# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Halifax (Regional Municipality) v. Dalhousie University*, 2025 NSCA 33

**Date:** 20250516
**Docket:** CA 529885
**Registry:** Halifax

**Between:**

Halifax Regional Municipality

Appellant

v.

Dalhousie University and Halifax University Neighbourhood Association, an unincorporated association represented by Peggy Walt and William Breckenridge

Respondents

and

Heritage Trust of Nova Scotia

Intervenor

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| **Judges:** | Farrar, Bryson, Van den Eynden, JJ.A. |
| **Appeal Heard:** | October 10, 2024, in Halifax, Nova Scotia |
| **Facts:** | Dalhousie University acquired a residential property in Halifax with plans to demolish the existing house. The Halifax Regional Municipality (HRM), acting on a recommendation from the Heritage Advisory Committee (HAC), registered the property as a municipal heritage property under the *Heritage Property Act*. Dalhousie objected, claiming procedural unfairness, bias, and unreasonableness in the decision-making process (paras 2-3, 18-20). |

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| **Procedural History:** | Nova Scotia Supreme Court, 2023 NSSC 374: The court quashed HRM's decision to register the property as a heritage site, agreeing with Dalhousie's claims of procedural unfairness, bias and that the decision was unreasonable. (paras 4-5, 72). |
| **Parties' Submissions:** | Appellant (HRM): Argued that the reviewing judge made errors in applying the standard of review and that the decision to register the property was reasonable and the process was procedurally fair and unbiased. (para 5).<br><br>Respondent (Dalhousie University): Claimed procedural unfairness, bias, and unreasonableness in the decision to register the property as a heritage site, arguing that the reviewing judge's decision was correct (paras 3, 64).<br><br>Intervenor (Heritage Trust of Nova Scotia): Supported HRM's position, arguing that the public interest in heritage preservation was not properly considered by the reviewing judge (para 5). |
| **Legal Issues:** | Was Council's decision procedurally fair?<br><br>Was Council's decision tainted by bias?<br><br>Did Council's decision fall within a range of reasonable outcomes?<br><br>Did the reviewing judge err in determining there was no authority for third-party applications under the *Heritage Property Act*? |
| **Disposition:** | The appeal was allowed, and HRM's decision to register the property as a heritage site was restored (para 8, 186).<br><br>The costs awarded to Dalhousie in the lower court were reversed, and costs on appeal were awarded to HRM (paras 8, 187-188). |
| **Reasons:** | Procedural Fairness: The Court found that the Council hearing was procedurally fair. Dalhousie had a fair opportunity to present its case, and any procedural shortcomings at the HAC level were remedied at the Council hearing (paras 102-123, 123, 129). |

Bias: The Court determined that there was no reasonable apprehension of bias at the Council level. The comments and conduct of Councillors, when viewed in context, did not demonstrate bias against Dalhousie (para170).

Reasonableness: The decision to register the property fell within a range of reasonable outcomes. The Council's decision was supported by the record and aligned with the statutory framework (para 184).

Third-Party Applications: The reviewing judge's determination on the lack of authority for third-party applications was deemed irrelevant and of no precedential value (para 185).

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| **Judges:** | Farrar, Bryson, Van den Eynden, JJ.A. |
| **Appeal Heard:** | October 10, 2024, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed with costs per reasons for judgment of Van den Eynden, J.A.; Bryson and Farrar, JJ.A., concurring |
| **Counsel:** | Randolph Kinghorne and William Hatfield, for the appellant<br>Peter Rogers, K.C. and Andrew Kinley, for the respondent Dalhousie University<br>Halifax University Neighbourhood Association, respondent, not participating<br>Ronald Pink, K.C. and Sophie Pineau, for the intervenor |

**Reasons for judgment:**

## Overview

[1] This appeal arises from a judicial review proceeding Dalhousie University ("Dalhousie") brought against the Halifax Regional Municipality ("HRM") in the Nova Scotia Supreme Court.

[2] Dalhousie acquired a residential property and over its objection, HRM Council ("Council"),[1] acting on a recommendation from the Heritage Advisory Committee (the "HAC"),[2] registered the property as a municipal heritage property pursuant to the provisions of the *Heritage Property Act.*[3]

[3] Dalhousie sought a judicial review of Council's decision with the objective of quashing it. Dalhousie claimed it was denied procedural fairness, the decision-making process was marred by bias and the decision itself was unreasonable.

[4] Justice Peter Rosinski (the "reviewing judge") heard the judicial review application. He agreed with Dalhousie's position, quashed Council's decision, and ordered the property be removed from the municipal registry of heritage properties.

[5] HRM appeals, asserting the reviewing judge made a number of errors and asks this Court to intervene and restore Council's decision. The Heritage Trust of Nova Scotia ("Heritage Trust") was granted intervenor status in this appeal. Heritage Trust also claims the reviewing judge erred and supports similar relief.

[6] On an appeal from a judicial review, this Court's task is to determine whether the reviewing judge: (1) correctly identified; and then, (2) correctly applied the standard of review to the administrative decision. In effect, this Court steps into the shoes of the reviewing judge and reviews the administrative decision afresh.

[7] Although the reviewing judge correctly identified the standard of review that guided his task, for the reasons that follow I have determined he erred in his application of the standard. That error led the reviewing judge to incorrectly

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[1] Council is the decision-making body of HRM. See *Halifax Regional Municipal Charter,* S.N.S. 2008, c. 39, at s. 8(1) ["HRM *Charter*"].

[2] The HAC is comprised of two members of HRM Council and ten volunteer members from the community as per Halifax Regional Municipality, by-law No H-200, *Heritage Property By-law* (1996) at s. 3(2) [By-law H-200].

[3] R.S.N.S. 1989, c. 199.

conclude Dalhousie did not receive the requisite level of procedural fairness, the decision was tainted by bias, and Council's decision to register the property did not fall within a range of reasonable outcomes.

[8] Accordingly, I would allow the appeal and restore Council's decision. I would reverse the $7,500 in costs awarded below meaning that amount is now payable by Dalhousie to HRM. I would award costs on appeal, payable by Dalhousie to HRM, in the amount of $1,500 inclusive of disbursements.

[9] My reasons follow beginning with: (1) framing the issues to be decided on appeal; (2) setting out the necessary background; (3) summarizing the reviewing judge's errors; and then (4) my analysis of whether Council's decision was tainted by bias, was procedurally unfair or was otherwise substantively unreasonable.

**Issues**

[10] HRM's Notice of Appeal raised 38 grounds of appeal. They were refined considerably in its factum.

[11] Each of the parties set out the issues differently in their respective facta. I would frame the issues to be determined as follow:

1. Was Council's decision procedurally fair?
2. Was Council's decision tainted by bias?
3. If Council's decision was not tainted by bias and/or was not procedurally unfair, did it fall within a range of reasonable outcomes?
4. Did the reviewing judge err in determining there was no authority for third-party applications under the *Heritage Property Act*?

[12] When considering the first two issues, I will address Dalhousie's complaints that it was denied procedural fairness before the HAC and that the HAC members acted in a partial manner against Dalhousie's interests.

[13] This Court's order granting Intervenor status to Heritage Trust permitted submissions on:

i. The role of public interest groups and "third-party heritage registration applicants" in the *Heritage Property Act*, […] heritage registration process;

ii. Third-party applications and the contributions of public interest groups are effective means for advancing the purposes of the *Heritage Property Act* […] which informs this Court's determination of the Legislature's intention and its application to the facts of this case.

[14] The fourth issue on appeal is of particular concern to Heritage Trust:

> The Reviewing Court was not asked to determine whether there was authority under the [*Heritage Property Act*] for third-party applications, and the Intervenor submits that the Reviewing Court erred in doing so. While the Reviewing Court's conclusion on this point was obiter, it sets a problematic precedent and risks upending the heritage registration processes that have been operating successfully for over 40 years.[4]

[15] The standard of review for the above issues is discussed in my analysis of them.

## Background

[16] Council did not provide reasons for its decision to register Dalhousie's property in the municipal heritage registry. However, the parties agree that Council was not required to provide written reasons given the format of its adjudication of the matter. In particular, the hearing was conducted by Council during one of its regularly-scheduled meetings. This process accorded with Council's established practice. Council received evidence and submissions, debated the matter, and then voted. A majority of Councillors—thirteen—voted in favour of registration; four voted against.

[17] Given there are no written reasons for this Court to review, the record is of particular importance when assessing the issues on appeal. To situate the issues, the following background will assist. Some detail is required.

[18] Dalhousie purchased a residential lot (1245 Edward Street) in Halifax on July 30, 2021 (the "property"). On the lot is a house built in 1897 (the "house"). The property was not subject to any heritage designation at the time of Dalhousie's purchase.

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[4] Intervenor factum at para. 43.

[19] Dalhousie had no immediate or short-term plans to develop the property. The property is beside an apartment building Dalhousie also owns. Dalhousie made clear that it intended to demolish the house and may develop the property in the future; however, for what purpose had not been decided.

[20] Dalhousie viewed the house to be in a poor condition and not economically viable to maintain. It applied to HRM for a demolition permit on May 2, 2022, and had begun to clear out the interior of the house in anticipation of receiving the requested permit.

[21] The Halifax University Neighborhood Association[5] ("HUNA"), an unincorporated association, learned of Dalhousie's intention to demolish the house. On May 9, 2022, it made an application under the *Heritage Property Act* to have the property registered as a heritage property. Members of HUNA provided a petition to HRM, with approximately 5,700 signatures of individuals supporting a request that Dalhousie halt the proposed demolition of the house.

