

Conservation Review Board
Commission des biens culturels



ISSUE DATE: May 18, 2021

CASE NO.: CRB1918
CRB1919
CRB1920

PROCEEDING COMMENCED UNDER subsection 29(5) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Owners: Dan and Mary D'Alessandro
Objector: John Colin Black
Subject: Notice of Intention to Designate
Property Address: 21 Prideaux Street
Legal Description: PT LT 31 TP PL 86 NIAGARA AS IN RO432606
Municipality: Town of Niagara-on-the-Lake
CRB Case No.: CRB1918
CRB Case Name: Black v. Niagara-on-the-Lake (Town)

PROCEEDING COMMENCED UNDER subsection 29(5) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Owner/Objector: John Colin Black
Subject: Notice of Intention to Designate
Property Address: 27 Prideaux Street
Legal Description: PT LT 30 TP PL 86 NIAGARA AS IN RO434461
Municipality: Town of Niagara-on-the-Lake
CRB Case No.: CRB1919
CRB Case Name: Black v. Niagara-on-the-Lake (Town)

PROCEEDING COMMENCED UNDER subsection 29(5) of the *Ontario Heritage Act*, R.S.O. 1990, c.O.18, as amended

Owner: Thomas and Kimberley Elltoft
Objector: John Colin Black
Subject: Notice of Intention to Designate
Property Address: 31 Prideaux Street
Legal Description: PT LT 30 TP PL 86 NIAGARA AS IN NTW8087

Municipality: Town of Niagara-on-the-Lake
CRB Case No.: CRB1920
CRB Case Name: Black v. Niagara-on-the-Lake (Town)

APPEARANCES:

Parties

John Colin Black

Town of Niagara-on-the-Lake

Counsel

Brian Duxbury

Terry Hill

HEARD: March 18, 2021 by video conference call
ADJUDICATOR(S): Daniel Nelson, Member

REPORT

OVERVIEW

[1] The Town of Niagara-on-the-Lake (“Town”) seeks to designate the properties set out below for their cultural heritage value or interest (“CHVI”) under s. 29 of the *Ontario Heritage Act* (“OHA”):

- 21 Prideaux Street, Town of Niagara-on-the-Lake, which is owned by Dan and Mary D’Alessandro (CRB1918);
- 27 Prideaux Street, Town of Niagara-on-the-Lake, which is owned by John Colin Black (CRB1919);
- 31 Prideaux Street, Town of Niagara-on-the-Lake, which is owned by Thomas and Kimberley Elltoft (CRB1920);

(the “properties”).

[2] Town Council, on September 16, 2020, voted to designate the properties and subsequently issued a Notice of Intention to Designate (“NOID”) for each. John Colin Black (“Black”) objected to the NOIDs for each of the properties although he was an owner of only one, 27 Prideaux Street. As a result of his objections, the matter was referred to the Conservation Review Board (“Review Board”), which convened a hearing under s. 29(8) of the OHA (“Hearing”) for the purpose of recommending whether, in the opinion of the Review Board, the properties should be designated under s. 29 of the OHA.

[3] Mr. and Mrs. D’Alessandro, owners of 21 Prideaux Street, originally objected to the NOID for their property but subsequently withdrew the objection before the Hearing and were not parties at the Hearing. Mr. D’Alessandro remained a participant in the proceedings. Mr. and Mrs. Elltoft did not object to the designation of their property; Mr. Elltoft was a participant in the proceedings.

[4] In the Review Board’s Procedural Order of December 3, 2020, the Review Board ordered that, given the overlap of parties and the contiguous nature of the properties, these matters would be heard concurrently.¹

[5] The list of exhibits entered as evidence at the Hearing is attached as Appendix 1 to this Report.

BACKGROUND

[6] The parties’ respective experts prepared Cultural Heritage Evaluation Reports (“CHER”) for the properties and they are in general agreement on the CHVI of the properties. As such, and since the Owner/Objector does not dispute these matters, except for the issues set out below, this Report will not directly address the issues not in dispute. In other words, subject to the issues set out below, the Owner/Objector does

¹ *Black v. Niagara-on-the-Lake (Town)*, 2020 CanLII 97421.

not object to the properties having CHVI. It is important to note that only one criterion is necessary for there to be CHVI in a property and therefore qualify for designation.

