Municipal Heritage Conservation’s Legal Toolbox: Comparative Approaches to Heritage Preservation and Conservation Easement, Covenants, and Trusts

Sara Gwendolyn Ross

Killam Laureate, SSHRC Postdoctoral Research Fellow, and Instructor | Peter A. Allard School of Law, University of British Columbia

Contact: [sross@allard.ubc.ca](mailto:sross@allard.ubc.ca)

Spaces, places, and properties are deemed to be of heritage value for a variety of reasons, and heritage value determinations, both in terms of process and result, take on different shapes depending on the context and the legal system within which the heritage asset is located. International legal frameworks and global standard setting action blueprints for the sustainable development and preservation of culture and cultural heritage in cities, such as UN-Habitat’s *New Urban Agenda*, express the importance of heritage considerations in better accounting for the human right to culture in the city. But, while international frameworks of this kind express a commitment to the need for developing sustainable heritage preservation infrastructures, at the local municipal level, once heritage value is ascertained, the challenge becomes a matter of what to do next. What are the legal mechanisms available to ensure the successful and sustainable preservation of the heritage asset? This paper is primarily concerned with the latter, and comparing these mechanisms between different national and provincial jurisdictions.

Various legal tools have been applied with varying success, and while there have been many different approaches taken by states and municipalities for the preservation of urban heritage spaces, some common themes can be drawn out. Notably, the effectiveness of frequently used protection tools such as heritage designation and listing do not tend to provide enough protection to avoid demolition or the harmful alteration or neglect of the heritage assets of a space or property in question. One key problem identified in this context is the difficulty in balancing the public and private interests implicated in heritage preservation decisions, strategies, and aspirations. Where initial heritage preservation goals and decisions are usually generated for the greater interest of the public or the “public good”, the effects of these heritage preservation decisions ultimately engage the private interests bound up in a property or space once the property or space in question is deemed to be of heritage value. Here, the identification and designation of a heritage asset can entail additional financial costs, time consuming obligations, and so on, for the owner, operator, and/or occupant of a property.

As such, compensation, or incentivization, for the property owner, operator, or occupant becomes a relevant concern in designing effective legal frameworks for heritage preservation that mitigate potential views of the heritage asset as a burden, and in order to ensure that the heritage asset is preserved and is not harmfully altered, neglected, or demolished. While addressing these basic elements of compensation, incentivization, and exchange may exist in some form amongst different jurisdictions, they can take on different forms. One loosely categorized form, however, that has a history of use in number of countries, such as the US, and that is gaining traction in others, such as Canada and Australia, is the heritage easement agreement (or, heritage covenant) as a servitude for a public purpose that often provides for property tax incentives or grants when the property owner enters into the heritage easement agreement with a municipality, heritage trust, or non-profit organization.

As a creature of statute, the heritage easement form can exist despite key missing elements that would normally preclude the formation of a common law easement or a servitude in civil law—such as the non-neighbour, non-property owner identity of the immovable dominant property/party and the lack of a benefit accruing to the dominant party. This paper will examine the heritage easement form as it is applied in Canada’s common law provinces and civil law province of Quebec, and will do this within the larger comparative context of the use of this kind of legal tool for heritage protection, in order to consider strategies for increased local engagement with the goals for sustainable cultural heritage considerations and infrastructure as called for by UN-Habitat’s *New Urban Agenda*.

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