

SUPREME COURT OF NOVA SCOTIA

Citation: *Dalhousie University v. HRM*, 2023 NSSC 374

Date: 20231121

Docket: 519239

Registry: Halifax

Between:

Dalhousie University

Applicant

v.

Halifax Regional Municipality and Halifax University Neighbourhood Association, an unincorporated association represented by Peggy and Shimon Walt

Respondents

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: June 15, 2023, in Halifax, Nova Scotia

Counsel: Peter Rogers, for the Applicant
Randolph Kinghorne, for the Respondent (HRM)
(Halifax University Neighbourhood Association not participating)

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By the Court:

A - Introduction

[1] In July 2021, Dalhousie University [“Dalhousie”] bought a residential lot [1245 Edward Street, Halifax, Nova Scotia] within its campus footprint, which coincidentally had thereon a house built in 1897.

[2] Dalhousie’s assessment was that it was in its best interests to demolish the building on the lot: “before it became unsafe or unsightly... [as it] was contaminated with asbestos, mould and lead paint. There was no safe economically viable use for the building on the property. Once demolished, the property would then be used to advance Dalhousie’s long-term strategic goal of growing its institutional footprint in a manner that is accessible to Dalhousie’s diverse population, environmentally sustainable, and economically viable. Dalhousie did not have a specific plan for use of the property at the time of its purchase, but the location immediately adjacent to a university residence within the primary Dalhousie campus area made it a good candidate to integrate into a larger project.”¹

¹ These facts were not disputed, and are drawn from Dalhousie’s May 15, 2023, Brief.

- [3] Dalhousie had no immediate or short-term use or plans for the building.²
- [4] Dalhousie bought the property for a purpose.
- [5] Dalhousie intended to demolish the building.
- [6] The lot next door is also owned by Dalhousie. It is an older multi-unit residence (Glengary Apartments).

² See para. 22 Danielle Boyd affidavit. At pages 131-137, of the Record, we find Dalhousie's September 16, 2022, submission to HRM Council regarding their October 18, 2022, meeting and consideration of whether to designate 1245 Edward Street as a Municipal Heritage Property. Therein, Dalhousie states its position in part as follows: "Dalhousie has no immediate plans for 1245 Edward Street and never acquired it to use the house given its very poor condition. Dalhousie determined demolishing the house was the prudent way forward... On August 24, 2022, Municipal staff submitted the 'Potential Heritage Resources on University Campuses' Report [the 'University Campuses Report'] to the Heritage Advisory Committee which identified 35 Dalhousie properties with, in the opinion of Municipal staff, sufficient architectural merit, heritage value and setting within the community to warrant further evaluation to determine whether such property should be recommended for Municipal Heritage Registration. This list was more expansive than any previously shared with Dalhousie. These 35 properties are **in addition to 1245 Edward Street and two other third-party applications being evaluated by HRM staff with respect to Dalhousie owned properties located at 1322 Robie Street and 1460 Oxford Street.** ... There have been years to consider the heritage attributes of 1245 Edward Street and to seek to have the property registered. It appears, only once it became known that Dalhousie was undertaking work on the site, and once it became known that Dalhousie had applied for a demolition permit that extraordinary steps were taken to ensure that Dalhousie's demolition permit would be rendered ineffective by accelerating [Heritage Advisory Committee] HAC's meeting [from July 27 to July 15]. Dalhousie strenuously opposes the registration of 1245 Edward Street as a Municipal Heritage Property and submits as follows ... From a heritage perspective, an objective evaluation of the property would allocate insufficient points to meet the necessary score required for heritage designation. The building has been assessed to be in very poor condition, questioning the long-term viability of the property. This would require significant financial investment in a building with no genuine prospect of occupancy or use by Dalhousie." [My emphases added]

[7] Dalhousie could demolish that building as well and later be in a position to build a larger modern construction, if it decided in *its* exclusive estimation, that that was its preferred use of the property.³

[8] By early May 2022, Dalhousie had begun gutting the interior of the building in anticipation of receiving a demolition permit, which it had applied for on May 2, 2022.

[9] However, on or about May 9, 2022, a special interest group, Halifax University Neighbourhood Association [“HUNA”] made an “application” to have HRM Council’s Heritage Advisory Committee [“HAC”] evaluate the building’s exterior’s “heritage value”, with the expectation that the HAC would make a recommendation to HRM Council to designate it a municipal “Heritage Property” - the effect of which would be to put a legislated stay under the *Heritage Property Act*, RSNS 1989, c. 199 [“HPA”], on Dalhousie’s demolition permit, and, if HRM Council agreed to register the property, Dalhousie would thereafter have to maintain the exterior of the building without changes to its heritage character.

³ Subject to zoning and other land use considerations.

[10] By June 13, 2022, HRM Heritage staff had prepared a Research Report to assist the HAC in deciding whether to recommend the property be forwarded to HRM Council for its consideration of whether the property should be designated a municipal Heritage Property.

[11] Dalhousie was unaware that HUNA had made a so-called “third-party application” to HRM Council to have its 1245 Edward Street property designated a municipal Heritage Property until HRM advised of this by letter on June 14, 2022.⁴

[12] Only coincidentally, on July 11, 2022, did Dalhousie become aware that the HAC had convened a hearing for July 15, 2022, to consider whether it should recommend 1245 Edward Street for designation as a municipal Heritage Property.

[13] HRM did not provide the HUNA third-party application and supporting documents to Dalhousie; nor did it advise Dalhousie that the HAC would be considering the Application for designation as a municipal Heritage Property on

⁴ Conspicuously, in large print on the HRM “Application Form for Heritage Registration”, the following two questions were both check-marked “No” by the Applicants: “If you are not the Registered Owner, **have you contacted the Registered Owner to make them aware of the application (required for application to be considered); Is the Registered Owner supportive of the registration application.**” That HRM staff accepted the Application knowing HUNA did not give notice to Dalhousie of their Application as required could lead to the inference that HRM staff intended that Dalhousie remain unaware of the HUNA Application. This inference would be consistent with HRM’s pro-registration conduct thereafter. [My bolding added]

July 15, 2022; nor did it provide a copy of its June 13, 2022, Heritage staff Research Report to Dalhousie until one day before the HAC hearing.⁵

[14] Only coincidentally on July 12, 2022, was Dalhousie able to locate a copy of the HUNA third-party Application via an online media report.

[15] Dalhousie applied for and received from HRM, a demolition permit, dated July 14, 2022, with an expiry date of March 1, 2024.⁶

[16] “On July 14, 2022, the day before the accelerated meeting date⁷ Dalhousie was advised that it could not make an oral presentation to HAC, but could make written submissions, and was provided a copy of the staff Report by HRM [HRM Heritage staff Research Report] for the first time.”⁸ [My underlining added]

⁵ Included by the individuals who filed the Application on behalf of HUNA was a 49-page portfolio of historical and heritage materials researched by William Breckenridge. These pages included photographs of the exterior and interior of the building; written summaries and historical descriptions; historic photographs, maps and deeds transferring title; and commentary by the Authors under the separate titles: “Age”; “Historical relationship and representative of an era”; “Architecture”; “Architectural merit”; “Architectural integrity”; and “Relationship to surrounding area”. The content of the Application’s supporting documents closely resembles the materials in the staff Research Report dated June 24, 2022.

⁶ See Nathan Rogers’s affidavit, Exhibit “B” – “Description of work – demolish the dwelling at 1245 Edward Street.”

⁷ The next regularly scheduled HAC meeting was due July 27, 2022, but after July 11, 2022, emails to HRM Councillors from HUNA and the Heritage Trust of Nova Scotia urging that HRM Council immediately convene a special meeting of the HAC, and a flurry of concurring emails between members of the HAC in support of a July 15, 2022, HAC meeting, the Application was moved up to the July 15, 2022 date.

⁸ An accurate account as set out in Dalhousie’s September 16, 2022, submissions to HRM Council, found at p. 131 Record. **As Dalhousie points out at para. 37 of its May 15, 2023, Brief: “However, following HUNA’s [written**

by Peggy Walt] July 11, 2022, email to HRM Council [p. 85, Record – “... Dear Mayor Savage, Deputy Mayor Lovelace, Mr. Lucic and Mr. Grbac and Councillors... As you would be aware, almost 6000 citizens have signed a petition asking Dalhousie to not demolish this building. As well, you would be aware a Heritage Designation application has been filed with the City. Mr. Mayor – you or any councillor– are able to ask that this application be expedited for immediate processing. Councillor Outhit recently did this for a property in his district. You can also ask for an emergency meeting of the Heritage Advisory Committee to address this urgent issue, otherwise it does not meet for two weeks. So it is within your powers to save this building by having an investigation of the demolition without permit and the safety concerns, expediting the Heritage Designation application; and calling an emergency meeting of the Heritage Advisory Committee. Staff’s report and recommendations are ready to go – let’s not delay hearing what they have to say about the importance of this building to Halifax’s history and heritage. As you will be aware almost 6000 citizens are watching how the Halifax Regional Municipality responds to this precedent-setting and flagrantly offensive violation of due process by Dalhousie University.”] **HAC and Council members took extraordinary measures to expedite the HAC meeting to consider the property.... after HRM received HUNA’s letter** [at 12:19 am July 11, 2022, and on July 11 at 12:28 pm], **Councillor Hendsbee** (who sits on HAC as one of two councillor representatives to the Committee [along with Iona Stoddard]) emailed other HAC members urging them to agree to calling an emergency meeting regarding the Property and **suggested that Dalhousie should move the building**. [He also stated therein: “... **Our scheduled meeting of July 27/22 may be too late because Dalhousie University has already started to gut the building. And applied for a demolition permit that is pending**. So the point is, will the building still be standing by the time our regular meeting is held. Hence the reason for an emergency meeting. **In my opinion Dalhousie should consider moving the building instead of removing it. Advise please!**”]. **HAC member Lois Yorke weighed in supporting the notion that Dalhousie should move the building** [email July 11, 2022, at 13:06 p.m.: “Yes I support an emergency meeting of HAC and I particularly like your idea of moving instead of removing. Adaptive re-use may be highly appropriate, to demonstrate ‘University leadership within the wider community’.”] **and other Councillors and HAC members also expressed support for an emergency meeting**. The full text of various emails about this appears [at paras. 135-136 of Dalhousie’s Brief of May 15, 2023].” **I note that Janet Morris, VP of the Heritage Trust of Nova Scotia, also wrote on July 11, 2022**, [email attachment re-sent to the Mayor and Council at 3:52 pm July 15, 2022, page 84 Record]: “The Trust sees the precedent being set with 1245 Edward Street as cause for concern. **We have been shocked by the attempt by Dalhousie University to ‘outrun’ the municipal heritage designation process**. Rather than acting as what it should be, one of the most well-respected institutions in the Municipality, Dalhousie is emulating some of the Municipality’s less well regarded ‘developers’.... The unusual third-party application was made in order to preserve a home that was, until a year ago, a residential property in good habitable condition. The owner, Dalhousie University has applied for, but not yet received, a demolition permit.... **Heritage Trust urges Council to expedite the process by asking staff to convene a special meeting of the HAC immediately so that Council can consider the outcome of the HAC meeting at its next meeting, thereby giving the property a fair chance to be considered for protection.**” (see p. 10 Exhibit “A” Kayla MacDonald affidavit). The letter and email are both stamped as distributed to the Mayor and Councillors on July 15, 2022. The other evidence available in the Record clearly indicates that they were aware of the urgency of this matter earlier, since the two Councillors on the HAC would have been aware at the latest by on or about the June 22, 2022, meeting of the HAC, and the communications between other Councillors about the urgency of the matter resulted in it actually being heard by the HAC on July 15, 2022. **On July 12, 2022, “later in the meeting” HRM Council had placed before it by Councillor Wayne Mason, seconded by Councillor Shawn Cleary that “item 18.2 Councillor Mason – 1245 Edward Street” as an addition to the formal Agenda**; which motion was put and passed; **and later addressed at p. 80-1 Record, as a further motion was moved by Councillor Mason seconded by Councillor Morse**, and put and passed: “That Halifax Regional Council: 1 - Waive the requirement for notice of motion under Administrative Order Number One s. 49(1); and 2 - Conditional on the Heritage Advisory Committee making a recommendation on 1245 Edward Street, pursuant to the *Heritage Protection Act*, direct the Office of the Municipal Clerk to schedule a heritage hearing within the statutory notice period as provided by the Act, and serve notice on the property owner, as provided by the Act.” Not present: Councillors Hendsbee, Stoddard, Kent. Thus, **Council also sought to ensure an**

[17] The HAC held an expedited meeting on July 15, 2022 (on the minimum three days' notice required) and recommended that HRM Council designate the property as a municipal "Heritage Property".⁹

[18] On October 18, 2022, HRM Council was in receipt of Dalhousie's September 16, 2022, written submissions, and afforded it the usual ten minutes' oral presentation time before Council.

[19] Dalhousie pointed out to HRM Council that, while the HAC assessed the Heritage Score of the building as 64 out of a possible 100 points, its Heritage Architecture consultant scored the property at only 32 points.

[20] Dalhousie had submitted that:

In its conclusion, the [Heritage Architect's] report refers to the importance of vitality (having a viable human occupancy use of some sort) in heritage conservation. Dalhousie

expeditious hearing of a recommendation of the HAC on July 15, 2022, regarding 1245 Edward Street. [My emphases added]

⁹ On or about July 15, 2022 (para. 21 HRM June 1, 2023, brief) Dalhousie became aware of the HAC recommendation for designation as a municipal Heritage Property when by letter from HRM and an enclosed Form A - Dalhousie was formally advised that "the land and building located at 1245 Edward Street ... has been recommended to be registered in the Registry of Heritage Property for the Halifax Regional Municipality." The reasons for the proposed designation followed. Moreover, on October 11, 2022, the later Form A (amended) notification also advised Dalhousie that "Regional Council will sit to hear any objections regarding the recommendation of the property described... on Tuesday, October 18, 2022, at 1 pm in City Hall Council Chambers... Information and particulars concerning the reasons for recommendation are available from the Office of the Clerk for the Halifax Regional Municipality weekdays from 8:30 am to 4:30 pm." [My underlining added]

submit this should be a key consideration for Council before registering a property in the face of opposition from the owner. (p. 133, Record)

[My underlining added]

[21] Dalhousie’s consultant stated in conclusion (p. 160, Record):

The HRM staff Report concludes with the statement that the ‘building remains in sufficient condition to be a candidate for successful restoration’. The important issues of cost and vitality are not addressed in the HRM staff Report. (p. 156, Record).

...

Vitality is a reality of conservation – without utility, the building is destined to be a museum... There has been no discussion about the vitality of the property in its assessment using the ‘Evaluation Criteria for registration of Historic Buildings in Halifax Regional Municipality’. The six criteria used to evaluate a building for registration as being of cultural heritage value do not speak to this requirement. Comparing the scoring by HRM HAC to that of +VG Architects using the six Evaluation Criteria (HAC = 64; +VG = 32) will identify the differences and highlight the areas of disagreement. [which he does in succinct fashion immediately thereafter].

[My underlining added]

[22] As a result of HRM having designated 1245 Edward Street as a municipal “Heritage” building, Dalhousie was precluded from demolishing the building.¹⁰

¹⁰ I recognize that: i - the owner may apply (to the HAC) to de-register the property pursuant to section 16 of the *HPA* where “the continued registration of the property appears to [HRM] Council to be inappropriate as a result of the loss of the property’s heritage value, as identified in the property’s heritage file or notice of recommendation, unless the loss of the heritage value was caused by neglect, abandonment or other action or inaction of the owner, after holding a public hearing to consider the proposed de-registration.”; and, ii - the owner may apply to alter or demolish the municipal Heritage Property pursuant to section 17 of the *HPA*, however per section 18, “the municipality may take up to three years to consider an application under section 17”, and “where the municipality does not approve the application, the property owner may, notwithstanding section 17, make the alteration or carry out the demolition at any time after three years from the date of the application, but not more than four years after the date of the application.”

[23] As Dalhousie put it in its September 16, 2022, written submission to HRM Council for its October 18, 2022, meeting:

The building has been assessed to be in very poor condition, questioning the long-term viability of the property. This would require significant financial investment in a building with no genuine prospect of occupancy or use by Dalhousie.

[24] HRM has its in-house Heritage Staff, which can be consulted by the HAC and HRM Council, in relation to the selection of suitable buildings/properties to be considered for designation as “heritage” properties, and their Evaluation Criteria scoring value. According to section 9 of By-law H 200: HRM “Council may, from time to time, after public hearing, set out and amend such guidelines as it sees fit for the designation of property as Heritage Property, and the Committee shall make recommendations in accordance therewith.” Presumably the latter is the legislative basis from which the Heritage Value Scoring Evaluation criteria is derived. General procedure at HAC meetings is addressed at s. 5(3): “The procedure of the Committee shall be governed, where not inconsistent with the Act or this By-law, by the Rules of Order Administrative Order of the Region.”

[25] During the decision-making processes in relation to 1245 Edward Street, only Dalhousie presented evidence in relation to the “condition” of the building, and specifically its financial viability. **Dalhousie’s July 15, 2022, written**

submission to the HAC can be found at pages 42-74 of Kayla MacDonald's affidavit.

[26] Therein, Mr. Rogers argued that there were "three high level propositions" which "should inform the Committee's approach towards this property and other properties which the University owns:

First, the University's approach is to build a sustainable, accessible campus that supports modern housing options that contribute to greatly needed supply ... Preserving low-density housing that does not meet these criteria is not the answer to affordable housing needs for students or citizens.

Second, ... Dalhousie submits that considerable moderation should be used in designating houses of modest architectural interest because they were commissioned by a prominent businessperson. Third, Dalhousie University, as one of the very few Canadian universities with a 200+ year history, takes a long-term view of its planning for both the University, its association with the and the [sic] City, and our Province. Dalhousie is deeply committed to protecting the heritage and character of its campus and its importance within the City. At the same time, however, it is deeply committed to supporting and fostering the growth of the University, the City and our Province as vibrant, sustainable, accessible places, that look forward at least as much as they look back. The University also requests that the Committee thoughtfully review the attached expert report from Torquil Duncan of Capital Management Engineering Limited. While the report was not received in time for the University to provide substantive comment in the submissions, the University believes it is relevant to the Committee's evaluation of the property. However, the University wishes to note that the Report is preliminary, and that the University expects the cost estimate to increase significantly. The University requests that the Committee be aware that the property is in very poor condition. This is illustrated in video footage which is being submitted to the Committee for its consideration... This video shows that the building has an undistinguished addition which is out of character with the original structure. Although the interior of the building is beyond the purview of the Committee from a heritage preservation perspective, the University wants the Committee to be made aware that attractive woodwork such as baseboards mantles and other trim is being saved for repurchasing in the local market. ... We ask that the Committee not be influenced by social media commentary complaining of work on the interior of the building. 1245 Edward Street is not a public building and therefore the interior is not subject to heritage preservation...

Finally, 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. On July 14, 2022, the day before the accelerated meeting date, Dalhousie was advised that he [i.e., Mr. Rogers] 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.”

The report of Mr. Duncan, based on his July 6, 2022, attendance at the site, notes that “the purpose of the assessment was to provide a general overview of the present condition of the building components and to provide an opinion of anticipated costs to remedy any identified physical deficiencies. ... Based on the visual assessment and on the information reported the building appears to be [sic] a failed condition. ... There were significant indications of major physical deficiencies observed during the site visit...

[Recommendations p. 62 MacDonald affidavit] the assessment of the property and building was completed on July 6, 2022. At the time of the assessment the site appeared to be in poor to failed condition. It is anticipated that the majority of the building components will require replacement or major repair. These include repair/replacement of the siding, roof, complete replacement of the interior finishes, and electrical replacement. Prior to reinstating power and water to the building it is expected that inspection by licensed trades will be required. The overall estimated costs associated with repairing and returning this building to service may not be financial [sic] viable. A serious review of costs taking into account availability of trades etc. may result in the building being demolished and replaced with new.”

