny.

[61] The core of the Town's position, and my colleague's approach to this appeal, is that since the conservation plan seeks to preserve only the physical attributes of Glen Abbey, the resolution approving it cannot concern the provision of "services or things" within the meaning of s. 11(8)5 of the *Municipal Act.*

[62] Consistent with this view, my colleague takes issue with the application judge's finding, at para. 24 of his reasons, that if Clublink were to cease to operate Glen Abbey as a golf course, it would be in breach of the conservation plan. In his view, Clublink could cease to operate and maintain Glen Abbey as a golf course and remain in compliance with the conservation plan, provided it did not alter the physical features of the golf course. For example, Clublink could turn Glen Abbey into a wildlife preserve. Provided it did not remove any tees, fairways, bunkers, greens or other features of the golf course, and provided that Glen Abbey could –

at some undetermined point in the future – be returned to operational use, there would be no violation of the terms of the conservation plan.

[63] I do not agree, for several reasons.

[64] First, the Town's consent is required for any action that is likely to affect Glen Abbey's heritage attributes. Given that the cultural heritage attributes of the property are defined as including the ongoing ability to host championship, tournament and recreational golf, I do not agree that the conservation plan envisions that Clublink could cease the daily and seasonal maintenance associated with operating a golf course. The term "ongoing ability" refers to an actual, present ability, not some future, potential ability.

[65] Second, the analysis as to whether the Town had the authority to pass the conservation plan resolution must involve proper consideration of its true effect. The evidence on the application below was that it costs approximately $2 million annually to maintain Glen Abbey as a championship-calibre golf course. Practically, if Clublink is required to maintain Glen Abbey, and is prohibited from putting the property to any use inconsistent with Glen Abbey's ongoing ability to host championship, tournament and recreational golf, Clublink has no logical or practicable choice but to continue to operate Glen Abbey as a golf course. Put somewhat differently, it might be theoretically open to Clublink to not operate Glen Abbey as a golf course and remain in compliance with the conservation plan.

However, any such scenario is virtually certain to be a money-losing proposition for Clublink, leaving them no practical option but to operate Glen Abbey as a golf course.

[66] The Town relies on *232169 Ontario Inc. (Farouz Sheesha Café) v. Toronto (City)*, 2017 ONCA 484, 67 M.P.L.R. (5th) 183, for the proposition that the ultimate effect of a by-law on the economic interests of the applicant need not be considered when determining whether the by-law was passed for a proper purpose. In that case, this court held that a by-law banning the use of hookah devices was passed for legitimate public health and safety concerns. This legitimate purpose was not abrogated by the economic effects the by-law would impose on owners of hookah establishments: at para. 15.

[67] The situation here is different. The application judge found that the purpose of the conservation plan is to force Clublink to continue to operate Glen Abbey as a golf course. The economic reality created by the conservation plan is not incidental to an otherwise legitimate or legal purpose; it is part and parcel of an otherwise non-legal purpose. The problem with the conservation plan is not that it affects Clublink's economic interests. Clearly, many types of legitimate municipal regulation necessarily impose costs on the regulated community. The problem with the conservation plan is that it purports to regulate so exactingly the use of Glen Abbey that it has the effect of compelling the provision of a service, which is specifically prohibited by s. 11(8)5 of the *Municipal Act*.

[68] I note as well that *Farouz* did not require the court to consider a legislated limitation on municipal power, as I am confronted with here. Section 11(8)5 provides that a municipality may not pass by-laws concerning the provision of a service or thing in respect of culture, parks, recreation and heritage, except as otherwise provided. The Town has not identified any alternative source of authority that conferred on it the power to regulate the provision of services by Glen Abbey. In particular, there is nothing in the *OHA* that provides the Town the authority to use a heritage designation to mandate the ongoing provision of a service.

