SUPREME COURT OF NOVA SCOTIA

Citation: *BM Halifax Holdings Ltd. v. Nova Scotia (Attorney General)*, 2014 NSSC 430

Date: 2014-12-17
Docket: Halifax No. 427522
Registry: Halifax

Between:

BM Halifax Holdings Limited, TDB Halifax Holdings Limited and Robin Halifax Holdings Limited

Applicants

v.

The Attorney General of Nova Scotia, Representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Judge:	The Honourable Justice Frank C. Edwards
Heard:	November 27, 2014, in Halifax, Nova Scotia
Final Written Submissions:	November 4, 2014 and November 19, 2014

Oral Submissions: November 27, 2014

Counsel:	Victor J. Goldberg and Ezra van Gelder, for the Applicants
	Adriana L. Meloni, for the Respondent

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INTRODUCTION

A. I have reviewed the written submissions of Counsel and listened carefully to their oral submissions in Chambers on November 27, 2014. I am in complete agreement with the written submissions of the Respondent which are set out in full below.

OVERVIEW

1. BM Holdings Ltd., TDB Halifax Holdings Ltd., and Robin Halifax Holdings Ltd. all of which are part of the Thiel Family Group of Companies ('the Applicants") have filed an Application in Chambers seeking declarations respecting the *Statement of Provincial Interest Regarding the Development of the Nova Centre*, OIC 2013-258: N.S. Reg. 272/2013 and the Ministerial Order establishing an Interim Area Planning Order by way of N.S. Reg. 310/2013 ("IPA Order").

2. The Applicants claim that the impugned regulations are not within the regulation-making authority of their respective enabling statues; notably the ***Municipal Government Act*** *SNS 1998, c.18 ("MGA") and the* ***Halifax Regional Municipality Charter****, SNS 2008, c. 39 ("HRM Charter").*

3. The Respondent, the Attorney General of Nova Scotia (the "Province"), disagrees and maintains that both the *SPI* and the *IPA Order* were lawfully enacted and within the Province's legislative authority.

BACKGROUND FACTS

4. Amidst concerns regarding limitations of the current World Trade and Convention Centre the Province, in collaboration with Halifax Regional Municipality, endeavored to examine alternatives for an expanded facility in the Downtown Core. As part of this examination, on or about March 25, 2008, the Province and HRM sent out an expression of interest for a development opportunity that would include a new trade centre as a core component. The Press Release from the Premier's Office noted:

> The province and Halifax Regional Municipality are seeking expressions of interest from qualified individuals or groups for a development opportunity that includes a new World Trade and Convention Centre as a core component.
>
> There are a number of conditions that must be met by interested parties. Among them, the building must be located in downtown Halifax and it must have a minimum of 150,000 square feet of usable space. It must be able to host multiple large conventions and several smaller events simultaneously.
>
> "This could be one of the most exciting things to happen to downtown Halifax in quite some time," said Premier Rodney MacDonald. "The existing World Trade Centre has been an economic engine for the city and the province, but we are outgrowing the existing facility.
>
> "As we continue to develop the downtown, it's clear more convention space needs to be part of the plan."
>
> Since 1984, Trade Centre Limited has contributed an estimated $2.2 billion in direct expenditures, and $1.6 billion in incremental expenditures. It has also resulted in almost $100 million in tax revenues and employs 98 full-time and 300 part-time staff.
>
> "HRM has the best of everything convention planners are looking for, from excellent dinning and a vibrant nightlife, to rugged ocean vistas and peaceful getaways," said Mayor Peter Kelly. "It's no surprise that we are becoming more sought after as a convention destination of choice; a new facility could give us the capacity to welcome to HRM not only more, but even bigger conventions from around the world—and we definitely want that business."
>
> [O'Connor Affidavit Tab "1"]

5. As part of this process, Rank Inc., a Halifax based developer owned by the Ramia family, was identified as a viable proponent for the possible development.

6. As part of their continued examination, the Province retained the firm of Gardner Pinfold to provide an economic impact assessment concerning the possible re-development of the World Trade and Convention Centre. Gardner Pinfold's report of December 2009, noted a number of positive economic benefits to the development of a new Convention Centre in the Downtown Core.

[O'Conner Affidavit Tab "2"]

7. After significant consideration, the Province, in or around December of 2010, again in collaboration with HRM, made a decision to support Rank Inc.'s ("Argyle") development of the new Convention Centre, subject to the federal government's agreement to contribute to the funding of the project.

8. On or about August 15, 2011, the Federal Government notified the Province that it had agreed to partner with the Province and HRM in the funding of the new Convention Centre. This was welcome news for the Province. The Province was excited for the opportunities and economic benefits the development of the Nova Centre would create for the people of Nova Scotia. A portion of the announcement from the Premier's Office reads:

> "This is great news for the people of Nova Scotia," said Premier Dexter. "This convention centre will mean new jobs during construction and operation, and it will put this province on the map as a premiere destination for conventions and other tourism activities."
>
> …
>
> Atlantic Canada is the only region in the country that is unable to accommodate major national organizations and international conventions, resulting in a loss of

> millions of dollars in potential revenue every year. The new convention centre will change that and bring thousands more people into the province.
>
> The potential spinoffs are far-reaching. Businesses across Nova Scotia stand to benefit both during and following construction. Industry trends show that 30 to 40 per cent of delegates extend their visits for personal travel, and meetings and convention services, such as transportation, local produce and local entertainment.
>
> …
>
> The tax revenue will go toward enhancing health, education and social services for Nova Scotians in all regions of the province," said Premier Dexter. "This is truly a Nova Scotia project."
>
> …
>
> The province has committed $56 million toward the convention centre portion of the project. HRM has also committed $56 million and the federal government announced it will contribute $51 million.
>
> …
>
> I can't remember a time when this province had so many projects on the horizon that could change the economic landscape of Nova Scotia," said Premier Dexter. "A new convention centre, the Lower Churchill project, Irving's shipbuilding bid—these are significant opportunities to invest in Nova Scotia's future and I am committing to do everything I can to support these projects moving ahead."

[Affidavit of O'Conner Exhibit "3"]

9. In July of 2012, the Province and HRM signed an Agreement detailing their respective responsibilities and understanding as regards to the construction and operation of the Nova Centre as well as their financial cost sharing commitments for the project.