[My bolding and underlining added]

[27] The HAC is to be solely focused on the “heritage value” of a property.¹¹

¹¹ Which is assessed, according to Seamus McGreal, Planner III, Heritage Property Program who is recorded in the October 18, 2022, HRM Council meeting Minutes (p. 206, Record): “[he] clarified that the *Heritage Property Act* focuses on **the exterior of the property** to evaluate heritage registration ...”.

[28] HRM’s staff oriented their research and preparation of their Report solely on that factor (while evaluating only **the exterior** of that building) when assisting the HAC with its advice by way of recommendation to HRM Council.

[29] The HAC is not expressly required to consider the consequent implications of such designation to the owner’s reasonable uses of that property.¹²

[30] However, HRM Council is not so restricted.¹³ It is required to consider the effects of such designation on the owner’s interest in the property.

¹² The typical HAC motion in such cases, as in this case, demonstrates this as well. The wording of the motion on **July 15, 2022**, can be found at p. 101 of the Kayla MacDonald affidavit: “[Moved and Seconded that the motion be put before the Committee for consideration] That the Heritage Advisory Committee recommend that Halifax Regional Council: 1 - set a date for a heritage hearing to consider the inclusion of the subject property in the Registry of Heritage Property for the Halifax Regional Municipality; and 2 - approve the request to include 1245 Edward Street, Halifax in the Registry of Heritage Property for the Halifax Regional Municipality... as a municipal Heritage Property under the *Heritage Property Act*.” It must be noted that in the formal recommendation at p. 213 Record, the document does provide captions for other considerations, limited to [I have included within brackets immediately after each caption the written comments in the staff Report.]: “Financial Implications” [the HRM costs associated with advertising and processing this application can be accommodated within the approved 2022/2023 operating budget for C340 – Heritage and Planning Information Services]; “Risk Consideration” [There are no significant risks associated with the recommendation in this Report] “Environmental Implications” [There are no significant environmental implications associated with the recommendation in this Report]; and “Alternative” [the Heritage Advisory Committee may choose to refuse the application to include 1245 Edward Street, Halifax in the Registry of Heritage Property for the Halifax Regional Municipality if the property scores less than 50 points based on the evaluation criteria. In doing so, the application will not proceed to Regional Council for evaluation.]

¹³ The HRM Council Minutes of **October 18, 2022**, (p. 205, Record) confirmed that **the following items were before the Council: “Heritage Advisory Committee report dated July 19, 2022**, with attached staff recommendation Report dated June 24, 2022; extract from **July 12, 2022, Regional Council Minutes** [this can be found at pp. 80-1 Record where the following motion (that put in motion the setting of a HRM Council hearing date Re 1245 Edward Street) was unanimously passed:” that Halifax Regional Council: ‘1 - waive the requirement for notice of motion under Administrative Order One, s. 49(1) and 2 - **conditional on the Heritage Advisory Committee making a recommendation on 1245 Edward Street pursuant to the *Heritage Protection Act***, direct the Office of the Municipal Clerk to schedule a Heritage Hearing within the statutory notice period is provided by the *Act*, and serve notice on the property owner, as provided by the *Act*.’ - see also p. 214 of the Record]; correspondence from Dalhousie University; staff presentation dated October 18, 2022; property owner presentation dated October 18, 2022.” Notably representatives of Dalhousie were permitted during a space of approximately 10

[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 building¹⁴;
- c) together with the “heritage value” of the building at 1245 Edward Street.

[32] Dalhousie’s fundamental and consistent position since it purchased the property was that the building on the property was to be demolished.

[33] Dalhousie had no immediate plans for the property after demolishing the building, but had long-term use intended for the property, the specifics of which it had not yet determined.

[34] The October 18, 2022, Council hearing videotape shows that members of Council appeared to consider it relevant to whether the property should be

minutes to address Council – per Gitta Kulczycki, VP Finance and Administration, Laura Hynes Jenkins, Director of Government Relations, and Peter Rogers, McInnes Cooper.

¹⁴ Importantly, there was **no evidence to the contrary before HRM Council. The only evidence was that the building was in a failed condition. There was no evidence that Dalhousie had any other reasonable use for the building in its condition at the time.** The consequent conclusion of Dalhousie’s **Architectural Heritage consultant** (who relied upon a report by Dalhousie’s Engineering consultant Capital Management Engineering Limited) stated that: “the condition of the building, its architectural integrity including the condition of the building envelope, and the cost associated with successful conservation, leads to **our conclusion that it is cost prohibitive to conserve this building.**” (p. 162, Record) [My bolding added]

designated a municipal Heritage Property, that Dalhousie did not have a short-term plan/use intended for the property.¹⁵

[35] That Dalhousie had no immediate plans after the property was demolished, is irrelevant to whether HRM Council should designate the property a municipal Heritage Property.

[36] The short and long term use of its property was a decision exclusively for Dalhousie. As Dalhousie expressly referenced in its September 16, 2022, written submission to HRM Council (p. 134 Record):

“It was never Dalhousie’s intent to keep 1245 Edward Street as a residential dwelling. ... Preserving the house on 1245 Edward Street which would require significant and disproportionate financial investment and could only accommodate a few residents, is not the answer to affordable housing needs for students or citizens. Furthermore, the property is in very poor condition, which was confirmed by a Property Condition Assessment prepared by Capital Management Engineering Limited, which Dalhousie shared with HAC on July 14, 2022, and again by +VG Architects ... The cost required to rehabilitate the house would be significant and are costs that Dalhousie never intended to incur. ... If 1245 Edward Street is registered as a Heritage Property, it will serve no useful purpose to Dalhousie, and Dalhousie will make no

¹⁵ Perhaps their thinking was that, three years later an application to demolish could be made by Dalhousie, and regardless of HRM’s approval or not, Dalhousie could demolish the building at that time. However, that position was not expressly articulated by any Councillor. Of course, in the interim Dalhousie will also have to have paid to maintain the property exterior and be precluded from using it in any meaningful way since its position was the property was in a failed condition and had no present “vitality”/use. I note that Councillor Shawn Cleary went so far as to question whether, as a taxpayer subsidized institution, Dalhousie was making the best use of that public money by purchasing the property without having any immediate intended use. This is an example of how some members of the majority in HRM Council appear to have viewed their decision-making role – i.e., rather than whether the property that is being recommended to be registered as a municipal Heritage Property should be so registered, they were inappropriately examining the circumstances with a view to ensuring what in their opinion was the best “municipal planning” outcome in the circumstances.

further investments in the property. No public good is served by leaving this failed building standing, further deteriorating and unoccupied, for the next three years.”

[My bolding added]

[37] Dalhousie received a Demolition Permit from HRM on July 14, 2022, which HRM is deemed to have known as of July 14, 2022. I am satisfied that on October 18, 2022, HRM Council knew that HRM had issued a Demolition Permit regarding 1245 Edward Street on July 14, 2022, and although generally (in non-*HPA* cases) that requires formal notification to HRM of at least 7 days before demolition could be started, the ability to demolish the building in this case upon 7 days notice of demolition was nullified temporarily for 120 days after the HAC recommendation in any event pursuant to sections 14 and 15 of the *HPA*.

[38] HRM Council was not entitled, by designating the property a municipal Heritage Property, to intentionally effectively defeat Dalhousie’s pre-existing right to demolish the building, on the basis that Dalhousie had no short-term plans for use of the property, and that Council preferred another use of the property as more appropriate.

[39] Moreover, since designating 1245 Edward Street a municipal Heritage Property would confer an “advantage” to HRM (see my other comments regarding “constructive takings”), it was required to have seriously considered the effect of

such designation, in relation to the reasonable uses of the property that would remain available to Dalhousie.¹⁶

[40] It did not.

[41] The “reasons” of the HAC for recommending, and HRM Council for voting, in favour of designation of 1245 Edward Street as a municipal Heritage Property can be discerned from various sources in the “Record” [by which I mean, the

¹⁶ I appreciate that **the decision in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36**, was only rendered on October 21, 2022, three days after the October 18, 2022, HRM Council meeting; and that Dalhousie did not in its Notice of Judicial Review filed November 21, 2022, nor in its initial written arguments, rely on *Annapolis Group*. Having reviewed the filed materials before the hearing, I felt it appropriate to, and consequently did, raise the implications of this case with counsel **in my letter of June 14, 2023**, before the hearing. Therein **I stated**: “While examining your written materials, 2 items struck me as potentially relevant to the arguments made herein. ... Secondly, neither counsel cited the following decision – [*Annapolis Group* ... para. 19 – “**To be clear not every instance of regulating the use of property amounts to a constructive taking.** Governments and municipalities holding delegated provincial regulatory authority... validly regulate land in the public interest without effecting ‘takings’, properly understood.... **The line between a valid regulation and a constructive taking is crossed where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property...** Put simply, ‘in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with ‘no reasonable use’ of the property’”.] Is there arguably a “constructive taking” in the circumstances?” **Both counsel responded on June 14, 2023. HRM counsel wrote**: “HRM would disagree that constructive taking is a relevant issue in this judicial review... In the present case no one raised this issue of what was previously called the *de facto* expropriation before the Council, so it is not an issue that would appropriately be a subject of the judicial review... While the HPA legislation regulates demolition/substantial alteration to the exterior of the building, it does not, per se impose any restrictions on uses of the property or the building. Further these time 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.” **Dalhousie’s counsel responded**: “We submit that it shows that the Supreme Court of Canada continues to recognize the strong importance of property rights... The main influence of the *Annapolis Group* case in the present proceeding should in our submission be to validate the significance of HRM’s intrusion on Dalhousie’s rights for purpose of the *Baker* analysis: to confirm the high standard of due process owed when deprivation of substantial property rights is at stake.” I reiterate here that in relation to this specific issue, I agree with Dalhousie’s position, but also find the reasons in *Annapolis Group* to be relevant to whether the outcome herein was within a range of the reasonable outcomes.

Record *per se* filed by HRM and the Supplemental affidavits herein filed by Dalhousie].¹⁷

[42] The HAC assigned a score of 64 of a 100 possible “Heritage” Value points to 1245 Edward Street - that being more than 50 points, this led to its recommendation for designation as a municipal Heritage Property.

[43] HRM Council does not assign its own “Heritage Value” scoring criteria to the property. From the video of the October 18, 2022, hearing, it appears that Councillors were not much concerned with the specific Heritage Value assigned by the HAC, as long as it was greater than the threshold of 50. They were more generally concerned with whether the property should be so designated.

[44] The “majority” HRM Council members did not expressly give “reasons” *per se* for their decision. It is a decision-making process resolved by way of a majority of the votes cast [13 to 4 in dissent].¹⁸

¹⁷ There are also videotaped media/flash drives included at p. 82 of the Record containing the July 12, 2022, HRM Council meeting and the October 18, 2022, HRM Council hearing (which commenced at 1:31 pm and closed at 2:02 pm - p. 5 of the Record. The July 15, 2022, HAC meeting (which can be viewed from the video found that Exhibit “M” of Kayla MacDonald’s affidavit) commenced at 1:04 pm and adjourned at 1:41 pm per the Minutes – p. 100 Kayla MacDonald affidavit; and the June 22, 2022, HAC meeting video is found at Exhibit “K” thereof.

¹⁸ **In favour** of designation were the following Councillors: Savage, Mason, Cleary, Hendsbee, Deagle Gammon, Kent, Austin, Smith, Stoddard, Blackburn, Lovelace, Cuttell and Morse. **Against** the designation were Councillors: Purdy; Mancini; Russell; and Outhit.

[45] Nevertheless, the October 18, 2022, Minutes (p. 206, Record) include:¹⁹

Regional Council stated that the *Heritage Property Act* allows for third-party Heritage Property registration, recognizing 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 heritage architecture.**

[My bolding added]

[46] In my opinion, the latter factor that constituted Council’s reasons [“concerns about the property owner’s lack of plans to use the property”] is irrelevant and an improper consideration, which materially taints the reasonableness of the outcome.

[47] I discuss below my concerns about what a reasonable onlooker could conclude are indicia of actual or an apprehension of bias against Dalhousie by some of the decision-makers.

[48] Evidence of the circumstances surrounding the time interval before and during that meeting provide further insights into whether the majority’s votes could reasonably have rendered the decision to designate 1245 Edward Street as a

¹⁹ It is unclear who drafted these “reasons”, however I presume that these Minutes were later approved by Council thus giving them an air of authority regarding why the property was designated a municipal Heritage Property.

municipal Heritage Property; and whether there were indicia of an apprehension of bias, or actual bias, as alleged by Dalhousie.

[49] Having bought the residential lot before it was designated a municipal Heritage Property, was it not then for Dalhousie *exclusively* to decide what it would do with its property, provided it is not contrary to the applicable laws at the relevant times?²⁰

[50] According to HRM Council, it was not.

[51] On October 18, 2022, HRM Council designated the building thereon a municipal Heritage Property.

[52] That designation imposes a substantial and ongoing interference with Dalhousie’s exclusive right to otherwise make decisions about its property. I bear in mind the statement of “purpose” of the *Act*, in section 2 of the *HPA*:

“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”; and the

²⁰ The 1245 Edward Street property is part of a much larger dispute between Dalhousie and HRM which is part of the contextual background of this specific dispute – see page 132 of Dalhousie’s submissions to HRM Council, September 16, 2022. I note that there are important distinctions under the *Heritage Property Act* between the three privately owned properties (1245 Edward Street/1322 Robie Street/1460 Oxford Street) and the “public” buildings Dalhousie owns, which require differential analysis when considering their suitability for municipal heritage designations.

definition of “heritage value” found that s. 2(be): "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.”

[53] On November 21, 2022, Dalhousie filed a Notice for Judicial Review, requesting this Court quash the decision and require HRM to remove 1245 Edward Street, Halifax, from HRM’s Registry of Heritage Properties.

[54] Dalhousie argues that, on various legal bases, HRM Council’s decision should not be upheld by this Court. The Notice for Judicial Review raises three grounds for quashing the decision:

- a) the decision was made without respect for the statutory purposes of the public notification provisions of the *Heritage Property Act*, which allow purchasers of property to know whether a property is constrained by its heritage status, and is accordingly *ultra vires* the *Act*;
- b) the decision was made without allowing a sufficient standard of fairness and due process commensurate with the factual and statutory context;²¹ and

²¹ Dalhousie raised numerous procedural fairness concerns, (see more specifically at pp. 2-3 of their May 15, 2023, Brief) including that: 1 - at the July 15, 2022, HAC meeting Dalhousie was not permitted to make an oral

- c) the decision was substantively unreasonable as HRM assigned unreasonably high scores on its heritage scoring of the Property, without having attempted to see the building interior [which was] necessary to evaluate its deteriorated condition and the significant changes made to its original architectural style.²²

[55] Respectfully, I conclude that HRM Council’s decision to designate 1245 Edward Street as a municipal Heritage Property:

presentation, although it was permitted to provide “written correspondence” to the HAC – see email chain attached as Exhibit “B” to Kayla MacDonald’s affidavit at pp. 17-23. In Jill McGillicuddy’s July 14, 2022, 10:28 a.m. email, she confirmed to Dalhousie’s Danielle Boyd: “This is to notify you that your request to present at the Heritage Advisory Committee Special meeting on July 15, 2022, has been denied by the Heritage Advisory Committee.... You are also able to submit correspondence to our office on this matter if you wish.... You’ve also requested relevant information that has been provided to the Committee, in addition to the Staff report. Correspondence on this matter has been received by the Clerk’s office. Once circulated to the Committee, this can be provided to you once any personal information has been redacted. If this would be of interest to you, please confirm.” Patrick Connor, the Chair of the HAC wrote in an email to Jill McGillicuddy, regarding Dalhousie’s presentation request on July 13, 2022, at 4:03 pm: “Hi Jill, thanks for the update. **While I imagine the HAC would be fascinated to hear from the property owner on 1245 Edward Street**, it is rather unusual for the Committee to hear such a presentation. As Aaron pointed out, there are other, more appropriate venues for the property owner to be heard, so I think we ought to stick to protocol in this case. Please convey my regrets to Dalhousie that the HAC is unable to accommodate their request at this time.” (p. 24, Kayla MacDonald affidavit).; 2 - Since Dalhousie only inadvertently discovered on July 11 that the HAC was meeting on July 15 regarding 1245 Edward Street, it made the above-noted inquiries regarding an oral presentation to the HAC. Once that was denied on July 14 at 10:28 am, Dalhousie scrambled to provide its written presentation, which was filed July 15 at 11:25 am by Kayla MacDonald (p. 38 of her affidavit) and only re-sent to the members of the HAC initially at 12:06 pm and then re-sent “due to size limitations” at 12:22 pm (p. 36 MacDonald affidavit) to HAC members for the 1 pm July 15, 2022, HAC meeting, which commenced at 1:04 pm. Since Dalhousie was not represented at the hearing, as it believed it could only submit written correspondence, Mr. Rogers was precluded from being available to answer any questions regarding the materials it had filed; and addressing the comments made by HRM heritage staff in relation to the property’s scoring evaluation criteria. Although it is unclear whether Dalhousie was made aware that “**All meetings of the Committee shall be open to the public.**” pers. 5(4) By-law H-200, I am inclined to the position that they were not.

²² The Notice of Judicial Review was filed on November 21, 2022, a month after the HRM Council decision on October 18, 2022. At that time, Dalhousie did not have the benefit of the Record or all of the information contained in the Supplemental Affidavits. The Review was argued broadly and not strictly within the confines of the wording of the bases for complaint in the Notice of Judicial Review. Dalhousie’s arguments became more varied and express in their filed materials. There has been no complaint by HRM regarding this and I see no prejudice to HRM thereby.

- a) was the product of an unfair process in all the circumstances;
- b) is not one that was within a range of reasonable outcomes; and
- c) was tainted by a reasonable apprehension of closed-mindedness at the Heritage Advisory Committee level, and a reasonable apprehension of bias at the HRM Council level of the process.

[56] I quash the decision to register 1245 Edward Street on the HRM Registry of Heritage Property, and order HRM to remove the property from the Registry, and to make corrections to any previously filed/registered public notice of such registration.²³

B - Background

[57] In order to better understand the legal and factual context here, I will review various topics including an examination of the legislative provisions underlying the processes of the municipal Heritage Property designation.

1. The relevant legislation does not expressly contemplate “applications” (whether by owners or other persons) to HRM for designation/registration of buildings as “Heritage Property”

²³ The court was fortunate to have the benefit of fulsome written and oral submissions from counsel.

[58] It appears that the *HPA* intended that only HRM itself would identify potential “heritage” buildings for such consideration. Let me next set out an abbreviated context in order to understand the “application” process adopted by HRM herein.

[59] In **July 2021** Dalhousie bought the property with the intention of demolishing the building thereon.

[60] On **May 2, 2022**, Dalhousie applied for a demolition permit from HRM, which was granted on July 14, 2022.²⁴

[61] On or about **May 9, 2022**, two individual co-applicants, on behalf of themselves and others who signed an online petition in support of an informal group under the banner of the “Halifax University Neighbourhood Association” [HUNA], filed a so-called “third party application” requesting HRM Council to add the property to the municipal Heritage Property Registry.

²⁴ See Nathan Rogers’s affidavit. The demolition was approved to be carried out during a period of two years thereafter. Dalhousie had already stripped the interior of the building to ready it for demolition. These actions are not contrary to any legislation or subordinate legislation. HRM says it was a “surreptitious demolition of non-structural interior components of the house in an effort to avoid the application of the *Nova Scotia Building Code Act and Regulations* – relative to this see the Record Tab 4 page 87” (para. 13, Brief). As I understand it, no demolitions of buildings can proceed without *Building Code* clearance (a permit) to ensure the demolition is safely carried out; and that Dalhousie sought by stripping the interior of the building, to avoid further delays and possibly the necessity of such clearance. See also Tab 4, p. 8 Record, and Exhibit “B” to Nathan Rogers’s affidavit.

[62] Although HRM has an “Application” form/template (p. 3 Record) that could permit any third-party to make application to request HRM Council designate any property a municipal Heritage Property, there is no legislated basis for such an “application” - not in the *Heritage Property Act* and not in HRM By-law H-200. The Court wrote to counsel after the hearing on June 15, 2023, and requested their perspectives about “what is the statutory or other authority for such ‘third-party’ applications?”.