[22] HRM has a long-standing and well-established process for the submission of applications under the *Heritage Property Act*. In short, applicants, including third-parties, must:

- Complete the prescribed application form for heritage registration;
- Provide a detailed summary of the history, heritage value of the property and the basis upon which the applicant believes it should be considered for heritage registration; and
- Provide a deed description of the property, a site plan showing the area proposed for heritage registration, and photographs of the building and property.

[23] Once an application is submitted, HRM heritage staff reviews the application for completeness. Should the application qualify for consideration, staff then prepare a report to the HAC to assist in its evaluation, as happened in this case.

[24] HUNA did not provide a copy of its heritage application to Dalhousie. There is no requirement to do so under the *Heritage Property Act.* Nor is there a

[5] HUNA (represented by Peggy Walt and William Breckenridge) was named as a respondent in the judicial review. However, HUNA did not participate in the hearing before HRM Council, the judicial review proceeding nor the appeal.

legislative requirement for HRM to advise Dalhousie that a third-party application has been received or is under review.

[25] However, notice rights change should the HAC recommend that a property be registered. The Legislature enacted express provisions that require a property owner to be notified of HAC's recommendation and their right to participate in the subsequent Council hearing where registration is decided. The *Act* stipulates:

> 14 (1) A heritage advisory committee may recommend to the municipality that a building, public-building interior, streetscape, cultural landscape or area be registered as a municipal heritage property in the municipal registry of heritage property.
>
> (2) **The municipality shall cause notice of the recommendation to be served upon each registered owner of the building**, public-building interior, streetscape, cultural landscape or area that is the subject of the recommendation at least thirty days prior to registration of the building, public-building interior, streetscape, cultural landscape or area in the municipal registry of heritage property.
>
> (3) The notice shall contain
>
> (a) a statement that the building, public-building interior, streetscape, cultural landscape or area described in the notice has been recommended for registration in the municipal registry of heritage property;
>
> (b) a brief statement of the reasons for the recommendation;
>
> (c) a summary of the consequences of registration;
>
> (d) a statement that no person shall substantially alter the exterior appearance of or demolish the building, public-building interior, streetscape, cultural landscape or area for one hundred and twenty days after the notice is served unless the municipality sooner refuses to register the property; and
>
> (e) **notification of the right of the owner to be heard and of the time and place for the hearing**.
>
> [emphasis added]

[26] Although not a legislative requirement, HRM staff did, by letter dated June 14, 2022, notify Dalhousie that it had received an application to register the property. The letter stated:

> Please accept this letter as confirmation that I am in receipt of an application, received on May 9th, 2022, to consider the inclusion of the property owned by

> Dalhousie University at 1245 Edward Street, Halifax, in the Registry of Heritage Property for the Halifax Regional Municipality. The application is currently under review by staff. You will be notified when the review is complete and updated regarding anticipated timelines for the application.

[27] HRM's letter did not identify the applicant nor enclose a copy of the application. While HRM staff could have done this, there was no legislative requirement to do so. However, Dalhousie obtained a copy of HUNA's application thorough its own initiatives.

[28] One week later, on June 22, 2022, at a regularly-scheduled HAC meeting, committee members were advised that HUNA's heritage application was being processed and it would come before them for consideration at its next scheduled meeting on July 27, 2022. Item 7.2.1 of the meeting minutes state:

> The Clerk submitted a petition from Peggy Walt, signed with approximately 5700 individuals asking Dalhousie to halt the proposed demolition of 1245 Edward Street, Halifax.
>
> Aaron Murnaghan, Principal Heritage Planner, provided the Committee with a summary of the status of this property. A demolition permit has been requested and is being finalized. A Third-Party Heritage Application is being processed and will be considered at next meeting of this committee in July. If the application is approved the property would be protected by the act for 90 [*sic*] days.

[29] The reference to "protected by the act for 90 days" relates to s. 14(4) of the *Heritage Property Act*. In the event of a recommendation from the HAC to Council that the property be registered, s. 14(4) imposes a 120-day, not 90-day, restriction on Dalhousie's ability to substantially alter the exterior appearance of or demolish the house:

> 14(4) No person shall substantially alter the exterior appearance of or demolish a building, […] for one hundred and twenty days after a notice respecting the building, […] has been served pursuant to subsection (2) except in those cases where, prior to the expiration of one hundred and twenty days, the municipality refuses to register the property.

[30] As HUNA's heritage application was not scheduled to come before the HAC until July 27, it was concerned the house might be demolished in the interim.

[31] On July 11, 2022, HUNA pressed HRM to convene an earlier meeting of the HAC, and one was scheduled for July 15, 2022. Dalhousie learned of the requested date change through one of its employees who was an HAC member.[6]

[32] On July 14, 2022—the day before the HAC was scheduled to meet—HRM issued a demolition permit to Dalhousie.

[33] The record does not indicate that HRM otherwise notified Dalhousie of the date and time of HAC's expedited meeting. In the normal course, the dates and times of HAC meetings are made available to the public. There is no legislative requirement for HRM and/or the HAC to directly provide an HAC meeting notice to a property owner.

[34] Once Dalhousie became aware of the pending HAC expedited meeting it made several inquiries to HRM asking for permission to make a presentation to the committee. HAC meetings are open to the public;[7] however, as a matter of practice, the HAC does not make allowance for external presentations at its meetings. Dalhousie's request to present to the HAC was denied. However, Dalhousie was permitted to file written submissions, which it did.

[35] Although short of the lead time it preferred, Dalhousie was able to provide the HAC with a written submission from its external legal counsel (Mr. Rogers, the same counsel on appeal), an engineering report, and a video of the house. The engineering report Dalhousie submitted to the HAC focused on the condition of the house and its economic viability as a continuing structure.

[36] In Dalhousie's written submissions to the HAC, it expressed these process concerns:

> […] Dalhousie University strongly objects to the manner and timing by which this application has been brought forward. There have been years to consider the heritage attributes of this building and to seek to have the property registered. It appears, only once it became known that Dalhousie University was undertaking work on the site, and once it became known that Dalhousie had applied for a demolition permit, that HRM has taken extraordinary steps to ensure that Dalhousie's demolition permit (granted on July 14) could be rendered ineffective by accelerating the Committee's meeting date from July 27 to July 15.

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[6] During the July 15th meeting, this employee declared a conflict and recused herself from the consideration of Dalhousie's property.
[7] See By-law H-200 at s. 5(4).

> On July 14, 2022, the day before the accelerated meeting date, Dalhousie was advised that it could not make a presentation to the Committee, but could make written submissions, and was provided a copy of the staff report by HRM for the first time.
>
> While Dalhousie respects HRM'S Heritage Bylaw and Committee, the University does not believe this process has been fair. This submission and the attached report from Capital Management Engineering Limited have been prepared under unreasonable deadlines, and are substantively deficient in consequence of that. While we fully understand that there is a subsequent opportunity to present to Council before Municipal Heritage Registration occurs, the process to achieve a fair and impartial Advisory Committee Report by effective submissions to the heritage advisors selected by the Municipality has quite likely been lost forever.

[37] Approximately an hour before the meeting convened, HRM staff circulated Dalhousie's materials to the HAC committee members. Thus, HAC committee members did not have a lot of time to review and digest all the materials Dalhousie submitted. In fact, during the meeting one committee member indicated that he had not looked at some of Dalhousie's materials, in particular, the video Dalhousie had provided respecting the condition of the house. However, during the meeting another committee member spoke of its contents.

[38] The July 15, 2022 expedited HAC meeting was conducted remotely with participants joining via Zoom. An audio-video recording of the meeting is included in the record.

[39] The HAC's task was to consider whether to make a recommendation to Council respecting the potential heritage registration of Dalhousie's property. HAC's role, as prescribed in ss. 13 and 14 of the *Heritage Property Act*, includes advising and making recommendations to Council with respect to heritage property registration. The HAC cannot and does not decide whether to register a heritage property. That decision is the sole domain of Council.

[40] Dalhousie's was concerned with the physical deterioration of the house and the cost effectiveness of maintaining it. In contrast, the governing scoring criteria the HAC applies when assessing heritage value expressly excludes any consideration of "the state of the building's condition".[8]

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[8] Halifax Regional Municipality, Heritage Property Program, *Evaluation Criteria for Registration of Heritage Buildings* (2013) ["*Evaluation Criteria"*].

[41] The heritage evaluation and scoring criteria used by the HAC is well-established, and available to the public. The criteria direct the HAC to focus on the extent to which a building retains original features, structures, and styles—not the building's condition.

[42] The criteria HAC employed are not in dispute. When the HAC evaluated Dalhousie's property pursuant to the criteria, the committee was required and did consider, the following attributes:

(1) Age (maximum score 25);

(2) Historical importance (maximum score 20);

(3) Significance of the architect or builder (maximum score 10);

(4A) Architectural merit: Construction type (maximum score 10);

(4B) Architectural merit: Style (maximum score 10);

(5) Architectural integrity (maximum score 15); and

(6) Relationship to the surrounding area (maximum score 10).

[43] Each of these categories have sub-set criteria the HAC evaluates. In order for the HAC to make a heritage registry recommendation to Council, the minimum required score is 50 out of a maximum score of 100.[9]

[44] A review of the July 15 HAC meeting recording confirms committee members were aware of Dalhousie's submissions. It also confirms committee members were mindful of the established criteria they were to employ in their heritage value assessment. It is further evident the participating members were engaged in their task and had a respectful discussion and debate.