[7] The Review Board heard from four witnesses.

- Denise Horne, who is a planner with the Town, provided testimony as to the process leading to the Town's resolution to issue the respective NOIDs. This was not useful for a determination of the issues and was eventually curtailed since the Review Board has no jurisdiction to consider issues prior to the issuance of a NOID and responding objection.
- Dr. Marcus Letourneau and Dr. Carl Pray, both expert witnesses for the Town, and are co-authors of a CHER for the three properties.
- Dan Currie, an expert witness for the Owner/Objector and is a co-author of a CHER for 27 Prideaux Street.

[8] With the consent of the parties, the Review Board determined that Drs. Letourneau and Bray, and Mr. Currie, were expert witnesses for the purpose of the Hearing and could provide opinion evidence.

[9] None of the participants, identified above, opted to make presentations to the Review Board.

[10] It is not disputed that the properties are within the Niagara National Heritage District ("NHD"), which was established by the federal government in 2004, and which was designated some 25 city blocks of the old downtown.

ISSUES

[11] The owners of 21 Prideaux Street and 31 Prideaux Street do not dispute their respective NOIDs and are content with the designation of their properties under the OHA. Black objects to two specific issues in the respective Statements of Cultural Heritage Value or Interest (“SCHVI”) for the properties discussed below. Black does not otherwise dispute the heritage designation of his property at 27 Prideaux Street.

[12] The parties agree that these two issues would be the focus of the Hearing, *viz.*:

- Do the properties constitute a nested cultural heritage landscape (“CHL”) as part of the properties’ respective SCHVI?
- Are the respective setbacks of the properties a heritage attribute for each of the properties?

RELEVANT LEGISLATION AND REGULATION

[13] The relevant legislation in this matter is s. 29 of the OHA, which sets out the process for designating a property as having CHVI, and Ontario Regulation 9/06 (“O.Reg. 9/06”), which sets out the criteria for determining CHVI. The relevant extracts of both are set out in Appendix 2 to this Report.

[14] The other key element, for the purposes of this Report, is the *Provincial Policy Statement, 2020* (“PPS”), which includes, *inter alia*, a definition of a CHL. The relevant extracts are set out in Appendix 3 to this Report.

CASE FOR THE MUNICIPALITY

[15] The Town believes that the three respective properties constitute two CHLs, one within the other. The three properties are part of the federal NHD but, are themselves a three-property CHL. The setbacks of the properties are important heritage attributes.

[16] Dr. Letourneau argued that the three properties are located where they are as a result of a high bank of a now-extinct watercourse. Each of the properties have an unusual setback from the street and, in their view, are aligned relative to each other. They believe that these three properties were only developed after drainage was altered to ensure that they were not flooded while managing the realities of the imposed grid pattern of development. While the watercourse and the risk of flooding may have been important drivers, they note that there were other advantages: better air, drainage, and views.

[17] Dr. Letourneau noted that, while most buildings in the NHD, were sited close to the road, these three properties were not. While the setback may have been forced by the watercourse, it may also have been motivated by changing cultural standards of house placement.

[18] Dr. Letourneau, in cross-examination acknowledged that:

- The homes on each property reflect different architectural styles including Greek Revival, French Empire and vernacular Classical, and
- Each of the properties have different setbacks.

[19] Dr. Bray invited the Review Board to consider the site around the time of the War of 1812, the area would have been mapped with the application of the standard survey grid. The area would have been largely clear-cut, which would cause an increase in stormwater runoff. Malaria was a serious concern and people would necessarily want

to avoid low-lying areas. The ridge, where the properties are located are a bit of an anomaly; other areas are gentler. He believes that people firstly built in more accessible sites earlier on, which is why the three properties were built later, in the 1840s, as a result of the watercourse and low-lying ground at the front of the properties.