[63] Counsel for **HRM, Mr. Kinghorne responded** in part:

... **The HPA [*Heritage Property Act*] is silent on how a property gets before the HAC [Heritage Advisory Committee] to consider [*sic*] for a recommendation, and there is nothing in the HPA that precludes a property owner or third-party applicant. On its face the HPA only seems to authorize the HAC on its own initiative to identify and make recommendations.** Implicitly, the HRM Council could request the HAC to investigate and make a recommendation on the property. If the absence of express authority to seek HPA registration was determinative of the matter, then there could never be any registration on [*sic*] based on the request of the Council, the property owner or anyone else. HRM has reasonably interpreted the HPA otherwise. It is our understanding that the HPA provincial registrations are conducted similarly regarding third-party application on corresponding language.²⁵ **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.

[My bolding added]

²⁵ I will ignore any evidentiary claims referred to by HRM (that are not otherwise available in the Record) such as: “It is our understanding that *HPA* provincial registrations are conducted similarly regarding third-party applications, on corresponding language”; and “there has never been any suggestion of a lack of *bona fides* on the part of those presenting their requests.”

[64] **Dalhousie likewise responded**, to my question, having the benefit of receiving Mr. Kinghorne's response:

... Dalhousie agrees with Mr. Kinghorne that **the HPA is silent on that subject. Furthermore, HRM's own By-law found at Tab 15 of HRM's Record, does not contain any authority whatsoever for third parties to make such applications either. Certainly, it is implicit in conferral of authority to the Municipality, that the Municipality itself has the right to ask its HAC to advise it on particular properties for heritage registration. Further, 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.** Standing is often an issue expressly addressed in municipal legislation where it is intended to be conferred upon persons whose property is not the subject of municipal process. For example, third parties never have standing to appeal a decision of a municipal development officer to grant the development permit or to approve a subdivision: see for example the *Municipal Government Act* section 247(3) and the Halifax Regional Municipality Charter section 262(3). Only an 'aggrieved person' has the right to appeal certain planning decisions of municipal councils: *Municipal Government Act* ss. 247(1) and (2). An 'aggrieved person' for such purposes is defined in the *Municipal Government Act*, s. 191 and Halifax Regional Municipality's Charter s. 209(aa). **As for the HPA itself, s. 15(2) notably gives only the owner a right to a hearing. If third-party applicants were contemplated, one would expect that the hearing would refer to their participation. Explicitly, only the Council or the owner can apply under section 16 for deregistration of municipal heritage properties.** Also, the Act does not provide for notice of section 16 hearings to be given to third parties who may have made initial registration applications – likely because there was no intention to confer authority on third parties to make such applications in the first place. The HPA silence on third-party applications to register an individual Heritage Property is in contrast to the specific provisions applicable where Heritage Conservation Districts are involved. Such districts involve multiple properties and one can understand the interests of one property owner being affected by certificates allowing others in the district to alter the exterior appearance of the buildings. Thus, we see in section 19H of the HPA that 'aggrieved persons, as defined in subsection 19H (2), have a right of appeal the granting of such certificates to the UARB. **Our conclusion is that the HPA and the applicable HRM By-law 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 HPA 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. ... HRM was simply wrong to treat the HUNA**

application for Edward Street as an application either HAC or Council was obligated to consider.

[My bolding added]

[65] In its **July 4, 2023, response, HRM says:**

... Dalhousie is urging the court to strip from these interested members of the public the opportunity to participate in preserving heritage properties that HRM has afforded them... HRM's interpretation of its authority under the HPA to follow this procedure, is in accordance with the HPA objective of identifying and preserving heritage properties... **Accepting third-party applications is a reasonable interpretation of the HPA and further to *Vavilov* [2019 SCC 65] the court should defer to HRM on this. A longtime practice related to such applications, has created a reasonable expectation of the public that their applications will be processed by the HAC.**

[My emphasis added]

[66] I agree with Dalhousie's position on this issue.

[67] Let me at this point make some preliminary observations.

[68] I note that there is no express reference to any such "application" to the HAC in section 13 *HPA* ["Powers of Heritage Advisory Committee"] or in section 4 of By-law H-200 ["Powers of the Committee"].²⁶

²⁶ An examination of the third-party application filed in this case, shows it to be a 53-page document including pictures and historical documentation, which I infer was researched and prepared by the co-applicants and William Breckenridge. The research and preparation must have taken a significant period of time. At page 14 of the Record, one sees a photo credit "June 2021, Peggy Walt". At page 26 we find a section of undated "1245 Edward Street photos", including six photos of the interior of the premises – which from a municipal heritage designation perspective are not materially relevant since only the exterior of the privately owned building is protected by that designation.

[69] The use of a “third-party application” as used in this case, is not expressly authorized in the legislation, subordinate legislation, or policy.²⁷

[70] On a practical level, HRM has its own “Heritage” staff, so it is fully capable of independently identifying properties that should be considered for municipal Heritage designation without the unnecessary intervention of, and consequent concerns about the so-called “weaponization” or otherwise inappropriate invocation of such processes by, third parties.²⁸

²⁷ It appears that in the case of property-owner generated requests for designation as municipal Heritage Property, HRM staff provide advice directly to HRM Council, as there is no need for the HAC recommendation process in such cases. **In the June 5, 2018, HRM Council Minutes**, which are included as a tab to HRM’s brief filed June 1, 2023, we find at page 3 in the case of a heritage hearing regarding 5375 Kaye Street the following comment: “**At the request of Mayor Savage, John Traves, Municipal Solicitor provided an overview of the heritage hearing process**, in accordance with the *Heritage Property Act*. Traves **clarified that the application before Regional Council was submitted by a third party** and that it is only customary to allow the property owner of the subject lands to make an oral submission before Regional Council renders a final decision... Aaron Murnaghan, Principal Planner, clarified the differences between a Heritage Property application submitted by a property owner and the third-party Heritage Property application. [He] commented on the responsibility of the Heritage Advisory Committee to assess and provide recommendations to Regional Council on third-party heritage applications, as outlined in the *Heritage Property Act*. [He] further advised that due [to] this stipulation in the Act, staff does not provide recommendations on third-party heritage applications, as it is the mandate of the Heritage Advisory Committee to do so.” Regarding policies that have the effect of law, see Justice Fichaud’s reasons in *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2, at paras. 30-1; and at para. 91 in *Pratt v. Nova Scotia (Attorney General)* 2020 NSCA 39. There are no relevant and applicable policies in this case. [My emphases added]

²⁸ There is no role, active or passive, expressly contemplated for such third parties in either the *HPA* or the By-law. On the other hand, where a potential de-registration of a municipal Heritage Property arises pursuant to an application of the owner or Council on its own motion, s. 16 of the *HPA* first requires “holding a public hearing to consider the proposed deregistration.” It also appears that Dalhousie was aware of the August 24, 2022, HRM staff Report titled “Potential heritage resources on university campuses” prepared for the Heritage Advisory Committee which identified 35 Dalhousie-owned properties which warranted further evaluation to determine whether they should be recommended for municipal heritage registration as “public” buildings. As noted in Dalhousie’s September 28, 2022, memorandum to HRM Council (p. 183 Record): “These 35 properties are in addition to 3 other third-party applications being evaluated by HRM staff with respect to Dalhousie own properties located at 1245 Edward Stret, 1322 Robie Street and 1460 Oxford Street. At their meeting, HAC revised the recommendation to Council to include action regarding 17 additional Dalhousie buildings identified in attachment B.” [My underlining added]

[71] At most, in any event, these so-called “applications” could only amount to a “request” to have the HRM consider investigating whether a property should be considered for designation - yet even then, the above-noted concerns may still be present.²⁹

²⁹ As the circumstances of this case demonstrate, an objective onlooker could have concerns that members of the HAC (two of whom are HRM Councillors) and HRM Council may have felt “pressured” by [*inter alia* 5000-6000 who signed the online petition] voters to designate the property as a municipal “Heritage Property”. For example, pressure may have felt more acutely when the third-party co-applicant wrote in her **July 11, 2022**, email (shortly before the July 15, 2022, HAC meeting) to the Mayor and Councillors of HRM, under that subject title “Urgent – Dalhousie’s precedent-setting demolition violation at 1245 Edward Street, Halifax” that: “I am writing to request that you do not issue a demolition permit to Dalhousie for the demolition of 1245 Edward Street until such time as a full investigation has taken place. I am concerned that... Dalhousie believes it is above the law. ... As you would be aware, almost 6000 citizens have signed a petition asking Dalhousie to not demolish this building. As well, you would be aware at heritage designation application has been filed with the city. Mr. Mayor – you or any councillor – are able to ask that this application be expedited for immediate processing. Councillor Outhit recently did this for a property in his district. You can also ask for an emergency meeting of the heritage advisory committee to address this urgent issue, otherwise it does not meet for two weeks. So it is within your powers to save this building by having an investigation of the demolition without a permit and the safety concerns; expediting the heritage designation application; and calling an emergency meeting of the Heritage Advisory Committee. **Staff’s report and recommendations are ready to go – let’s not delay hearing what they have to say about the importance of this building to Halifax’s history and heritage.** As you will be aware **almost 6000 citizens are watching how the Halifax Regional Municipality responds to this precedent-setting and flagrantly offensive violation of due process by Dalhousie University.** I respectfully ask that you take the appropriate measures outlined in this letter. I look forward to hearing from you on this urgent matter. Yours truly, Peggy Walt.” See also the earlier HAC Committee minutes of **June 22, 2022**, item 7.2.1 being page 111 of Kayla MacDonald’s affidavit; and the Special Meeting [HAC] minutes of July 15, 2022, page 100 where one finds that before the Committee that day were the following: “ staff recommendation Report dated June 24, 2022; staff Presentation dated July 15, 2022; correspondence from Janet Morris, Heritage Trust of Nova Scotia; Diana Torbert; Peggy Walt; Mary Vingoe; Lukas Pearse; and Peter Rogers [Dalhousie’s Legal Counsel].” Janet Morris’s **July 11, 2022**, letter to HRM Council reads in part: “**Heritage Trust of Nova Scotia** has, as part of its mandate, the conservation of heritage buildings and education about their value. The Trust sees the precedent being set with 1245 Edward St. as cause for concern. **We’ve been shocked by the attempt of Dalhousie University to ‘outrun’ the municipal heritage designation process.** Rather than acting as what it should be, one of the most well-respected institutions in the municipality, Dalhousie is emulating some of the municipality’s less well-regarded ‘developers. ...Heritage Trust urges Council to expedite the process by asking staff to convene a special meeting of the HAC immediately so that Council can consider the outcome of the HAC meeting at its next meeting, thereby giving the property a fair chance to be considered for protection.” I keep in mind that HRM did issue a demolition permit to Dalhousie on or about July 14, 2022, but that that was negated when the **HAC** made its recommendation on July 15, 2022 - See the **June 22, 2022**, Minutes [p. 111, Exhibit “J” of Kayla MacDonald’s affidavit] at item 7.2.1 where it states: “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 the next meeting of this Committee in July. If the application is approved the property would be protected by the Act for 90 days.” At page 101 of Kayla MacDonald’s affidavit the **Special Meeting Minutes of the**

[72] Thus, although there is no express legislated legal obligation upon HRM once in receipt of so-called “third-party applications” made to the HAC to conduct an assessment of such properties, by considering itself so prompted to undertake an assessment in this manner,³⁰ the HAC is making a “decision” which affects the substantive rights of Dalhousie.³¹

[73] By HRM’s accepting a third-party application, which third-party has pre-selected a specific property for consideration by the HAC (including HRM in-

July 15, 2022 HAC meeting include: “Moved by David Atchison, seconded by Councillor Stoddard that the Heritage Advisory Committee recommend that Halifax Regional Council: 1-set a date for a Heritage Hearing to consider the inclusion of the subject property in the Registry of Heritage Property for the Halifax Regional Municipality; and 2-Approve the request to include 1245 Edward St., Halifax in the Registry of Heritage Property for the Halifax Regional Municipality, as shown on Map 1 of the Staff Report dated June 24, 2022 as a Municipal Heritage Property under the Heritage Property Act. Motion Put and Passed. ... The Committee acknowledged the correspondence received to assist with their deliberations.” The Committee gave the property a total score on the Heritage Evaluation of 64/100 possible points. [My emphases added]

³⁰ As HRM has put it its July 4, 2023, letter in response to the Court’s enquiry: “Dalhousie is urging the Court to strip from these interested members of the public the opportunity to participate in preserving heritage properties that HRM has afforded them.... Precluding such input from the public as proposed by Dalhousie would frustrate the HPA objectives. As such, accepting third-party applications is a reasonable interpretation of the HPA and further to Vavilov [2019 SCC 65] the Court should defer to HRM on this. The longtime practice related to such applications, has created a reasonable expectation of the public that their applications will be processed by the HAC. The related history shows that the concern expressed by Dalhousie of the HPA being weaponized by third parties, is both overly dramatic, and conjecture at best. Finally, contrary to Dalhousie’s allegation, third-party applications do not go before Council. These applications are only relevant at the HAC stage.” While not every third-party application may result in the HAC proceeding to hear the matter and rendering a recommendation to HRM Council, in this case the focus must be on the “application” process that has been incidentally adopted by HRM, and which affected Dalhousie’s rights in this instance. [My underlining added]

³¹ A recommending committee can, in proper circumstances, be considered to be an administrative body whose recommendation is the subject of judicial review: *Re Haber and Medical Advisory Committee of the Wellesley Hospital*, (1990) 56 O.R. (2d) 553 at 569; 62 O.R. (2d) 756 (Ont CA), (Leave to SCC refused April 26, 1988). This case was favourably cited by Justice Cullen in *Cimolai v Children’s and Women’s Health Centre of British Columbia*, 2006 BCSC 1473, (upheld 2007 BCCA 562 - Leave to SCC refused April 28, 2008).

house Heritage staff), the HRM process for the designation of a property as a municipal Heritage Property has been deliberately triggered (which would not otherwise have been the case).

[74] Additionally:

- a) the HAC decides whether the property will even go on to be considered for designation as a municipal Heritage Property by HRM Council: “Should the Heritage Advisory Committee score a property with 50 or more points, a positive recommendation **will be** forwarded to Regional Council. If the property scores less than 50 points, the report **will not be** forwarded to Regional Council”³²; and
- b) in this specific case the decision to recommend to HRM Council (which was communicated to Dalhousie on July 15 2022, by Form A- see para. 21 HRM brief June 1, 2023) that the property be designated a municipal Heritage Property also has the effect of staying for 120 days the demolition permit that was issued to Dalhousie on July 14, 2022, per sections 14 and 15 of the *HPA*.

³² Per HAC Formal Request to include 1245 Edward Street, Halifax, in the Registry of Heritage Property for the Halifax Regional Municipality- Original signed by HAC Chair Patrick Connor (p. 213 Record).

[75] Although the HAC is not the ultimate decision-maker *per se*, it is a creation of, and supervised by, HRM Council, and therefore Council is also responsible to ensure that the HAC process is “fair” in any individual case.

[76] In its supervisory role, HRM Council is responsible to ensure that the recommendation it has received from the HAC was made in a fair manner, including that the recommendation was not rendered in circumstances where there is a reasonable apprehension of closed-mindedness on behalf of HAC members; that the recommendation was not based on irrelevant or arbitrary considerations; or that the HAC failed to consider material relevant considerations.

[77] Depending on the specific circumstances in a given case, the systemic prejudice to the property owner flowing from the nature and degree of the lack of fair process may taint the recommendation of the HAC to such an extent that it would be unfair or unreasonable for the HRM Council to place reliance thereon.

[78] Next, let me briefly reference the fundamental property interest that Dalhousie, as a real property owner, acquired when it purchased 1245 Edward

Street, which was long before it had any inkling that the property could be subject to a municipal Heritage Property designation.³³

2. The importance of the decision to the property owner/Dalhousie

[79] In Canada, the criminal law recognizes the right of a real property owner to be left in peace while on their property.

[80] As Justice Dickson stated for the majority in *Eccles v. Bourque et al.*, [1975] 2 S.C.R. 739, regarding whether there was a common law right not to be arrested by state authorities on your own private property:

The first issue, therefore, depends upon the second issue, *videlicet*, can the trespass be justified on common law principles? For these principles, we go back to vintage common law, to 1604, and *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, in which **the principle, so firmly entrenched in our jurisprudence, that every man's house is his castle, was expressed in these words [p. 195]: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose". That, then, is the basic principle, as important today as in Biblical times (Deuteronomy 24:10) or in the 17th century.**

[My bolding added]

³³ Dalhousie acquired the property in **July 2021**. The very earliest indication that 1245 Edward Street could possibly be considered a municipal Heritage Property, arose, I infer, sometime in April/May 2022, when the co-applicants (who reside very nearby) became aware that Dalhousie was actively de-constructing the interior of the building, and consequently filed their Third-Party Application in the first week of May 2022. Dalhousie was not made aware of this Application by HRM. It only incidentally discovered the Application had been filed on or about **July 11, 2022**.

[81] Similarly, in the civil law, the perimeter of one's property is considered to be inviolable - and anyone who crosses without lawful authority or permission is a trespasser.

[82] When one buys real property, one expects to be able to do on one's property anything that is not prohibited by the law at that time.

[83] One also expects that the restrictions relating to what one can do with one's property will not be unfairly, unreasonably, and materially increased.

[84] When such increased restrictions are imposed unilaterally by the State (in this case, HRM), real property owners can, in limited circumstances, rely upon the common law to protect their private interests, using any available court processes.

[85] Next, let me set out what interest Dalhousie had in the property, in which it acquired a "fee simple" interest.

[86] In the Second Edition of his *Introduction to Real Property Law* (Butterworth & Co. (Canada) Ltd., 1982), Professor Alan M. Sinclair stated at page 13, under the heading “Freehold Estates”:³⁴

1. The fee simple

Remember that the word ‘estate’ comes from the word ‘status’ and you will see what is meant by the statement that the fee simple is the largest estate known to the law. It means that if a man owns an estate in fee simple, his interest is as large in relation to that land as is possible to have and his status is the greatest, for it will last potentially longer than any other of the estates.

[87] However, an owner of real property is not completely “free” to do with their property as they wish - real property is also subject to regulation by government, sometimes in a substantial manner.

[88] An example of this flows from section 12(1) of the *HPA*:³⁵

³⁴ Former Professor and Dean at the University of New Brunswick Law School, who also taught courses at Dalhousie University Law School. This short book contains a compact review of the history of Real Property law from its ancient origins, which presently underlie the modern law. A more fulsome publication and somewhat indispensable in this area of the law, is the aptly titled *Nova Scotia Real Property Practice Manual* (Lexis-Nexis Canada Inc., Toronto, (looseleaf), 2023).

³⁵ The existence of the Halifax Regional Municipality, as an entity in law, and the limits of the Municipality’s authority, are derived from, a Provincial statute, the *Halifax Regional Municipality Charter*, SNS 2008, c. 39 [“**HRM Charter**”]. As HRM stated in its brief, (paras. 64-66): “**Pursuant to HRM Charter, the Council is empowered to act through three basic administrative actions: by-law, policy and resolution. These different types of actions are to a large extent interchangeable as is evidenced by the provisions of HRM Charter section 58.... The HRM Charter provides HRM through its Council, wide discretion on the manner it conducts itself in the exercise of the authority given it.**” Under the *HPA*, HRM is given power pursuant to section 12(1): “A municipality may by by-law establish a municipal registry of Heritage Property.” HRM has done so under its **By-law H-200, “Respecting the Establishment of a Heritage Advisory Committee [“HAC”] and a Civic Registry of Heritage Property”** [“the By-law”] - found at p. 310 of the Record - and specifically section 7(2). Pursuant to section 5(3) of the By-law, the procedures of the HAC are governed by the provisions of the *HPA*, the

“A municipality may by by-law establish a municipal registry of heritage property.”