[45] Under its governing criteria, the HAC reached the following score:

| Heritage Criteria | | Highest Possible Score | HAC Score |
|---|---|---|---|
| 1. | Age | 25 | 13 |
| 2. | Historical Importance | 20 | 13 |
| 3. | Significance of Builder/Architect | 10 | 1 |
| 4A. | Architectural Merit: Construction Type | 10 | 5 |

[9] *Evaluation Criteria*.

| | | | |
|---|---|---|---|
| 4B. | Architectural Merit: Style | 10 | 9 |
| 5. | Architectural Integrity | 15 | 14 |
| 6. | Relationship to Surrounding Area | 10 | 9 |
| | Total Score | 100 | 64 |

[46] Given the HAC scoring was greater than 50, it exercised its discretion under s. 14(1) of the *Heritage Protection Act* to recommend to Council that the property be registered as a municipal heritage property.

[47] Then, as required by s. 14(2) of the *Act,* HRM sent a formal notice to Dalhousie advising it of the hearing date before Council on October 18, 2022 and Dalhousie's participatory right. The notice also detailed HAC's rationale for recommending heritage registration. The hearing was subsequently conducted by Council during a regularly-scheduled Council meeting.

[48] The Council hearing is not an appeal. Council need not determine that the HAC erred in its heritage value assessment. Nor is Council constrained by the evaluation criteria HAC employs. Although Council considers HAC's recommendation, it can, and based on the record, did consider other information as well.

[49] The standard time allotted to make oral submissions before Council is 10 minutes.[10] Prior to the hearing, Dalhousie requested an additional 10 minutes. The request was not approved; however, no limit was placed on Dalhousie's ability to make written submissions. Prior to the hearing, Dalhousie provided Council with:

1) Submissions explaining its opposition to registration;
2) An architectural report, authored by Mr. White, who was retained by Dalhousie. Mr. White opined, among other things, that HAC's heritage scoring was too high and proposed a revised heritage score of 32 – which fell below the cut-off level of 50 needed for the HAC to make a heritage registration recommendation to Council;
3) The engineering report that was provided to the HAC respecting the condition of the house; and
4) A slide show presentation.

[10] See Halifax Regional Municipality, Administrative Order Number One, Procedures of the Council Administrative Order (2024) at s. 45(1)(d) ["Administrative Order One"].

[50] HRM staff also provided written materials to Council and Dalhousie in advance of the hearing, which included a slide show presentation from HRM staff.[11]

[51] The record before this Court includes an audio-video recording of the Council hearing.[12] Dalhousie utilized its 10-minute oral presentation limit and was afforded additional time during the hearing to respond to Council member questioning.

[52] As mentioned earlier, Council decided, by majority vote, to include the property in the municipal heritage registry without providing written reasons. However, Council prepared minutes of its meeting which include this abbreviated summary of Dalhousie's submissions:

> **Gitta Kulczycki, Vice President Finance and Administration, Dalhousie University, Laura Hynes Jenkins, Director of Government Relations, Dalhousie University and Peter Rogers, McInnes Cooper** gave a presentation on Case H00539. Kulczycki, Hynes and Rogers responded to questions of clarification from Regional Council. Rogers suggested that the heritage registration application was more appropriate earlier in the demolition application process. Kulczycki confirmed the property owner does not have immediate plans for the property's use. Rogers clarified the reasons why the property owner's heritage architect scored the property's heritage value below the threshold for heritage registration. Rogers indicated that the engineer's report states the property is a failed structure and that the property owner believes that the property is not viable.

And this brief summary of the responses to questions posed by Council:

> **McGreal and Aaron Murnaghan, Principal Planner, Heritage Property Program** responded to questions of clarification from Regional Council. McGreal confirmed the architectural significance of the property's Victorian eclectic style and explained that the scoring differences of the property's heritage value was due to HRM staff and the property owner's heritage architect using different heritage assessment standards. It was further clarified that the Heritage Property Act focuses on the exterior of a property to evaluate heritage registration and that the property is one of the oldest houses on Edward Street.

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[11] The third-party application from HUNA and supporting materials was not formally placed before Council. As a matter of HRM practice, external application documents are not placed before either the HAC or Council. As described earlier, HRM heritage staff determine which properties are to be considered by the HAC. If an application passes screening, staff prepare a report to the HAC.

[12] See Appeal Book, Volume II, at page 619.

[53] Finally the minutes provide this summary:

> Regional Council stated that the Heritage Property Act allows for third party heritage property registration, recognized that the third party heritage property registration process could be improved, indicated that the property's exterior possesses significant architectural style and value that contributes to Halifax's built heritage, recognized that the Heritage Advisory Committee's scoring of the property's heritage value was above the threshold required for registration, indicated concerns about the property owner's lack of plans to use the property and encouraged the property owner to consider restoration and adaptive reuse of the property to preserve its' (sic) heritage architecture.

[54] In my analysis of the procedural fairness and bias issues, I will elaborate on Dalhousie's concerns regarding its interactions with the HAC and Council.

## The reviewing judge's decision

[55] As identified in *United Food and Commercial Workers Union Canada, Local 864 v. Sproule Lumber*, 2024 NSCA 27:

> [35] The standard of review on an appeal from a judicial review is correctness. This means the reviewing judge must correctly identify and apply the standard of review to the administrative decision. The appellate court steps into the shoes of the lower court and conducts its own review of the administrative decision. The focus is on this decision and not the judicial review [citing *Paladin Security Group Limited v. Canadian Union of Public Employees*, Local 5479, 2023 NSCA 86 at para. 37].

[56] While the role of this Court is to step into the shoes of the reviewing judge and review Council's decision afresh, I will explain my finding that the reviewing judge erred in his application of the standard to be applied when a court judicially reviews an administrative decision. The parties made extensive submissions respecting whether the reviewing judge erred. It is appropriate to summarize my reasons for finding error.

[57] The reviewing judge's decision is reported at 2023 NSSC 374. It is lengthy (140 pages) and contains 120 footnotes, many of which are very extensive. Substantive aspects of the reviewing judge's reasoning path are embedded in numerous footnotes. As an aside, embedding substantive reasoning in a footnote, particularly in this extensive manner, is not an ideal practice as it can make the reasoning path more challenging to identify and follow. And, as a general statement, it detracts from readability.

[58] The reviewing judge acknowledged Council was obliged to consider the heritage value of the property; however, he determined Council fell short in its consideration of other matters. The reviewing judge said:

> [31] I conclude that HRM Council was required to seriously consider, but did not reasonably do so [see also the videotape and Minutes of October 18, 2022]:
>
> **a)** the purpose for which Dalhousie acquired the property/the proposed use of its property (at the time of the October 18, 2022, HRM Council meeting); and
>
> **b)** the "vitality" of the building;
>
> **c)** together with the "heritage value" of the building at 1245 Edward Street.

[59] It is clear from the decision that the "purpose" and "proposed use" the reviewing judge referred to was Dalhousie's immediate demolition plan. And "vitality" focused on Dalhousie submissions that the costs of preserving the house was prohibitive.

[60] The reviewing judge was concerned with a possible "constructive taking" of Dalhousie's property by HRM—an issue neither party had raised as relevant nor asked the judge to adjudicate.

[61] In responding to the reviewing judge's request for submissions on "constructive taking", counsel for HRM wrote:

> HRM would disagree that constructive taking is a relevant issue on this judicial review. As a starting point, a judicial review is a consideration of the reasonableness of the decision of the tribunal based on the information and submissions that were placed before the tribunal. This is made clear in *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7, at paragraph 52:[13]
>
> > ... Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew.
>
> In the present case no one raised this issue of what was previously called a de facto expropriation before the Council, so it is not an issue that would appropriately be a subject of judicial review.

[13] HRM misattributes this passage. It is found in *Sorflaten*, but at para. 9, not 52. It is not a quote attributable to the justice in that case, but rather part of an excerpt from the text: Sara Blake, *Administrative Law in Canada*, 5th ed., (Toronto: LexisNexis, 2011).

[62] Counsel for HRM went on to say:

> […] While the [*Heritage Property Act*] regulates demolition/substantial alternation [*sic*] of the exterior of the building, it does not, per se, impose any restrictions on the uses of the property or the building. Further these limitations are only temporary in nature. In any event, if a constructive taking has occurred, that would only result in the ability to claim damages - not to set aside the municipal registration on that basis. Such a claim by the property owner would not be an appropriate component of this judicial review application.

[63] Nevertheless, the reviewing judge adjudicated the issue. There are many paragraphs and footnotes in his decision that demonstrate the prominence and influence "constructive taking" had on the outcome in the court below. It is unnecessary to review them all; however, I reference these three paragraphs and footnote 36 which is attached to para. 91:

> [91] In my view, the designation 1245 Edward Street as a municipal Heritage Property, is in law, or at the very least closely approaches to, a constructive "taking" by the State (HRM) of private property owned by Dalhousie.
>
> [92] HRM acquired "an advantage" by designating the property a Heritage Property. It was acting in furtherance of its objective of preserving properties which it assesses as worthy of the municipal "Heritage" designation.
>
> […]
>
> [96] This substantial interference, which arguably amounts to a constructive taking of the property by HRM from Dalhousie, is **most relevant here to the analysis of whether there was a defensible reasonable basis for this outcome, and whether there were correspondingly calibrated levels of procedural fairness in place.**
>
> [emphasis added]
>
> [Fn] 36 […] in my view, the reasoning in [*Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36] has relevance to this judicial review because the proper characterization of the nature of the decision taken by HRM (a "near", or "full" constructive taking) informs the analysis required in this judicial review; namely, whether the outcome was substantively a reasonable one, and whether there was a sufficient level of procedural fairness afforded to Dalhousie. I also bear in mind Dalhousie's position, set out in its May 15, 2023, letter at para. 7: "This case is prototypical of the proposition that unfair process often leads to an unreasonable outcome".