[O'Connor Affidavit Tab "4"]

10. Between July and December 2012, Argyle undertook a comprehensive public engagement process across Nova Scotia. To incorporate the feedback Argyle garnered from the public sessions, Argyle went back to the drawing board and made major modifications to their original design plans. As a result of the re-design, Argyle believed it would likely require changes to the Land Use Bylaw and Municipal Planning Strategy in order to secure necessary development permits. In a letter dated July 3, 2013, Argyle sought

guidance from HRM on an approach that would allow Argyle to continue to work on the subgrade portions of the Centre while the necessary amendments were being reviewed and put in place. Portions of the letter provide as follows:

> We are committed to participating in the HRMbyDesign approval process. We will make the case for design changes that have arisen as a direct result of the public's input. We believe those who participated in the extensive consultation process agree that these changes make this project better, but also result in a more complex design.
>
> Our challenge is one of timing. We are committed to delivering this project on time and are looking for a solution that allows us to continue the momentum on the site and to proceed with below grade work while the regulatory process unfolds.
>
> …
>
> It is important that we maintain momentum of this project for various reasons, not the least being the occupancy date requirements of our tenancies. We do recognize the impact a project of this magnitude can have on the neighboring restaurants and businesses and we are striving to keep the duration of the construction to a minimum. Further, the optics of a large undeveloped construction site remaining in the heart of the city for an extended period does not lend itself to the vibrancy of the surrounding restaurant and bar district. Weather is also an important consideration with construction, with the warmer months being key to making substantial headway.
>
> In summary, we do not think it is in either the public interest or our own interest to have construction of the project stalled for a period of months. We understand, of course, that if we were permitted to proceed with the subgrade work this would not provide us with any assurance regarding the approval of the portion of the Nova Centre which would be placed above ground. This portion of the project would require site plan approval. As developer, we would entirely assume the risk associated with the approval of this portion of the project.

> The underground portion which we wish to continue to construct pending site plan approval for the above ground portion can be adapted to support buildings consistent with the mass and scale permitted in the Land Use By Law. This request arises as a result of our response to the public consultation process and our attempt to meet the public's aspirations and vision for this project.
>
> We seek your support in finding a practical solution to maintain momentum and keep this project moving, while also respecting the HRMbyDesign approval process. [emphasis added]
>
> [Affidavit of Ann Clarke, May 22, 2014 Exhibit "D" Attachment B to HRM staff report of July 15, 2013]

11. A HRM staff report dated July 15, 2013, went before HRM council at the July 23, 2013 meeting. The report clearly canvased risks and implications of requesting the Province to consider the issuance of a statement of provincial interest and subsequent interim planning area order. At page 3 of the report it states:

> There are risks and implications associated with the adoption of a Statement of Provincial Interest and Interim Planning Area as described. Correspondingly, there are also risks and implications associated with not doing so.
>
> The implications of pursing a Statement of Provincial Interest and Interim Planning Area Order relate to proceeding with below-grade construction activity in advance of planning approvals for the above-grade portions of the building. Specifically, if the approvals do not reflect the building that is currently envisioned by the developer, parts of the underground structure may need to be removed and re-designed.
>
> The implications of not pursuing a Statement of Provincial Interest and Interim Planning Area Order relate to a delay in the January 2016 overall project completion date. This could place preliminary bookings for events in the facility in jeopardy. It could also delay the occupancy for the tenants in the leasable portions of the building and increase the risk to the commercial viability of the project. It would also result in significant risk to the Province's and HRM's perceived capacity to meet commitments to host events at this facility. In

addition, the site would sit without meaningful construction activity for a period required to implement any alternative solutions.

[Affidavit of Anne Clarke
May 22, 2014 Exhibit "D"]

12. Ultimately HRM passed a resolution authorizing that a request be made of the Province to consider passing a statement of provincial interest and thereafter the possible issuance of an interim planning area order. By letter dated July 26, 2013, Richard Butts, Chief Administrative Officer, wrote to the Service Nova Scotia and Municipal Relations and confirmed that that HRM was authorized to request that the Province consider issuing a statement of provincial interest and interim planning area order.

[Affidavit of MacDonald
Exhibit "A" and Supplemental
Affidavit MacDonald Exhibit "A"]

13. On or about July 19, 2013, Argyle applied to HRM to amend the Downtown Halifax Municipal Planning Strategy and the Downtown Halifax Land Use By-Laws. In support of their application Argyle included a letter from Noel Fowler Architect, among other documentation. The letter recapped the public input into the design of the project and the unique nature of a development of this magnitude in the downtown core. It emphasized the import of the Convention Centre within the bigger complex. At page 8 of the report it reads:

> Clearly, the topic which generated the most discussion and debate throughout the public engagement sessions was the Convention Centre component. The Convention Centre represented the public face of this mixed use development and the public clearly wanted this component to be iconic and therefore much more visible and prominent in the overall composition. Additionally, the majority of participants believed it was essential the Convention Centre have access to more natural light and provide views of the surrounding City and Harbour from within.

[Supplemental Affidavit of
MacDonald Exhibit "A"]

14. The report then concluded by re-asserting the unique nature of the Nova Centre and the role in which the context of the build must be in the fore when considering development of such a significant and "one of a kind" development:

> Context is arguably the most powerful generator of built form. From context, buildings may derive a sense of scale, rhythm, texture or colour, all of which may be meaningless if used only a few blocks away and even more so if applied to a "green field" site. But, in a broader sense, context provides much more than visual cues to the creation of built form. If context can be considered to include the requirements and aspirations of various governmental agencies, land use by-laws and public opinion, then building expression and form are inextricably tied to context.
>
> Nova Centre, the subject of this application, has in no small measure derived its expression and form over several years of immersion in "context". The project is clearly a product of this "immersion", and its expression and form a measure of its responsiveness to these influences.
>
> That Nova Centre is no longer compliant with certain provisions of the Land Use By-Law for Downtown Halifax and the Municipal Planning Strategy is arguably a function of its unique geneses. But there is also a convincing argument suggesting "one of a kind" projects, such as the Nova Centre, with extreme demands for the accommodation of relatively large building components will predictably find themselves at odds with some provisions of the Land Use By-laws and Municipal Planning Strategies. Cities develop by-laws and strategies around the predictable, common occurrences in an effort to encourage, facilitate and manage future growth. Exceptions, such Nova Centre, are by definition unpredictable and are therefore generally not adequately addressed [sic] such by-laws and strategies. By extension, the amendments being requested in this Planning Application should not be considered exceptional, but rather predictable.

[Supplemental Affidavit
MacDonald, Exhibit "A"]

15. On August 1, 2013, the then Minister of Service Nova Scotia and Municipal Relations announced that the Province would support HRM's request and

adopt a Statement of Provincial Interest. An excerpt from the press release reads:

> "The Nova Centre is important to the entire province," said Service Nova Scotia and Municipal Relations Minister John MacDonell. "We are ensuring initial work can move forward while revised plans for upper floors go through municipal approval and consultations."
>
> "The province is giving HRM the flexibility to avoid delay in the project, so it can provide growth for the province and ensure we remains [sic] competitive. It's important for all Nova Scotians that the three levels of government work together to create new jobs and grow a strong economy".
>
> [Supplemental Affidavit
> MacDonald Exhibit "B"]

16. On August 6, 2013, pursuant to section 193 of the *MGA*, the Governor in Council formally adopted the *Statement of Provincial Interest Regarding the Development of the Nova Centre*, OIC 2013-258 identifying that the Nova Centre Subgrade Portion was a matter of Provincial Interest. In its entirety the *SPI* reads as follows:

> **Goal**
> To recognize that the timely construction of the subgrade portion of the proposed development complex by Argyle Developments Inc. in the site bounded by Argyle, Sackville, Market and Prince Street[s] in Halifax Regional Municipality is a matter of Provincial interest and therefore warrants special planning policies and regulations.
>
> **Basis**
> The proposed development complex by Argyle Development Inc. consists of office towers, a hotel, retail shops and underground parking as well as a convention centre. It is referred to, in its entirety and for the purposes of this Statement of Provincial Interest, as the "Nova Centre".
>
> All levels of government have an interest in the development of the convention centre and as a consequence have an interest in the construction of the Nova Centre (of which the convention centre forms part).
>
> The Governor in Council is satisfied that the adoption of a statement of Provincial interest is necessary to protect the Provincial interest in promoting economic growth and employment opportunities through the timely development of the Nova Centre.

