



HERITAGE TRUST OF NOVA SCOTIA

PRESERVING NOVA SCOTIA'S BUILT HERITAGE

November 30, 2015

Hon. Diana C. Whalen, Chair and
Members of the Law Amendments Committee
Legislative Assembly, Nova Scotia

Madam Chair and Committee Members:

Brief of the Heritage Trust on Bill 118:

The Trust would like to thank Minister Ince for meeting with us on November 19.

Bill 118, as introduced, has serious technical flaws. Some of these flaws, if adopted, could leave the Heritage Property Act open to challenges in court. Some flaws could put the heritage buildings in our province in greater jeopardy. The Trust recommends that the Law Amendments Committee make amendments in three areas.

Clause 9:

Clause 9 of the Bill would repeal the permanent protection for municipal heritage properties in heritage conservation districts. By Subsection 19B(1)(b) of the present Act, municipalities now have the power to protect buildings permanently by including them in a heritage conservation district. Subsection 19B(1)(b) provides that

19B(1)(b) "Section 18 does not apply to any municipal heritage property within the district" [a heritage conservation district].

Section 18 provides in part that

18(3) "Where the Municipality does not approve the application [to alter or demolish a heritage building], the property owner may, notwithstanding Section 17, make the alteration or carry out the demolition at any time after three years from the date of the application but not more than four years after the date of the application."

Outside conservation districts, under Section 18, Municipalities only have the power to protect buildings for three years from the date of an application for a demolition. Inside conservation districts, as long as Subsection 19B(1)(b) remains in place and overrides Section 18, Municipalities have the power to protect buildings permanently. Yarmouth, Lunenburg, Halifax, Maitland, Truro and Cape Breton Regional Municipality have established districts. **Many significant heritage buildings are permanently protected within conservation districts.**

Bill 118 proposes to remove Section 19B(1)(b) from the Act. Municipal heritage properties in conservation districts would no longer have permanent protection; an owner who applied to

demolish a heritage building could carry out the demolition three years later, unless the municipality bought the property or entered into an agreement. **If Clause 9 is adopted, Nova Scotia would become the only province in Canada where municipalities do not have legislated, permanent protective power.**

In a letter to the Trust, Minister Ince has suggested putting wording similar to Subsection 19B(1)(b) into regulations. **Having 19B(1)(b) in the Act is stronger than having it in regulations,** for the following reasons:

1. An Act has a higher status than regulations.
2. The Act can only be changed by the Legislature, with notice, with the opportunity to be heard and after open debate, whereas regulations can be changed behind closed doors. Municipalities could find out that a new cabinet had changed the regulations, and that permanent protection was gone with the stroke of a pen.
3. If 19B(1)(b) is removed from the Act and placed in regulations, a lawyer might challenge the regulatory protection in Court. The lawyer might say that his or her client applied to demolish a municipal heritage property in a conservation district based on Section 18 of the Act, but that the Municipality refused the application, citing the regulations. The lawyer could tell the Court that Section 18 in the Act should take precedence over the regulations. The lawyer could say the cabinet was *ultra vires* in establishing a regulation that is contradicted in the Act. The lawyer could ask the Court to order the Municipality to issue a demolition permit in accordance with Section 18 of the Act. It is difficult to predict in advance what decision a Court might make in such a case. Even if such a lawyer's argument were not successful, it would take time and resources to fight about it. It is much simpler to avoid any dispute by leaving 19B(1)(b) in the Act.
4. If 19B(1)(b) were removed from the Act, an owner might rely on Section 18 and demolish after three years without municipal approval. A demolition, legal or not, would permanently destroy heritage value.

We request that the words of the current Subsection 19B(1)(b) be retained in the Act.

Clauses 3 and 8:

Clauses 3 and 8 would provide extra ways to delete a building from the lists of protected heritage properties in Nova Scotia. These clauses would allow deregistration of heritage properties on the basis of "significant financial difficulties" or "undue hardship to the owner". This wording is subjective and open-ended.

Deregistration of a property, like registration, should be based only on the historic and architectural merit of the property. The Province and Municipalities have the authority to deregister heritage properties under the current Act. The provisions for deregistration in Subsections 9(2)(a) and (b) and 16(1)(a) and (b) of the present Act are sufficient.