[64] In its submissions to this Court, Dalhousie did not defend the reviewing judge's analysis of whether a "constructive taking" was correct in law. Rather,

Dalhousie simply echoed its position in the court below which, in short, was that the Supreme Court of Canada's decision in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 recognizes the importance of property rights which in turn should inform the analysis of what procedural fairness rights were owed to Dalhousie in this matter.

[65] The reviewing judge raised another issue—whether a third-party (in this case HUNA) had standing to submit a heritage application to HRM. No party raised, let alone hinted, this was relevant to the judicial review application. Nevertheless, after the judicial review hearing the judge wrote to counsel and asked they address the standing issue.

[66] In part, HRM's reply letter said:

> […] the [*Heritage Property Act*] is silent on how a property gets before the HAC to consider for a recommendation, and there is nothing in the [*Act*] that precludes a property owner or third party applicant. On its face the [*Act*] only seems to authorize the HAC on its own initiative to identify and make recommendations. […] If the absence of express authority to seek [*Act*] registration was determinative of the matter, then there could never be any registration [based on] the request of the Council, the property owner or anyone else. HRM has reasonably interpreted the [Act] otherwise. […]
>
> Under the HRM interpretation the practice has fallen into place over many years that the HAC will consider the appropriateness for registration of properties identified by HRM staff, the property owners, and anyone else who comes forward. There has never been any suggestion of a lack of bona fides on the part of those presenting their requests.

[67] Dalhousie's response letter, for the first time, suggested the issue of standing had some relevance:

> […] Dalhousie does not dispute that a property owner likely has standing to request registration. The standing of any other member of the public to do so is not, however, at all obvious.
>
> […] Our conclusion is that the [*Act*] and the applicable HRM bylaw do not provide standing for third parties to make applications for registering someone else's property. Otherwise, it would allow third parties to weaponize the [*Act*] as a means to protect their own interests – including interests relating to non-heritage issues, such as potential developments. That does not mean that third parties cannot be a source of information for the Municipality to consider registration. But what it does mean, for purposes of the present case, is that HAC

> had no obligation to consider the information or application from HUNA, let alone having an obligation to consider it on some basis of urgency.

[68] The reviewing judge seized on the issue. It received considerable attention in his decision (paras. 57 – 77 and footnotes 24 – 33). Sifting through this content in the reviewing judge's reasons, it is apparent he held a dim view of third-party applications and effectively regarded them as unauthorized, unfair, and in alignment with what he viewed as HRM's "pro-registration" mindset (para. 261).

[69] The reviewing judge also determined that at least seven of the thirteen Councillors who voted in favour of the registration motion displayed indicia of a reasonable apprehension of bias against Dalhousie either by their statements or conduct.

[70] The reviewing judge's analysis as to whether Council members demonstrated bias at the hearing is found at paras. 257 – 258. He provides the following two conclusory reasons (supplemented by three footnotes to para. 258):

> [257] I am satisfied that likely at least seven of the majority Councillors (13 in total) who voted to designate 1245 Edward Street a municipal Heritage Property, displayed indicia of a reasonable apprehension of bias against Dalhousie.
>
> [258] A number of Councillors made known their preference for re-purposed use by Dalhousie of the 1245 Edward Street property, or otherwise by their statements/conduct belied reasonable apprehensions of closed-mindedness (at HAC)/bias (at HRM Council): […]
>
> [emphasis in original]

[71] In para. 258, the reviewing judge went on to list the comments/conduct of ten Councillors. Based on his underlining of comments and the footnotes appended to para. 258, it is apparent the reviewing judge was critical of Councillors expressing a preference to re-purpose the house versus demolition. He thought some did not seriously consider that Dalhousie had no use for the house and viewed the cost of restoration as prohibitive. He thought it irrelevant that Dalhousie had no foreseeable plans to develop the property and thus wrong for Councillors to inquire of Dalhousie's future intentions for the property. He does not state which seven of the ten he concluded were biased nor does he clarify that elsewhere in his decision.

[72] The reviewing judge ultimately concluded:

> [269] HRM's decision to register 1245 Edward Street on the HRM Registry of Heritage Property is fundamentally flawed, it being the result of:
>
> a) circumstances that viewed objectively lead to a conclusion that there is a reasonable apprehension of an attitude of closed-mindedness at the HAC level, and a reasonable apprehension of bias at the HRM Council level - a bread-crumb trail that led to an a [*sic*] clearly unreasonable result;
>
> b) an unfair process that materially prejudiced Dalhousie's interests and undermined the substantive reasonableness of HRM's decision;
>
> c) and a substantively unreasonable outcome *per se*.

[73] As to remedy, the reviewing judge ordered:

> [270] I quash the decision to register 1245 Edward Street on the HRM Registry of Heritage Property, and order that HRM remove the property from the Registry, and to make corrections to any previously filed/registered public notice of such registration.

[74] In my view, the reviewing judge's analysis is flawed and no deference is afforded to his findings on procedural fairness, bias and substantive unreasonableness. I conclude that for several reasons.

[75] Questions relating to "constructive taking" and "third-party standing" did not require adjudication. These issues were not raised before Council nor did they have to be resolved for the reviewing judge to determine the application before him. Doing so was an unnecessary departure from the general principle that administrative decisions are to be assessed on the basis of the record that was before the decision-maker.[14]

[76] The reviewing judge's "constructive taking" analysis does not properly account for the temporal nature of restrictions placed on a property owner under the *Heritage Property Act*. "Temporal nature" is the 120-day pause on substantial alteration and demolition etc. pursuant to s. 14(4) of the *Heritage Property Act,* the continuation of these restrictions after heritage registration (s. 17(1)) and the outer three-year limit pursuant to s. 18(3). Respecting the latter, an owner can apply to alter or demolish (s. 17(2)). HRM can take up to three years to consider the application (s. 18(1)). If not approved, s. 18(3) provides that the property owner *"may, notwithstanding Section 17, make the alteration or carry out the demolition*

[14] See e.g. *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86 at para. 42, [*Paladin*]; and *Tsleil-Waututh Nation v Canada (National Energy Board*), 2016 FCA 219 at para. 78.

*at any time after three years from the date of the application but not more than four years after the date of the application."*

[77] Further, the reviewing judge's reasoning path on "constructive taking" and no "third-party standing" did not properly account for the statutory context in which Council's decision was made. More specifically:

- The Legislature granted HRM significant discretion to design its own processes throughout the heritage application and registration process;
- The broad purposes pursuant to the HRM *Charter* and the *Heritage Property Act*; and
- The public interest in preserving heritage property.

Later, I review these factors in more detail.

[78] Respectfully, the reviewing judge's "constructive taking" determination is misguided and of no precedential value. I reach the same conclusion respecting his third-party standing determination.

[79] It is evident these erroneous considerations ("constructive taking" and no "third-party standing") had a material impact on the judge's assessment of procedural fairness, bias, and his ultimate determination that the decision was substantively unreasonable. The judge indicated this many times in his decision.[15]

[80] In my view, the reviewing judge's bias determination that at least seven of the thirteen councillors voting in favour of registration displayed bias against Dalhousie during the hearing also failed to properly account for the statutory context and decision making milieu in which Council's decision was made. On their face, some comments from Councillors are concerning. However, when placed in their proper context, the impugned comments/conduct are, on balance, more indicative of decision-makers attempting to consider and weigh the competing interests of a property owner vehemently opposed to registration and the public interest of preserving heritage property—not clear markers of bias.

[81] In my analysis of the bias issue, I will review the legislative framework and address in more detail the statements/conduct the reviewing judge said "belied" a reasonable apprehension of bias at the Council hearing.

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[15] See e.g. at paras. 66,70 -71, 96, 106-107, 229; and at fns. 16, 29-30, and 36-37.

[82] The reviewing judge also went to great lengths to set out what he opined to be appropriate procedures and processes that should have been followed by the HAC and Council when considering whether a property should be placed on the heritage registry. There is no need to review them; rather, it is sufficient to observe that on any fair reading of the reviewing judge's decision, it appears he made his own "yardstick" and then used it to measure what the HAC and Council had done. As the Supreme Court explained in the *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], this is not the function of a reviewing court:

> [83] […] The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. […] The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": […] Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[83] I turn to my analysis of the issues raised on appeal.

## Analysis

### *Was Council's decision procedurally fair?*

*Governing test*

[84] As this Court explained in *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92:

> [41] […] no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness.
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge [citations omitted].

[85] In *Burt v. Kelly*, 2006 NSCA 27[16] [*Kelly*] this Court discussed the required analytical steps to determine what duty of fairness is owed and how to assess an alleged breach:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. […]
>
> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review

*Step 1 - What was the duty of fairness owed to Dalhousie?*

[86] I will first address the duty of fairness owed to Dalhousie at the Council level, followed by the duty owed at the HAC level.

*Council's duty*

[87] HRM Council was acting in an adjudicative capacity and rendered an administrative decision.

[88] When making an administrative decision, a municipality is bound by a duty of procedural fairness. The Supreme Court of Canada makes this clear in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village*), 2004 SCC 48 [*Lafontaine*]:

> 3 A public body like a municipality is bound by a duty of procedural fairness when it makes an administrative decision affecting individual rights, privileges or interests: […]

[16] Also referred to as *Kelly v. Nova Scotia Police Commission*.