[69] My colleague suggests that, because Clublink did not challenge the Designation By-law on the application below, the analysis as to whether the Town had the authority to pass the impugned by-laws and the conservation plan resolution must proceed on the basis that the Town has validly designated Glen Abbey as a cultural heritage property: at para. 82.

[70] I agree that since the Designation By-law was not challenged on the application, the legality of that by-law is not formally in issue. However, this does not somehow insulate the conservation plan from review. The conservation plan, as approved by a resolution of the Town council under the CHL By-law, must have properly fallen within the Town's powers regardless of the validity of the Designation By-law.

[71] Similarly, the fact that the conservation plan incorporates the definitions of "cultural heritage value" and "cultural heritage attributes" defined in the Designation By-law, and prohibits certain alterations without Town approval, does not mean it is coterminous with the Designation By-law. The conservation plan goes much further by identifying specific processes and considerations to be taken into account where Clublink seeks to make a change to the designated property. It also prospectively asserts that some seemingly minor alterations, such as the removal of a single tree or changes to a single bunker, are alterations that will affect the property's cultural heritage attributes and therefore require Town approval. I would note as well that the CHL By-law prohibits any alterations contrary to the conservation plan, regardless of the content of the Designation By-law: s. 2.2.2.

[72] The substance of the conservation plan, taking into account its purpose and effect, requires Clublink to continue to operate Glen Abbey as a golf course or, in other words, to provide a service in respect of culture, parks, recreation and heritage. This is a power expressly withheld from municipalities, pursuant to s. 11(8)5 of the *Municipal Act*. As noted above, "[a] by-law which is ostensibly within the authority of a council to enact may be set aside or declared invalid if its real purpose and attempt is to accomplish by indirect means an object which is beyond its authority": *Barrick Gold*, at para. 59. While the conservation plan purports to regulate the physical features of Glen Abbey with a view to preserving heritage features of the golf course, the real purpose and effect are to regulate the provision

of the service offered by the golf course. Allowing the Town to achieve indirectly what it is forbidden to do directly would be contrary to the legislator's intention expressed at s. 11(8)5 of the *Municipal Act*.

[73] In light of my conclusion that the conservation plan mandates the provision of a service in respect of culture, parks, recreation or heritage by Clublink, it is not necessary to determine whether it concerns the provision of "things". As it exceeded the Town's statutory authority, the application judge was correct to quash the conservation plan resolution. However, I do agree with my colleague that the application judge erred in concluding that the conservation plan compels the provision of "things" for the reasons my colleague provides at paras. 104-6.

[74] It is not necessary for me to determine whether the conservation plan resolution was passed in bad faith, given that I would find that the Town lacked jurisdiction to make it. Similarly, I decline to determine whether it is void for vagueness.

E. CONCLUSION

[75] The Town had the statutory authority to pass all the impugned by-laws. Each impugned by-law, considered separately but in context, was grounded in the Town's statutory authority in the *Municipal Act* and other applicable statutes and therefore validly passed. Contrary to the conclusion of the application judge, none of them mandated the provision of a service. There was no basis to overturn the

presumption that they were validly enacted, and it was an error for the application judge to do so. Further, the impugned by-laws were not passed in bad faith and are not void for vagueness. They are therefore legal.

[76] The conservation plan, however, regulates Glen Abbey to such a degree that it has the effect of compelling the provision of the service of operating a golf course. In order to comply with the conservation plan, Clublink has no practicable option but to continue to operate the golf course as it currently is and minor changes to its course are subjected to Town approval. Indeed, I accept, as the application judge found, that this was the purpose behind this conservation plan: to compel the operation of the golf course. This runs afoul of the clear limitation on the Town's otherwise expansive jurisdiction over the sphere of heritage enacted at s. 11(8)5 of the *Municipal Act*. Given that the legislator withheld the power to enact by-laws respecting the provision of services from the Town's general jurisdiction over heritage, the Town lacked authority to approve the conservation plan and I would find that the conservation plan resolution purporting to do so is a nullity.