[20] The 1840s also saw the development of a more romantic and picturesque approach to landscape, as advanced by writers such as the American landscape designer Andrew Jackson Downing. As communities developed, and people moved away from subsistence agriculture, there was less need for outbuildings and houses themselves moved back from the road with an increase in gardens, both practical and ornamental during this period.

CASE FOR THE OWNER/OBJECTOR

[21] The Owner/Objector's view is that there is no link between the three properties giving rise to CHVI and, likewise, there is no CHVI in the respective setbacks as potential attributes.

[22] Mr. Currie, for the Owner/Objector, agrees with the Town's experts that the three properties are located where they were, on high ground overlooking a former watercourse, which may have been driven by marshy conditions and flooding. He also agrees that such a siting of the buildings on the properties would offer better air drainage and better views. This was part of a general cultural concern about bad air tied to low-lying and marshy areas. Since the original tree cover had long been removed, there would have been a view, not obscured by subsequent regrowth, in the 1840s.

[23] Fundamentally, in his view, the properties were sited where they were for practical considerations, which were not significant. It could be significant if it was shown to be a designed landscape, where there was purpose to the location, with a designed intent for an aesthetic urban form. In his view, there is no evidence of such

purpose or design. If the setback gives variability to the area and should be preserved, then the properties to be protected should be expanded to capture other properties adjoining the watercourse.

[24] Mr. Currie asserts that, since there is no connection between the properties, there can be no nested CHL.

[25] Mr. Currie placed a great deal of emphasis on the idea of “significant” in his testimony. It should be noted that in the 2014 (and earlier) versions of the PPS, the term “significant... means in regard to cultural heritage and archaeology, resources that have been determined to have cultural heritage value or interest for the **important contribution they make to our understanding of the history of a place, an event, or a people**” [emphasis added]. The 2020 PPS has removed the language bolded here. There is no longer a requirement that a significant CHL make an important contribution. Now, for a CHL to be significant, it must meet one or more of the criteria set out in O.Reg. 9/06.²

ANALYSIS

[26] As previously discussed, the experts in this matter are in general agreement on the factual evidence. The properties are worthy of designation, except for in the areas in dispute already identified. This leaves the Review Board to evaluate the opinion evidence of the respective witnesses regarding whether the issues identified are important and should be included in the respective properties’ SCHVI or not.

Nested CHL

[27] The Review Board has been asked to determine whether the three properties, together constitute a “nested” CHL. This arises because the Town included the

² See Appendix 3 for the new definition of “significant” from the 2020 PPS.

concept as part of the SCHVI in the issued NOID for each of the respective properties. From the NOID for 27 Prideaux Street, as an example:

The property also contains cultural heritage value in its contextual value, as it is physically and visually connected to the adjacent neighbouring properties at 21 and 31 Prideaux Street. The three properties represent a nested cultural heritage landscape and provide a sense of uniformity, all of which have a deep setback from the street.

[28] The Town's CHER goes further in its draft SCHVI for the respective properties. From the CHER for 27 Prideaux Street:

[The property] is also physically and visually linked to the neighbouring properties, 21 and 31 Prideaux Street as part of a nested landscape defined by their unusually deep setback from the front property line and position on the high point of their respective lots.

[29] The Town's experts, in that report, added the nested CHL as a specific heritage attribute in their draft SCHVI. Again, from the CHER for 27 Prideaux Street:

The cultural heritage value or interest associated with the Property is represented in the following heritage attributes...

- The Property's role as part of both a nested cultural heritage landscape constituting 31, 27, and 21 Prideaux Street...

[30] The concept of a "nested" CHL has not been considered by the Review Board before but it is not a difficult concept to understand and define. In effect, it is a discrete CHL within a larger CHL. Thus, the nested CHL must, itself, be a CHL, independent from the larger CHL that may surround it. In this case, the properties are part of the Niagara NHD, which is, of course a CHL itself.

[31] It is important to note that, while the OHA, and O.Reg. 9/06 is binding upon the Review Board, the PPS is not and the OHA and its regulations make no reference to CHLs. In other words, the OHA does not recognise the concept of a CHL, and it is, therefore, not specifically part of the analysis of O.Reg. 9/06.