[89] In *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, the Majority, per Justices Russell Brown and Suzanne Côté, considered the circumstances in which state regulation of land use may amount to a *de facto*, or “constructive”, taking of private property. The appellant claimed that HRM used regulatory powers to effectively seize a piece of property without compensation. The Nova Scotia Court of Appeal struck out the claim, applying *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227. The Majority said:

[4] We would allow Annapolis’ appeal. The Court of Appeal, in our respectful view, misapplied *CPR* and summary judgment principles. *Read in harmony with the jurisprudence upon which it was decided, CPR signifies that a constructive taking occurs where: (1) a beneficial interest — understood as an advantage — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue.* Further, the Court of Appeal erred by holding that Halifax’s intention is irrelevant to applying the second part of that analysis. ...

...

By-law, and the “Rules of Order Administrative Order of the Region” which is attached to HRM’s brief filed June 1, 2023, and entitled “**Administrative Order One – The Procedure of the Council’s Administrative Order** [“Administrative Order One”]. Section 4 sets out the powers of the **Heritage Advisory Committee**: “The Committee **shall, within the time limits prescribed by Council or the Act, advise the Region respecting**: (a) the inclusion of buildings, public building interiors, streetscapes, cultural landscapes or areas in the Registry [of Heritage Property].” The *HPA* also has Regulations: “Heritage Conservation Districts Regulations” NS Reg. 138/92; and “Heritage Property Act Forms” NS Reg. 30/83 – which authorize the Forms A, B and C attached to the By-law H-200.

[9] At issue in this appeal is Annapolis’ allegation of a constructive taking. Specifically, Annapolis says that Halifax’s regulatory measures have deprived it of all reasonable or economic uses of its land, resulting in a constructive taking without compensation, contrary to ss. 65 and 237 of the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, and ss. 6 and 24 of the *Expropriation Act*, R.S.N.S. 1989, c. 156. It alleges in particular that Halifax has acquired a beneficial interest in the Lands by exercising dominion over them so as to effectively create a public park at Annapolis’ expense. According to Annapolis, members of the public hike, cycle, canoe, camp, and swim on the Lands, are encouraged to do so by Halifax, and Halifax financially supports organizations that also encourage people to use the Lands as a park. Further, signs posted on the Lands allegedly depict the municipality’s logo and phone number, and a media article quotes a municipal employee referred to as “the city staffer overseeing the park’s creation”.

[My italicization added]

[90] The Majority went on to review the law of takings, and the meaning of “beneficial interest”:

A. Overview of the Law of Takings

[17] It is useful to begin with a brief overview of the law of takings. Given the facts of this appeal, our focus is on expropriation through regulation — which, again, we refer to as a “constructive taking”

[18] A “taking” is a “forcible acquisition by the Crown of privately owned property . . . for public purposes” (K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at § 5:1). It may take the form of a constructive taking (effective appropriation of private property by a public authority exercising its regulatory powers), or a *de jure* taking (formal expropriation), by (in the case of land) taking title.

[19] To be clear, not every instance of regulating the use of property amounts to a constructive taking. ...**The line between a valid regulation and a constructive taking is crossed where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property** (Horsman and Morley, at § 5:2). Put simply, “in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with ‘no reasonable use’ of the property” (Horsman and Morley, at § 5:13 (emphasis added)).

...

[25] This legal backdrop brings us to *CPR*, and its elaboration of the common law rule in the form of a two-part test for showing a constructive taking: “. . . (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property . . .” (para. 30 (emphasis added), citing *Mariner*, at p. 716; *Manitoba Fisheries*; *Tener*). The issues present in this appeal require us to consider the meaning of a “beneficial interest in the property or flowing from it” under the first part of that test. In bringing greater clarity to this aspect of the *CPR* test, we do not change the doctrine of constructive takings, but simply apply it to the facts of the present dispute. As we will explain, the Court in *CPR* did not use “beneficial interest” in the technical sense that it carries in the domain of equity. Rather, a “beneficial interest” is to be more broadly understood as an “advantage” — hence the Court’s coupling of “beneficial interest” with the phrase “or flowing from [the property]”. *Clearly, if the interest acquired by the state can be one which flows from the property, what must be shown by the property owner can fall short of an actual acquisition by the state.*

[26] Further, we must also decide the relevance, if any, under the second part of the test of the public authority’s intended use of the land.

B. “Beneficial Interest”

...

[40] **Secondly, interpreting “beneficial interest” broadly (as meaning a benefit or advantage accruing to the state) ensures *CPR*’s coherence to *Manitoba Fisheries* and *Tener*, neither of which understood “benefits” in the strict equitable sense of that term. Again, the references to those authorities in *CPR* demonstrate that *CPR* merely sought to affirm, and not to alter, our law of constructive takings. **This interpretation is supported by the explicit wording under the first part of the *CPR* test: “. . . a beneficial interest in the property or flowing from it . . .” (para. 30 (emphasis added)). An interest flowing from the property affirms that a “beneficial interest” can be more broadly understood as an advantage, and need not be an actual acquisition.****

...

(4) Conclusion on “Beneficial Interest”

[44] In sum, we affirm that the test to show a constructive taking is that stated by *CPR*, properly understood. The reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and (2) whether the state action has removed all reasonable uses of the property. This gives effect to this Court’s acknowledgement of a common law right to compensation where the two-part *CPR* test is satisfied. It accords with imperatives of justice and fairness, which underpin the court’s assessment of expropriation claims, and

remedies situations where cases do not neatly fit within the expropriation legislative framework and would otherwise “fall between the cracks” (Warchuk, at pp. 686 and 690).

[45] **To this, we would add that, because the test focusses on effects and advantages, substance and not form is to prevail.** A court deciding whether a regulatory measure effects a constructive taking must undertake a realistic appraisal of matters in the context of the specific case, including but not limited to:

- (a) The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner’s reasonable expectations;
- (b) The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition of all *potential* reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and
- (c) The substance of the alleged advantage. *The case law reveals that an advantage may take various forms.* For example, permanent or indefinite denial of access to the property or the government’s permanent or indefinite occupation of the property would constitute a taking (*Sun Construction*, at para. 15). Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. *It could also include confining the uses of private land to public purposes*, such as conservation, recreation, or institutional uses such as parks, schools, or municipal buildings.

...

[52] Respectfully said, neither position is correct. The public authority’s intention is not an element of the test for constructive takings at common law. Again, the mischief addressed by the doctrine is one of advantage and effects, not that a public authority acted in bad faith or with an otherwise ulterior motive. Indeed, this Court held in *CPR* that, even if the City’s purpose were to “enable the inhabitants to use the corridor for walking and cycling,” its By-law, *in effect*, neither encouraged trespassing nor prevented the historical and current use of the land (para. 33) and therefore could not be said to have deprived the landowner of all reasonable uses.

[53] This does not mean, however, that intention is irrelevant to the inquiry. Indeed, the case law we discuss below suggests that the objectives pursued by the state may be some evidence of constructive taking. Stated differently, the intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all reasonable uses of their land (inasmuch as a finding of this effect can be supported by

evidence that such an effect was intended). But the absence of evidence of the state’s intention does not preclude a property holder’s claim. It follows that intent may constitute a “material fact” in the context of a constructive taking claim. We stress, however, that the focus of the inquiry must remain on *the effects* of state action.

...

[57] In short, the underlying objective pursued by a public authority may provide supporting evidence for a constructive taking claim. But it is neither necessary nor sufficient. The case law indicates that the assessment of intent has proved helpful in distinguishing between mere regulations in the public interest and takings requiring compensation at common law. **What ultimately matters, however, irrespective of matters of intent, is whether the state-imposed restrictions on the property conferred an advantage on the state that effectively amounts to a taking** (*Tener*, at pp. 563-65, per Estey J., and pp. 551-52, per Wilson J.; *Manitoba Fisheries*, at p. 118).

[My bolding added]

[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.³⁶

³⁶ I recognize that this is a judicial review and not a trial or application at first instance. While the Record herein has already been supplemented in order to permit the Court a better understanding of the circumstances underlying the dispute, I do not require any further evidence to allow me to address this issue. Thus, I generally agree with HRM when counsel says in its June 14, 2023, letter that “the judicial review is a consideration of the reasonableness of the decision... based on the information and submissions that were placed before [HRM counsel]” citing *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7, at para. 52. However, in my view, the reasoning in *Annapolis Group* 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”.

[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.

[93] Dalhousie bought the property for a specific purpose - to demolish the building so the vacant lot would be available to it for further development in the longer term. The evidence presented is that it was “cost prohibitive” to rehabilitate the building, and that, Dalhousie had no use for the building in its existing condition.

[94] Had this designation existed at the time the property was available for sale, Dalhousie has indicated that it would not have purchased the property. Dalhousie’s intention was always to demolish the building.

[95] Designating the property as a municipal Heritage Property precluded Dalhousie from demolishing the building, and defeated its purpose and plans for 1245 Edward Street.³⁷

³⁷ Based on the Record and supplemental affidavits, I am satisfied that in addition to Dalhousie’s specific purpose for purchasing the property and intention having been defeated, by designating it a Municipal Heritage Property, “the state action has removed all reasonable uses of the property” by Dalhousie. I bear in mind that the land is presently zoned “residential”, which limits Dalhousie’s use of the property in the short term in any event.

[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.

[97] Seen in this light, municipal Heritage Project designation processes and decisions are of a nature that they correspondingly require HRM to ensure that property owners such as Dalhousie are involved, and provided with an effectual and timely level of procedural fairness throughout the process that HRM undertakes.

[98] Since a property owner's substantive rights in relation to the property will be engaged from the point at which the registration process is triggered, including when a "third-party application" (and any "request" to similar effect or a unilateral decision by HRM itself have a heritage staff report created regarding the property) is received by HRM, the property owner should then also receive immediate notification including the Application and supporting documentation from HRM.³⁸

³⁸ This would, *inter alia*, and at a minimum, provide a property owner with the opportunity to question or refute applications that could be identified in a preliminary manner as being made by, for example, disgruntled neighbours

C - The applicable standards of review

[99] Dalhousie has included in its Notice of Judicial Review, and in its arguments, three overall grounds.

[100] Let me briefly deal with the first ground.

1. Was HRM's decision *ultra vires* the *Heritage Property Act* because it thwarted the purpose of the *Act* by denying notification to prospective buyers?

[101] In summary, Dalhousie argues that the *HPA* intends registration of properties as municipal Heritage Properties to be a means to alert prospective buyers to the restrictions on the property's buildings. In this case, Dalhousie purchased the property intending to ultimately demolish it. By designating the property a municipal Heritage Property after Dalhousie purchased it having made HRM (the HAC and Council) aware that it did so with the intention of ultimately demolishing it, HRM Council, by ignoring that fact, subverted the intention of the

or other parties whose motivations are not exclusively or genuinely based on legitimate public interest considerations. Moreover, had Dalhousie received the third-party Application in mid-May 2022, it would have been much better prepared to present its position before the HAC. The process here gives one the sense of how quickly such proceedings can come to a conclusion - the third party Application was filed on May 9, 2022; the HAC recommended the property be designated as a municipal Heritage Property on July 15/19, 2022; and HRM Council so confirmed on October 18, 2022.

HPA notification of such registrations. Dalhousie elaborates in its May 15, 2023,

Brief, starting at paragraph 236:

[Relying on the reasons in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 68 and 108] “... the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority, ...”. Because Council (and HAC) are statutory bodies, the governing statutory scheme is ‘likely to be the most salient aspect of the legal context relevant to a particular decision’. The *HPA* is the relevant statute that constrains Council’s discretionary authority to register a property. It follows that **Council decisions must fall in line with the overall purpose and scheme of the Act**. The *HPA* provides for registration of municipal heritage properties on public registries, namely a municipal Heritage Property’s Registry and the Registry of Deeds. **The provisions pertaining to public registration serve an important role in advancing the Act’s purpose of responsible government regulation of real property to promote conservation of buildings with genuine heritage value** pursuant to section 2. **The registration provisions allow for the public – including prospective purchasers and financiers, – to know whether a property is encumbered by heritage registration before buying it**. In other words, these provisions ensure that purchasers understand the consequences of buying the property *before* they do so. When Dalhousie purchased it, the property was not listed in any provincial or municipal Heritage Registry, nor was its Heritage status listed as an encumbrance in the Registry of Deeds. **Dalhousie purchased the property in reliance upon its non-Heritage status. Furthermore, Dalhousie applied for and received the demolition permit in reliance of the property’s non-Heritage status**. The Record shows the Council gave no regard to Dalhousie’s reliance of the property’s non-Heritage status, nor did it regards the timing by which the Heritage Application was brought forward.... It appears that only once it became known that Dalhousie intended to demolish the property that HRM took extraordinary steps to consider the property’s Heritage attributes. **If it were a genuine Heritage Property it likely should have been evaluated and registered at a time when it could have a viable human occupancy to help support conservation and preservation. This is an improper and unreasonable use of Council’s discretionary authority to register properties. Council, in resolving to register the property, effectively made an “end run” around the public notification objectives of the HPA. It is *ultra vires* Council’s authority to disregard the Act’s public notification objectives and the fact that HRM had already issued a demolition permit to a *bona fide* purchaser**. It is not a situation where the registration Application came forward in the ordinary course as a result of reviewing properties in the area, in which case the fact that the owner bought the property sometime previously, when there was no heritage encumbrance would be irrelevant. But here, the buying of the property with the intention of lawfully demolishing it to the point of applying for and obtaining a demolition permit sets this case on a different footing.

Essentially, it was only **because the owner was openly on that course, that HUNA applied or that the Municipality intervened on a so-called ‘emergency’ basis.**”

[My bolding added]

[102] While Dalhousie characterizes HRM Council’s decision as *ultra vires* the HPA and “unreasonable”, in substance its argument is that the decision was “unreasonable”.

[103] I do not accept that the Council’s decision was *ultra vires* in the strict sense of that concept.

[104] The *HPA* is intended to, and does, permit a municipality to designate as municipal Heritage Property, properties that are not presently municipal Heritage Property.

[105] I accept that the *HPA* did not intend any buyer of real property who purchases it before a municipality designates it a municipal Heritage Property to be able to **successfully argue later that because they were not so notified** at the time of purchase, therefore HRM is precluded from designating it a municipal Heritage Property.

[106] On the other hand, the fact that HRM did not engage the process to designate the property a municipal Heritage Property until Dalhousie had applied for a

demolition permit, and then in response to public outcry, did so, may be part of a factual context that leads a court to conclude the decision is procedurally unfair, tainted by alleged closed-mindedness, a reasonable apprehension of bias, and that it is substantively unreasonable.

[107] Therefore, I will not deal with this as an independent ground for judicial review, but rather as part of the unreasonableness ground, and to the extent that it is applicable, incidentally as part of the unfair process ground.

[108] Let me next consider the standard of review for the argued procedural unfairness issues.

2. What is the standard of review in relation to allegations of unfair process³⁹, and was it breached?

(a) The standard of review

³⁹ HRM stated between paras. 4-6 of its Brief: “Under the statutory scheme to protect heritage buildings, a HAC essentially acts as an autonomous advice and recommendation body distinct from the Municipal Council... An application for registration itself is not put before Council-only the HAC recommendation. The **function of Council** is not 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...** The HAC assessment is not a process with discretion to consider factors unrelated to the listed criteria of exterior features of the building or to weigh the value of different perspectives... Conversely, the Council is making the actual decision on whether or not to register the building and 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 impact on the owner.**” And at para. 9: “... Dalhousie is asking the court to overlook that both the HAC and the Council fully complied with the HPA statutory process, that Dalhousie was afforded the requisite level of procedural fairness...”. HRM argues at para. 55 of its Reply Brief: “the [Supplemental Record] affidavit evidence should not be considered by the Court for any purpose unrelated to the Dalhousie arguments on procedural fairness.” – i.e., not in relation to the reasonableness of the Decision. I note here that unfair process can itself lead to an unreasonable outcome. [My bolding added]

[109] First let me set out the standard of review,⁴⁰ referencing an excerpt from *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92:

41 The reviewing judge correctly identified the principle that **no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness**. (See for example, *G. (T.) v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43 (N.S.C.A.), leave to appeal refused, [2012] S.C.C.A. No. 237 (S.C.C.), at ¶90).

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 (see: *G. (T.) v. Nova Scotia (Minister of Community Services)*, *supra*, at ¶8; *Bowater Mersey Paper Co. v. C.E.P., Local 141*, 2010 NSCA 19 (N.S. C.A.), ¶28; *M. (N.N.) v. Nova Scotia (Minister of Community Services)*, 2008 NSCA 69 (N.S. C.A.), ¶40; and *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27 (N.S. C.A.), ¶21-33).

[My bolding added]

[110] **I therefore disagree with HRM in its Brief at para. 29, and following**, when it states:

It is respectfully submitted that the jurisprudence has been migrating towards adopting reasonableness as the overarching standard of review of an administrative decision as a whole – not just on the substance of the decision. In... *Vavilov*... at paragraph 76, the court noted that the duty of procedural fairness in a given case will impact how a court conducts reasonableness review. Essentially, if the decision viewed in its entirety is reasonable it stands, if it is unreasonable, it is set aside... It is respectfully submitted that specific competency issues such as legality and procedural sufficiency, are only amongst the many factors to be considered in whether the process they are part of leads to a decision that is

⁴⁰ It must be borne in mind that this examination of whether an administrative process was “unfair in light of all the circumstances” in cases of non-statutory based judicial review (where there is no statutory appeal) has been a consistent theme in the jurisprudence: in *Jono* (para. 42); *Tarrant*, 2019 NSCA 27 (para. 24); *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 (paras. 26-29).

reasonable. The question becomes more one of materiality of the role played in the decision outcome – i.e., is an element of procedural unfairness or illegality, so material as to render the decision as a whole unreasonable. This approach seems to flow from the decision in *Jono Developments Ltd. v North End Community Health Assn.* [citing paragraphs 107-112] ... **(para. 33)** In the present case Dalhousie is arguing that the decision of Council should be quashed on the basis of the alleged breaches of procedural fairness in the HAC process. However, as **the decision of Council is arrived at via hearing *de novo***, the alleged unfairness in the HAC processes may lack sufficient materiality to render the ultimate decision by Council unreasonable. [and in Part III – Issues paras. 34-5] ... From HRM’s perspective, preliminary issues forming part of this determination include... Was the process reasonable – i.e., procedurally sufficient in material respects? Was the decision to register the house as a municipal Heritage Property reasonable?

[My bolding and underlining added]

[111] Although the HAC does not make a “decision” *per se* that can be judicially reviewed, its process does constitute a significant step in the Heritage Property designation/registration process where owners do not consent to the designation, and therefore it is inappropriate to refer to HRM Council’s decision/process as *de novo* if that suggests the HRM Council’s decision is disconnected from or unaffected by the pre-HAC and HAC processes in judicial reviews of the present nature.

[112] I find helpful, in resolving this issue, the reasons in *Halifax (Regional Municipality), v. Tarrant*, 2019 NSCA 27, where the question was: “did the [reviewing] judge commit an appealable error by ruling the [HRM] Council had

breached the duty of procedural fairness”⁴¹ *Tarrant, supra*, was most recently cited by Justice Sidnell in her reasons from *Westcan Recyclers Ltd. v Calgary (City)*, 2023 ABKB 442:

Duty of fairness applicable to the passage of the Closure By-law

128 In *Baker v Canada* (Minister of Citizenship and Immigration), [1999] 2 SCR 817, [*Baker* cited to CanLII] a mother with Canadian-born dependent children, who was ordered to be deported, sought a waiver of the requirement to make a permanent residence application from outside Canada. A senior immigration officer replied to her request by letter stating, without reasons, that there was insufficient humanitarian and compassionate reasons to grant a waiver. The Supreme Court of Canada considered whether the principles of procedural fairness were violated and, L’Heureux-Dubé J, for the majority, found that a duty of procedural fairness applies to decisions that affect the rights, privileges, or interests of an individual: *Baker*, at para 20.

129 The existence of a duty of fairness does not determine the requirements of that duty. Procedural fairness is eminently variable, and its content is to be decided in the specific context of each case: *Baker*, at para 21.