F. DISPOSITION

[77] I would allow the appeal in part. I would set aside the order below except for the order quashing the resolution approving the conservation plan. The parties agreed that costs would be fixed in the amount of $35,000 plus disbursements and

HST to the successful party. Given the mixed success, I would award costs in the amount of $18,000 to the respondent.

"A. Harvison Young J.A."
"I agree Doherty J.A."

Nordheimer J.A. (dissenting in part):

[78] I have reviewed the reasons of my colleague. I agree with her conclusion that the application judge erred in quashing the five by-laws at issue. I do not agree with her analysis in respect of the Cultural Heritage Landscape Conservation Plan for the Glen Abbey Property (the "Conservation Plan"). In my view, the application judge erred in quashing the Conservation Plan on the basis that it was *ultra vires*.

[79] I agree with my colleague that the issue of the Town's jurisdiction is a question of law and questions of law are reviewed on the basis of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Clublink's repetitive efforts to describe the reasons of the application judge as amounting to findings of fact or of mixed fact and law, and thus attracting deference and a standard of review of reasonableness, are misconceived and fundamentally flawed. At the centre of his decision is the legal question of whether the Town has the jurisdiction to do that which it purported to do through the by-laws.

[80] The application judge treated all the by-laws as one. He found that they stood or fell as a group. In particular, the application judge treated any finding regarding the CHL By-law as determining the fate of all the challenged by-laws. I agree with my colleague that he erred in doing so. Each of the by-laws ought to have been reviewed independently, especially given that all five of the by-laws are of general application.

(1) The Town's Jurisdiction

[81] I begin my analysis of the by-laws by quoting the following observation made by the application judge, at para. 11:

> In order to do justice to the Town's enactment of the Impugned By-laws, I must consider them in their own right without being distracted by other measures not currently being challenged.

[82] I agree with this observation. Unfortunately, the application judge did not heed his own advice in reaching his ultimate conclusions. In considering the validity of the by-laws and the Conservation Plan, it is important to remember that the by-law designating Glen Abbey as a cultural heritage property was not challenged before the application judge. Therefore, any analysis of the validity of the by-laws must proceed on the basis that the Town has validly designated Glen Abbey as a cultural heritage property under the provisions of the *Ontario Heritage Act*, R.S.O. 1990, c. O.18.

[83] I repeat that it is important to remember that each of the by-laws are by-laws of general application. They are not specific to the issue surrounding Glen Abbey, despite the efforts of Clublink to paint them as such. Only the Conservation Plan is specific to Glen Abbey, and for obvious reasons. I do not dispute that the situation regarding Glen Abbey may have been the catalyst that caused the Town to act, but that is a very different thing than finding that the by-laws "targeted"

Clublink. Whenever a new policy or approach is taken, someone will always have to be first to feel the impact.

[84] The starting point for considering whether the Town was empowered to enact the by-laws and the Conservation Plan is the presumption of validity. As this court said in *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)* (2005), 202 O.A.C. 395 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 45, at para. 3:

> The modern approach presumes that municipal by-laws are validly enacted absent "clear demonstration" that the by-law was beyond the municipality's powers.

[85] In addition, on this point, s. 8 of the *Municipal Act, 2001*, S.O. 2001, c. 25 reads, in part:

> (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.
>
> (2) In the event of ambiguity in whether or not a municipality has the authority under this or any other Act to pass a by-law or to take any other action, the ambiguity shall be resolved so as to include, rather than exclude, powers the municipality had on the day before this Act came into force.

[86] What then are the Town's powers with respect to these by-laws? Section 11(3) of the *Municipal Act* reads, in part:

> A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in

> subsection (4), respecting matters within the following spheres of jurisdiction:
>
> …
>
> 5. Culture, parks, recreation and heritage.