Application
The area bounded by Argyle, Sackville, Market and Prince Streets in Halifax Regional Municipality.

Provisions
The planning documents of Halifax Regional Municipality must contain specific policies and regulation for the timely development and construction of the subgrade portion of the Nova Centre.

[Affidavit of MacDonald,
Exhibit "B"]

17. This *SPI* was issued as a stand-alone Regulation and identified as N.S. Regulations 272/2013. This specific *SPI* now appears as a consolidated regulation under the *MGA* along with Regulation N.S. Reg. 101/2001 (April 1, 1999).

18. Following the issuance of the *SPI*, the then Minister of Service Nova Scotia and Municipal Relations, the Honourable John MacDonell, was advised by HRM that they could not amend their planning documents in a manner that would permit the timely construction of the subgrade portion of the Nova Centre. As such the Minister was satisfied that it was necessary to regulate the Nova Centre Subgrade portion as an Interim Planning Area, and by way of Ministerial Order dated September 6, 2013 issued an IPA Order for the subgrade construction of the Nova Centre by way of Regulation 310/2013. The Order reads, in part, as follows:

> WHEREAS the Governor in Council adopted the *Statement of Provincial Interest Regarding the Development of the Nova Centre* by Order in Council 2013-258 (dated August 6, 2013, (the "SPI") pursuant to Section 193 of the *Municipal Government Act* and identified that the timely construction of the subgrade portion of a proposed development complex by Argyle Developments Inc. ("Argyle") in the site bounded by Argyle, Sackville, Market and Prince Streets in downtown Halifax (the "Nova Centre site") is a matter of provincial interest;
> …
> AND WHEREAS Argyle's participation in the HRM by Design process resulted in changes to the original design of the Nova Centre to reflect the public's input, and these changes have prevented Argyle from Filing an application showing a

> design for the entire Nova Centre with the Municipality in timely manner, and whereas Argyle has not obtained an encroachment license or street closure authorization or otherwise complied with planning requirements of the Municipality, with the result being that the Nova Centre Subgrade Constructions cannot be considered for site plan approval or a development permit or building permits by the Municipality's permitting authority as a result of the present requirements of the Downtown Halifax Secondary Municipal Planning Strategy ("MPS") and the Downtown Halifax Land Use By-law ("LUB");
>
> AND WHEREAS Argyle cannot proceed with the Nova Centre Subgrade Construction without a site plan approval, development permit and building permits, and other municipal approvals, licenses and permits, including an encroachment license or street closure authorization in respect of Grafton Street;
>
> AND WHEREAS Argyle has applied to the Municipality, by application dated July 19, 2013, to amend the MPS and the LUB, and the Argyle application is currently under consideration by staff of the Municipality as Case No. 18708;
>
> AND WHEREAS on July 23, 2013, the Council of the Municipality passed a resolution requesting that the Province consider the adoption of a Statement of Provincial Interest and the creation of an Interim Planning Area Order to facilitate the timely construction of the underground portions of the Nova Centre site;
>
> AND WHEREAS the Municipality has advised that should it receive a request from me to adopt or amend its planning documents so that they are reasonably consistent with the SPI, it could not comply with the request in a manner that would permit the timely development and construction of the subgrade portion of the Nova Centre site, as is required in the SPI;
>
> AND WHEREAS I am satisfied that there are necessary and compelling reasons to establish and regulate the Nova Centre Subgrade Portion as an interim planning area pursuant to Section 214 of the Halifax Regional Municipality Charter to protect the provincial interest;
>
> [Affidavit of Marvin MacDonald
> June 25, 2013, Exhibit "C"]

19. In conjunction with the issuance of the *IPA Order*, an Indemnity Agreement was signed between HRM, the Province, Argyle and Rank Inc. on this same date. The Agreement laid out the understanding between the parties and confirmed that Argyle assumed the risk of proceeding with the subgrade construction in the absence of approval (at that time) of the above grade design. The Agreement made it clear that Argyle's application to amend the MPS and LUB, for the approval of the above grade construction, would be

subject to normal practices and procedures and that no special promises were given to Argyle for said approvals.

[Supplemental Affidavit of MacDonald, Exhibit "D"]

20. On September 9, 2013, HRM issued the necessary permits to Argyle allowing them to commence work on the subgrade portions of the Nova Centre.

[Affidavit of MacDonald, Exhibit "D"]

21. Construction of the subgrade portion of the Nova Centre was completed in the summer of 2014 and on August 6, 2014 HRM issued the necessary permits allowing Argyle to commence construction of the above grade portions of the Nova Centre. Construction on the above grade levels of the Nova Centre are now well underway.

[Supplemental Affidavit of MacDonald Exhibit "E"]

ISSUES

1. Are the impugned regulations, that being the *Statement of Provincial Interest Regarding the Development of the Nova Centre*, by way of N.S. Reg. 272/2013 and the Ministerial Order establishing an Interim

Area Planning Order by way of N.S. Reg. 310/2013 *vires* their respective enabling legislation.

LAW & ARGUMENT

(a) Statutory Interpretation

22. This Application involves the interpretation of the impugned regulatory provisions, specifically, the *SPI* and *IPA Order*, and of the *MGA* and the *HRM Charter* under which the impugned regulations were made. The Nova Scotia Court of Appeal reconfirmed the modern approach to statutory interpretation in ***Nova Scotia (Health) v. Morrison Estate, 2011 NSCA 68*** in the following terms:

> **14** This Court recently adopted and applied the "modern approach" to statutory interpretation in **Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)**, 2009 NSCA 44, where MacDonald, C.J. held:
>
> > [36] The Supreme Court of Canada had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
> >
> > > ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

23. Dridger's modern approach to statutory interpretation has been repeatedly cited by this Court as the preferred approach to interpretation and ought to be employed in this case.

(b) Vires of Regulations

24. The burden of demonstrating that the *SPI* and *IPA Order* are *ultra vires* their enabling legislation falls squarely on the Applicants.