[32] The individual properties may, individually and collectively, constitute a CHL, nested or otherwise and, on its face, there is nothing particularly wrong with that. But, on closer examination, such action creates a very serious concern. By interweaving the interconnected concept of a nested CHL as part of each individual properties' SCHVI, which is used to understand the heritage attributes and evaluate any future changes thereto, and, potentially, naming the nested CHL as a common heritage attribute across the three properties, regardless of property boundary, per the draft SCHVI in the Town's CHER, the Town appears to be attempting to tie the properties together in a way not permitted by Part IV of the OHA.

[33] The designation process under Part IV of the OHA, including s. 29, which is the relevant section for these matters, provides for a specific designation on a specific property. Such a designation cannot 'slosh over' that boundary line³ and for good reason; adjoining property owners cannot be responsible for the actions of their neighbours. Except for a heritage conservation district designation process in Part V of the OHA, there is no provision in the OHA to tie properties together with a common, overlapping, protection.

[34] The Supreme Court of Canada observed, in *St. Peter's Evangelical Lutheran Church (Trustees of) v. Ottawa (City)*:

The Ontario Heritage Act was enacted to provide for the conservation, protection, and preservation of the heritage of Ontario. There is no doubt that the Act provides for and the Legislature intended that municipalities, acting under the provisions of the Act, should have wide powers to interfere with individual property rights. It is equally evident, however, that the Legislature recognized that the preservation of Ontario's heritage should be accomplished at the cost of the community at large, not at the cost of the individual property owner, and certainly not in total disregard of the property owner's rights. **It provided a procedure to govern the exercise of the municipal powers, but at the same time to protect the property owner within the scope of the Act and in accordance with its terms** [emphasis added].⁴

³ See s. 26 of the OHA. See also *Qureshi v. Mississauga (City)*, 2015 CanLII 99223 at para. 74, which discusses how views, identified as a heritage attributes must be within the legal boundary of the protected property.

⁴ *St. Peter's Evangelical Lutheran Church (Trustees of) v. Ottawa (City)* 1982 CanLII 60 (SCC) at p. 591.

[35] The OHA, as the Supreme Court noted, not only sets out the scope of municipal power to designate property to preserve the heritage of Ontario, but also limits that scope in order to protect property owners. This is important because, while the preservation of heritage property in Ontario is a “public good”⁵ it does, as the Supreme Court noted, necessarily interfere with individual property rights.

[36] It must, therefore, follow, that any attempt to restrict those individual property rights must be found within the authority of the statute. The Town cannot, by stealth, achieve a mini-heritage conservation district without engaging with the provisions of Part V of the OHA. As the Divisional Court has noted:

The decision to designate a property is clearly discretionary. However, there are limits on the exercise of discretion where fundamental constitutional and societal interests are at stake. **That discretion must be exercised ‘with the boundaries imposed in the statute**, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter’ [emphasis added].⁶

[37] The CHL concept cannot be used to tie multiple properties together, as in this case, to circumvent, accidentally or purposefully, the procedural safeguards of Part V of the OHA, governing heritage conservation districts. To do so is, therefore, improper, and, for these reasons the Review Board cannot recommend that the properties constitute a nested CHL as proposed by the municipality in the draft SCHVI in the Town’s CHER. To do so would create a heritage district in all but name.

[38] Having said that, it is, of course, still true that the properties could, individually, constitute a nested CHL provided that there is no attempt to avoid the provisions of Part V of the OHA and that there are no shared heritage attributes. In other words, a property can be linked to its surroundings in keeping with s. 3(ii) of O.Reg. 9/06, without creating a heritage district in the way proposed by the Town’s experts.

⁵ *House v Lincoln (Town)*, 2015 ONSC 6286 (CanLII) at para. 11.

⁶ *Tremblay v. Lakeshore (Town)*, 2003 CanLII 6354 (ON SCDC) at para. 18.