[87] In considering the scope of the powers in s. 11 of the *Municipal Act*, it is important to remember the purpose behind the section. It was described by Feldman J.A. in *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.), at para. 7:

> One of the ways in which the new Act introduces more flexibility is by giving municipalities two kinds of powers. Part II of the new Act, for the first time, gives municipalities the power of a natural person (s. 8) and as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws.

[88] The by-laws in issue here and the Conservation Plan are all clearly dealing with matters relating to heritage. That is their core purpose. Consequently, not only is there presumptive validity to the by-laws, there is express authority for them pursuant to s. 11(3)5.

[89] In order to find the by-laws and the Conservation Plan *ultra vires*, one must find an exception to, or restriction on, the plain authority that s. 11(3)5 of the *Municipal Act* provides. On that point, Clublink relies exclusively on s. 11(8) which reads, in part:

> The power of a municipality to pass a by-law under subsection (3) under the following spheres of jurisdiction

> does not, except as otherwise provided, include the power to pass a by-law respecting services or things provided by any person, other than the municipality or a municipal service board of the municipality, of the type authorized by that sphere:
>
> …
>
> 5. Culture, parks, recreation and heritage

[90] Consistent with the presumption of validity, and with the fundamental power provided by s. 8, this restriction must be read narrowly. Additionally, it is consistent with the thrust of s. 8(2), to find that, if there is any ambiguity as to whether the Town has the authority to pass a by-law, that ambiguity should be resolved in favour of the Town having the authority.

[91] With those principles in mind, it is my view that s. 11(8)5 does not preclude the Town from passing the by-laws and the Conservation Plan. In accordance with the proper interpretative principles, the expression “services or things provided by any person” must be read narrowly and restrictively. Otherwise, s. 11(8) could include almost anything that a municipality would otherwise attempt to govern, especially since there is very little that could not be captured between the terms “services” and “things”. Absent a restrictive interpretation of s. 11(8)5, the result would be that there would be very little room for s. 11(3)5 to operate.

[92] The application judge held that s. 11(8)5 precluded the Town from passing the impugned by-laws because he accepted Clublink’s principal submission that the Conservation Plan required it to provide a “service” in relation to “culture, parks,

recreation and heritage", that service being to require Clublink to operate Glen Abbey as a golf course: at paras. 22-25, 35. Indeed, the application judge said that, if Clublink were to cease to operate Glen Abbey as a golf course, that would constitute a breach of the Conservation Plan and thus the CHL by-law: at para. 24.

[93] I do not agree with the application judge's conclusion or with his reasoning. There is, in fact, nothing in the Conservation Plan that requires Clublink to operate a golf course nor can Clublink point to anything in the Conservation Plan that expressly does so. Indeed, the Conservation Plan does the opposite. It expressly states:

> This plan is not a maintenance plan for the Glen Abbey property. Nor is it an operational plan. Maintenance, meaning routine non-destructive actions that preserve the existing form, and operations are exempt from Town heritage review. Other activities are exempt from heritage review because they will not affect the property's heritage attributes.

[94] What the Conservation Plan does do is to restrict the actions that Clublink can take respecting the Glen Abbey property as long as it owns the property and the property remains subject to a heritage designation. It precludes Clublink from taking any action that might alter the heritage attributes of the Glen Abbey property, without first seeking and obtaining the approval either of the Town or its delegate. That is, after all, the fundamental purpose of a conservation plan. By definition, the heritage attributes here involve most of the aspects of the golf course. This should

not come as a surprise since it is the existence of the golf course, including all of its component parts, along with its history, that creates its heritage value.

[95] I pause at this juncture to say that the Conservation Plan flows from the designation by-law. The restrictions imposed by the Conservation Plan, in turn, flow from the fact and the terms of the heritage designation. I repeat that the heritage designation was not challenged before the application judge.