[89] The parties do not dispute that Dalhousie was owed a duty of fairness; they disagree on the nature and content of that duty.

[90] The content of the duty of fairness a public body owes is informed by five (non-exhaustive) factors often described as the "*Baker* factors", referring to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], also discussed in *Lafontaine* at para. 5:

> 5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: […]

[91] In *Baker,* the Supreme Court reiterated, at para. 21, that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".[17]

[92] In *Kelly,* respecting the deference owed to administrative decision-makers, this Court stated:

> [28] The fifth contextual factor is the nature of the deference owed to the decision-maker. What the duty of fairness requires in a particular case "... should ... take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures ...": **Baker,** […] at para. 27 *per* L'Heureux-Dubé, J.; **Knight,** […] at p. 685 *per* L'Heureux-Dubé, J. Subject to the applicable statutes and regulations, an administrative body is the "master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair." *Per* L'Heureux-Dubé, J. in **Knight** at p. 685.

[93] As observed, the underlying dispute between the parties is not that a duty exists, but rather, what is its content. More pointedly, where on the spectrum does it fall—low, moderate or high?

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[17] Quoting *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 682 [*Knight*].

[94] Having set out the overarching legal principles, I will summarize the competing positions of the parties.

*Position of the Intervenor*

[95] Heritage Trust submits that Council owed a moderate duty of procedural fairness to Dalhousie. In support, Heritage Trust argues:

- Heritage registration does not only engage the private interest of a property owner. The public has an interest in heritage preservation. Procedural fairness should be attuned to reflect this;
- Council must consider and balance these, sometimes conflicting, interests;
- The Legislature granted HRM broad and discretionary powers to do so. Thus the Legislature can be taken to have appreciated that Council would implement social and economic policy in its decisions because Council would be more conversant with the needs of their community than a court; and
- Taken together, these important contextual factors militate in favour of a more relaxed standard.

*Position of HRM*

[96] HRM's appeal submissions focus more on how the duty owed to Dalhousie was functionally met, rather than clearly identifying the duty owed on a continuum of low – moderate – high. I see no clear articulation of the standard in its written submissions on appeal. In oral submissions, when questioned by the panel, counsel for HRM acknowledged the adjudicative nature of Council's decision and that this would engage a higher standard. In its written submissions to the reviewing judge, HRM said:

> [...] Together with the legitimate expectation of the property owner to have the opportunity to present all his [*sic*] concerns [...] supports a level of procedural fairness towards the higher end of the scale, although not near the level [of] formal procedural fairness of the Courts, or various statutory tribunals such as the [Workers Compensation Board, Utility and Review Board] or Boards of Inquiry.[18]

[18] Appeal Book, Volume 3, at pages 1152-1153.

[97] From the foregoing, I infer HRM concedes that Dalhousie was owed a duty of procedural fairness that falls on the higher end of the spectrum.

*Dalhousie's position*

[98] Dalhousie acknowledges the public has an interest in the preservation of heritage properties. However, it emphasized that public interest must be balanced against an owner's private interests such that the public interest does not override the legitimate rights of an owner.

[99] Dalhousie submits an application of the *Baker* factors demonstrates Council owed it a high duty of procedural fairness. Thus, it seems the positions of the principal parties (HRM and Dalhousie) are closely aligned on the duty owed—it is on the higher end of the spectrum.

[100] Respecting the *Baker* factors, I am in substantial agreement with Dalhousie's analysis which I would summarize as follows:

(1) *Nature of the decision and Council's decision-making process*: Council's decision was adjudicative in nature which indicates the need for greater procedural safeguards and participatory rights;

(2) *Nature of the statutory scheme and statutory provisions in which Council operates:*

Short of judicial review, Council's decision is determinative of a heritage registration dispute as the Heritage Property Act does not provide for any appeal process;

(3) *Importance of the decision to those affected:*

Although there is a public interest component in heritage registration, the decision had consequential impacts on Dalhousie's interests. In particular the interruption of its plan to demolish the building, something it planned to do from the date it acquired the property;

(4) *Dalhousie's legitimate expectations:*

Dalhousie's submissions on this factor focused on its procedural expectations before the HAC. However, obviously Dalhousie should and did expect, that the hearing before Council would be procedurally fair; and

(5) *Nature of the deference accorded to the body:* The absence of processes and procedures in the Heritage Property Act does not equate to the Legislature indicating that Council can disregard common law procedural fairness rights.

[101] As to the fifth *Baker* factor, I also note the recognized need of an administrative body to work out a system that is "flexible, adapted to their needs and fair", and not to "import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court".[19]

[102] Given the guiding principles referenced above and taking into account all of the *Baker* factors, in my view, at the Council hearing Dalhousie was owed a level of procedural fairness on the high end of the spectrum.

[103] The more controversial point between the parties is whether that duty was breached, and if so, was it in a manner that resulted in unfairness to Dalhousie's right to be heard.

*Step 2 - Did Council breach the duty of fairness it owed to Dalhousie?*

[104] In assessing whether a breach of procedural fairness occurred, it is helpful to understand the genesis of the "hearing" before Council.

[105] As explained earlier, once the HAC makes a recommendation to Council to register a property, the *Heritage Property Act* requires HRM to notify the owner of their "right" to be "heard", including where and when. Other than providing for a "hearing", and that an owner has the "right" to be "heard" the *Act* is silent on what hearing processes and procedures are to be followed, and the nature and extent of a property owner's participatory rights. The sections provide:

14 (2) The municipality shall cause notice of the recommendation to be served upon each registered owner of the building, […] at least thirty days prior to registration of the building, […] in the municipal registry of heritage property.

(3) The notice shall contain

[…]

[19] *Kelly*, at para. 28, citing *Knight* at p. 685.

> (e) notification of the right of the owner to be heard and of the time and place for the hearing.
>
> […]
>
> **Registration as municipal heritage property**
>
> 15 (1) At any time not less than thirty days nor more than one hundred and twenty days after service of the notice pursuant to Section 14 and on the advice of the heritage advisory committee, the municipality may register the building, […] as a municipal heritage property in the municipal registry of heritage property.
>
> (2) No registration pursuant to subsection (1) shall take place until the council has given the owner of the property an opportunity to be heard and such opportunity shall be given not earlier than three weeks after service of the notice pursuant to subsection (2) of Section 14.
>
> (3) Notice of the registration shall be sent to each registered owner of the building, …. and a copy thereof shall be deposited in the registry of deeds for the registration district in which the building, […] is situate.

[106] Given the *Act*'s silence on process and procedure, HRM says it turned to its *Charter* and interpreted a "hearing" under the *Act* as:

> Based on *HRM Charter* section 11(1) providing that "the powers of the Municipality are exercised by the Council", HRM interpreted this as being a hearing before Council, and per *HRM Charter* sections 16&20 [*sic*], as being in the usual manner that Council conducts hearings which includes ten minute initial oral representations, supplemented by unlimited written submissions. […].[20]

[107] HRM further explained its interpretation of the statutory provisions and the separation of the roles and function of the HAC and Council:

> […] The function of the Council is not an appeal to re-evaluate the HAC's work – rather the Council conducts a hearing de novo assessment of the heritage value of the building without deference being afforded to the HAC recommendation.
>
> Essentially the HAC acts as a gatekeeper in providing a preliminary assessment of whether the exterior of subject building meets its established criteria for heritage value which might result in registration. The HAC Evaluation Criteria for Registration of Heritage Buildings explicitly does not include the building's conditions as a factor in considering its architectural Integrity. […] Further the HAC assessment and recommendation is not a process with discretion to consider factors unrelated to historical importance and the listed criteria of

[20] Appellant factum at para. 70.

> exterior features of the building or to weigh the value of different perspectives. The HAC assesses and provides its recommendation in a public meeting - which is not a hearing. Council in making the actual decision on building registration must give the owner of the property an opportunity to be heard, and in rendering its decision has the discretion to take into consideration other factors - such as the building condition and impact on the owner.
>
> […] The legal burden of proof is on the heritage staff – the responding property owner is not tasked with establishing that the building does not have heritage value – the staff submissions made supporting registration may fall short of persuading Council without any need of participation by the property owner. The owner is free to present any evidence or argument that registration is not appropriate […].[21]

[108] There is no real controversy, at least in theory, that HRM has interpreted HAC's function as both advisory and gatekeeping and that once a heritage registry recommendation comes forward, it is Council's duty to decide the issue afresh (in other words, as a hearing *de novo*). Neither is there controversy that heritage staff carried the burden to establish that a property should be registered.

[109] What is vigorously challenged by Dalhousie is whether Council actually and impartially heard the matter afresh, and whether the actual processes and procedures afforded to Dalhousie satisfied the duty of fairness it was owed. (I address impartiality later under the issue of bias).

[110] Dalhousie had the right to challenge the heritage registry recommendation the HAC put before Council. The hearing before Council had to be fair. Processes and procedures needed to be calibrated to sufficiently meet the high duty of procedural fairness Dalhousie was owed. Encompassed in that duty was a requirement that Dalhousie have a fair opportunity to present its views and evidence and an obligation on Council to consider them.

[111] Dalhousie puts forward two main reasons for contending the Council hearing was procedurally unfair: (1) the denial of an additional 10 minutes for oral submissions; and (2) HRM heritage staff were allowed to split their case.

[112] As to Dalhousie's allotted time complaint, it says Council should have been more flexible, particularly given it was a property owner opposing registration versus an owner supportive of registration. Additionally, Dalhousie claims the time

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[21] Appellant factum at paras. 3, 4 and 44. The record also contains extensive submissions and materials referred to by HRM in support of this functional interpretation.

limit restrained its opportunity to counter HAC's heritage score and influence Council's decision.