[39] The Town's experts, in their O.Reg. 9/06 evaluation of 27 Prideaux Street note: "It is also physically and visually linked to the neighbouring properties, 21 and 31 Prideaux Street as part of a nested landscape..."⁷ This appears to be a direct allusion to O.Reg. 9/06, s. 3(ii). The question before the Review Board may therefore be reframed as follows: does each individual property have CHVI under O.Reg. 9/06, s. 3(ii) because it has contextual value as a nested CHL since each individual property is physically and visually linked to its surroundings?⁸

[40] As previously discussed, the PPS concept of a CHL is not part of an OHA analysis but it could be a useful tool or lens to understand O.Reg 9/06 criteria, particularly when considering whether a property has contextual value because it is important in defining, maintaining, or supporting the character of an area or because it is physically, functionally, visually, or historically linked to its surroundings.⁹ As was noted by the Review Board in *Qureshi v. Mississauga*,

At this point in the proceeding, the Review Board clarified that the definitions and provisions of the Act and its Regulations are the authority for this scope of inquiry. Unlike the PPS, the [OHA] does not define or reference the term "cultural heritage landscape." Similarly, the *Heritage Tool-Kit* and *Parks Canada Standards and Guidelines*, although useful evaluative tools, have no legislative authority. The Review Board does view the use of these definitions, policies, and guidelines by a consultant when formulating a recommendation, as an indicator of due diligence.¹⁰

[41] It may be fruitful, therefore, to examine the 2020 PPS's definition of CHL¹¹ by deconstructing that definition into its constituent parts and evaluating them in the context of the properties:

1. *Defined Geographical Area*: In this case, there is a clearly defined geographical area being the metes and bounds of the properties together.

⁷ See page 61 of the Town's experts' CHER.

⁸ Note that the Town does not suggest that the properties are functionally or historically linked to their respective surroundings.

⁹ O. Reg. 9/06 s. 3(i) and (ii).

¹⁰ *Qureshi supra* at para. 31.

¹¹ See Appendix 3 for the definition.

2. *May Have Been Modified by Human Activity:* In this case, the geographical area has been modified, over time, by human activity. Note that the definition necessarily means, in its phraseology, that the area does not need to have been modified by human activity.
3. *May include features such as buildings, structures, spaces, views...or natural areas that are valued together for their interrelationship meaning or association:* The properties clearly have all of these features. The question that remains is whether they are valued together for their interrelationship meaning or association. Note, again, the use of the permissive “may”.
4. *Identified as having CHVI by a community:* The definition indicates that CHVI could be determined, *inter alia*, if the geographical area has been included on a federal register or through an evaluation under the OHA. The properties are not, themselves, on a federal register but are part of the NHD.

[42] There is a defined geographical area here with the three properties identified, the properties have been clearly modified by human activity and, certainly, the area has been identified as having CHVI. Being part of the NHD is not, by itself, in the view of the Review Board, specific enough to establish that the properties are automatically a CHL by themselves but, provided that the properties are themselves a CHL, being within the NHD does establish that it is necessarily nested within. This then leaves the alternative: do the properties, being “nested,” have CHVI by operation of O.Reg. 9/06? Remember that the regulation only requires one criterion to establish CHVI. The parties, in this case, agree that, except for the two issues, set out above, the properties do have CHVI.¹²

[43] What remains, therefore, in this analysis of CHL, is whether the “buildings, spaces, views, and natural elements on the respective properties are valued together

¹² Using this PPS’s definition, one could certainly argue that the entire NHD is a CHL but that is not a question before the Review Board.

for their interrelationship meaning or association” per the definition above. Note, however, that the definition states that a landscape “may” include such features that are valued together. Since the permissive “may” is used, it must follow that a CHL may not have such features valued together. This makes clear the challenge of using the CHL concept as part of a rigorous OHA analysis. There may be a CHL in these matters but that may only become clear retrospectively when properties have already been evaluated under the OHA.

[44] Given this analytical difficulty, the Review Board, therefore, must step back from the macro analysis of CHL in respect to the properties and specifically examine whether or not the individual properties can qualify for designation under O.Reg. 9/06, s. 3(ii) since the Town raises the CHL issue within the context of that subsection. Put another way, the Review Board must determine whether or not the individual properties are physically or visually linked to one another before answering the question about the existence of the CHL.