25. In ***Harling v. Nova Scotia (Attorney General)*** 2009 NSSC 2 Justice Goodfellow succinctly set out the guiding principles in assessing whether regulations were *ultra vires* their enabling statutes at paragraph 167:

> (a) where a Regulation falls within the contemplation of a power confirmed by a Statute, a court should only consider interfering with the exercise by the Governor in Council of its Regulation making authority if there is a condition precedent to the exercise of that power that has not been observed, if it conflicts with the provisions of the empowering Act, or if the Regulation was enacted in bad faith deliberately directing what was prohibited (Investment Property Owners' Association of Nova Scotia v. Nova Scotia, (1984), 15 D.L.R. (4th) 192 (N.S.C.A.) at pp. 196-197, Ross Barrett & Sons v. A.S. (Guardian ad litem of) (1995), 33 C.P.C. (3d) 250 (N.S.C.A.) at para. 18);
>
> (b) it is not the function of the court to pass judgment upon the wisdom of the Governor in Council in making Regulations so long as it has acted within the bounds of the authority delegated to it by the Legislature (Wentzell et al v. Attorney General of Nova Scotia, [1985] N.S.J. No. 395 (C.A.) (QL) at para. 11, Ross Barrett & Sons, supra at para. 19);
>
> (c) in determining if there is an inconsistency between the Regulation and the parent Statute, the court should not restrict its consideration simply to the authorizing section of the Act, but should look to the statue as a whole and its intent and its spirit (Kubel v. Alberta (Minister of Justice), (2006), 32 C.C.L.I. (4th) 243 (Alta. Q.B.). at para. 23, Johnson v. Federated Mutual Insurance Co. (1989), 60 D.L.R. (4th) 417 (Alta. C.A.));
>
> (d) when considering the validity of subordinate legislation, a court must proceed on the assumption that such legislation is within the authority conferred by the parent statute and should not declare it invalid unless there is clear evidence to support such a finding (Heppner v. Alberta (Minister of Environment) (1977), 80 D.L.R. (3d) 112 (Alta. C.A.) at p. 118);
>
> (e) enabling legislation may grant the statutory delegate the requisite authority to define terms in a manner that is at variance with the plain and ordinary meaning normally attributed to such terms (Johnson, supra at p. 424; Kubel, supra at para. 23; c/f Szmuilowicz v. Ontario (Ministry of Health) (1995) 24 O.R. (3d) 204, (Div. Ct.)); and
>
> (f) a definition that amounts to a colourable attempt to amend the legislation or is adopted in an effort to satisfy some other collateral purpose is ultra vires (Kubel, supra at para. 23). [emphasis added]

26. Justice Goodfellow's decision was upheld on appeal at 2009 NSCA 130. Writing for the Court, Chief Justice MacDonald confirmed:

> **117** The applicable law involves three basic premises. Firstly, it is customary for legislation in furtherance of its objects, to authorize the government (by way of order-in-council) to proclaim appropriate regulations. …
>
> **118** Secondly, regulations must nonetheless be consistent with and not beyond the scope of the legislation. For example, in Way v. Covert, (1997), 160 N.S.R. (2d) 128 (C.A.), this court held:
>
> > para. 84 ... it is trite law that a regulation cannot stand if it is inconsistent with its parent statute (*Booth v. R.* (1915), 21 D.L.R. 558 (S.C.C.) and *The Grand Truck Pacific Railway Co. v. The City of Fort William* (1910), 43 S.C.R. 412….
>
> **119** Thirdly, the regulations are presumed valid unless demonstrated to be otherwise. In other words, the appellants bear the onus. For example, as stated by L'Heureux-Dubé, J. in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40:
>
> > para. 21 ... The party challenging a by-law's validity bears the burden of proving that it is ultra vires: see Kuchma v. Rural Municipality of Tache, [1945] S.C.R. 234, at p. 239, and Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368, at p. 395.

27. Since the decision in *Hartling*, we also have the benefit of clear confirmation from the Supreme Court of Canada as to the guiding principles in challenges being made as to the legality of regulations. In ***Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*** [2013] 3 S.C.R. 810 Justice Abella writing for the court explained:

> 24 A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole. (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292)

25 Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15: 3200 and 15: 3230).

26 Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach ... consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13: 1310; Keyes, at pp. 95-97; *Glykis v. [page827] Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64).

27 This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice" (*Jafari v. Canada (Minister of*

Employment and Immigration), [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.):

> ... the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]

> 28 It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15: 3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111). [emphasis added]

28. Recently our own Court again had occasion to consider the vires of certain provincial and federal regulations in ***Geophysical Service Inc. v. Canada – Nova Scotia Offshore Petroleum Board*** [2014] NSSC 172. In this case the Applicant challenged certain *Accord Regulations* which required it to disclose seismic survey data it compiled to the Offshore Petroleum Board. Geophysical argued that the Board lacked authority to make regulations pertaining to the collection of this type of data. Justice Boudreau disagreed and concluded that the impugned regulations were vires and part of the overall legislative and regulatory scheme of the Acts.

29. At paragraph 22 of the Applicants' submissions, reference is made to the decision in ***Sobey's Group Inc. v. Nova Scotia (Attorney General)*** 2006 NSSC 290 in support for their position. With respect, the Province does not believe this case assists the Applicants as they suggest. While true the court concluded that the impugned regulations were *ultra vires*, the particulars of the authority, legislation and circumstances of that case are not particularly helpful in coming to the same finding in the present case. As always, the authority granting power to enact regulations and the specific intent and purpose of the enabling legislation must be at the fore. In ***Sobey's*** the Court found the impugned regulations were discriminatory as against the applicants, and others not fitting within the restrictive provisions of the regulations. In the present case there is no issue with respect to the *SPI* or *IPA Order* being discriminatory in any regard whatsoever. Secondly, throughout the decision the Court commented on the fact that had either the restrictive provisions been incorporated into the Act, or if subjective language had been imported into the regulation itself, a challenge to the provision would likely be unsuccessful. This latter distinction will be addressed in more detail later in these submissions.

30. In the present Application the Applicants challenge the scope of the regulation making authority of the Governor in Council. That authority is determined by the power conferred on the Governor in Council by the respective enabling legislation. In this case the *MGA* and the *HRM Charter*. The Applicants allege that there has been an improper use of power by Governor in Council in passing the *SPI* and *IPA Order*. They suggest that the Governor in Council, with respect to the *SP*I, and the then Minister of

Service Nova Scotia and Municipal Relations, with respect to the *IPA*, acted outside their respective scope of delegated authority.

31. The Applicants clearly have the heavy burden of showing that the impugned regulations are *ultra vires* the enabling legislation. The Province maintains that the regulations are *vires* the *MGA* and the *HRM Charter* and further the object, purpose and intent of the legislation.