[113] Regarding the assertion that the case was "split", Dalhousie points to some additional questions several Councillors posed to HRM staff during Council's debate on the registration motion respecting the competing heritage scores. Dalhousie complains that it was not given an opportunity to reply to these questions or staff's responses to them.

[114] HRM submits the hearing before Council was procedurally fair and the duty owed to Dalhousie was met. In support, HRM points to the 10-minute practice being long-standing and a function of Council's experience in managing its hearing process—choices which should be respected. Property owners are not restricted in presenting written submissions and supporting documentary evidence. If clarity is needed Councillors can ask questions during the hearing, which occurred in this case. In sum, HRM says the mix of oral and written submissions from property owners is a reasonable approach to fairly deal with the volume of matters before Council.

[115] Heritage Trust also argues the duty was met. It raises arguments similar to HRM's—given the combination of oral and written submissions Dalhousie had a fair opportunity to advance its case. It argues no unfairness or prejudice to Dalhousie's right to be heard is evident.

[116] In assessing Dalhousie's complaint that the hearing before Council was procedurally unfair, I am mindful of these principles expressed in *Baker*:

> 22 […] the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[117] Dalhousie was entitled to a contextually fair procedure, not a perfect one. Further, Council's decision should only be set aside for procedural error if it resulted in unfairness to Dalhousie.

[118] It is fair to observe that Dalhousie is a sophisticated litigant and was represented by very capable and experienced counsel. Dalhousie had ample time to prepare for the hearing and was aware of the reasons underpinning HAC's heritage

recommendation. In other words, there were no surprises at the hearing for Dalhousie to address. Dalhousie had time to have engineering and architectural reports prepared in advance of the hearing and there was no limit placed upon Dalhousie's right to supply Council with written submissions.

[119] Further, although Dalhousie had to work within Council's normative 10-minute oral presentation limit, it was afforded additional time to advance its case during the hearing. One example arose from an invitation Mr. Rogers made during his oral submissions. Mr. Rogers invited Councillors to ask questions about specific concerns he identified but said deserved more attention than he could capture in the time allotted. Members of Council followed up with a thoughtful exchange with Mr. Rogers on the points he raised.

[120] I do not accept Dalhousie's allegation that HRM was permitted to "split" its case. The hearing unfolded with HRM heritage staff making a presentation on the heritage registry recommendation. Next, Dalhousie presented its case and then responded to follow up questions from various Councillors. Council then moved on to discuss the proposed registration. During their debate a few Councillors posed questions to HRM heritage staff seeking to clarify their understanding of the competing heritage evaluations. All of which seemingly corresponds with how hearings normally unfold pursuant to Council's Administrative Order One.[22]

[121] Even if this could be characterized as "splitting" a case, the result was not material to the overall assessment of procedural fairness. Council already had before it Dalhousie's architectural report which set out the competing valuations and critique of the method employed by HRM heritage staff. They had the benefit of Dalhousie's oral submissions on the subject. The asking of clarifying questions to ensure appreciation of the subject matter is, as a general statement, a good thing. I see nothing troublesome with the timing nor content of the clarifying questions.

[122] Having reviewed the recording of the hearing, it is apparent Council considered the materials before it and debated the merits of the heritage registration. I am satisfied there was no breach of procedural fairness before Council. If there were any irregularities they were not material and thus did not render the hearing procedurally unfair. With respect, the reviewing judge was incorrect to have concluded otherwise.

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[22] Appendix "A" Rules for Public Hearing, s. 18, which provides: "Members may request clarification of staff respecting matters raised during the public hearing".

[123] These reasons are not to be taken as a standing endorsement that Council's 10-minute normative presentation limit in a contested heritage property registration hearing will always be procedurally fair. Rather, given all the circumstances of this case, it was.

*Procedural fairness at the HAC level*

[124] The parties made extensive submissions respecting whether a duty was owed at the committee level and if so, the content of that duty.

[125] Dalhousie asserts it was owed a high duty of procedural fairness at the committee level. It says that duty was breached by a number of shortcomings including: limited time to prepare submissions to the HAC, limited ability for committee members to digest the materials that were submitted, and no opportunity to present in person—all of which impaired Dalhousie's ability to effectively influence the committee's deliberations.

[126] HRM says any duty of fairness at the HAC stage is met simply by the HAC acting in good faith, which HRM says the HAC did.

[127] The Intervenor's perspective was if a duty was owed it was minimal and met. Heritage Trust notes HAC only makes a recommendation which is not a final decision that definitively affected Dalhousie's rights and interests. HAC's recommendation simply triggered a hearing before Council.

[128] Council recognized the processes and procedures at the committee level could be improved. A review of the hearing recording and Council's minutes make this evident. That said, as discussed earlier, HAC's discretionary authority has statutory limits.[23] The HAC only makes a recommendation to Council respecting the registration of a municipal heritage property. The decision whether or not to register a property is made by Council.

[129] In my view, there is no need to resolve the issue of the duty of fairness and its content at the committee level. That is because any shortcomings at the HAC level were rectified during the Council hearing—a hearing *de novo*—where Dalhousie had meaningful participatory rights which it exercised. With respect, the reviewing judge was incorrect to have decided otherwise.

[23] As prescribed by ss. 13 and 14 of the *Heritage Property Act*.

[130] That said–I can say that if any duty of fairness is owed at the committee level it would not be on the high end of the spectrum as argued by Dalhousie and as the reviewing judge found. That is because the Legislature clearly did not intend for there to be full participatory rights at the committee level. The Legislature expressly turned its mind to providing a full right of participation to the property owner and where in the process that participation would take place—at the hearing before Council.

[131] To conclude, in the context and circumstances of this case, I am satisfied there are no procedural fairness breaches that warrant the setting aside of Council's decision.

***Was Council's decision tainted by bias?***

[132] Bias is an aspect of procedural fairness. As recently described in *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 [*Vento*]:

> [23] The requirements of procedural fairness flow from the pillars of natural justice. The first pillar, *audi alteram partem*, requires decisionmakers to hear both sides before deciding a dispute. In essence, it requires that a fair hearing be provided before a decision is made. […] The second pillar, *nemo iudex in sua causa*, […] [in] essence, it requires that a decisionmaker be impartial or unbiased – someone without an interest in or connection to the dispute, who will fairly consider the parties' positions before deciding.

[133] The "first pillar" was the subject of my foregoing analysis. The "second pillar" – bias – is also of critical importance. The Ontario Court of Appeal in *Vento* went on to say:

> [28] […] a reasonable apprehension of bias […] is no minor procedural defect. A reasonable apprehension of bias means that it is objectively reasonable to think an adjudicator would not decide a dispute fairly. It is a finding that undermines the integrity and legitimacy of the adjudicative process. A reasonable apprehension of bias is necessarily a major violation of procedural fairness.
>
> […]
>
> [32] […] No one whose rights, interests, or privileges are at stake can be required to accept a decision made by an adjudicator whose ability to decide fairly is – for whatever reason – reasonably in doubt. The importance of the rule against bias transcends the interests of the parties to a particular dispute: bias is intolerable in any system that aspires to the rule of law. The finding of a reasonable apprehension of bias requires the disqualification of an adjudicator and the nullification of any decision they have made. Nothing less will do.

[134] HRM Council was executing its adjudicative responsibility under the *Heritage Property Act*. Bias in decision-making is inexcusable. Should bias be present, Council's decision to register the property in the municipal heritage registry would be void. I refer to *Vento* again:

> [31] [...] once the finding is made the adjudicator is disqualified. If a decision has already been reached, the decision is void. As Cory J. explained on behalf of a unanimous Supreme Court of Canada, "it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established". Moreover, "[t]he damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void": *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 645. [...].

[135] The Court in *Vento* reviewed the well-established test for a reasonable apprehension of bias:

> [26] […] Canadian law takes an objective approach to establishing bias**:** the question is not whether a decisionmaker is in fact biased but, instead, whether there is a reasonable apprehension that the decisionmaker is biased.
>
> [27] **This approach asks whether "an informed person viewing the matter realistically and practically ... [w]ould think that it is more likely than not that [the decisionmaker], whether consciously or unconsciously, would not decide fairly":** […]. [This test] gives effect to the purpose that underlies the reasonable apprehension of bias concept, […]"it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" […]. [citations omitted]
>
> [emphasis added]

[136] The analysis in this case begins with asking whether the reasonable apprehension of bias test referenced in *Vento* applies to Council—or something less stringent?

[137] HRM urges, as it did before the reviewing judge, that the less stringent test of "closemindedness" should apply. Under this relaxed test the question is whether the decision-maker had a mind incapable of persuasion, not whether a reasonable person would believe they did.

[138] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at p. 1197, the "closemindedness" test was expressed this way:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile.

[139] In *Baker*, the Supreme Court Canada explained at para. 47 that like other aspects of procedural fairness, the standards for impartiality/bias also vary, and are dependant upon *"the context and the type of function performed by the administrative decision-maker involved"*.

[140] Dalhousie says the more stringent test applies, as does Heritage Trust. In my view, HRM's outlier position lacks merit. A review of the jurisprudence plainly points to an application of the more stringent test in the context of this case. That is because Council was performing an adjudicative function, not a policy or legislative function.