[45] In undertaking such an analysis of each individual property, it is important to understand the concept of what “linked” means within the context of this criterion. It is not enough, for example, to say that one property is “linked” to another simply because they are side-by-side. Such a definition, *reductio ad absurdum*, would mean that every property in Ontario could qualify for designation, as a daisy-chain, and this cannot be the intention of the Ontario Legislature. Rather, in the view of the Review Board, to be “linked” within the context of this regulation necessarily means there must be some substantial or important connection between the property and its surroundings that “ensure[s] the attainment of the legislature’s objectives.”¹³ In other words, this important connection must establish CHVI.

[46] To establish that the respective properties have CHVI as a result of O.Reg 9/06, s. 3(ii), it would be necessary for the Town to establish, in the affirmative, that each is:

¹³ Tremblay at para. 15.

- Physically linked; and/or,
- Visually linked

to its surroundings, including the other two properties and that such linkage creates CHVI.

[47] Fundamentally, they are three independent properties that happen to be situated side-by-side and there is no evidence that they were built with any common intention or plan. They are three houses, and so are, at a basic level, functionally linked, but they are houses in a residential area of the Town and that, by itself, is not significant or important. No evidence was provided that these properties were historically linked to their surroundings in a significant or important way. Likewise, while the three respective properties are, no doubt, physically and visually linked to their surroundings, it is difficult to imagine, based on the evidence provided, that such linkage is significant or important in a way that gives rise to CHVI. In this regard, the Review Board prefers the evidence of Mr. Currie. They are three independent properties with varying setbacks that may or may not have been forced upon the individual builders by the existence of a long-forgotten watercourse.

[48] Therefore, based on the evidence presented to it, the Review Board cannot recommend that each property has CHVI by operation of O.Reg 9/06 s. 3(ii) as it has not been shown that the properties are physically and visually linked to each other in ways that creates significant or important CHVI. Yet this does not, of course, negate the other criteria for designation applicable to the properties under the regulation and any criteria under the regulation can establish a CHL. Thus, for planning purposes, it is clear that, given the CHVI in the respective properties, the area constituting the three properties, in accordance with the PPS definition, is a nested CHL.

[49] Despite this finding, the Review Board wishes to signal a note of caution. It is of fundamental importance to remember that the CHL concept is one found in the PPS and not the OHA and, therefore, is not part of a rigorous O.Reg. 9/06 analysis of

property for CHVI. Municipalities must be cautious, when importing the CHL concept into any SCHVI, if such an importation would accidentally create a heritage conservation district, without engaging the procedural protections of Part V of the OHA or unduly prejudice any SCHVI analysis for future change to the property.

Setback

[50] The final question before the Review Board is whether the respective setbacks of the properties constitutes a heritage attribute for each of the properties individually.

[51] The OHA defines a heritage attribute as “in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest...”¹⁴ Once a property is designated, it may not be altered if such alteration would likely affect the property’s heritage attributes.¹⁵

[52] The Review Board has previously noted:

Therefore, on a plain reading of the statute and its regulation and in the context of their relevant provisions, heritage attributes may relate to a part of a property and contribute to its cultural heritage value or interest, as do the architectural design attributes of the house in this case, but the designation of cultural heritage value or interest relates to the whole of a property.¹⁶

[53] The term “attribute” itself is not defined in the OHA. Generally, the Review Board understands the term to mean a feature or some other quality of a building or structure on the respective properties regarded as characteristic or inherent to each of them. Thus, put together, a heritage attribute would be:

- a. A feature, quality or characteristic of the property, or of a building or structure on one of the properties that,

¹⁴ OHA, s. 1.

¹⁵ OHA, s. 33(1).

¹⁶ *Deluca v. Bradford West Gwillimbury (Town)*, 2016 CanLII 33703 at para. 63.

b. Contributes to a property's CHVI.

Note that there is no requirement for such an attribute to be *significant* in itself.