130 Where participatory rights are at issue, administrative decisions are to be made using a fair and open procedure, appropriate to the decision being made in its statutory, institutional, and social context. There must be an opportunity for those affected by the decision to put forward their views and evidence and have that considered by the decision-maker: *Baker*, at para 22.

131 There are **five non-exhaustive factors relevant to determining what is required by the common law duty of procedural fairness: *Baker*, at paras 23 to 28. These were applied in *Halifax (Regional Municipality) v. Tarrant*, 2019 NSCA 27, at para. 30, in the context of judicial review of a municipal By-law.** These five factors were also summarized in *Vavilov*, at para 77:

(1) the nature of the decision being made, and the process followed in making it;

⁴¹ An HRM Development Officer granted a landowner a setback variance, which decision was appealed to the Community Council (the 3 local elected Councillors), which overturned the variance. The reviewing Justice found the absence at the Community Council hearing of the parties who had argued against a variance initially was procedurally unfair, and remitted the matter to the Community Council. HRM successfully appealed.

- (2) the nature of the statutory scheme;
- (3) the importance of the decision to the individual or individuals affected;
- (4) the legitimate expectations of the person challenging the decision; and
- (5) the choices of procedure made by the administrative decision maker itself.

132 To determine the duty of fairness applicable to the Closure By-law, I will consider the five; non-exclusive *Baker* factors.

[113] Justice Fichaud stated in *Tarrant*:

23 Consequently, this Court is to focus on procedural fairness. In my respectful view, the judge's reasons erroneously applied those principles. I say this for the following reasons.

24 *Kelly v. Nova Scotia Police Commission* [sometimes cited as *Burt v. Kelly*], 2006 NSCA 27 (N.S. C.A.), is **the leading decision in this Province on the approach to procedural fairness**. Justice Cromwell said:

[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.** In my respectful view, the judge did not adequately consider the first of these steps.

[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 up 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.

[My bolding added]

[114] From *Jono Developments Ltd.*, *supra*, per Justice Farrar for himself and Justice Bryson, we find the following statements about the duties of reviewing courts (some citations omitted):

Issue #1 Did the reviewing judge err in law in finding that HRM breached a duty of fairness to the Community Groups?

Standard of Review

40 This issue addresses the reviewing judge's substantive findings on the judicial review. The appropriate approach for a court of appeal to take when reviewing the lower court's decision in a judicial review was addressed by the Supreme Court of Canada in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.):

45 The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 (F.C.A.), at para. 18:

Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed palpable and overriding error in its application of the appropriate standard.

46 In *Merck Frosst Canada Ltée c. Canada (Ministre de la Santé)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (S.C.C.), at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).

47 The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?

41 **The reviewing judge correctly identified the principle that 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 ...**

Existence of a duty of fairness

43 **The reviewing judge embarked on a duty of fairness content analysis following *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) before assessing the threshold issue of whether a duty was owed at all. This omission by the reviewing judge is of little consequence as, for the reasons that follow, I am satisfied that HRM owed a duty of fairness to the Community Groups.**

44 **In *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)*, 2004 SCC 48 (S.C.C.), the Supreme Court of Canada stated:**

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: ...

45 **The first requirement is that the decision be 'administrative,' as opposed to 'legislative'.**

46 **Justice Oland in *Potter v. Halifax Regional School Board*, 2002 NSCA 88 (N.S. C.A.) provides a helpful explanation of the distinction:**

[39] [...] I have found the following passage from S.A. De Smith's text, *Judicial Review of Administrative Action*, [3rd ed.], 1973 London: Stevens at p. 60 on the distinction between administrative and legislative acts helpful for my analysis:

The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[40] The classification of an act as legislative or administrative is not always easily done. **There is a great diversity of administrative decision-making with decision-makers ranging from those primarily adjudicative in function to those that deal with purely legislative and policy matters:** see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 at para 27. **Where a particular decision-making power falls on this continuum is a consideration in determining the application and extent of any duty of fairness.** [...] I agree with Brown and Evans that **those decisions closer to the "legislative and general" end of the spectrum usually have two characteristics: generality** (the power is of "general application and when exercised will not be directed at a particular person") **and a broad policy orientation in that the decision creates norms rather than decides on their application to particular situations:** see D. Brown & J. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) vol. 2 at para 7:2330. In my view, when the Board decides to close a specific school or specific schools, it is applying, among other things, policy and general considerations but to particular situations. Such decisions are not, in my view, so close to the legislative and general end of the spectrum as to foreclose entirely any duty to act fairly. [Emphasis added]

47 Similarly, the decision to sell the surplus school is a decision related to a particular situation and is not so close to the legislative end of the spectrum to preclude a duty of fairness.

48 Further, it has been recognized that public interest may give rise to a duty of fairness if an applicant has (i) a genuine interest in the matter, (ii) the issue is justiciable, (iii) there is a serious issue to be tried and (iv) there is no other reasonable and effective manner for the issue to be resolved (see Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada*, (loose-leaf (updated May 2013) (Toronto: Canvasback, 1998) at 4-44 and 7-54).

[My bolding added]

(b) HRM owes a duty of fairness to Dalhousie

[115] The first question I must address is whether a duty of fairness exists at the HAC and/or HRM Council levels (and whether the process at each level is “legislative” or “administrative” in nature). If so, I will go on to assess the limits of the content of that duty of fairness.

[116] I am satisfied that collectively viewed, HRM’s “Heritage Property” processes involve HRM “[making] an administrative decision affecting individual rights, privileges, or interests” [*Jono*, at paras. 45-46].⁴²

[117] The nature of the statutorily sequential processes of the HAC and HRM Council are “administrative”, and given the context and interests involved, a different duty of fairness exists at both levels, which is owed to Dalhousie in this case.⁴³

(c) The sources of the content of the duty of fairness

[118] As the materiality of the “rights, privileges or interests” that are at risk of interference by the State increases, generally speaking, so will the minimum acceptable content of the duty of fairness increase. **As the Supreme Court noted in *Baker, supra*, at paras 21-27:**

“The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As [Justice L’Heureux-Dubé] wrote in *Knight* ... ‘the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.’ **All of the circumstances must be considered in order to determine the content of the duty of procedural fairness ... it is helpful to review the criteria that should be used in determining what procedural**

⁴² See the reasons in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, at para. 3; and para. 20 in *Baker*, [1999] 2 S.C.R 817.

⁴³ Dalhousie’s property interests alone was selected by HRM and subjected to these processes, and only Dalhousie’s interests were directly interfered with by HRM’s processes.

rights the duty of fairness requires in a given set of circumstances. ... I emphasize that underlying all these factors is the notion that the purpose of 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. Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. ... the nature of the decision being made ... nature of the statutory scheme ... importance of the decision to the individual ... the legitimate expectations of the person challenging the decision ... important weight must be given to the choice of procedures made by the agency itself and its institutional constraints ...”.

[My bolding added]

[119] The non-exhaustive five *Baker* factors are a good starting point:

- a) the nature of the decision being made, and the process followed in making it;
- b) the nature of the statutory scheme;
- c) the importance of the decision to the individual or individuals affected;
- d) the legitimate expectations of the person challenging the decision; and
- e) the choices of procedure made by the administrative decision maker itself.

[120] Next, I will set out some aspects of the statutory scheme, relevant to the process for designating properties in HRM to be municipal Heritage Properties.

i. The legislative provisions

a) HRM By-law H-200

[121] Municipal Heritage Property designations are ultimately decided by HRM Council.

[122] However, all applications are first considered by the Heritage Advisory Committee [“HAC”].

[123] The “powers” of a Heritage Advisory Committee are expressly set out in section 13 of the HPA. That section does include: “(d) any other matters conducive to the effective carrying out of the intent and purpose of this Act.” Therefore, it would seem a reasonable conclusion, particularly in light of the approval of the Minister of Municipal Affairs of the By-law, that the legislature intended this “catchall” provision to supplement the HAC’s broad powers to conduct its business; subject to section 5(3) of By-law H 200 – see also section 117 of Administrative Order One.

[124] The HAC must meet at least once a month [section 5], and consists of two HRM Councillors and ten other members (per section 3 of By-law H-200: “10

residents of the Region, who have applied to the Council to act as members and have expressed an interest in heritage preservation”.)⁴⁴

[125] The HAC is tasked pursuant to its powers under section 4 of By-law H-200

“within the time limits prescribed by Council or the Act, [to] *advise* the Region respecting:

(a) **the inclusion of buildings**, public building interiors, streetscapes, cultural landscapes or areas **in the Registry**;

(b)...

(c) **applications to substantially alter the external appearance of or demolish a municipal Heritage Property**;

...

(g) building or other regulations that affect the attainment of the intent and purpose of the Act;

...

(i) the use, administration, and management of registered heritage properties owned by the Region;

...

(l) the deregistration of heritage properties;

(m) the acquisition of heritage properties;

⁴⁴ It is unclear what specific process and criteria HRM Council uses in its consideration of which applicants for citizen representatives on the HAC will be eligible and appointed, but see Administrative Order One, page 73, Schedule 3, section 12 “Advisory Committees”.

- (n) financial incentives to heritage properties;
- (o) the amendment of evaluation criteria, guidelines and standards for municipal heritage properties;
- (p) recommendations for enforcement in the event of noncompliance; and
- (q) any other matters conducive to the effective carrying out of the intent and purpose of the Act.

[126] Under “Procedure”, section 5(3) of the By-law states:

The procedure of the Committee shall be governed, where not inconsistent with the Act or this By-law, by the rules of Administrative Order One of the Region.

b) The Provincial Legislation

[127] The provincial statutory framework that gives the municipality its authority, which in turn gives the HAC its authority, includes the *HRM Charter*, SNS, 2008, c. 39, [“the Charter”] and the *Heritage Property Act*, RSNS 1989, c. 199 [“HPA”].

[128] The HPA provides for both Provincial and Municipal Heritage Property registries, but does distinguish between the two processes in some respects.

[129] As HRM points out at paragraph 62 of its Brief:

HPA s. 7(3)(e) provides only for ‘*an invitation to the registered owner to comment on the proposed [Heritage Property] registration*’ to the Minister.’ The municipal process in

section 14(3)(e) provides for ‘notification of the *right of the owner to be heard* and of the time and place for the hearing’ to the municipal council.⁴⁵

[130] In my opinion, section 14(3)(e) should be interpreted as intending that a municipal property owner has a robust and meaningful “right to be heard” at a HRM Council hearing. A ten minute oral presentation, in addition to written submissions, will not always be sufficient if this “right to be heard” is to be meaningful.

[131] Before Council the property owner arguably has its only true opportunity to persuade HRM to not register the property as a municipal Heritage Property. However, as in the present circumstances, “the ground is prepared” at the HAC level, for the crucial hearing at Council. For example, the staff recommended ranges cumulating to 53-72 (low to high range) points, were apparently deferred to by the HAC members – who gave a 64 overall score in comparison to the 62.5 points average of the staff recommend ranges. Having only received HRM Heritage staff’s Report to HAC on July 14, 2022, which the HAC “scored” on July 15, 2022, as 64 out of a possible 100 points, Dalhousie was severely hamstrung in making meaningful arguments as to why the staff Report’s qualitative comments

⁴⁵ My italicization added. HRM noted that section 11 of HRM Charter provides that generally speaking: “The powers of the Municipality are exercised by the Council.”

and, therefore, scoring recommendations were inaccurate, unreliable, and unjustified. This is an illustration of how, although the HAC is not a decision-maker, the process followed at the HAC can effect a significant unfairness which a property owner cannot effectively address before Council.⁴⁶

[132] HRM’s Council gets its powers explicitly from section 58 of the Charter.

⁴⁶ The video of Council’s October 18, 2022, hearing demonstrates that no one seriously questioned the bases for the HAC’s recommended scores, which themselves simply reflected HRM’s Heritage staff recommended ranges of scores without deviation. The only issue appears to have been whether the Councillors were satisfied that 1245 Edward Street should be designated a municipal Heritage Property. Thus, the scores assigned by staff were effectively adopted/accepted not only by the HAC, but also by HRM Council. A meeting of the HAC does provide a much less fulsome opportunity to persuade the HAC that its staff Report and a scoring range above 50 points should be rejected in favour of the position of the property owner, as the practice is to not permit oral presentations and therefore no opportunity to directly challenge staff’s recommended scoring. Consequently, it may become disproportionately difficult to do so before HRM Council, for various reasons, including that a majority of Councillors may be reluctant to reject the HAC recommendation which was presented by that specialized Committee, given that - it includes 2 Councillors, and 10 citizens who, “have expressed an interest in heritage preservation”; and is based upon reliance of in-house staff’s “expertise” and which includes staff’s research and opinions in their Report to the HAC (pp. 216-229 Record); who while recognizing the HAC must make the scoring decision, have provided their own range of scores on each of the evaluation criteria. For example **Age** – [maximum possible score 25] “staff recommended a score of 13 points for age”; **Relationship to important occasions, institutions, personages or groups** – [maximum possible score 20] “staff recommended a score between 11 and 15 points for historical importance”; **Significance of architect or builder** – [maximum possible score 10] “... staff have been unable to ascertain the architect or builder responsible for the design or construction of 1245 Edward Street. Staff recommend a score between 1 and 3 points.”; **Architectural merit** - (a)[**construction type/building technology** - maximum possible score 10] “staff recommend a score between 4 and 6 points”; (b) [**style** – maximum possible score 10] “staff recommend a score between 7 and 10 points for architectural style”; **Architectural integrity** – [maximum possible score 15] “staff recommend a score between 11 and 15 points”; **Relationship to surrounding area** - [maximum possible score 10] “staff recommend a score between 6 and 10 points.” In the case at Bar, I note that even taking the minimum score recommended by staff on each scoring criteria, leads to a total of 53 points, which exceeds the 50-point threshold over which the HAC is expected to recommend HRM Council consider designating the property as a municipal Heritage Property. While not required for my decision, a reasonable person may be drawn to ask whether perhaps “the net is cast too widely” – is the minimum threshold of 50+ points too low, thus catching potentially too many properties? I believe it was Councillors Mancini and Outhit who questioned at the October 18, 2022, hearing how many similar registered properties Halifax has, and how many more of the styles/eras of 1245 Edward Street are appropriate?

[133] Council is generally entitled to act “through three basic administrative actions: By-law, policy and resolution. These different types of actions are to a large extent interchangeable...” (para. 63, HRM Brief).

[134] HRM counsel pointed out that its Administrative Order One is intended as a catch-all procedural group of provisions.⁴⁷

[135] Therein, at section 2 the purposes are outlined as:

“to recognize the functions of the Municipality include providing good government; **to complement and supplement, and not to replace, the requirements contained in applicable Municipal legislation**; to provide notice to the Members and the citizens respecting matters that will be considered by the Council; and to provide an open, respectful and orderly form for public input, debate and decisions. In accordance with the purposes of subsection 1, the **Council hereby adopts the Rules of Procedure to govern meetings of the Council, Community Council, and committees of the Council.**”

Dalhousie ultimately appeared before the Council to state its position about why 1245 Edward Street should not be registered as a municipal Heritage Property. Dalhousie argues there is unfairness in it only having such a short time period, to orally present its position and that it should have been (as it requested) granted more time to make its case to Council, since it was limited to a written position and not permitted to appear personally before the HAC. Such requests and permission for public input to HRM Council are covered by sections 42-45 of the Administrative Order One. Notably, section 45 sets out restrictions in relation to each “presentation” to Council, and that “**each presentation shall be allotted a maximum of 10 minutes**”.

[136] In my opinion, the HAC has the authority to permit (before the HAC) a reasonable period of time to property owners to present their position in person to the HAC, and, although expressly ten minutes is the starting point of time available

⁴⁷ A certified copy dated May 29, 2023, can be found as an attachment to HRM’s June 1, 2023, filed brief.

for a party to address Council on such matters, HRM Council has the authority to expand the time available to a party entitled to present their position in cases where the circumstances are such that the entitlement to fair process demands it.

[137] The following sections of the *HPA* provide the basis for the operation of the HRM Heritage Advisory Committee:

3(e) ‘heritage advisory committee’ means a heritage advisory committee established by a municipality pursuant to this Act;

...

Municipal registry of Heritage Property and heritage advisory committee

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.

(5) The by-law may provide that the planning advisory committee of the municipality shall be the heritage advisory committee of the municipality.

(6) A by-law made pursuant to this section is subject to the approval of the Minister of Municipal Affairs, and when so approved has the force of law. *R.S., c. 199, s. 12.*

Powers of heritage advisory committee

13 The heritage advisory committee may advise the municipality respecting

(a) the inclusion of buildings, public-building interiors, streetscapes, cultural landscapes and areas in the municipal registry of Heritage Property;

(b) an application for permission to substantially alter or demolish a municipal Heritage Property;

(ba) the preparation, amendment, revision or repeal of a conservation plan and conservation by-law;

(bb) the administration of heritage conservation districts pursuant to the provisions of this Act;

(bc) an application for a certificate that is required by this Act or the conservation plan and conservation by-law to go to a public hearing;

(c) building or other regulations that affect the attainment of the intent and purpose of this Act;

(d) any other matters conducive to the effective carrying out of the intent and purpose of this Act. *R.S., c. 199, s. 13; 1991, c. 10, s. 3; 2010, c. 54, s. 9.*

Recommendation as municipal Heritage Property

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.

(4) No person shall substantially alter the exterior appearance of or demolish a building, public-building interior, streetscape, cultural landscape or area for one hundred and twenty days after a notice respecting the building, public-building interior, streetscape, cultural landscape or area 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.

(5) A copy of the notice served pursuant to subsection (2) shall be deposited in the registry of deeds for the registration district in which the building, public-building interior, streetscape, cultural landscape or area is situate. *R.S., c. 199, s. 14; 2010, c. 54, s. 10.*

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, public-building interior, streetscape, cultural landscape or area 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, public-building interior, streetscape, cultural landscape or area and a copy thereof shall be deposited in the registry of deeds for the registration district in which the building, streetscape or area is situate. *R.S., c. 199, s. 15; 2010, s. 54, s. 11.*

[138] Pursuant to the *HPA*, HRM enacted By-law Number H-200, “Respecting the establishment of a Heritage Advisory Committee and Civic Registry of Heritage Property”.⁴⁸

⁴⁸ It can be found at page 310 of the Record. By letter dated June 28, 2023, I inquired of counsel whether, as required by section 12(6) of the *HPA*, HRM’s By-law H-200 had been approved by the Minister of Municipal Affairs. I received from HRM’s present counsel the following: a photocopy of an August 6, 1996, letter from

[139] Sections 17-18 of the *HPA*, provide an “off-ramp” from the continued inclusion of a property registered in the Municipal Heritage Property Registry:

Approval to alter or demolish municipal Heritage Property

17 (1) Municipal Heritage Property shall not be substantially altered in exterior or public-building interior appearance or demolished without the approval of the municipality.

(2) An application for permission to substantially alter the exterior or public-building interior appearance of or demolish municipal Heritage Property shall be made in writing to the municipality.

(3) Upon receipt of the application, the municipality shall refer the application to the heritage advisory committee for its recommendation.

(4) Within thirty days after the application is referred by the municipality, the heritage advisory committee shall submit a written report and recommendation to the municipality respecting the municipal Heritage Property.

(5) The municipality may grant the application either with or without conditions or may refuse it.

(6) The municipality shall advise the applicant of its determination. *R.S., c. 199, s. 17; 2010, c. 54, s. 13.*

18 (1) **The municipality may take up to three years to consider an application** under Section 17.

Cathleen O’Grady, Department Solicitor, Department of Housing and Municipal Affairs, date stamped August 9, 1996, by the Municipal Clerk for HRM, which read: “Halifax Regional Municipality – Heritage By-law; The above By-law which was adopted at a meeting of Council held on July 2, 1996, has been approved by the Minister of Housing and Municipal Affairs. I return one copy bearing the Minister’s approval dated August 1, 1996.” I also received a photocopy of a November 4, 2014, letter from Jessica McDonald, Acting Provincial Director of Planning to Kathy Mellett, Municipal Clerk HRM, date stamped November 5, 2014, which read: “Amendments to Halifax Regional Municipality Heritage Property By-law (202) Approval by Council – June 25, 2014 - Please find enclosed two copies of the above-captioned By-law adopted by Municipal Council and approved by the Minister of Municipal Affairs on November 4, 2014. Once the notice stating that the By-law is in effect and is published in the newspaper, would you please inform Janet Rutledge of the newspaper’s publication date. ...” (Dalhousie took no objection to these documents, and I accept them to be true copies of the originals.)