The proposed clauses would also set up an internal conflict within the Act. Subsections 9(2)(b) and 16(1)(b) of the present Act state that "loss of the heritage value" "caused by "neglect, abandonment or other action or inaction of the owner" is **not** an allowed justification for deregistration. However, "neglect, abandonment or other action or inaction of the owner" could ultimately lead to "financial difficulty" for the owner. Bill 118 does not propose to exclude "financial difficulties" caused by action or inaction of the owner from the allowed reasons for deregistration. "Neglect" by an owner should not be permitted to justify deregistration under the guise of "financial difficulty" or "undue hardship". The proposed added reasons for deregistration would be in inherent conflict with Subsections 9(2)(b) and 16(1)(b) of the present Act. The proposed amendments could create or even invite irreconcilable conflict between property owners and the Province or municipalities. The amendments would also invite those who desire deregistration (for whatever reason) to allow their property to deteriorate. This would create a host of other problems for communities.

Owners facing financial difficulties now have the options of selling the properties, of applying for a substantial alteration, or of asking for financial help. Adding an extra reason for deregistration would add to the number of deregistration applications and reduce the number of registered properties. Owners who were denied deregistration might take the issue to court.

Clauses 2 and 7:

The third area of concern is Clauses 2 and 7, which would allow for a reduction in the portion of a property that is protected by the Act. Parts of heritage properties can be deregistered now. For a municipal heritage property, this requires a public hearing. **Since a hearing is necessary to register a municipal heritage property, a hearing should also be necessary to remove the designation from part of the property.** The heritage value of a structure depends in part on its compatibility with its surroundings, which includes buildings or other structures on the same lot. Demolition of structures or construction of new buildings on parts of a property outside a scope of registration could affect the compatibility of the property with its surroundings and the longevity of the heritage structure.

A recent trip by our President, Joe Ballard, to the Simeon Perkins House in Liverpool showed how construction of the Queens County Museum complex and associated paved parking and driveway has impacted the historic Perkins House. The construction has disrupted normal storm-water runoff and the saturation capacity of the grounds, which has caused increased water penetration of the stone cellar, which in turn has de-stabilized the floors and walls and contributed to increased moisture inside the house. This demonstrates how construction on parts of a property outside a scope of registration could affect an historic site's integrity structurally and contextually. **The Province and municipalities should be authorized by the Act to consider the effect of a change in scope on the structural and contextual integrity of the heritage property.**

We have provided draft wording for new Clauses 2 and 7 to address these issues.

Heritage Trust draft Clause 2, with new test in bold type:

2 Chapter 199 is amended by adding immediately after Section 8 the following Section:
 8A (1) On the application by an owner of a provincial heritage property, the Advisory Council may recommend to the Minister that the scope of the designation of the property as a provincial heritage property be amended.

(2) A recommendation pursuant to subsection (1) may be made if

(a) the heritage value of the property is maintained **and will be maintained if any permitted construction or demolition occurs on the portion of the property outside the proposed scope of designation**; and

Heritage Trust draft Clause 7, with proposed new text in bold type:

7 Chapter 199 is further amended by adding immediately after Section 15 the following Section:

15A (1) On the application of an owner of a municipal heritage property, the heritage advisory committee may recommend to the council that the scope of the designation of municipal heritage property be amended.

(2) A recommendation may be made pursuant to subsection (1) if

(a) the heritage value of the property is maintained **and will be maintained if any permitted construction or demolition occurs on the portion of the property outside the proposed scope of designation**; and

(b) the owner has submitted supporting documentation and a survey plan prepared in accordance with the Standards of Practice of the Association of Land Surveyors of Nova Scotia describing the proposed amendment to the designation and bearing a surveyor's certificate.

(3) Where the council receives a recommendation from the heritage advisory committee to amend the scope of the designation or where the council considers that the proposed amendment of the scope of designation is reasonable, the council may amend the designation as recommended or proposed **after holding a public hearing to consider the proposed amendment of the scope.**

(4) Such a public hearing shall be held not less than thirty days after a notice of the hearing is served on the registered owner of the municipal heritage property and published in a newspaper circulating in the area.

In summary, the Heritage Trust of Nova Scotia asks the Law Amendments Committee to amend Bill 118 by:

- 1) Retaining the present wording of Subsection 19B(1)(b) in the Act, to continue the permanent protection of municipal heritage properties in heritage conservation districts, and by
- 2) Withdrawing Clauses 3 and 8 from the Bill, to avoid increasing the number of applications for deregistration, and by
- 3) Adopting the additional words in Clauses 2 and 7, as suggested above.

Heritage buildings and sites are important economic and cultural resources in Nova Scotia. Please take action to protect them.

Yours sincerely,

Philip Pacey
Chair, Buildings-at-Risk Fund Committee