[96] The Conservation Plan itself is authorized by the 2014 Provincial Policy Statement which addresses, among other things, the conservation of cultural heritage landscapes. Indeed, the Provincial Policy Statement provides, in its definition of the word “conserved”, that the conservation of cultural heritage landscapes “may be achieved by the implementation of recommendations set out in a conservation plan”. I note, on this point, that provincial policy statements are authorized by the *Planning Act*, R.S.O. 1990, c. P.13. By virtue of s. 3 of the *Planning Act*, any decision of the council of a municipality in respect of the exercise of any authority that affects a planning matter must be consistent with any policy statements.

[97] Further, even if one could find something in the Conservation Plan that required Clublink to provide the service of a golf course, that would be a problem with the Conservation Plan. It would not be a reason to find that any of the impugned by-laws breach s. 11(8)5. The Town is entitled, under its authority and

responsibility to protect properties that have heritage value, to pass a by-law (here, the CHL By-law) that requires a property owner to comply with a Conservation Plan. Any problem with the scope and validity of the Conservation Plan does not perforce equate to a problem with the validity of the by-law.

[98] I would also point out that, if Clublink's position is correct, then the Town would be precluded from doing the very thing that both the *Ontario Heritage Act* and the *Municipal Act* authorize it to do – namely, protect properties that have heritage value. There is no interpretive principle that could be properly applied that would lead to that result.

[99] All of that said, I am prepared to accept that, if the Conservation Plan purported to tell Clublink how much it could charge people to play Glen Abbey, or what tee-off times they could book, or how many groups could play Glen Abbey each day, that might draw the Conservation Plan into the realm of legislating with respect to services provided by a person, and thus be outside of the powers of the Town. However, that is not what the Conservation Plan does.

[100] What the Conservation Plan does do is advise Clublink, with some degree of detail, what it can do with the Glen Abbey property on its own and what it needs the Town's approval to do, and the process for obtaining that approval. While I appreciate that Clublink does not believe that the Town has any such authority, if it should turn out that Clublink is wrong in that position, then I would have thought

that Clublink would welcome the details provided by the Conservation Plan as providing them with a roadmap going forward in terms of its dealings with the Glen Abbey property. I would also observe that the Conservation Plan represents the antithesis of vagueness about which Clublink otherwise complains.

[101] I appreciate that Clublink says that the harmful consequence for it, that results from the combination of the Conservation Plan and the CHL By-law, is that, from a practical point of view, it is required to operate a golf course, as otherwise it will be left with the expense of maintaining the golf course without receiving any revenue. I make two observations with respect to that claim of harm. First, while Clublink may make the business decision to continue to operate Glen Abbey as a golf course, it is not required to make that decision. It has other options, including selling the property if it does not wish to continue to operate a golf course on it. Second, Clublink has been operating Glen Abbey as a golf course for twenty years, so this is not a new venture for it, nor does it appear to be one that has been economically damaging to it during that time. I would note, on that point, that Clublink says, in the affidavit of its Senior Vice President, Investments filed in this matter, that it is “Canada’s largest owner and operator of golf clubs, with 33 golf course locations in Ontario and Quebec”. Operating golf courses would therefore appear to lie at the very core of Clublink’s business.

[102] The application judge concluded, at para. 37:

> The Impugned By-laws were enacted without a proper purpose under the *Municipal Act* and in direct contradiction to a specific statutory limitation of the Town's authority. For that reason, they are *ultra vires* the authority of the Town to enact them.

[103] Again, I disagree. As will be evident from the above, the Town was authorized both by the *Ontario Heritage Act* and the *Municipal Act* to enact by-laws and resolutions to protect properties, within its municipal boundaries, that have heritage value. There is no legal or factual basis for the application judge's finding that the by-laws were enacted "without a proper purpose".

[104] The application judge also found support for his conclusion that the by-laws and Conservation Plan are *ultra vires* in this court's decision in *Galganov v. Russell (Township),* 2012 ONCA 409, 293 O.A.C. 340. With respect, the application judge appears to have misread that decision.