(c) The *SPI* is Vires the *MGA*

32. Under the *MGA* and the *HRM Charter*, municipalities are given primary authority for planning through the adoption of municipal planning strategies and land use by-laws. A Statement of Provincial Interest as referred to in section 193 of the *MGA* is one area of a land use planning power that the Province has reserved for itself. Specifically it enables the Province to intervene directly in the affairs of municipalities, whether by setting the ground rules with respect to the land uses a municipality may exclude from its borders or by setting rules for development within a municipality.

33. While true, the *MGA* was enacted as a mechanism to give municipalities more flexibility and control over their own issues, it was never intended to give *carte blanche* control over all issues.

34. In the Applicant's submissions they reference the Honourable Wayne Gaudet's speech in the House when he introduced the *MGA* to the Legislature back in 1998. The important passage, which is also highlighted by my friend, is found at page 3050 and provides:

> The bill recognizes municipalities as an order of government and gives them the tools they require to meet their responsibilities with limited involvement by the province.

35. The Province clearly intended that they would retain authority and power over a limited number of issues and the *MGA* specifically provides that the granting of a statement of provincial interest is one of those limited areas. It is not however the only exception. There are indeed other instances where the Province remains the decision maker. By way of example, the Director of Planning (Province) must review planning documents (e.g., municipal planning strategies) under section 208 of the *MGA*. Where the Director determines that the planning docs e.g., affect a provincial interest, then the planning docs are subject to the Minister's approval.

36. Section 2 (a) of the *MGA* confirms the general purpose of the Act and reads:

> The purpose of this Act is to
>
> (a) give broad authority to councils, including broad authority to pass by-laws and respect their right to govern municipalities in whatever ways the councils consider appropriate within the jurisdiction given to them;

37. Municipalities are given no more power than that which is given to them by the Province. The *Act* sets out clearly the various limitations to this over-arching authority. Municipalities have no jurisdiction over issues that are deemed to impact the provincial interest. Power and authority over these issues rightly remains within the jurisdiction of the Province. Part VIII of the *Act* deals with Planning and Development and has its own stated purpose. Section 190 provides:

> Purpose of this Part is to
>
> (a) enable the Province to identify and protect its interests in the use and development of land;
> (b) enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character,

through the adoption of municipal planning strategies and land-use by laws consistent with interests and regulations of the Province;

(c) establish a consultative process to ensure the right of the public to have access to information and to participate in the formulation of planning strategies and by-laws, including the right to be notified and heard before decisions are made pursuant to this Part; and

(d) provide the fair, reasonable and efficient administration of this part.

38. The language is clear and unambiguous. The purpose of this section is to give the Province the clear authority to take action in order to protect the provincial "interests in the use and development of land". Section 193 specifically gives authority to Governor in Council to make a Statement of Provincial interest by regulation. It provides:

> **Statement of provincial interest**
> **193** The Governor in Council, on the recommendation of the Minister, may adopt or amend a statement of provincial interest necessary to protect the provincial interest in the use and development of land.

39. Portions of the regulation clearly explain the Province's intentions and the rationale in issuing the *SPI* in this case:

> **Goal**
> To recognize that the timely construction of the subgrade portion of the proposed development complex by Argyle Developments Inc. in the site bounded by Argyle, Sackville, Market and Prince Street[s] in Halifax Regional Municipality is a matter of Provincial interest and therefore warrants special planning policies and regulations.
>
> **Basis**
> **…** All levels of government have an interest in the development of the convention centre and as a consequence have an interest in the construction of the Nova Centre (of which the convention centre forms part).
>
> The Governor in Council is satisfied that the adoption of a statement of Provincial Interest is necessary to protect the Provincial interest in promoting economic growth and employment opportunities through the timely development of the Nova Centre.

40. While the rationale behind the decision to issue the *SPI* ought not be second guessed by this Court, the decision itself must be consistent with the intent and purpose of its enabling statute. At paragraph 13(a) of the Applicants' Application it is argued that the *SPI* and *IPA Order* do "not comply with the letter spirit or intent of the enabling legislation." The identified and stated purpose of the issuance of Statement of Provincial Interest, as specifically referenced by section 193 of the *MGA*, is "to protect the provincial interest in the use and development of land". It is difficult to envision how then the issuance of the *SPI* in this instance was in any way outside the scope and intent of the legislation.

41. As referenced in the HRM council report, the wording of the *SPI*, the public statements of the then Minister of Service Nova Scotia and Municipal Relations, and the initial request from Argyle there was a multitude of reasons why the issuance of the *SPI* was in the provincial interest.

- the timely construction of the publically funded convention centre;
- the creation of, and support for, direct and indirect job creation both during the construction and operations of the Nova Centre;
- the importance of growing the economy;
- the commitment to convention bookings;
- negative impact on the Province's and HRM's perceived capacity to meet commitments to host events at this facility; and
- having a large undeveloped site in the downtown core.

42. The Applicants make much of the fact that the initial request originated from Argyle and that Argyle ultimately benefited from the issuance of the *SPI*. At paragraph 10 of their submissions they suggest that the only reason Argyle was looking for some type of accommodation was because of its "occupancy

date requirements of [its] tenancies." With respect this is not an accurate characterization of Argyle's request. Argyle specifically raises other concerns in its July 3, 2013 letter. Additionally Argyle's application package forwarded on or about July 23, 2013, seeking the requested amendments, makes it clear that the unique nature of the Nova Centre and the importance of it to the Province necessitated the amendments.

43. Likewise, in the Notice of Application the Applicants cite "an unfair competitive advantage to Argyle over the interests of other private developers and commercial landlords. The Nova Centre is a specific and unique development in the Province and is of importance to Nova Scotians. The Province, along with the other levels of government have made a significant financial commitment to this project. The Province clearly has a vested interest in the timely construction of the Centre both from a funding perspective for the potential economic benefits and will bring to the Nova Scotia economy.

44. Given the magnitude of the Nova Centre, public feedback was obtained in an effort to improve the development of the Centre. This public feedback resulted in changes to the design plans. In order to have the amendments issued significant delay would have resulted. The Province considered the timely construction of the Nova Centre to be in the interest of Nova Scotians and as such authorized the issuance of the *SPI*. While the physical impact of the *SPI* was site specific, the scope of its implications were widespread. The timely construction of the Nova Centre, which included the provincially funded Convention Centre, was seen to be a matter of provincial interest for the economic growth and employment opportunities it would bring to the Province. To suggest an unfair advantage was gained by Argyle against

others is simply inappropriate. The circumstances giving rise to the issuance of the *SPI* were in isolation and unique to the situation facing the Province at the time.

45. Nonetheless, the fact that Argyle received a benefit from the ultimate decision of the Governor in Council to issue the *SPI* is irrelevant. Ultimately, the Province was of the opinion that it was in the province's ultimate best interest to so issue the Statement. Any collateral benefit bestowed on Argyle ought not to be held against the Province in an effort to question the true intentions or motives thereof.