[141] The two standards noted above were explained this way by the authors of *Judicial Review of Administrative Action in Canada*:[24]

> Policy decisions manifest a point of view, whether made in a format that resembles adjudication or legislation, and for this reason courts have recognized that even where the duty of fairness applies, it is inappropriate to apply the judicial standard of bias. Thus, when enacting bylaws, members of municipal councils have been required only to avoid having or appearing to have a "closed mind," even though they were under a statutory duty to provide a prior hearing. (*Old St. Bonaface*, supra; *Save Richmond Farmland Society*, supra...) Moreover, given the high policy content of the decisions to be made, and the fact that the statutorily-designated decision makers were elected, and indeed had campaigned on the issues, the duty of fairness in this context has been held to be satisfied as long as the members remained "capable of persuasion," the minimum standard required to prevent the proceedings from becoming a sham.
>
> In the result, the starting point in each case will be an analysis of the decision making process in order to determine whether any form of participation is to be afforded to affected parties. If it is not, then the relevant standard will depend upon the context. For example, where the process has the essential trappings of adjudication, with a hearing at which the parties are afforded an opportunity to present submissions, a test of bias akin to that applied to judges will presumptively apply. (*Newfoundland Telephone Co*, supra ) on the other hand, where the decision making process merely leads to preliminary decisions, or is investigative in nature, or is part of the administration of overall policy, as in the

[24] Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, (Online: Thomson Reuters, 2024) at §11:14. See also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities*), [1992] 1 S.C.R. 623; and *McLaren v. Castlegar (City),* 2011 BCCA 134 [*McLaren*].

> case of the Director of Investigation and Research under the *Competition Act*, or implements or makes policy, or implements a political decision, then a less stringent standard of impartiality, such as only requiring an absence of a conflict of interest, or a mind that is capable of persuasion, may be more suitable.
>
> [emphasis added]

[142] As an aside, I observe that in *Kiann v. HRM*, 2024 NSSC 305 [*Kiann*], HRM unsuccessfully put forth the same "closemindedness" argument. *Kiann*, decided on October 17, 2024, has, to my knowledge, not been appealed by HRM.

[143] The reviewing judge correctly determined that the more stringent test applied; however, as explained earlier, he erred in his application of it.

[144] Given that the test to be applied is clear, there is no need to canvass the supporting authorities in any further detail. Rather, I turn to my fresh application of it.

[145] Prior to reviewing the specific impugned comments and conduct it is important to situate the analysis within the overarching statutory context because this informs Council's approach to decision-making.

[146] The purpose of the *Heritage Property Act* is to preserve, for the public benefit, built heritage. The *Act* provides:

> 2 The purpose of this Act is to provide for the identification, designation, preservation, conservation, protection and rehabilitation of buildings, public-building interiors, structures, streetscapes, cultural landscapes, areas and districts of historic, architectural or cultural value, in both urban and rural areas, and to encourage their continued use.
>
> 3. In this Act,
>
> […]
>
> (eb) "heritage value" means the aesthetic, historic, scientific, cultural, social or spiritual importance or significance for past, present or future generations and embodied in character-defining materials, forms, locations, spatial configurations, uses and cultural associations or meanings; […].

[147] The Legislature assigned responsibility to municipalities to administer the *Act* within its boundaries and allowed for members of the public, in addition to members of Council, to serve on the HAC:

> 12 (1) **A municipality may by by-law establish a municipal registry of heritage property.**
>
> (2) A by-law made pursuant to this Section shall provide for the establishment of a heritage advisory committee.
>
> (3) **The heritage advisory committee shall consist of at least two members of the council and such persons or such number of persons as the council may determine by by-law.**
>
> (4) The by-law may provide the term for which members of the heritage advisory committee shall serve.
>
> [emphasis added]

[148] As noted, pursuant to its governing by-law[25], HRM can appoint 10 members of the public to serve on the HAC. This recognizes the importance of the public's interest in preserving heritage and provides an opportunity for the public to participate in the process to some degree.

[149] It is also clear that the Legislature afforded HRM broad powers to achieve its responsibilities. HRM's *Charter* provides:

> 2 The purpose of this Act is to
>
> (a) give broad authority to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate within the jurisdiction given to it;
>
> (b) enhance the ability of the Council to respond to present and future issues in the Municipality; and
>
> (c) recognize the purposes of the Municipality set out in Section 7A.
>
> […]
>
> 7A The purposes of the Municipality are to
>
> (a) provide good government;
>
> (b) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality; and
>
> (c) develop and maintain safe and viable communities.

[150] A legislative amendment to the *Heritage Property Act* is also worthy of mention. Section 16 of the *Act*, as originally enacted in 1980, provided for a one-year period in which demolition and other changes were restricted, before an

[25] See By-law H- 200 at s. 3(2)(b), which provides: "[…] ten residents of the Region, who have applied to the Council to act as members and have expressed an interest in heritage preservation."

owner could opt out of continued registration. In 2010 the Legislature increased this to a 3-year period. HRM interpreted the amendment, reasonably in my view, as the Legislature's intention to provide further opportunity for HRM to work with a property owner in an effort to find ways to preserve the property. HRM explained options that are often explored include securing maintenance or improvement grants, reducing zoning use restrictions, re-locating the building, persuading the owner to consider alternative uses, or conversely possibly expropriation of the site if the owner's agreement to continued registration cannot be obtained.

[151] HRM's interpretation finds support in this Hansard[26] excerpt of December 9, 2010 wherein the then Minister of Tourism, Culture and Heritage said the following when introducing the amendment:

> Mr. Speaker, to increase protection for heritage properties, we're proposing amendments that focus on key areas. Once a heritage property is substantially altered or demolished, the effects are irreversible. Many people agree that a one-year time period to consider applications for substantial alteration or demolition of a municipal registered heritage property is simply too short**. In some cases, the time period expires and the property is demolished, it seems without even enough time to allow for dialogue.**
>
> We are proposing that the time period for municipalities to review applications for substantial alteration or demolition be extended from one year to three years. Mr. Speaker, **under the proposed amendment, municipalities, property owners and developers will be encouraged to use the extended time period for dialogue. A longer time period, coupled with mediation, will allow for all parties involved to reflect carefree on their actions and to find the best solutions for the property.**
>
> [emphasis added]

[152] It comes as no surprise that the public's interest in preserving heritage value may come into conflict with the interest of an owner – such as it did is this case. Council has to consider and weigh the competing rights and interests in the exercise of its discretion whether to register a property. In doing so, courts have recognized that elected municipal decision-makers are not expected to have the trappings of a formal judicial court process and should be given some latitude in how they resolve the conflicting interests.

---

[26] "Bill No. 125, An Act to Amend Chapter 199 of the Revised Statutes, 1989, the Heritage Property Act", 2nd Reading, *Assembly Debates*, 61-2, No. 10-61 (9 December 2010) at 4965 (Percy Paris).

[153] For example in *McLaren*, the Court said:

> 37 [...] Because members of council were engaging in an adjudicative function, it was not sufficient that they had irrevocably made up their minds. Rather, they had to be completely open to a fresh evaluation of the evidence and submissions presented to them. In short, they had a duty to be impartial. Keeping in mind, however, that the tribunal was made up of elected politicians who could not be expected to come to the hearing without some knowledge of the situation and without some inkling as to the appropriate disposition, it would be imposing an unrealistically high standard to expect them to come with no preconceptions or inclinations.

[154] I turn to the specific impugned comments/conduct. As it did in the court below and on appeal, Dalhousie suggests bias is present in comments made or actions taken by some Councillors both before and during the hearing. In its factum at paras. 160 – 163, Dalhousie sets out the impugned comments/conduct. I will address each in turn.

[155] At para. 160 of its factum Dalhousie claims:

> 160. […] the Registration Hearing before HRM Council also suffered from pre-judgment and gave rise to a reasonable apprehension of bias. Notably, three HRM Councillors, Mason, Hendsbee and Stoddard, who participated in the Registration Hearing, had already campaigned for the HAC Emergency Meeting. In the case of Councillors Hendsbee and Stoddard, who were also members of HAC, they had already in part formed and decided the pro-registration HAC Recommendation and heritage scoring.

[156] HRM logically argues it has a responsibility to act reasonably and within its powers under its *Charter* and the *Heritage Property Act* to identify and assess heritage value before an alteration or demolition renders doing so moot. That was the motivation to expedite the HAC meeting and not some pro-heritage/pre-determined mindset that the reviewing judge unfairly attributed to certain Councillors who voted in favour of heritage registration.

[157] As established earlier, the reviewing judge was almost singularly focused on the interests of the property owner. A very important interest of course, but Councillors also had to consider the public interest component in preserving property with sufficient heritage value. In my view, on a balanced review of the record, it cannot be said the expedited HAC meeting was indicative of any bias or strident "pro-heritage' agenda as suggested by the reviewing judge. Even the reviewing judge recognized a more benign explanation (at para. 228) was

available, in particular, an earlier meeting date was necessary in face of the demolition permit that could have been acted upon.

[158] As well, just because Councillors Hendsbee and Stoddart participated in the HAC meeting and supported a registration recommendation to Council does not equate to bias. Again, context matters. Under the legislative framework at least two Councillors were mandated to sit on that committee.[27] Courts have recognized the reality of overlapping functions. As observed in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919:

> 47. […] In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an **overlap of functions** which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. **If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.**
>
> [emphasis added]

[159] And as this Court stated in *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24:

> [44] Having an opinion will not disqualify a decision-maker from fairly adjudicating a matter; it is the ability to approach one's consideration of the issues in dispute with an "open mind" that is required. […].

[160] It is also important to remember that at the HAC level the impugned Councillors were using the established criteria they were directed to employ when assessing whether the property had sufficient heritage value. They cannot be faulted for doing so. However, their role changed during the hearing and they had to be impartial and have an open mind to the evidence and arguments advanced during the hearing. I am satisfied the record cannot support a finding that these Councillors fell short of the impartiality required of them when sitting in an adjudicative capacity at the Council hearing.