[105] First, in *Galganov*, this court found that the municipality had authority to pass a by-law requiring the content of any new exterior commercial signs to be in French and in English. The basis for that conclusion was found in the broad authority granted to municipalities under s. 11(1) of the *Municipal Act*. It was in the context of that broad authority that this court concluded that signs fell within the meaning of the word "things" as used in s. 11(1). What this court did not consider, in *Galganov*, was the scope of any of the exceptions provided for in s. 11(8). Thus, the decision in *Galganov* has limited application to the case here.

[106] Second, the application judge compares the CHL By-law with the by-law in *Galganov* and says, at para. 28, that the purported governance of signs in the Conservation Plan is governance "of, among other things, the very 'thing' – signage – that the Court of Appeal says is beyond the boundaries of municipal authority". In fact, what this court decided in *Galganov* was that the municipality did have authority to legislate with respect to signage. It found that the by-law in question was "*intra vires* the Town's authority": *Galganov,* at para. 49. The decision in *Galganov*, therefore, to the degree it has any relevance to this case, actually provides support for the Town's position.

[107] Applying the proper interpretive principles, there is no basis for the application judge's broad interpretation of the restriction found in s. 11(8)5 of the *Municipal Act*. With respect, the application judge's conclusion turns the jurisdictional issue on its head. It gives paramountcy to the limitation in s. 11(8)5 rather than to the general authority and purpose found in ss. 8, 11(1) and 11(3). It is also inconsistent with the proper approach to the interpretation of municipal by-laws.

[108] In addition, the application judge failed to consider that there are other statutory authorities by which the Town can enact these by-laws, which my colleague refers to at paras. 48 and 52 of her reasons. The application judge's reasons do not address any of these other statutory authorities. It was not open to the application judge to find that all five of these by-laws were *ultra vires* the Town's

jurisdiction without considering all of these other sources of statutory authority in terms of the jurisdiction issue. He erred in not undertaking that analysis before reaching the conclusion that he did.

[109] In the end result, I conclude that the by-laws and the Conservation Plan were within the jurisdiction of the Town to enact.

(2) Bad faith

[110] I agree with my colleague that the application judge erred in finding that the by-laws were enacted by the Town in bad faith. I go further and also conclude that the application judge's finding that the Conservation Plan was enacted in bad faith cannot be sustained. On this issue, I recognize that the application judge's decision attracts a deferential standard of review and that the decision below should not be interfered with absent palpable and overriding error. However, that standard is met in this case. In my view, the application judge was unable to point to anything in the factual record, viewed objectively and fairly, that could support a finding of bad faith.

[111] To begin, by-laws are presumed to have been enacted in good faith. Consequently, there is a high burden on anyone challenging a by-law by seeking to establish bad faith: *Seguin (Township) v. Hamer*, 2014 ONCA 108, at para. 5.

[112] Bad faith was discussed by this court in *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.). As Laskin J.A. observed, at p. 340:

> Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.

[113] There is no evidence in this record that would support a finding of bad faith in accordance with that definition. Indeed, the application judge himself found, at para. 68:

> [T]here is no suggestion that the Town enacted the Impugned By-laws out of any motive other than what they thought was the best interest of their constituents at large.

[114] Notwithstanding that clear finding, the application judge engaged in negative speculation regarding the motives of the Town in enacting the by-laws and Conservation Plan. He also placed great weight on the fact that Clublink was being prohibited from using its property as it wished, which the application judge characterized as "[t]he wholesale transfer of property value from owner to community": at para. 62. I do not understand how the application judge reached that conclusion but, more importantly, I do not see how that sustains a finding of bad faith. In considering the actions of the Town, in this respect, it is important to

remember the observation made by Major J. in *Nanaimo (City) v. Rascal Trucking Ltd*, 2000 SCC 13, [2000] 1 S.C.R. 342, at para. 35:

> The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance.