(2) In its consideration of the application, the municipality may require public notice of the application and information meetings respecting the application to be held.

(3) Where the municipality does not approve the application, the property owner may, notwithstanding **Section 17**, make the alteration or carry out the demolition at any time after three years from the date of the application but not more than four years after the date of the application.

(4) Where the property owner has made the alteration or carried out the demolition in accordance with this Section, **the municipality may deregister the property if the municipality determines that the property has lost its heritage value.** *2010, c. 54, s. 14.*

[My bolding added]

[140] In summary then, if a property is registered as a Heritage Property, the owner may at any time thereafter apply for a reconsideration. The HAC only has 30 days to make its recommendation to HRM Council, but HRM Council “may take up to three years to consider” that application. Presumably, the strongest case could be made if there had been a material change in circumstances in the intervening period.

[141] Even if the application is rejected, the owner may still demolish the property at any time three years after the date of the application, but not more than four years thereafter.

D - A return to the standard of review/duty and content of fairness

[142] The *HPA* statutory processes set out in relation to the HAC and HRM Council decisions are different, and each is afforded necessarily incidental

discretionary powers to make decisions regarding procedural matters not expressly set out in the statutory processes.

[143] As noted by Justice Cromwell in *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, at para. 21, I must “pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal’s discretion to set up its own procedures”.⁴⁹

[144] Given my examination of the Record, the statutory scheme, the choices of procedure made by HRM, the significant interests that real property owners have in such proceedings, and the legitimate expectations of the affected real property owner, I am satisfied that a duty of fairness exists at both the HAC and HRM Council levels.⁵⁰

[145] Ultimately, it is HRM Council that made the substantive decision herein, and it is there that the higher standard of fairness should prevail.

⁴⁹ Which procedures in the case of HRM Council, *inter alia*, are also set out in Administrative Order One and By-law H-200.

⁵⁰ At a minimum, a property owner should have the benefit of decision-makers who are not demonstrably, closed-minded, biased or reasonably apprehended as being closed-minded, or having a bias.

[146] Generally, I conclude that for municipal Heritage Property designation processes, the duty of fairness, and its content, owed to real property owners includes the following elements:

- a) although there is no expressed statutory duty to give a real property owner notice of its receipt of an application for designation/investigation into whether a property should be designated as a municipal Heritage Property,⁵¹ in my opinion it is necessary that HRM **give the property owner timely and fulsomely informative notice of the process being triggered, and this duty continues in an ongoing manner as the process develops;**⁵²

⁵¹ Given that the legislative scheme herein does not envisage “third party” applications, this is not surprising.

⁵² I have considered HRM’s argument that there is no statutory (section 7(3)(e) *HPA*/section 14(3)(e) *HPA*) and no common-law duty of procedural fairness (*Baker*) to give notice to an owner of the Application, at least until it has been processed by the HAC - (citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61; *Baker and Jono Developments*). HRM’s argument is premised on the notion that HRM is entitled to deference in relation to the *HPA* which HRM suggests is akin to its “home statute”. In these circumstances, I question whether HRM has the characteristics of a specialized adjudication process usually associated with bodies considered to have a “home statute”. Dalhousie has made the argument that there was an apprehension of closed-mindedness and of bias in the decision-making by HRM as early as the HAC process. Although the HAC strictly speaking does not make a reviewable stand-alone “decision”, I bear in mind the circumstances here: accepting an Application from third party; expediting its hearing; not giving Dalhousie notice of the filing of the Application hearing, all the Application’s supporting documentation, or the Heritage staff Research Report, until the day before the HAC meeting; and the fact that a HAC recommendation that the property be designated a municipal Heritage Property triggers the substantive outcome that Dalhousie’s demolition permit which was issued on July 14, 2022, was suspended on July 15, 2022 by the HAC’s recommendation. These events support my conclusion that **notice is a key element of fair process from the start, in all cases.**

- b) although there is no express statutory duty to **give a real property owner the supporting documentation underlying an application** (including the original written application, HRM-created documentation, consequent staff reports, and “other party” communications to HRM relevant to the decision), bearing in mind that an owner is entitled to a meaningful opportunity to respond, **such documentation must be given, to the owner, and in a timely manner;**
- c) although there is no express statutory duty to give a real property owner a right to make oral submissions before the HAC, bearing in mind that these meetings are statutorily mandated as open to the public (By-law H-200), **at a minimum there should be a timely and meaningful opportunity for the owner to make fulsome written submissions in response to an Application** (by HRM⁵³ itself or a third party), **and any staff Report and supporting documentation.**

⁵³ I note here that during the HRM Council meeting of October 18, 2022, the participants acknowledged that many of the **municipal Heritage Property designations arise as a result of property owner requests, which do not involve the intervention of the HAC process**, but rather go directly to HRM Council with staff reporting on the Heritage value thereof.

In exceptional cases, the duty of fairness may require that the property owner be given the opportunity to make oral submissions to the HAC;

- d) HRM Council must give **a fair and meaningful opportunity to property owners who contest Applications for registration of municipal Heritage Property to challenge HRM’s HAC recommendation/scoring and otherwise argue against their property being so designated; and**
- e) there must be **no indicia leading to a conclusion of actual bias** (HRM Council legal test); a **closed-minded attitude** (HAC legal test) **or a reasonable apprehension of closed-mindedness or bias, as the case may be.**

E - My conclusions regarding why there was a material level of procedural unfairness, in “all the circumstances”

[147] In summary, I conclude that, regarding the Application to designate 1245 Edward Street as a municipal Heritage Property, Dalhousie was prejudiced in responding thereto in the following respects:

- a) HRM did not initially provide Dalhousie with timely and fulsomely informative notice that the process had been triggered, nor with notice in an ongoing manner as the process developed;⁵⁴
- b) HRM did not give Dalhousie, in a timely and fulsome manner, a copy of the third-party Application and supporting documentation underlying it, or the HRM staff Research Report;
- c) HRM failed to give Dalhousie timely notice of the date the HAC was meeting to consider whether to recommend that 1245 Edward Street be designated a municipal Heritage Property;⁵⁵

⁵⁴ HRM's June 14, 2022, letter was the first indication to Dalhousie that there was a third-party application filed. That letter also created a reasonable expectation in Dalhousie that, as it stated: "**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.**". These expectations were not met. Strangely, the staff Report appears to have already been completed by June 13, 2022 - before the letter was composed. I note that HRM's counsel, at paras. 101-102 of its Brief, makes the following statements: "The *HPA* does not have a provision requiring, or that even seems to envision, that notice be given to the property owner that the consideration of a registration recommendation has been initiated... This deliberate lack of legislation intention to afford notice and opportunity to make representations at the HAC level strongly supports that procedural fairness was not intended to exist at this stage." This is a curious statement in light of HRM's June 14, 2022, letter to Dalhousie, the HAC's own agreement to permit written representations to be made by Dalhousie at the municipal Heritage Property application related meeting of July 15, 2022, which, per section 5(4) By-law H-200, states: "All meetings of the Committee shall be open to the public."; and keeping in mind Chair Patrick Connors' statement in his email of July 13, 2022, 4:03 pm to Jill McGillicuddy: "**I imagine the HAC would be fascinated to hear from the property owner... [but although possible, it] is unusual for the HAC to hear such a presentation...**".

⁵⁵ Dalhousie had to scramble in an unreasonably short timeframe to get its written submissions prepared for the HAC (it did not receive the June 13/June 24 staff Report until July 14, 2022), which, consequently it could not deliver to the HAC until one hour before the meeting, and it appears now that the HAC members either did not know they had received it before the meeting, or received it but did not read it; and none asked for time to read it beforehand.

- d) HRM Council did not give Dalhousie a fair and meaningful opportunity to challenge the HAC's recommendation and argue against 1245 Edward Street being designated a municipal Heritage Property;⁵⁶
- e) Dalhousie has satisfied the Court that there was a reasonable apprehension of closed-mindedness by the HAC, and a reasonable apprehension of bias on the part of the majority of HRM Council.⁵⁷

[148] In an effort to flesh out the specifics of the procedural unfairness experienced by Dalhousie, let me next revisit the timeline.

1. Some instances relevant to procedural unfairness

⁵⁶ Although ten minutes oral presentation during the “open” portion of the hearing is the norm in such circumstances, Dalhousie was refused 20 minutes. However as HRM pointed out, Dalhousie’s counsel and representatives did have nearly 20 minutes in total if one includes its opportunities to respond to concerns of Councillors. I nevertheless conclude that Dalhousie was disadvantaged by being so limited. Had Dalhousie been advised earlier that it would be allocated more time, it could have had its consultant, Terry White, appear and speak to Council (by video). This disadvantage was exacerbated, and collectively the process became more “unfair” to Dalhousie, because after the hearing was “closed”, and Councillors were to move to debate, and ultimately a vote upon the issue, HRM Councillors repeatedly sought further elaborations from its Heritage staff that were present at the hearing. This material additional information further prejudiced Dalhousie’s position, yet Dalhousie had no opportunity to also ask questions of the HRM Heritage staff, or respond otherwise.

⁵⁷ I will separately set out some of the relevant aspects arising from the videos of the June 22 and July 15, 2022, HAC and July 12 and October 18, 2022, HRM Council meeting/hearing.

[149] On **May 2, 2022**, Dalhousie applied for a demolition permit from the HRM, regarding the dilapidated building on its property at 1245 Edward Street,⁵⁸ purchased in July 2021.

[150] Unbeknownst to Dalhousie until June 14, 2022, its activities preparing the interior of the building for the eventual demolition thereof, prompted a “third-party” Application to have the property designated as a municipal Heritage Property by co-applicants Peggy and Shimon Walt on their own behalf, and that of the informal group known as Halifax University Neighbourhood Association (HUNA), on May 9, 2022.

[151] HRM in-house Heritage staff concluded their Research Report regarding 1245 Edward Street for use by the HAC on **June 13, 2022**.

[152] Dalhousie was first notified by HRM of the HUNA Application by letter dated **June 14, 2022**.

⁵⁸ See Nathan Rogers’s affidavit Exhibit “B”, which also records July 14, 2022, as the issuance date thereof. Nowhere in the evidence is it suggested that the building was not in a “failed condition”.

[153] Dalhousie was not provided a copy of the May 9, 2022, Application at that time, or later, by HRM,⁵⁹ but the June 14, 2022, letter gave the following assurances:

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.⁶⁰

[154] That Committee already had its HRM staff Report on or about **June 13, 2022**, regarding the Heritage value/score of the property, according to its “evaluation criteria”, **which Report would typically be considered at its next scheduled meeting, which was July 27, 2022.**

[155] As a result of the pending demolition permit, which had been requested by Dalhousie on May 2, 2022, and which was date-stamped as issued on July 14,

⁵⁹ As Danielle Boyd states: “Dalhousie was able to obtain a copy of the Heritage Application on July 12, 2022, through an online media report.”

⁶⁰ It is somewhat incongruous that by a June 14, 2022, letter, HRM advised Dalhousie that the staff review was ongoing, when the staff review appears to have been effectively completed by June 13, 2022: “Research Report – 1245 Edward Street, Halifax, NS”, p. 229, Record (as updated with scoring recommendation as of June 24, 2022 – p. 216, Record). Moreover, as Danielle Boyd’s uncontested evidence states: “Contrary to the statements made in the June 14, 2022, letter, HRM did not notify Dalhousie when the Heritage Application review was complete, and it did not update Dalhousie regarding anticipated timelines for the Heritage Application”. Only one week later, the HAC considered that issue at its June 22, 2022, meeting – see page 111 of Kayla MacDonald’s affidavit: Minutes of the HAC’s meeting: “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 the next meeting of this Committee in July. If the application is approved the property would be protected by the Act for 90 days.**” [My bolding added]

2022, on July 12, 2023, the HAC extraordinarily moved 1245 Edward Street for a Heritage value assessment to its next meeting on July 15, 2022 - just three days later.

[156] Prior to the July 15, 2022, HAC meeting and recommendation of a Heritage Property designation, Dalhousie was not informed of the existence of, or given copies of the following:

- a) “The June 13, 2022, staff review (p. 229, Record), wherein staff did not make specific recommendations of ranges of scores for each criterion;
- b) The **June 24, 2022**, “Research Report” [p. 213, Record], wherein staff did make scoring recommendations]; or
- c) The HUNA Application (until **July 12, 2022**, when Dalhousie itself found it via “an online media report”).⁶¹

[157] Dalhousie was also not informed of the outcome wherein staff recommended ranges of Heritage scores for each criterion [Attachment 2 has the Heritage

⁶¹ See para. 7, Danielle Boyd affidavit, and Dalhousie’s September 16, 2022, submissions - p. 131, Record.

“scoring” for this property by the HAC as 64 out of 100 points which, being more than 50 points- suggests it is recommended for Heritage Property Designation].

[158] Nor was Dalhousie in a timely manner, “updated regarding anticipated timelines for the application”⁶², although the June 14, 2022, letter from HRM had so promised.

[159] Whatever he meant by it, I am satisfied that Mr. Seamus McGreal’s June 14, 2022, reference to “anticipated timelines for the application” created a reasonable expectation that Dalhousie would be “updated” in a timely manner regarding any matters of importance in relation to its property.

[160] Nevertheless, in spite of the HAC meetings presumptively being “open to the public” (s. 5(4), By-law H-200), given the HAC’s intended focus on “Heritage” - related criteria only, its advisory capacity vis-à-vis HRM Council, and the lack of express, or clearly implicit, legislative references to a property owner being entitled to an opportunity to make oral submissions before the HAC, I am inclined to conclude that, subject to exceptional cases (where that expectation has been

⁶² See para. 6, Danielle Boyd affidavit.

created by the conduct of HRM, or by agreement, or where otherwise such opportunity is appropriate), there is no such obligation on HRM.

[161] However, there is a fundamental requirement to provide the property owner with timely notice that their property interests could be substantially interfered with - which risk arises upon an Application being filed or a unilateral HRM decision to investigate the property for consideration by the HAC - see for example Justice Brown's and Côté's reasons in *Annapolis Group Inc.*, *supra*, at para. 19.

[162] The Form A "Notice of Recommendation to Register as a Municipal Heritage Property", such as the one which was sent to Dalhousie in this case⁶³ provides sufficient notice, after the HAC has heard the matter, presuming that the Staff Report/Recommendation and scoring are included therewith, and that these materials are given with sufficient notice before Council considers the matter to ensure that the property owner has a fulsome opportunity to present its best case to the contrary.

[163] I recognize that the practice is to afford only ten minutes of time before HRM Council for a property owner to put their case, in addition to their written

⁶³ Page 188, of the Record.

submissions. Council would be wise, especially where an owner opposes the designation, to make available more time as a practice - even without specific requests in an individual case to do so - as this would appear to be the only certain opportunity for a property owner to resist their property being designated as a municipal Heritage Property.⁶⁴ Dalhousie only requested a further ten minutes time.⁶⁵

[164] By letter dated **June 14, 2022**,⁶⁶ Dalhousie was first advised by HRM that it had received an Application seeking registration of the property as a Municipal Heritage Property. The **May 9, 2022, filed Application was not included** (para. 5 MacDonald affidavit). The letter ended: “You will be notified when the [HRM

⁶⁴ If Council is of the strict view that more time cannot reasonably be afforded to property owners who contest HRM’s attempts at designating their property municipal Heritage Property, then I would expect there may arise an obligation to also allow those persons to present their concerns more fulsomely (perhaps even by oral and written submissions) before the HAC. Somewhere in the process, property owners must have a meaningful opportunity to challenge these substantial interferences with their property. One avenue to do so is to provide property owners with very timely notification of Applications (whether HRM staff-generated or otherwise) and copies thereof. **Although involving distinguishable circumstances**, I bear in mind Justice Hood’s reasons in *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)*, 2007 NSSC 28: **“A high degree of deference is accorded to a municipality having set its own procedural rules as long as they provide for procedural fairness.** Some of the procedures set out in Appendix A to the Administrative Order were specifically considered in *Williams Lake Conservation Co. v. Chebucto Community Council of Halifax (Regional Municipality)*, [2003] N.S.J. No. 465 (N.S.S.C.). In that decision, which is factually distinguishable, McDougall, J. concluded there was nothing procedurally unfair about the five-minute time limit on oral presentations which could be supplemented by written comments” (para. 96).

⁶⁵ See Mr. Rogers’s email to HRM at p. 129 of the Record.

⁶⁶ Exhibit “C” to Mr. Rogers’s affidavit.

staff] review is complete and updated regarding anticipated timelines for the application.”⁶⁷

[165] On **June 20, 2022**, HAC member/citizen advocate Lois Yorke⁶⁸ wrote to Simon Ross-Siegel, Legislative Assistant, that: “I’ve had a request from a concerned citizen that 1245 Edward Street be fast tracked for consideration by HAC... wants it on this Wednesday’s agenda”.⁶⁹

[166] The May 9, 2022, third-party Application had been considered by the HAC at its **June 22, 2022**, meeting. It was noted in the Minutes as “being processed and will be considered at the next meeting of this Committee in July” – p. 111 Kayla MacDonald affidavit.

[167] Dalhousie **first had access to the third-party Application on July 12, 2022**, when coincidentally Dalhousie became aware of it and “was able to obtain a copy of the Heritage Application... through an online media report” (para. 7 Kayla MacDonald affidavit).

⁶⁷ Notably the advisement does not suggest that the owner will receive the results of the [HRM staff] review regarding its property that may be designated a municipal Heritage Property; yet here it was already completed and available long before Dalhousie incidentally obtained access to it on July 14, 2022: the initial staff review was dated June 13, 2022 - p. 229 Record; as more formally set out and dated June 24, 2022, at p. 216 Record.

⁶⁸ See July 11, 2022, email at page 5 Exhibit “A”, Kayla MacDonald’s affidavit.

⁶⁹ Pages 14-15 Exhibit “B” Kayla MacDonald’s affidavit.

[168] **On July 14, 2022, Dalhousie first had access to the HRM staff review, “Research Report – 1245 Edward Street, Halifax, NS”** (at p. 229 of the Record an earlier version bears a June 13, 2022, date) - more precisely the Report of June 24, 2022, which was later updated, was provided to the HAC.⁷⁰

[169] Dalhousie was not formally notified by HRM that on July 15, 2022, the Heritage Advisory Committee [“HAC”] would be considering the May 9, 2022, HUNA Application to designate 1245 Edward Street a Municipal Heritage Property.

[170] By happenstance, **Dalhousie first became aware on July 11, 2022, of the expedited July 15, 2022, HAC meeting**, through one of its employees (para. 8, Danielle Boyd’s affidavit).

[171] Only on **July 14, 2022**, was Dalhousie informed that no one could appear in person on its behalf at the HAC meeting to make oral presentation to the HAC, but that it could make written representations.⁷¹

⁷⁰ See p. 131 Record, Dalhousie’s submissions.

⁷¹ In the emails between the Chair, Patrick Connor, and Jill McGillicuddy on July 13, 2022, he responded to her regarding Dalhousie’s request to give an oral submission to the HAC: “While I imagine the HAC would be fascinated to hear from the property owner on 1245 Edward Street, it is rather unusual for the Committee to hear such a presentation.... so I think we ought to stick to protocol in this case.” Notably, By-law H-200, section 5(4) states: “All meetings of the Committee shall be open to the public.” - Thus, Dalhousie was entitled to be present at the HAC hearing, even if it had no right to participate.