46. While governments must act within their authority, a recent case from the Ontario Court of Appeal, highlights that the lawful decision making authority of governments ought not to be scrutinized unless some degree of bad faith exists. In ***Seguin (Township) v. Hamer*** 2014 ONCA 108, (leave to appeal to the SCC dismissed with costs July 3, 2014) the Court considered a challenge to a Municipal By-Law which prevented citizens from feeding bears. The lower Court dismissed the Town's motion seeking an injunction to restrain the Respondent from continuing to feed bears contrary to the Town's By-Law and granted the Respondent's counter-application quashing said By-law. The Town appealed the lower Courts decision and the Court of Appeal allowed the appeal and issued a permanent injunction against the respondent. In doing so the Court made it clear that it should not interfere with the lawful decision making authority of the legislature. Specifically the Court endorsed the comments from the Manitoba Court of Appeal in *Mr. Pawn Ltd. v. Winnipeg (City)*, 2002 170 Man. R. (2d) 1 wherein Twaddle J.A. at paragraph 11 stated:

> City Council is a legislative body, not a court. It must, of course, act within the authority conferred on it and, in doing so, enact its by-laws in good faith and not for an improper purpose. There is, however, no requirement that Council have evidence of anything before enacting a by-law. In particular, there is no requirement that Council have evidence of potential harm before enacting a by-law designed to prevent such harm. Council can enact laws within its authority on whatever information it chooses, be that information placed before it by evidence or representation or even information within councillors' own knowledge.

47. The Court went on to conclude that the by-law on its face addressed concerns well within its power to enact and then made the following concluding comment at paragraph 12:

> It seems to us the respondent's evidence seeks to have the court engage in a review of the wisdom of the By-law. This the court cannot do.

48. The Province maintains that the issuance of the *SPI* was enacted in good faith and for the interest of the Province. In the absence of evidence of bad faith, it is, with respect, not the role of this Court to engage in an analysis of the rationale or decision making process of the Legislature in situations where they are clearly acting within their own authority.

49. At paragraph 36 of the Applicants' submissions it is suggested that section 193 of the *MGA* ought to be interpreted narrowly. This despite the broad language used in the provision. With respect, such an interpretation is contrary to the modern approach to interpretation. There is no ambiguity in the section or provision itself. The wording is clear that the Province retains the ultimate authority to adopt a Statement of Provincial Interest in circumstances where it is necessary to protect the province's interest in land use and development.

50. The Applicants then go on to suggest that section 193 authorizes Governor in Council to issue statements of provincial interest only in circumstances where the Province is trying to prevent or prohibit the development and use of land. With respect, such an interpretation is contrary to the clear and unambiguous wording of the specific provision and not consistent with the modern approach to statutory interpretation.

51. The Applicant attempts to buttress this position by pointing to the other statements of provincial interests as comparators. The nature and scope of the other statements of provincial interest are irrelevant to a determination of whether the *SPI* in this instance was made within the authority of the *MGA*. What ought to be central to the review here is only whether the enabling legislation gave the authority to the Governor in Council to issue an SPI in circumstances where it was believed necessary to protect the provincial interest, whatever that may be. The Province maintains that its authority to so issue was clear. Whether a statement of provincial interest is preventative in nature or not, is immaterial. The broad language of the provision clearly gives the Province the power to make such regulations as it deems necessary in the circumstances.

52. Moreover, while it might seem like a rather narrow point, it must not be lost that this *SPI* was enacted as its own stand-alone regulation. While it is consolidated with the other statements it is not an amendment to the previous regulation. The Registry of Regulations often group together like regulations into a consolidation for convenience of reference. Although the regulations are in the same consolidation as the previous statements (which were one document, so filed as one regulation – 101/2001), the statement itself was not filed as an amendment to the previous statements.

Accordingly, the introductory provisions in NS Reg. 101/2001 do not apply to the *SPI Regarding the Development of the Nova Centre*. While it is acknowledged, as referenced at paragraph 47 of the Applicants' submissions, that this *SPI* is "a different creature than the statements of provincial interest predating its creation" such an acknowledgment does not diminish in any way the Province's power and authority to have enacted it. It's authority is derived from the clear words of the *MGA*.

53. The *MGA*, read as a whole, and with particular reference to the broad authority bestowed on the Governor in Council to make regulations pursuant to sections 193 and 194 of the Act, confirm that the *SPI* was within Governor in Councils authority. There is no evidence sufficient to displace the presumption of validity. The *SPI* specifically corresponds with the authority provided for by way of section 193 and generally aligns with the purpose, object and intent of the *MGA* in reserving jurisdiction over certain issues with the Province.

(d) *IPA Order* Vires the *HRM Charter*

54. The *HRM Charter* clearly gives authority to the Minister of Service Nova Scotia to establish an Interim Planning Area by way of Ministerial Order. The language of sections 214 (3) and (4) of the *Charter* are clear in this regard:

> 214 (3) Where
>
> (a) The Council does not comply with a request pursuant to subsection (2); or
>
> (b) Development that is inconsistent with a statement of provincial interest that applies within a Municipality might occur and the Minister is satisfied that there are necessary and compelling

> reasons to establish an interim planning area to protect the provincial interest,
>
> the Minister may, by order, establish an interim planning area for a prescribed area.
>
> (4) Within an interim planning area subdivision, development, or certain classes of subdivision or development, may be regulated or limited or prohibited in whole or in part, as necessary, to protect the provincial interest.

55. As discussed briefly earlier in these submissions, the subjective language used in s.214 of the *HRM Charter* affords considerable latitude and broad authority to the Minister. This was indeed highlighted in the ***Sobeys (supra)*** decision referred to in the Applicants submissions. In that case, the Court canvassed the distinction between subjective and objective language in enabling legislation where, at paragraphs 17 and 18, the Court stated:

> It is somewhat revealing that the power given to the Governor in Council in the Labour Standards Code states in part *The Governor in Council may make regulations concerning any matter or thing which appears* ***to him*** *necessary or advisable for the effectual working of this Act.* This introduces a subjective element into the power given by the legislation, whereas, in the Retail Business Uniform Closing Day Act this power is defined as - *respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act*. The difference between these two approaches is substantial as stated in Driedger in *Construction of Statutes* (2d, 1983) at 328:
>
> > Sometimes the authority is to make such regulations as are necessary for carrying out the Act. It is doubtful that the words - as are necessary - add anything. In their absence, the Courts would no doubt strike down a regulation they thought unnecessary. In either case, the Courts would no doubt be the judges of necessity. Wider authority is conferred if a subjective test of necessity is prescribed. This power may be conferred on the Governor in Council to make such regulations as he deems necessary (advisable, expedient) for carrying out the purposes of the Act. In such a case ... the regulation making authority is the sole judge of necessity and the Courts will not question his decision, except possibly if bad faith were established. (Underscoring mine) There is, therefore a vast difference between the two following examples and the extent of the power conferred:
> >
> > > May make such regulations as may be necessary for carrying out of the provisions of this Act