[161] As to Dalhousie's contention that Councillor Mason's pre-hearing conduct establishes, he was biased at the hearing – presumably Dalhousie is referring to, as the reviewing judge did, Mr. Mason's comments at a July 12, 2022, Council

[27] See *Heritage Property Act* at s.12(3).

meeting. During this meeting, Council considered whether to waive the standard hearing notice such that Council could hear any recommendation that might be forthcoming from the HAC before the 120-day demolition pause expired. In making the motion Mr. Mason gratuitously stated "[…] it not being my first rodeo when it comes to saving a heritage property."

[162] That impugned comment was made months before the Council hearing took place. Although it is concerning, once again, placed in context the underlying driver is to allow the process to evolve before demolition renders it moot.

[163] At para. 161 of its factum Dalhousie points to comments Mr. Mason made during the hearing:

> 161. At the Registration Hearing, HRM Councillors displayed bias through remarks that were off topic, absurd, or unfair. For example, Councillor Mason made dismissive comments that he could come to the Property to help Dalhousie's staff fix the serious foundation issues that Capital Management had identified in the Building and described it as being an easy fix.

[164] It is entirely understandable that Dalhousie would take offence to such comments. They seem unprofessional, disrespectful, and not in keeping with the seriousness of the matter before Council. Not to excuse the Councillor's comments, but sometimes decision-makers do make inappropriate and irrelevant comments; however, they do not necessarily establish an absence of impartiality. I am satisfied that although concerning, these comments do not elevate to bias.

[165] Dalhousie's articulation of the remaining problematic comments are summarized at paras. 162 and 163 of its factum. Dalhousie said:

> 162. Similarly, Councillor Hendsbee reiterated his conclusion … that Dalhousie should move and not demolish the Building. Councillor Hendsbee as well criticized Mr. White and his report stating "you pay for what you get", that the "report…be taken with a grain of salt", and he would put HRM heritage staff "up against anyone any day".
>
> 163. Finally, Councillors Austin and Cleary were critical of Dalhousie buying the property without fully developed plans for its use, and as asserted by them, without consideration of the applicable zoning. Councillor Austin described it as a "buyer beware" scenario. Councillor Cleary questioned this use of "public funds" as "about half of Dalhousie's money comes from taxes", which is a consideration that underlay the entire flawed heritage registration process for the Property. This was improper. Dalhousie should not be subjected to a higher

> standard of heritage preservation than other private property owners due to its public funding. ….

[166] No doubt Councillor Hendsbee was reacting in part to the harsh criticisms Dalhousie launched against HAC committee members and HRM heritage staff both in its written and oral submissions. On their face, the comments are concerning; however, they can be taken to mean that the opinion proffered by Dalhousie's expert (Mr. White) might be tainted by financial gain and that the expertise of HRM's heritage staff is on equal footing with that of Mr. White. The expression of such a sentiment does not establish Mr. Hendsbee was partial and failed to properly consider Dalhousie's evidence and submissions. It may indicate Mr. Hendsbee was not persuaded by it but that is a view he could arrive at on this record.

[167] As to the remaining impugned comments, Dalhousie's concerns have to be considered in their proper context. I accept HRM's and the Intervenor's submissions that the general thrust of the Councillors' statements, as captured in the video recording of the hearing, reveal a general belief by the majority of Councillors that the house had heritage value, and that there was a desire for the municipality to seek out a solution that would result in Dalhousie preserving the house exterior as a heritage property.

[168] Some Councillors took note of Dalhousie's unequivocal intention to demolish the house and there being no short term nor intermediate plans for site development. This could lead to an inference there would be fewer negative consequences to Dalhousie if the property was registered which, in turn, engages the three-year window and thus an opportunity for further reflection and dialogue to consider non-demolition options. During the hearing Councillors discussed adaptive use, moving or repurposing the property and a myriad of other things such as: the housing crisis, the effect demolition would have on the neighbourhood, impacts on taxpayers and zoning issues. They also discussed the different heritage evaluation scorings for the house, the value of preserving built heritage and the heritage value of the house's architectural style.

[169] Given the nature of the decision before Council and the competing interests to be considered, it is not surprising that a number of factors were raised. Some were more relevant than others. Some Councillors did express their preference and indicated how they intended to vote. However, Councillors are entitled to publicly state their positions in deliberations leading to a vote. They are after all politicians performing the task assigned to them by the Legislature in the presence of

constituents who elected them. That does not afford a license for bias; however, a proper understanding of the context helps to fairly assess the impugned comments/conduct.

[170] As discussed, some cause for concern has been identified by Dalhousie and requires close examination by this Court. Having done so, I am satisfied Council's decision is not in doubt due to a reasonable apprehension of bias. Said differently, a reasonable and informed person, viewing the matter realistically and practically given the relevant contextual factors discussed above – and having thought the matter through – would not conclude that Council was predisposed to decide the registration dispute in a certain way.

[171] On this record, my bias assessment is what I would describe as a "close call". It is paramount that administrative decision-makers, in this case Council members, understand the degree of impartiality that its adjudicative functions attract and conduct themselves accordingly. While one can appreciate the context and the political role Councillors must navigate that does not detract from their obligation to be impartial. It is worth repeating the notable adage that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[28]

*Bias at the committee level*

[172] The parties agree that the less stringent "closeminded" standard applies to the assessment of bias at the committee level. To recap, that is whether a committee member in fact had a mind that was incapable of persuasion, not whether a reasonable person would believe they did.

[173] During the hearing before Council, Dalhousie was not shy about criticizing what it viewed as inappropriate conduct of HAC members during the July 15, 2022 meeting. The recording of the hearing confirms that in his oral submissions, Mr. Rogers described the work of committee members as "*what seemed like an effort on the part of staff and committee members to fall over themselves to award spurious unwarranted heritage points*".

[174] Having also reviewed the recording of the July 15 HAC meeting, I do not share that harsh view. It is not borne out by any reasonable view of what transpired during the meeting. No animus towards Dalhousie is apparent. The recording

[28] *Vento* at para. 27 citing *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256 (E.W.H.C.) at p. 259.

depicts committee members who were mindful of the established evaluation criteria they apply in their heritage assessment. Committee members appeared engaged in their task and had a respectful discussion and debate. I detect no expression of a pre-formed opinion on the HAC's part as to whether to recommend registration to Council.

[175] I am not persuaded the HAC acted in a partial manner against Dalhousie's interest. Even if it had, the recommendation was not binding on Council and it was considered by Council along with the other evidence and submissions. In other words, any bias concerns would be neutralized at the *de novo* hearing.

***Did Council's decision fall within a range of reasonable outcomes?***

[176] I must now consider whether Council's decision to register the property in the municipal heritage registry fell within a range of reasonable outcomes.

[177] The core foundation of Dalhousie's unreasonableness submissions are anchored in its breach of procedural fairness and bias claims. Dalhousie relies heavily on the findings of the reviewing judge which have been displaced.

[178] Having determined that (1) the reviewing judge erroneously strayed beyond the applicable standard of review in his reasoning; (2) any shortcomings at the HAC level were remedied at the hearing before Council; (3) the Council hearing itself was procedurally fair; and (4) Council's decision was not tainted by bias, this issue can be dealt with summarily.

[179] This is not a case where any party takes issue with the governing framework set out by the Supreme Court of Canada in *Vavilov* and reiterated in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

[180] In *Paladin*, this Court set out a helpful review of the essential principles for conducting a reasonableness review at paras. 39 – 48. There is no need to review all of them but I note these two:

> [42] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification. History and context include the evidence, submissions, record, the policies and guidelines that informed the decision-maker's work and past decisions. Context also includes the administrative regime, the decision

> maker's institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation.
>
> [43] The "hallmarks of reasonableness" are "justification, transparency and intelligibility". Consequently, a decision will be unreasonable where "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point". [citations omitted]

[181] Given Council did not provide written reasons for its decision, the record, including the recording of the hearing, are critical in assessing reasonableness.

[182] To repeat, Council received detailed written materials, had the benefit of oral submissions, obviously weighed and debated the evidence and submissions, and held a vote, with a majority of Councillors voting in favour of registration.

[183] There is no question that Council had the authority to make the decision it did under the *Heritage Property Act*. Further, the decision whether to register a property as a municipal heritage property is a discretionary one. Just because Dalhousie's position and supporting evidence did not carry the day does not render Council's decision unreasonable.

[184] In my view, Council's decision falls within the range of reasonable outcomes. It is internally rational, logical, and tenable in light of the relevant factual and legal constraints.

***Did the reviewing judge err in determining there was no authority for third-party applications under the Heritage Property Act?***

[185] For the reasons set out earlier, the reviewing judge's determination of this issue, which was irrelevant to his review of the administrative decision, is *obiter* and of no precedential value. Nothing further need be said about the disposition of this issue.

**Conclusion**

[186] For the foregoing reasons, I would allow the appeal and restore Council's heritage registration decision.

[187] The parties agreed to costs of $7,500 payable by HRM to Dalhousie in the court below. I would reverse the award meaning that amount is now payable by Dalhousie to HRM.

[188] HRM sought $2,500 as costs on appeal. I would award costs of $1,500 (inclusive of disbursements) payable by Dalhousie to HRM. The reduction is to recognize the unsustainable argument HRM advanced respecting the governing bias test to be applied to Council's adjudicative function. No costs were sought by the Intervenor.

Van den Eynden, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.