[172] On **July 15, 2022**, in spite of Dalhousie’s written protestations (p. 41, MacDonald affidavit) and an Engineering/cost assessment report (p. 45, MacDonald affidavit) the HRM Heritage Advisory Committee recommended that HRM Council designate the property at 1245 Edward Street a Municipal Heritage Property.⁷²

[173] HRM formally re-advised Dalhousie by letter dated **October 11, 2022**, that the HAC had recommended the property be designated a municipal Heritage Property by enclosing a **Form A (Amended)** – Notice of Recommendation to Register as a Municipal Heritage Property; and that HRM Council would hear ten minutes of Dalhousie’s oral arguments before Council on October 18, 2022.⁷³

⁷² **The formal written Recommendation of the HAC to Council** is contained in the Record beginning at page 213. In addition, **Form A (Amended)** at p. 188, Record, is the Notice of Recommendation to Register a Municipal Heritage Property, and includes in part: “2 - **The reasons for this proposed designation are:** a) Age...; b) Historical Importance; ... c) Architectural Merit – Construction Type and Style; d) Architectural Integrity; e) Relationship to Surrounding Area ...”. The HAC breakdown of scoring is found at p. 265, Record, and totalled 64 out of a possible 100 points.

⁷³ See p. 187, Record. Notice of this recommendation must be served on the owner - at least 30 days before Council hears the application – section 14(2), *HPA*, and incidentally it prohibits the owner from making any substantial alterations to or demolition of the property for 120 days thereafter – section 14(4), *HPA*. At page 317 of the Record, one finds **Form A** - Notice of Recommendation to Register as a Municipal Heritage Property. This template was sent to Dalhousie after the HAC recommended the property be designated as a Municipal Heritage Property (on or about July 15, 2022 - see para. 21, HRM’s June 1, 2023, Brief; and as well, after it was further amended October 11, 2022 - p. 190 Record). It includes the wording: “Section 14(4) of the *Heritage Property Act* prohibits demolition or any substantial alteration of the appearance of the property described herein for a period of 120 days from the date of service of this notice, unless the Council sooner refuses to register the property. The consequences of registration in the Registry of Heritage Property for the Halifax Regional Municipality described in paragraph 1 would be that: (a) no demolition or substantial alteration in exterior appearance may be undertaken from the date of registration unless an application in writing for permission is submitted to the Municipality and the application is granted with or without conditions; or (b) where such application is not approved the owner may make the alterations described in

[174] The Form A Notice was “Amended” because the Council meeting of September 27, 2022, was rescheduled by agreement:

In the ordinary course, the date for the hearing is set a minimum of 30 days in advance. On this basis, the next available Council date would be November 8, 2022, with a Heritage hearing at 1 PM. However, in light of the September 27, 2022, Council meeting being rescheduled owing to Hurricane Fiona, if your client would prefer to proceed prior to that date, the next scheduled Council meeting is October 18 with a heritage hearing at 1 PM. Please let us know how you wish to proceed”; Mr. Rogers on behalf of Dalhousie indicated that same day: “Dalhousie University prefers that it proceed on October 18”.

(From an email sent by Municipal Clerks to Peter Rogers and Danielle Boyd of Dalhousie on **September 28, 2022**, p. 170 Record.)

[175] Thus, Dalhousie agreed on **October 11** to appear at the HRM Council meeting on October 18, rather than November 8, 2022, which reduced the amount of time it had to prepare its presentation.

[176] On **October 18, 2022**, in spite of Dalhousie’s written (p. 280, Record) and ten + minutes oral submissions (p. 308 - Video of HAC meeting, in addition to its Power Point presentation, pp. 280-307); HRM Council voted in favour (**13 “for”, and 4, “against”**) the motion of designating 1245 Edward Street as a Municipal Heritage Property.⁷⁴

his or her application or carry out the proposed demolition at any time after three years but not more than four years from the date of application.”

⁷⁴ Dalhousie made a request to have more than ten minutes presentation time before HRM Council. HRM responded by email September 7, 2022, as follows: “Following consideration by Regional Council Agenda Review, the request for additional presentation time has been denied. During the hearing, the registered property owner will be provided

[177] On September 16, 2022, Dalhousie filed its written submissions to HRM Council for the October 18, 2022, Council hearing (p. 128, Record). Therewith, Dalhousie included its own “independent Heritage Architecture expert” Terry White’s Report (pp. 138 – 169, Record). He concluded:

The vitality of a property is attributed to its use. If the original use is no longer viable, then the Heritage Property asset needs to be adapted for reuse... Without vitality the conservation of a historic place is unsustainable.... [regarding my] opinion on the condition of the building, its architectural integrity including the condition of the building envelope, and the cost associated with a successful conservation, leads to our conclusion that it is cost prohibitive to conserve this building. (pp. 161-2 Record).

[178] Mr. White opined that a heritage score of 32 out of a possible 100 points was appropriate - pp. 154-162 Record.

[179] Dalhousie expressly argued that the building had no “vitality/use” in its present condition, and “it is cost prohibitive to conserve this building”.⁷⁵

ten minutes to make a presentation.... In addition to the presentation, the property owner may submit a written submission containing additional information.... If you would like the correspondence to be circulated to the Councillors with the Agenda Package, the deadline is 3 pm on Monday, September 19.” - p. 128-9, Record).

⁷⁵ As reiterated to HRM Council by Mr. Rogers, in Mr. White’s Report, pp. 160-162, Record: “Without vitality, the conservation (be it preservation, restoration, or rehabilitation – refer to the Standards and Guidelines for the Conservation of Historic Places in Canada) of a historic place is unsustainable. The utility of a single-family dwelling does not meet the needs of Dalhousie... +VG Architect’s opinion on the condition of the building, its architectural integrity including the condition of the building envelope, and the cost associated with successful conservation, leads to our conclusion that it is cost prohibitive to conserve this building.”

[180] Although arguments regarding the “failed state” of the building and the Capital Management Engineering Ltd. July 6, 2022, Report⁷⁶ were submitted via HRM on July 15, 2022, to the HAC, and later to Council, in writing by Dalhousie on September 16, 2022, they were not referenced by the majority Councillors and members of the HAC, nor did HRM staff expressly address these arguments when speaking to Council on October 18, 2022.⁷⁷

[181] Once Dalhousie presented the Engineer’s Report to the HAC, that information and Dalhousie’s position was then known to HRM - long before the October 18, 2022, HRM Council hearing. But that information was ignored by HRM staff and the majority Councillors on October 18, 2022, when making their decision.

[182] Although at Council on October 18, 2022, some of the dissenting Councillors did reference Mr. White’s Report, none of the majority Councillors

⁷⁶ Exhibit “E” to Kayla MacDonald affidavit (p. 41) contains the Engineer’s Report that Dalhousie provided to the HAC on July 15, 2022, which described the building as being in a failed condition, and that Dalhousie argued the building’s lack of usefulness to it, as a residential building.

⁷⁷ Before the HAC, Dalhousie presented, in support of this position, the July 6, 2022, Engineering Report of Capital Management Engineering Limited. In fairness, as I stated elsewhere, given that the HAC’s narrow advisory role is focused on the “heritage value”, the failed condition of the building’s interior would not have been an appropriate consideration for them. HRM agrees with this statement: the “HAC assessment is not a process with discretion to consider factors unrelated to the listed criteria of exterior features of the building or to weigh the value of different perspectives...” at paras. 4-6 of its Brief. However, to the extent that there were any such failings regarding the exterior of the building they were certainly cogent considerations at the HRM Council meeting on October 18, 2022.

appear to have seriously considered the building's lack of vitality/utility to Dalhousie as a basis for not designating 1245 Edward Street a Heritage Property, even if it might otherwise be eligible to be so designated.

[183] Having viewed the video, I confidently conclude that the majority Councillors, either unknowingly, or knowingly, did not consider that they could have, and should have, considered the lack of utility of the existing residential building to Dalhousie (i.e., that it had no use to Dalhousie if it was restored - and incidentally it would be cost prohibitive to do so). Dalhousie was expressly adamant that, *ceteris paribus*, it had no intention of restoring the interior, or maintaining the exterior, of the building.

[184] These factors were also a significant basis for Dalhousie's opposition to the property being designated a Heritage Property, and must be considered by HRM Council – as they were a proper basis upon which Council could have declined to designate the property a municipal Heritage Property.

[185] Having not included these material factors in their consideration of whether the property should be so designated, and given the importance that these factors should have taken in their decision whether to designate the property as it relates to the owner's reason for opposing the designation, HRM Council has come to an

unreasonable conclusion. I also rely on this conclusion when I consider the “reasonableness” of the outcome in this case. **HRM’s preferred use of the property, as a residential building for example, as opposed to an empty lot (as preferred by Dalhousie), is irrelevant to Council’s decision. HRM cannot intend to defeat the owner’s preferred use of the property by effecting its own preferred use of the property through the process of inclusion of the property in the HRM Registry of Heritage Property.**

[186] More generally stated, HRM Council did not seriously consider the property owner’s ongoing right to deal with the property as it wishes, without this form of interference from HRM.⁷⁸

[187] Dalhousie’s position had been reiterated by Mr. Rogers’s express statement that Mr. White was the only professionally designated Heritage Architect who had given an opinion regarding the Heritage value of 1245 Edward Street.⁷⁹

⁷⁸ Councillor Purdy was conflicted about the vote, but noted: “the fact that Dalhousie’s lack of support is not being seriously considered is disconcerting”.

⁷⁹ His *curriculum vitae* at p. 166 of the Record includes that he has professional affiliations with the Royal Architectural Institute of Canada (MRAIC); the Canadian Association of Heritage Professionals (CAHP); and the National Trust Heritage Canada Foundation (NTHCF). The “qualifications” of HRM Heritage Staff are not referenced specifically in the Record (although see Mr. Kinghorne’s letter cited below re them also being members of the CAHP). I note here **that I wrote to counsel on June 14, 2023**, wherein I stated: “... the Council relies upon the scoring that the Heritage Advisory Committee did in relation to the heritage value of the property and contrasted it with that offered by Dalhousie’s Heritage Architect’s scoring. **HRM’s Heritage Advisory Committee relied on in-house staff to do the scoring. Their scoring is very much in dispute. My question is in relation to my**

[188] On **October 18, 2022**, after Dalhousie’s presentation ended, the “hearing” closed, and **after** the ‘Motion was put’ forward to include 1245 Edward Street on the HRM Registry of Heritage Property⁸⁰ **but before the voting by Councillors**, Councillor Mason stated that he supported the HAC recommendation, and that **“the inside of the house doesn’t matter”** - which I take to mean that even if the building had no present or contemplated utility to Dalhousie, that factor is irrelevant if otherwise Council finds it appropriate to designate the exterior of the property to be of a nature that it should be registered as a municipal Heritage Property.

[189] Councillor Mason’s statement is incorrect in the circumstances of the present case. For HRM Council, it is very relevant that the owner is contesting the designation of the building as a “heritage” property – especially where the

observation that, it appears that some of the in-house staff at HRM are effectively operating as persons giving ‘expert opinion’ assessments of the property in question, yet there has been no evidence presented of their credentials.” In response **HRM stated** in its June 14, (filed June 15) 2023, written response: **“the HRM heritage planners that compile the information put to the HAC, then to Council, have been accepted by the Municipality as having the education, training and experience required to do the work in question.** In response to a question from one of the Councillors **Aaron Murnaghan**, [Principal Planner-who I note had been copied with Mr. White’s report on September 16, 2022, and Dalhousie’s PowerPoint presentation on October 17, 2022- pp. 126 and 280, Record] **advised that he and Seamus McGreal (who prepared the Report) are members of the Canadian Association of Heritage Professionals** – the same organization as Mr. White, the Dalhousie Heritage Architect, is a member of. It is noted that architecture is only included in two of six criteria considered when evaluating heritage properties in HRM, and Mr. White has not shown evidence of education or experience encompassing the full scope of the HRM evaluation criteria. The qualifications of HRM staff were not raised by Dalhousie before the Council, and accordingly is not appropriately an issue on judicial review. The assertion that the HAC relied on the HRM staff to do the scoring for them is incorrect.” [My bolding added]

⁸⁰ See p. 205, Record.

uncontradicted evidence is that the building is in a “failed state” and it is “cost prohibitive” to rehabilitate the building interior. Moreover, what public interest is served when Dalhousie has stated it would not rehabilitate the building?

Consequently, Council’s decision would mandate a façade, which itself would fade over time, since there is no obligation on owners to actively maintain a “heritage” building in the state it was in at the time of its registration. The only active obligation, is not to alter or demolish the building – see s. 16(1)(b), s. 17, and s. 18, *HPA*.

[190] After both HRM staff and Dalhousie had finished their presentations, but just before the votes were cast, HRM was effectively permitted to “split its case” for registration of 1245 Edward St. as a municipal Heritage Property.⁸¹

⁸¹ See HRM Council Minutes, October 18, 2022, p. 205, Record. I note that **Dalhousie’s argument that HRM was able to “split its case” is buttressed in this respect because HRM staff were asked by Council and answered, about what accounted for the dramatic difference between the HAC 64-point score and Mr. White’s 32-point score.** Councillor Austin asked staff whether a house with so-called “eclectic Victorian period” features (having a collection of various heritage styles- sometimes also referred to as “transitional” between overlapping period styles - “Second Empire” and “Queen Anne Revival” according to the staff Report June 24, 2022) is historically significant. His inquiry references the **“Architectural Merit” scoring criterion of the building, which criterion has subset categories of: “Construction type or Building technology”; and “Style”.** Staff recommended for each of those respectively, between 4-6 points, and between 7-10 points. **Mr. White had given a score of 0 and 3 points respectively in his report** (p. 155, Record). He stated, **firstly**, “[under Architectural Merit/Construction type], **Construction type or Building technology is not identified as an early or rare method of construction or use of materials.**” [His footnote 11 references page 17 of the staff Report, where staff have described this criterion, and they do not therein provide any expressed basis for a recommended 4 -6 points out of a possible 10]. He stated **secondly**, under “Architectural Merit – Style” that **the building “is not a rare, unique, representative, early example of a ‘style’. It is not of any one style but is identified as “a transitional’ style.** If it stylistically doesn’t belong to the Second Empire or Queen Anne styles, and it resides between two styles; then **architecturally it does not belong to a style. It is eclecticism.... The architecture is eclectic, not rare.”** Mr. McGreal of HRM

[191] The “last word” literally went to Councillor David Hendsbee.

[192] Just before the voting at approximately 1:47 pm on October 18, 2022, the opinion of Dalhousie’s consultant (Terry White), was dismissively referred to by Councillor Hendsbee (who also sits as one of two Councillors on the HAC) as: **“you always pay for what you get”**. He went on to laud HRM’s Heritage staff: **“I’ll put them up against anyone, any day”**.

2. The unfairness arising from HRM Council having, as characterized by Dalhousie, “split its case”

[193] At HRM Council’s October 18, 2022, hearing, the proceeding was split into distinct segments (as evidenced by the video, and **Minutes** (p. 202, Record):

1-Call to Order and Land Acknowledgement

Heritage staff, who were present, responded and specifically indicated (presumably after receiving and reviewing Dalhousie’s report, after September 16, 2022), that **he did extra research in relation to whether Victorian eclectic is to be highly rated and found that it was “very much a part of our heritage”** (but did not add this “new” information to the Record, until HRM had begun to split its case). **Notably this information/opinion had not previously been reduced to writing or otherwise shared with Dalhousie.** Furthermore, when Councillor Mancini asked how to reconcile Mr. White’s evaluation with that of the staff/HAC, **Mr. McGreal again responded that Mr. White did not recognize, as he should have, that Victorian eclectic is to be highly rated, and that basically “the criteria were differently understood[and therefore scored differently] by +VG and the HAC [and HRM Heritage staff, who he noted were “local experts]”.** **Mr. Murnaghan went further** when Councillor Deagle Gammon revisited the difference in scoring between Mr. White (**32 points** – which is insufficient to allow the property to be recommended to Council) and the HAC/heritage staff (**64 points**), when she asked had there ever been such a discrepancy before. He responded **there never had been such a discrepancy before because they had never had an assessment of that nature by a professional before**, but noted that **“we are more qualified than [Mr. White] to make these evaluations... Halifax has a unique typology likely not understood by [Mr. White]” and that “64 is consistent with our practice in the past”.** Dalhousie had no opportunity to revisit these important issues. [My bolding added]

...

4-Approval of the Order of Business and Approval of additions and deletions

5-Consent Agenda

...

12-Hearings

12.1 **Case H00539**: Request to include 1245 Edward Street, Halifax in the Registry of Heritage Property for the Halifax Regional Municipality

[Hearing opened]

... Seamus McGreal, Planner III, Heritage Property Program gave a presentation... **The Hearing opened at 1:31 pm**

Mayor Savage invited the property owner to come forward and address Council.

Gitta Kulczycki, VP Finance and Administration Dalhousie University, Laura Hynes Jenkins, director of government relations, Dalhousie University and Peter Rogers, McInnes Cooper gave a presentation.... [They all] 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.

Moved by Councillor Mason, seconded by Councillor Kent

That the hearing be closed

The Hearing closed at 2:02 pm

Motion put and passed.

Moved by Councillor Mason, seconded by Councillor Cleary

That Halifax Regional Council approve the request to include 1245 Edward Street, Halifax in the Registry of Heritage Property for the Halifax Regional Municipality, as shown on

map 1 of the staff report dated June 24, 2022, as a municipal Heritage Property under the *Heritage Property Act*.

[Seamus] 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 the property to evaluate heritage registration and that the property is one of the oldest houses on Edward Street.

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 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 encourage the property owner to consider restoration and adaptive reuse of the property to preserve its heritage architecture.

Motion put and passed (13 in favour, 4 against)⁸²

In favour: Mayor Savage; Deputy Mayor Lovelace [“is there actually life in it...at what point could this be safe to house people?”]; Councillors **Deagle Gammon** [Dalhousie’s “absence of a plan is a problem... I like adaptive re-use”]; **Hendsbee**, [“relocation is always an option”]; **Kent** [“I like adaptive re-use in a crisis for space”], **Austin** [“if vacant for 3 years then you could demolish it”]; **Mason** [at July 12, 2022, Council meeting seeking to expedite HRM Council hearing of Heritage Application: “it not being my first rodeo when it comes to saving a Heritage Property”] **Smith; Cleary** [“thinking as a taxpayer ...Dalhousie gets ½ its funding from taxes... is that a wise thing to do...just to buy a property and sit on it?”/“rumours in the community” that [once house is demolished] Dalhousie’s plans are to use it as a parking lot - “Any truth to that?”]; **Morse; Cuttell** [“There is a learning opportunity here ...instead of demolishing buildings - repurpose them”]; **Stoddard** [“grants can be applied for...easy fix to the exterior”]; **Blackburn.**

⁸² I find it opportune to set out the perspectives of Councillors at this time in summary form using their own words. Regarding the number of Councillors who favoured “re-use”, they appear to have ignored the evidence that it was “cost prohibitive” to rehabilitate the buildings to one fit for habitation. Regarding the references favouring “relocation”, I observe that s. 3(a) of the *HPA* reads: “alter the exterior appearance includes move in whole or part”; and that once registered, 1245 Edward Street (the building) could theoretically be relocated, but Dalhousie and the HAC must agree to this – s. 17, *HPA*.

Against: Councillors Purdy, Mancini, Russell, Outhit.

[194] Dalhousie’s argument is that once the hearing was closed, it was unfair to permit HRM Heritage staff to respond to so-called “questions of clarification”, because it was giving the last word to HRM.

[195] I agree. These were not truly questions of “clarification”, should such even be permissible at that stage of the procedure in any event, but rather questions of “certitude” – how certainly could Council rely on its own staff’s expertise as opposed to that of Dalhousie’s Heritage Architect? These were matters of substance, not “clarification”.

[196] Moreover, Dalhousie was not even given an opportunity to respond to those answers by HRM staff.

[197] A viewing of the video gives a sense that there is a real risk that Dalhousie was prejudiced thereby, because *inter alia*, since the questions were asked, it is likely these answers were important and could have affected what would otherwise have been the voting pattern that emerged ultimately among HRM Councillors.