[115] The Town is legislatively empowered to designate property as having cultural heritage value under the *Ontario Heritage Act*. I repeat that the Town's designation of Glen Abbey as a cultural heritage landscape was not challenged before the application judge. The designation of any property as having cultural heritage value will inevitably limit the use to which the property can be put by its owner. It will mean that the owner may not be able to maximize the value of the property. Given that practical reality, one cannot equate the potential economic consequences associated with a heritage designation, standing alone, with bad faith, without effectively equating any use of the heritage authority as amounting to bad faith.

[116] It is readily apparent that the Town wishes to have Glen Abbey remain essentially as it is. It is the nature of Glen Abbey as a championship golf course, designed in the way that it was, that caused the Town to designate Glen Abbey and the surrounding property as a cultural heritage property. It is a "landmark" in Oakville that the Town wishes to preserve. The fact that the Town has acted to achieve that objective, which it is fully entitled to do under the *Ontario Heritage Act*, does not mean that the Town has failed to "balance" the interests of the Town's

constituents with the interests of Clublink. As Laskin J. A. noted in *Equity*, at p. 343:

> A court should not be quick to find bad faith because members of a municipal council, influenced by their constituents, express strong views against a project.

[117] The application judge's view of what constitutes a balancing of interests abjectly fails to take into account the realities of the situation. The Town wishes to maintain Glen Abbey as a golf course and Clublink wishes to transform Glen Abbey into a residential and commercial development. There is no common ground between those positions. Either one or the other must prevail. Those realities cannot render the Town's actions in pursuit of its goal as constituting bad faith.

[118] Further, none of the "badges" of bad faith, identified by the application judge, demonstrate bad faith, either viewed individually or collectively. I note, on that point, that one cannot take individual actions not taken in bad faith and then, in some fashion, add them together and find bad faith.

[119] I will address specifically one of those "badges" of bad faith identified by the application judge because it demonstrates the error in the application judge's analysis. It is the application judge's finding that while the Town is "keenly aware of the development value locked up in alternative uses for the Glen Abbey property" it is "blithely unaware of the value locked up in the very same property

when it suits its need to suppress all development beyond its current use": at para. 60.

[120] First, I have already made the point that the designation of a property as having heritage value will inevitably restrict the use to which the owner can put the property, and thus limit the value that the owner may be able to extract from it. Second, the application judge's reliance on this point, even it was otherwise valid, arises from the designation of Glen Abbey, and the surrounding property, as a cultural heritage property. I repeat that that designation was not in issue in this application. Clublink cannot, through the back door, do that which it was not prepared to do directly and that is challenge the heritage designation. Third, there is no foundation for the application judge's finding that the Town is "blithely unaware" of the consequences of the designation. That is an unfair and unjust characterization of the Town's actions, especially given the point, which I referred to earlier, that municipalities often have to "balance complex and divergent interests" in arriving at decisions that are in the public interest.

[121] Lastly on the bad faith point, the application judge also criticized the Town for its failure to realize that operating Glen Abbey as a golf course "is a money-losing proposition for the property owner": at para. 67. The evidence does not establish that to be the case. Indeed, Clublink itself does not make that assertion anywhere in its evidence. All that Clublink does say is that "it would cost Clublink approximately $2 million annually" to maintain Glen Abbey as a championship golf

course. What is missing from Clublink's evidence, of course, is how much revenue Clublink generates from Glen Abbey annually through membership, green fees, and other sources. The record before the application judge was simply insufficient to permit any conclusions to be made regarding the economic impact, if any, of the Conservation Plan.

[122] The application judge's analysis on the issue of bad faith is fundamentally flawed. Thus, his conclusion that bad faith was established is an unreasonable one.

(3) Vagueness

[123] The application judge found that the CHL By-law was void for vagueness. He then applied that conclusion to the other by-laws without further analysis. He did not make any finding on this point with respect to the Conservation Plan.

[124] The application judge referred to the leading case on the concept of vagueness – namely *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. In that decision, Gonthier J. identified, at pp. 626-27, five propositions that could be drawn from the existing case law. It is the third proposition that is of relevance here:

> Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many

> varying judicial interpretations of a given disposition may exist and perhaps coexist.