> May make such regulations as he deems necessary for carrying out the provisions of this Act.
>
> It appears from this analysis that had the Minister or Cabinet (the regulating authority) been granted the power to make such regulations *as he deems necessary* then this court would be hard pressed to find the legal authority to question such decision. In the absence of such a subjective authority it is open to the Courts to objectively review the challenged regulations to determine if they were made under the authority of the Act, or, whether such regulations exceeded the specific authority and are thus *ultra vires* the Cabinet. [emphasis added]

56. Again, the Court goes on to highlight the distinction in its concluding paragraphs:

> By enacting the *Retail Business Uniform Closing Day Act* the province exercised its undisputed constitutional power to control business operations on selected holidays, including Sunday. Had the province (as did Ontario) passed the restrictive measures as part of the Act there would probably be no question as to the validity of such laws.
>
> By electing to place the power with Cabinet by way of the impugned Regulations it became the responsibility of Cabinet to make certain that such power was exercised in accordance with the powers delegated to it by the Legislature through the Act. It is trite to say that Cabinet can only do that which it is expressly, or impliedly permitted or authorized to do by the Legislature. This delegated power could have been greatly enhanced by the use of subjective discretionary provisions such as those found in the Labour Standards Code. Such a subjective power may even be sufficient to withstand any challenge based upon allegations of discrimination since the Cabinet would be the sole judge of "necessity or reasonableness". [emphasis added]

57. In the present case, the Minister issued the *IPA Order* on September 6, 2013. The recitals to the order clearly lay out his reasons for doing so, portions of which provide:

> WHEREAS the Governor in Council adopted the *Statement of Provincial Interest Regarding the Development of the Nova Centre* by Order in Council 2013-258 (dated August 6, 2013) (the "SPI") pursuant to Section 193 of the *Municipal Government Act* and identified that the timely construction of the subgrade portion of the proposed development….is a matter of provincial interest.
>
> …

> AND WHEREAS on July 23, 2013, the Council of the Municipality passed a resolution requesting that the Province consider the adoption of a Statement of Provincial Interest and the creation of an Interim Planning Area Order to facilitate the timely construction of the underground portions of the Nova Centre site;
>
> AND WHEREAS the Municipality has advised that should it receive a request from me to adopt or amend its planning documents so that they are reasonably consistent with the SPI, it could not comply with the request in a manner that would permit the timely development and construction of the subgrade portion of the Nova Centre site, as is required in the SPI;
>
> AND WHEREAS I am satisfied that there are necessary and compelling reasons to establish and regulate the Nova Centre Subgrade Portion as an interim planning area pursuant to Section 214 of the Halifax Regional Municipality Charter to protect the provincial interest;

58. The specific planning details contained in the *IPA Order* are consistent with the Minister's authority to regulate the development as deemed necessary to protect the provincial interest.

59. Having the Governor in Council adopt a statement of provincial interest which specifically recognized the need for special planning policies and regulations to ensure the timely construction of the subgrade portion of the Nova Centre, the Minister was satisfied that the then existing by-laws were inconsistent with the specific *SPI* and satisfied himself that the issuance of an interim planning area order was necessary to protect the provincial interest.

60. The *HRM Charter* was enacted in recognition of the growing need for a special arrangement between the Province and HRM as relating to development opportunities. The introduction of the Bill in the Legislature by then Minister of Service Nova Scotia, Jamie Muir confirms this. In part he noted:

> Mr. Speaker, some of the things that were in the Halfiax Charter and the accompanying legislation would follow it, were going to make it easier for developers to remove some of the red tape that would enable developers to make it more friendly for development so perhaps we can grow and bring this A-class office space that we need downtown, a little more easily. I've been told that sometimes it's very frustrating to people who want new development in HRM, some of the restrictions that are there for a variety of reasons. You know, bringing in the Charter and some of the additional amendments to the MGA and, of course, the HRM by Design, which is a piece of this as well, would enable HRM to grow economically and, of course, it, well, we have to get things that will keep our young people here. [4082]
>
> …
>
> Anyway, the fact that it's the economic engine in the province and, as they say, the health and economic performance in many ways is related –other municipalities are related to how well Halifax goes. [4083]
>
> …
>
> What the Charter will do, Mr. Speaker, is it will allow government to be more flexible and more responsive to HRM's evolving needs, especially around growth, development and economic opportunities, without continually having to amend the Municipal Government Act. I guess one only has to take a look at this sitting of the House to find out what happens when you try and make some minor changes to the Municipal Government Act to get the full perspective of people, particularly the people in HRM…[4085]
>
> [Tab 10 Applicants Book of Authorities]

61. It is very clear from a full reading of Minister Muir's introduction that the Province recognized the need to be more responsive to HRM's growing needs as the "economic engine" of our Province. Attracting and advancing development opportunities in the downtown core were certainly seen to be of vital importance.

62. The Applicant goes to great pains to lump the definitions of "regulate", "limit" and "prohibit" together in an effort to assist its argument that section 214 of the Charter does not allow the Province to issue an interim planning area order that permits development but rather only contemplates preventing or limiting development.

63. Reference is made specifically to 214(6)(a) which provides:

> The Minister shall
>
> (a) Send a copy of an order establishing an interim planning area and any order regulating or prohibiting development in the interim planning area to the Clerk. [emphasis added]

64. Clearly regulating and prohibiting, as used here, have to mean something different. We understand from section 209(o) "regulate" does not include the power to prohibit. There was a clear intent on the part of the legislature to exclude the power to prohibit from the definition of regulate while the definition of prohibit at 209(n) includes regulate.

65. The Shorter Oxford English Dictionary, 3rd ed., p. 1692 states:

> Regulate: "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings".

66. The Privy Council confirmed more than a century ago that there is a significant difference between a by-law that regulates and one that prohibits. In ***Toronto (City) v. Virgo*** (1895), [1896] A.C. 88 the Privy Council held that a municipal by-law that prohibited hawkers from carrying on business on certain specified streets of the city was invalid. The specific enabling legislation in that case allowed the municipality to "regulate and govern," but did not allow for the ultimate prohibition of business activity that was otherwise lawful.