[54] The Review Board has previously examined the issue of setbacks as a heritage attribute in *Deluca, op cit*. In that matter, Mr. Currie, for the Owner/Objector, testified that there was no evidence of a designed landscape on the property in question and that the landscape, having evolved, was not a heritage attribute. Mr. Pruss, the municipality's expert, testified that the setback was a heritage attribute and described it as a "visual setting" for the property. In its recommendation, the Review Board agreed that the property in the matter had CHVI for its architectural design and historic associations. It found, preferring the evidence of Mr. Pruss, that the setback on the property was a heritage attribute.¹⁷

[55] In these matters, each of the properties are set back substantially from Prideaux Street. The parties agree that this was likely due to the existence of a long-disappeared creek and the need to place the homes on the respective properties on the high ground away from that watercourse. The experts for the Town further argue that such placement on the high ground reflected changing cultural norms with setbacks increasing throughout this period. People were moving away from subsistence agriculture and there was less need for outbuildings and more time and funds for ornamenting a property. Views and visual prominence would also be gained by siting the properties at the highest location available.¹⁸

[56] Regardless of the motivation, it would seem that the respective setbacks of the properties are a characteristic of each property. Interestingly, the setback can be both an attribute of an applicable building (where it is located on the property) and an attribute of an applicable property itself (the extinct watercourse altering the use of the property). But does such a characteristic contribute to the respective properties' CHVI?

¹⁷ *Ibid.* at paras. 25, 35 and 53.

¹⁸See *Qureshi, supra* at para. 68 where a heritage landscape architect made a similar observation.

[57] In considering the evidence before it, the Review Board prefers the evidence of the Town's experts. Each of these properties, separately, were built in the 1840s, likely as infill and were placed where they were because of the now extinct watercourse and cultural changes happening at the time. Whether by design, or as a result of the existing topography, the respective setbacks help people to understand each property in respect to both its time and space. Each respective setback, to borrow a phrase from *Deluca, op. cit.*, is part of each property's "visual setting". Part of the story of each of these properties is that they were built in response to the topography and culture around them, which, in turn, supports the character of the area. There are direct associations with the early settlement of the town, the creation of these lots after the devastation of the War of 1812, and the subsequent infill once the water issue was resolved. They are as integral to the understanding of each property as the architectural features of the respective buildings, which have also been identified as attributes and are not in dispute.

[58] Therefore, the Review Board is satisfied, on the evidence before it, that each property's respective setback is a characteristic of each property that contributes to each of the property's individual CHVI.

Summary and Recommendations

[59] Having considered the evidence before it and the submissions of the parties at the Hearing, and for the reasons set forth above, the Review Board recommends that the individual properties be designated under the OHA with the following provisos:

- a. That the concept of a common nested CHL be struck from the SCHVI for each of the properties;
- b. That the concept of a nested CHL not be incorporated into the final lists of heritage attributes of the properties;

- c. That each respective setback of each property be identified as a specific heritage attribute applicable thereto. The unique setback measurement for each should be identified in each of the respective property's list of heritage attributes.

- d. As a result of the OHA designation, the properties may, for planning purposes, constitute a nested CHL.

"Daniel Nelson"

DANIEL NELSON
MEMBER

If there is an attachment referred to in this document,
please visit www.olt.gov.on.ca to view the attachment in PDF format.

Conservation Review Board

A constituent tribunal of Ontario Land Tribunals

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Appendix 1

Hearing Exhibit List

Exhibit #	Nature of Exhibit and description	Filed By:
1	CRB Notice Email to Parties	CRB
2	Notice of Hearing Affidavit	Municipality
3	Denise Horne Witness Statement	Municipality
4	CHER Report, 27 Prideau	Municipality
5	CHER Report, 21 Prideau	Municipality
6	CHER Report, 31 Prideau	Municipality
7	Photo Book (in lieu of site visit)	Joint

8	Letourneau Witness Statement	Municipality
9	Bray Witness Statement	Municipality
10	Owner/Objector Document Book, Volumes 1 & 2	Owner/Objector

Appendix 2

Ontario Heritage Act, Designation of Properties by Municipalities

Definitions

1. In this Act,

“heritage attributes” means, in relation to real property, and to the buildings and structures on the real property, the attributes of the property, buildings and structures that contribute to their cultural heritage value or interest:

Designation by municipal by-law

29.(1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,

- (a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
- (b) the designation is made in accordance with the process set out in this section.