[125] It appears, however, that the application judge imposed a much heavier burden on the Town to support the scope of its by-laws then is justified by the decision in *Nova Scotia Pharmaceutical*. He did so by relying on earlier authorities that do not mirror the approach laid out by Gonthier J.: see e.g. paras. 75, 82.

[126] In particular, I note the following observation by Gonthier J. at p. 632:

> As was said by this Court in *Osborne* and *Butler*, the threshold for finding a law vague is relatively high.

[127] As with the first issue, on the issue of vagueness, the application judge dealt exclusively with the CHL By-law. The central reason why the application judge found that the CHL By-law was vague was as follows, at para. 77:

> It is entirely unclear from the terms of the CHL By-law which properties require a conservation plan and what the contents of the plan must be.

[128] I disagree with the application judge's reasoning. In my view, the CHL By-law is sufficiently clear on this point. First, the by-law only applies to "cultural landscapes contained or included in or on a protected heritage property in the Town" (s. 2.1.1). Consequently, a property has to have been designated as a heritage property before the by-law applies. Second, the preparation of a conservation plan begins with a direction from the Town Council (s. 2.1.3). In the absence of any such direction, there is no obligation to prepare a conservation plan, with one exception. That sole exception is where the owner of the property

seeks to alter a cultural heritage landscape on a designated cultural heritage property. In that situation, the owner must prepare a conservation plan to accompany the request to alter (s. 5.1.2). I do not see anything vague in these provisions. No property owner would be confused as to whether the CHL By-law applies to their property, nor whether they were required to prepare a conservation plan.

[129] The application judge also appears to have been unduly influenced in his consideration of the issue of vagueness by his earlier conclusion that the by-laws had been enacted in bad faith. Bad faith and vagueness are two separate and distinct concepts. There is nothing in the plain wording of the by-laws that could justify the application judge's conclusion, at para. 83:

> The argument about the vagueness of the Impugned By-laws is intertwined with the argument about bad faith … That is, the CHL By-law, the amendments to the Property Standards By-law, and the other Impugned By-laws are unintelligible because they attempt to speak in general terms about a policy that is arguably specific to Glen Abbey.

In fact, the by-laws are all ones of general application within the Town. That the Town has been focused on Glen Abbey, given its importance to the Town, does not change that fact. There is nothing "unintelligible" about any of the by-laws.

[130] As I earlier noted, the application judge did not directly address the other by-laws. It is sufficient to point out, in that respect, that the other by-laws simply amend

existing by-laws to provide consistency with the CHL By-law and the Town's cultural heritage landscape strategy. In addition, By-law 2018-020 delegates certain authority from the Town Council to the Director of Planning Services relating to heritage matters. By-law 2018-042 updates the minimum standards for maintenance and occupancy of property so that they apply to cultural heritage landscapes. Similarly, By-law 2018-043 updates the Town's Tree Protection By-law and By-Law 2018-044 updates the Town's Site Alteration by-law, so that both of those by-laws apply to cultural heritage landscapes. There is nothing vague about any of these amendments, nor does Clublink suggest that there is.

[131] Finally, there is nothing vague about the Conservation Plan. To the contrary, it is a very detailed document that is intended "to guide future alterations of the Glen Abbey property that are likely to affect the heritage attributes of the property". Indeed, Clublink complains in its written submissions that the Conservation Plan "chose to dictate in minute detail the operation and maintenance of the Golf Course". It appears, therefore, that Clublink's complaint with respect to the Conservation Plan is the polar opposite of vagueness.

[132] In the end result, the vagueness argument fails.

Conclusion

[133] I would allow the appeal, set aside the order below and dismiss the application with costs to the Town fixed in the agreed amount of $35,000 inclusive of disbursements and HST.

Released: October 23, 2019
"DD"

"I.V.B. Nordheimer J.A."