67. ***Virgo*** has been considered numerous times in Canadian jurisprudence. Recently the Supreme Court of Canada in ***Katz, supra*** had occasion to

consider ***Virgo*** and the statutory principle that it expounded. Katz involved a challenge to private label Regulations that placed restrictions on who could sell generic drugs. Specifically starting at paragraph 44 Justice Abella, writing for the Court, wrote:

> 44. It seems to me somewhat ethereal to speak of a commercial "right" to trade in a market as highly regulated as is the pharmaceutical market in Ontario. Manufacturers have no right to sell drugs in the public market in Ontario unless they are listed in the Formulary, and no right to sell generic drugs at all unless they are designated as interchangeable. Since the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act* give the Lieutenant Governor in Council the authority to set the conditions that a drug must meet in order to be listed in the Formulary and designated as interchangeable, they expressly authorise interference with a manufacturer's ability to enter and remain in the market.
>
> 45. Nor do the private label Regulations contravene the principle that a statutory power to regulate an activity does not include the power to prohibit it. This principle had its origins in *Toronto (City) v. Virgo* (1895), [1896] A.C. 88 (Ontario P.C.), where Lord Davey held that
>
> > there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. [p. 93]
>
> 46. Assessing whether a regulation has crossed the line from being a permissible condition into being an impermissible prohibition requires establishing the scope of the activity to be regulated and then determining the extent to which it can continue to be carried on (Keyes, at p. 312). Here, the activity to be regulated is the sale of generic drugs in the private and public markets in Ontario. The private label Regulations do not prohibit manufacturers from selling generic drugs in Ontario's markets; they restrict market access only if a particular corporate structure is used. That cannot be characterized as a total or near-total ban on selling generic drugs in Ontario. [emphasis added]

68. By specifically excluding the power to prohibit from the definition of "regulate" in the present case, it is clear that the legislators intended the term to mean something different than prohibit. Regulate as used in this section contemplates some permissive action. "Guidance" or the "continued existence of that which is to be regulated" aligns with this understanding of

the definition, not prohibition. This is unlike the case in ***Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.*** 2007 NSCA 89 where Justice Cromwell determined that the statutory principle that the power to regulate does not include the power to prohibit had no application in the analysis of whether solid waste management by-laws were *ultra vires* the Municipality by virtue of the fact that they created a monopoly over the disposal of waste. At paragraph 126, Justice Cromwell reviewed the lower courts analysis and disagreed clarifying:

> Later in the paragraph from Rogers quoted by the judge, this appears: "[w]ithout express statutory authority, a municipality cannot use its power to regulate in trying to create a monopoly on its behalf." However, one must remember that at one time, courts frequently held that the power to regulate did not include the power to prohibit: see for example, **Toronto** (City) v. **Virgo** (1894), 22 S.C.R. 447 (S.C.C.). That line of authority has no relevance here because, as we have seen, the MGA expressly provides that the power to regulate includes the power to prohibit: see s. 171(1)(c). Moreover, the only case cited in Rogers to support this statement is Sept-Îles (Cité) c. Rioux, [1985] C.A. 295 (Que. C.A.). But it turns primarily on findings that the City used its zoning power in a discriminatory manner and that this was expressly illegal under La Loi sur l'Aménagement et l'urbanisme L.Q. 1979, c. 51.

69. In that case, the definition of regulate under that section of the MGA (s. 171) specifically provided for a definition of regulate that included the power to prohibit. It is noteworthy to point out that the definitions in this section specifically noted that they are subject to Part VIII of the Act which is the Part of the Act that the authority to grant a statement of provincial interest falls within. Pursuant to section 190(o) of the *MGA*¸ the definition of regulate is the same as that under the *HRM Charter* and does not include the power to prohibit.

70. Accordingly, the long standing principle that the power to regulate is something different than the power to prohibit is applicable to the analysis in this case. It supports the position that the power extended to the Minister in

"regulating or prohibiting development in the interim planning area" as referred to in section 214 of the *HRM Charter*, does not limit his authority to only "prevent" development.

71. The subgrade construction of the Nova Centre was subject to the Downtown Halifax Land Use By-laws. The *IPA Order* amended this by-law as necessary to allow the subgrade portion of the construction to proceed. By its very nature the *IPA Order* regulated the development of this portion of the construction.

72. The Minister, in granting the *IPA Order*, acted within his authority and pursuant to his powers under the *HRM Charter*. Accordingly, the Province maintains that the *IPA Order* was validly enacted and lawful. Furthermore, it is clear that the authority given to the Minister by virtue of section 214(2)(b) imparts a subjective element into the exercise of authority. Such subjective component limits this Court's ability to question and assess its necessity or reasonableness in any event.

(e) No Evidence of Bad Faith

73. There is a presumption that regulations are enacted in good-faith. The onus is on the person attacking the impugned provisions to establish that it was enacted in bad faith. In this case, there is no evidence whatsoever that the Province acted in bad faith in the adoption of the *SPI* or the issuance of the *IPA Order*. While this matter did not proceed by way of judicial review, the practical effect and considerations are nonetheless similar. Our courts have repeatedly stated that they should be slow to determine bad faith in the conduct of democratically elected officials unless there is no other rational conclusion.

74. In ***Thorne's Hardware Ltd. v. R.*** [1983] 1 S.C.R. 106, [1983], Dickson, J. considered an attack on a federal Order of Council which expanded the boundaries of the Saint John Harbour. It was alleged that the sole purpose of the expansion was to increase the Boards revenue and was in bad faith and outside of its delegated authority. Dickson, J. disagreed with the characterization and stated the following:

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: R. v. National Fish Co., [1931] Ex. C.R. 75; Minister of Health v. The King (on the Prosecution of Yaffe), [1931] A.C. 494 at p. 533. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case

75. Of like reasoning, according to Strayer J.A. in ***Jafari v. Canada (Minister of Employment and Immigration*,)** 1995 CanLil 3592 (FCA),:

> It goes without saying that it is not for a court to determine the wisdom of delegated legislation or to assess its validity on the basis of the court's policy preferences. . . It is accepted that a broad discretionary power including a regulation-making power may not be used for a completely irrelevant purpose but it is up to the party attacking the regulation to demonstrate what that illicit purpose might be.

76. Further, in ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C). the Supreme Court of Canada has clearly stated that review of a government action should recognize that local governments are political bodies and accountable to the electors. Respect for

legislative choices to leave some matters in the hands of elected decision makers, for the processes and determinations that draw on their particular expertise and experience, and for recognizing the different roles of the courts and elected municipal bodies.

77. In the present case, there is nothing in the evidence suggestive in any way that the Province acted in bad faith in the adoption of the *SPI* and then thereafter by the issuance of the *IPA Order*. While it is not the role of this Court to scrutinize the rationale behind its decisions, in this case the only evidence before the Court confirms that as regards to the *SPI*, the Province was taking action which it deemed necessary to protect its interest in the development and use of land pursuant its authority under section 193 of the *MGA*. As regard to the *IPA Order*, the recitals to the Order clearly confirm that then Minister MacDonell satisfied himself that there were necessary and compelling reasons to establish an interim planning area and in so ordering acted within his clear delegated authority pursuant to section 214 of the *HRM Charter*.

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78. The Province states that the *SPI* and *IPA Order* were consistent with the object, purpose, intent and spirit of the *MGA* and *HRM Charter*. Moreover, they each were enacted pursuant to the Province's delegated authority found in section 193 of the *MGA* and 214 of the *HRM Charter*. Accordingly the Province maintains that both of the impugned regulations are <u>vires</u> the Province and as such requests that the Applicants' Application be dismissed with costs in favour of the Province.

CONCLUSION

79. I am dismissing the application with costs in the amount of $1500.00 to the Respondent.

Order Accordingly,

Edwards, J.