29.(14) After considering the report under subsection (12), the council, without a further hearing,

- (a) shall,
 - (i) pass a by-law designating the property,
 - (ii) cause a copy of the by-law, together with a statement explaining the cultural heritage value or interest of the property and a description of the heritage attributes of the property,
 - (A) to be served on the owner of the property and on the Trust, and
 - (B) to be registered against the property affected in the proper land registry office, and
 - (iii) publish notice of the by-law in a newspaper having general circulation in the municipality; or
- (b) shall withdraw the notice of intention to designate the property by causing a notice of withdrawal,
 - (i) to be served on the owner of the property and on the Trust, and

- (ii) to be published in a newspaper having general circulation in the municipality.

Ontario Regulation 9/06 – Criteria for Determining Cultural Heritage Value or Interest

1.(1) The criteria set out in subsection (2) are prescribed for the purposes of clause 29(1)(a) of the Act.

1.(2) A property may be designated under section 29 of the Act if it meets one or more of the following criteria for determining whether it is of cultural heritage value or interest:

Design or Physical value

1. The property has design value or physical value because it,
 - i. is a rare, unique, representative or early example of a style, type, expression, material or construction method,
 - ii. displays a high degree of craftsmanship or artistic merit, or
 - iii. demonstrates a high degree of technical or scientific achievement.

Historical or Associative Value

2. The property has historical value or associative value because it,
 - i. has direct associations with a theme, event, belief, person, activity, organization or institution that is significant to a community,
 - ii. yields, or has the potential to yield, information that contributes to an understanding of a community or culture, or
 - iii. demonstrates or reflects the work or ideas of an architect, artist, builder, designer or theorist who is significant to a community.

Contextual Value

3. The property has contextual value because it,
 - i. is important in defining, maintaining or supporting the character of an area,
 - ii. is physically, functionally, visually or historically linked to its surroundings, or
 - iii. is a landmark.

Appendix 3

Provincial Policy Statement, 2020

1.7.1 Long-term economic prosperity should be supported by...encouraging a sense of place, by promoting well-designed built form and cultural planning, and by conserving features that help define character, including built heritage resources and cultural heritage landscapes...

2.6.1 Significant built heritage resources and significant cultural heritage landscapes shall be conserved.

2.6.3 Planning authorities shall not permit development and site alteration on adjacent lands to protected heritage property except where the proposed development and site alteration has been evaluated and it has been demonstrated that the heritage attributes of the protected heritage property will be conserved.

6.0: Definitions

Conserved: means the identification, protection, management and use of built heritage resources, cultural heritage landscapes and archaeological resources in a manner that ensures their cultural heritage value or interest is retained. This may be achieved by the implementation of recommendations set out in a conservation plan, archaeological assessment, and/or heritage impact assessment that has been approved, accepted or adopted by the relevant planning authority and/or decision-maker. Mitigative measures and/or alternative development approaches can be included in these plans and assessments.

Cultural heritage landscape: means a defined geographical area that may have been modified by human activity and is identified as having cultural heritage value or interest by a community, including an Indigenous community. The area may include features such as buildings, structures, spaces, views, archaeological sites or natural elements that are valued together for their interrelationship, meaning or association. Cultural heritage landscapes may be properties that have been determined to have cultural heritage value or interest under the Ontario Heritage Act, or have been included on federal and/or international registers, and/or protected through official plan, zoning by-law, or other land use planning mechanisms.

Heritage attributes: means the principal features or elements that contribute to a protected heritage property's cultural heritage value or interest, and may include the property's built, constructed, or manufactured elements, as well as natural landforms, vegetation, water features, and its visual setting (e.g. significant views or vistas to or from a protected heritage property).

Significant: means...in regard to cultural heritage and archaeology, resources that have been determined to have cultural heritage value or interest. Processes and criteria for determining cultural heritage value or interest are established by the Province under the authority of the Ontario Heritage Act.