[198] Further examples included the following: in response to councillor Deagle Gammon’s questions, HRM Heritage staff stated that the “64 [total points awarded as the heritage score of 1245 Edward Street] is consistent with our practice in the

past “[which is a very subjective and unhelpful response, since assessing the heritage value of different houses is inherently comparing “apples” and “oranges”]; and followed up a bit later with: “we are more qualified than +VG [Dalhousie’s Heritage Architect Terry White whose *curriculum vitae* was included and is impressive] to make these evaluations... Halifax has a unique typology likely not understood by [Mr. White].” Other than perhaps Mr. Murnaghan mentioning teaching “planning” courses, there was no reference with any reliability made regarding the specific or general qualifications of HRM’s Heritage staff, as compared to Mr. White.

[199] As I pointed out earlier, in their Report to the HAC, HRM Heritage staff prepared suggested ranges for each of the six “heritage value” scoring evaluation criteria.

[200] At the HAC, members conducted their assessment of what score to give for each “heritage value” category by simply adopting *as a starting point* the range suggested by HRM staff.

[201] For every category but one, they not only accepted HRM staff's range⁸³ but stayed within the mid to high end of that range.

[202] HRM Heritage staff appeared to be personally invested in the outcome in this case, so much so that their answers to Councillors' questions reflect an attempt to buttress or rehabilitate HRM staff's own Heritage value scoring preferences, and "expertise".

[203] Page 266 of the Record is referred to in the Index as: "October 18, 2022, Staff presentation to Council - item 12.1 – H0039". Pages 266-279 are the slide presentation given by HRM's Seamus McGreal, Planner III, to Council on October 18, 2022.

[204] Slide 12 is entitled "Registration Evaluation Criteria" and on the left-hand side we see "Criterion", and on the right-hand side we see "Score Awarded" by the HAC on July 15, 2022 (p. 214 Record) with the following tabulation (wherein I have added Mr. White's scores bolded):⁸⁴

⁸³ Except for "significance of Architect or Builder" where staff recommended between 1-3 points out of a possible 10 points, and the HAC agreed on a 1 point score, where **both the builder and architect (if any), were unknown.**

⁸⁴ At the October 18, 2022, HRM Council meeting, Councillors did not assign scores for the various Heritage Property evaluation criteria (which are more fully set out at page 223 of the Record). I have added Terry White's scores (p. 155 Record).

- a) Age [staff: **13** points]⁸⁵
- HAC **13** [out of a maximum of 25] [**13 T. White**]
- b) Historical or Architectural Importance [staff: **11-15**]
- HAC **13** [out of a maximum of 20] [**8 T. White**]
- c) Significance of Architect/Builder [staff: **1-3** both unknown individuals]
- HAC **1** [out of a maximum of **10**] [**0 T. White**]⁸⁶
- d) Architectural merit - construction type/building technology [staff: **4-6**]
- HAC **5** [out of a maximum of 10] [**0 T. White**]
 - style [staff: **7-10**]
 - HAC **9** [out of a maximum of 10] [**3 T. White**]
- e) Architectural integrity [staff: **11-15**]
- HAC **14** [out of a maximum of 15] [**5 T. White**]

⁸⁵ Which is pre-determined simply based on the estimated age of a building.

⁸⁶ Notably, in the similar circumstances [Case H00512] of unknown builder and architect, on June 22, 2022, regarding 2287 Brunswick Street, HRM, the staff Report recommended “0 points” – see Tab 6 Dalhousie’s Book of Authorities filed May 15, 2023.

f) Relationship to surrounding area [staff: **6-10**]

- HAC **9** [out of a maximum of 10] [**3 T. White**]

Total points: **64 [32 T. White]**

[205] One can understand that HRM staff would want to “stand their ground”, having expressly stated their belief that they were more qualified than Mr. White regarding appropriate Heritage value scores for 1245 Edward Street, and having received the blessing of their scoring recommendations by the HAC. But were they so much more qualified than Mr. White that therefore their opinions should be so heavily weighted by Councillors, with the result that the majority Councillors appear to have given scant regard to Dalhousie’s grounds of opposition and its consultant’s scorings?⁸⁷

⁸⁷ Closed-mindedness/bias, if present, is likely to be manifested during staff’s, HAC’s, and HRM Council majority Councillors’ scoring evaluation. A review of the October 18, 2022, HRM Council video confirms that the majority Councillors, except for Councillor Deagle Gammon’s general question to Mr. Rogers, during the pre – “split-case” portion of the hearing, did not expressly question Dalhousie’s consultant’s scoring, and the qualitative comments bear out an inference that they wholeheartedly sided with the HAC’s scoring. I bear in mind the context here - Mr. Rogers had pointed out the stark differences that existed between Mr. White’s scoring and that of the HAC/HRM staff; and during the “split case” portion of the Council meeting after Councillor Austin’s question of “clarification” to HRM staff, Mr. McGreal elaborated that HRM staff had reviewed Mr. White’s report, disagreed with it, and stated that “Victorian Eclectic” construction/style is “very much a part of our heritage... and very prevalent”. A number of the majority Councillors (e.g., Councillor Cuttell) referenced their own background, education, experience with their own heritage homes, and interests in “heritage properties”, to effectively buttress the case for why 1245 Edward Street should be registered. Dalhousie (and a reasonable onlooker) may reasonably have concluded that it did not receive a procedurally and substantively fair hearing before HRM Council.

[206] Dalhousie was not given the opportunity to question or otherwise directly challenge HRM Heritage staff about their “expertise”, or the bases for their opinions, at this critical juncture in the proceedings.

[207] The wording in **Form B** - Notice of Registration of Heritage Property was sent to Dalhousie after Council’s decision to designate 1245 Edward Street as a Municipal Heritage Property. It outlines the consequences of registration for the Owner of the property.⁸⁸

The consequences of registration in the Registry of Heritage Property for the Halifax Regional Municipality are that:

- (a) no demolition or substantial alteration in the exterior appearance may be undertaken from the date of registration unless an application, in writing, for permission is submitted to the Council and the application is granted with or without conditions; or
- (b) where an application is not approved, the owner may make the alteration described in his or her application or carry out the proposed demolition at any time after three years but not more than four years from the date of application.

[208] On **November 21, 2022**, Dalhousie filed a Notice for Judicial Review, requesting this Court quash the decision and require HRM to remove 1245 Edward Street, Halifax, from HRM’s Registry of Heritage Properties.

⁸⁸ See template at page 318 of the Record.

3. An examination of the reasonable apprehension of “closed-mindedness”/bias issue

[209] I agree with Dalhousie’s argument (para. 131 May 15, 2023, Brief) that:

“The authors in *Judicial Review of Administrative Action in Canada* at paragraph 11:12 explain this principle succinctly:

‘At one time, the doctrine of bias did not apply to the conduct of investigations, nor to other stages in the decision-making process leading up to the determination of the rights of the parties. Such functions in the past were more likely to be classified as “administrative” and therefore not subject to the rules of natural justice, including the duty of impartiality. Today, however, **the non-final nature of a power does not in itself exclude the duty of fairness, provided at least that the administrative action impugned constitutes a significant step in the decision-making process, although a less demanding standard may be applied.**’ [footnotes omitted]
[emphasis added]

The HAC meeting was, indeed, a “significant step” in the heritage application process.”

[My bolding added]

[210] Furthermore, Dalhousie fairly points out that at the HAC, relying as authority therefor, on *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623:⁸⁹

Instead of the more exacting standard of reasonable apprehension of bias set out in *Committee for Justice and Liberty v. Canada (National Energy Board)*, where the nature of the decision is preliminary in that it is a “significant step” along the way to a final adjudication of a party’s rights, the standard to be applied is whether the decision maker had a closed mind

[My bolding added]

⁸⁹ At paras. 127-132 of its May 15, 2023, Brief.

[211] In *Newfoundland Telephone*, Justice Cory stated for the Court:

Two issues are raised on this appeal. The first requires a consideration of the extent to which an administrative board member may be permitted to comment upon matters before the board. The second, raises the question as to what the result should be if a decision of a board is made in circumstances where there is found to be a reasonable apprehension of bias.

[212] He went on to state:

25 Bias was considered in a different setting in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134. **That case concerned a planning decision which was made by elected municipal councillors. The governing legislation for municipalities was designed so that councillors would become involved in planning issues before taking part in their final determination. The decision of the court recognized that city councillors are political actors who have been elected by the voters to represent particular points of view. Considering the spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy-making in nature, the court held that municipal councils fall in the legislative end. Sopinka J., at p. 1197 [S.C.R.], set forth the "open mind" test for this type of situation:**

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.** Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that **they are the expression of a final opinion on the matter, which cannot be dislodged.**

26 **This same principle was applied in the companion case, *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 46 Admin. L.R. 264, 2 M.P.L.R. (2d) 288, [1991] 2 W.W.R. 178, 52 B.C.L.R. (2d) 145, 75 D.L.R. (4th) 425, 116 N.R. 68. That case concerned a municipal councillor who campaigned for election favouring a residential development. He made public statements that he would not change his mind with regard to his position despite public hearings on the issue. Sopinka J. found that the councillor should not be disqualified for bias because he did not have a completely closed mind. He determined that to have ruled otherwise would have distorted the democratic process by discouraging politicians from expressing their views openly.**

27 It can be seen that there is a great diversity of administrative boards. **Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts.** That is to say that the conduct of the members of the board should be such that there could be **no reasonable apprehension of bias with regard to their decision.** **At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile.** Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. **For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the Legislature.**

[My bolding added]

[213] The impetus for a prejudgment of a matter under consideration by the HAC/HRM Council, can conceivably arise from multiple sources, including: *animus* against a party; oppositional *animus* to a proposed course of action *per se*; on wholesale pre-determined favouritism toward a party or a proposed course of action *per se*.

[214] More specifically, in relation to the present circumstances, I conclude that the HAC is subject to the apprehension of “closed-mindedness” threshold, or test. Whereas HRM Council is subject to the “reasonable apprehension of bias” threshold, or test.

[215] I find helpful Justice Groberman's reasons for the Court in *McLaren v.*

Castlegar (City), 2011 BCCA 134:⁹⁰

[31] In *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, the Supreme Court of Canada considered the application of rules against bias to administrative tribunals. Cory J., for the Court, said at 636:

Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. ... The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased.

[32] Just as the extent of the duty of fairness will depend on the nature and function of the particular tribunal, so too will the degree to which members of the tribunal are entitled to have some pre-disposition toward a particular result. In *Newfoundland Telephone*, the Supreme Court said at 638-9:

[T]here is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature. [Emphasis added.]

[33] In the case before us, the nature of the tribunal – a municipal council composed of elected officials – is of considerable importance. Elected municipal officials are expected to have opinions on civic priorities and policies.

⁹⁰ More recently cited in *Cartwright v. Rocky View County Subdivision and Development Appeal Board*, 2020 ABCA 408.

[34] Where a matter that comes before a municipal council is a matter of policy, a member of council will not be disqualified for being pre-disposed in one direction or another. What is necessary is simply that the councillor be willing to listen to the submissions; as long as the councillor is not impervious to submissions such that any arguments would be futile, he or she will not be disqualified on grounds of bias: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385; *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CanLII 1132 (SCC), [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425.

[35] While the nature of the tribunal here suggests a lenient standard should be applied, the Court must also consider the function of the tribunal in this case. Castlegar City Council was not, here, acting as a policy-making body. Rather, it was determining whether certain buildings violated bylaws and codes, whether they were unsafe, whether they constituted a nuisance, and whether they were so dilapidated and unclean as to be offensive to the community. After making those findings, Council was also required to exercise its discretion in determining whether the appropriate remedy was demolition. These various considerations were adjudicative in nature: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342. As indicated in *Newfoundland Telephone Co.*, a tribunal exercising primarily adjudicative functions will generally be required to comply with more strict standards of fairness than a policy-making tribunal.

[36] While the fact that the municipal council was engaged in adjudicative functions in this case cannot be ignored, the nature of a municipal council and the fact that it is an elected body is also of significance. Municipal councillors are responsible to their constituents and are vitally interested in the enforcement of municipal bylaws. They are entitled to press city staff to investigate and report on particular perceived problems. When municipal staff identify a problem, it will only be considered by council if an elected member of the municipal council moves for consideration of a resolution and another seconds the motion. Unlike most adjudicative tribunals, municipal councils are not required to hear whatever disputes come before them; rather, they determine their own agendas. At least some members of council, therefore, will inevitably have made some preliminary estimation as to the merits of a matter before it formally comes before council for resolution.

[37] In my view, the standard that was applied in *Old St. Boniface Residents Assn.* and in *Save Richmond Farmland Society* would be too lenient a standard to apply in a case such as the present one. **Because members of council were engaging in an adjudicative function, it was not sufficient that they had not 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.

...

[40] I cannot accept that the determination of whether there was a reasonable apprehension of bias depends on what the appellants may or may not have thought. The test is an objective one. As stated by de Grandpré J. (dissenting, but not on this point) in *Committee for Justice and Liberty et al. v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 394, 68 D.L.R. (3d) 716:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude”

[216] The closer that decisions by HRM Council approach to “adjudicative” as opposed to administrative (e.g., policy-making or legislative) decisions, the more likely that the “reasonable apprehension of bias” standard should be applied.⁹¹

[217] In my opinion, in relation to the HAC (which is composed of two HRM Councillors and ten citizens), **the test for disqualification is: “has there been a prejudgment of the matter to such an extent that any representations to the**

⁹¹ Justice Bourgeois stated in *LeBlanc v LeBlanc*, 2023 NSCA 48: “30 I turn now to Ground 3, **the claim of judicial bias. This Court recently set out the law relating to such claims in *Green v. Green*, 2022 NSCA 83.** There, Justice Van den Eynden wrote: “[41] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada explained that the apprehension of bias must be a reasonable one: 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. In *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias: **...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. *Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.*”** [My bolding and italicization added]

contrary would be futile? Since the HAC only advises HRM Council by making recommendations regarding proposed municipal heritage properties, the prejudgment test, “a closed-mind”, should be applied.

[218] Let me examine the specific circumstances of the impugned HAC process first, before addressing the HRM Council process.

(i) At the HAC⁹²

[219] Dalhousie summarized its position as follows:

133. Here, **the correspondence between HAC members leading up to the special meeting is imbued with a pro-registration tenor.** Together, this correspondence shows that HAC members did not come to the special meeting with an open mind, but instead **with the express goal of nullifying the Demolition Permit.**

134. As early as June 20, 2022, member Yorke wrote to HRM staff forwarding HUNA’s request that the Property be fast tracked for HAC consideration before the next scheduled meeting. Member Yorke wrote:

I appreciate this item can't be added to the agenda at this time, but is there some way it could be noted or tabled during the meeting (and in the minutes), flagging that it will be up for consideration very soon? Possibly via a special HAC meeting in the coming weeks? **The concerns here are that if the matter isn't kept directly in the public eye, the building's owner will proceed to demolition before the matter can be raised in HAC.** [⁸² MacDonald Affidavit, Exhibit A, p. 15; ⁸³ MacDonald Affidavit, Exhibit A, pp. 11-12; ⁸⁴ MacDonald Affidavit, Exhibit A, p. 10.]

135. On July 11, 2022, HUNA again wrote to HRM Council, urging Councillors to call an emergency HAC meeting. ⁸³ Less than 10 minutes after receiving HUNA’s letter, Councillor Hendsbee, a member of HAC, emailed other HAC members, explicitly noting the need to call an emergency meeting to prevent Dalhousie from acting on the demolition

⁹² Both Dalhousie and HRM agree that the “closed-mindedness” test applies at the HAC level.

permit before the next regularly scheduled July 27, 2022, meeting. **Councillor Hendsbee also took that opportunity to opine that Dalhousie should move the Property instead of demolishing it, further illustrating his pre-judgment of the Property's heritage attributes:**

Subject: Re: Emergency Heritage Advisory Committee Meeting

Hello all –

There is a request to have an Emergency meeting of the HAC ASAP to deal with the Henry Street situation. What is the shortest legislative timeline that an emergency advisory committee meeting can be called?

I understand that a staff report about 1245 Henry Street (I think that the address) is ready to go to HAC but our scheduled meeting of July 27/22 may be too late because Dalhousie University has already started to gut the dwelling.

And applied for a demolition permit that is pending.

So the point is, will the building still be standing by the time our regular meeting is held. Hence the reason for an emergency meeting.

In my opinion Dalhousie should consider moving the building instead of removing it.

Advise please!

Regards - David Hendsbee

136. In short order, Members **Lois Yorke** and **Luke Stock** also voiced their support for the emergency meeting. Notably, Member **Yorke showed her support for the idea of moving the Property** and also gives her opinion on how Dalhousie could best demonstrate leadership within the wider community:

“Councillor Hendsbee —thanks for your interest in this. Yes, I support an emergency meeting of HAC, and I particularly like your idea of moving instead of removing. Adaptive reuse may be highly appropriate, to demonstrate 'university leadership within the wider community'.

Lois Y “.

...

Councillor Hendsbee - Thank you for raising this. Certainly a very time-sensitive issue. If this is a possibility, **I would certainly support the idea of an emergency meeting of the HAC regarding 1245 Edward Street.** I would make every effort to ensure I could attend such a meeting.

- **Luke S.** [⁸⁵ MacDonald Affidavit, Exhibit A, p. 9; ⁸⁶ MacDonald Affidavit, Exhibit A, p. 5; ⁸⁷ MacDonald Affidavit, Exhibit A, p. 7; ⁸⁸ HRM Record, Tab 11, p. 265.]

137. The idea that Dalhousie should move the building was not raised with Dalhousie. The above correspondence was disclosed in the course of this proceeding, long after it was circulating. HRM did not ask Dalhousie for permission to inspect the cellar or basement beneath the building on the Property to assess the viability of moving the building or ask for video or photographic evidence about relevant structural elements such as sills, beams, joists and support columns or posts.

138. Councillor Stoddard, also a HAC member, was another who requested the special meeting. ⁸⁶ Other HAC members also indicated their availability for an emergency meeting. Ultimately, HAC decided to hold the Emergency Meeting on three days' notice, the earliest possible timeline for convening a special meeting under HRM Administrative Orders.

139. Next to HUNA, **HAC members** appeared to be the strongest advocates of taking immediate action to nullify the Demolition Permit until Council could register the Property. Unlike HUNA, however, these members **possessed the unique statutory power to strip Dalhousie of its demolition rights that had been acquired in advance of the meeting.**

140. The law of procedural fairness requires that those who possess statutory power exercise it with an open mind and remain amenable to persuasion. Based on the pre-HAC meeting communications, it is evident that **the goal of the Emergency Meeting was not to approach the Heritage Application with an open mind, but instead to leverage HAC's powers to halt the Property's demolition as soon as possible and without any meaningful input from the Property's owner.**

141. Before hearing any submissions on the issue, HAC members took it upon themselves to advocate for an outcome based on their personal opinions of what should happen to the Property instead of based on an objective and open-minded assessment of the Property's heritage and structural attributes. Evidenced above, Dalhousie's written representations to the contrary were completely futile when faced with a committee that already made up its mind.

142. There are several examples from the Emergency Meeting itself that evidence a closed mind on part of HAC members. The video of the hearing shows Committee members falling over themselves to award high heritage scoring. Dalhousie will canvass these

examples in detail in its submissions regarding reasonableness. A snapshot of some instances where HAC betrayed its will, to achieve a positive heritage recommendation to Council, undeterred by its own scoring criteria include:

- HAC awarded the Property a score of 13 out of 15 for historical importance, even though no prominent person of historical importance actually lived in the Property and no historically significant events occurred there.
- HAC awarded the Property a score of 1 for significance of the builder/architect, in spite of the fact that the builder/architect was completely unknown.
- HAC awarded the Property a score of 5 for being a “moderately rare or early example of its construction type”, even though HRM Staff acknowledged that “this construction type was common during the 1890s”. [⁸⁹ HRM Record, Tab 11, p. 219]
- HAC awarded the Property a nearly perfect score of 9 out of 10 for architectural style, even though the style was non-exemplary in that it was of no inventive or creative influence.
- HAC awarded the Property a staggering 14 out of 15 points for architectural integrity, despite the fact that the main building was described by a professional engineer as being in state of failure and in spite of the fact that the shape of the roof had been drastically altered during the conversion to a boarding house.
- HAC awarded the Property a nearly perfect score of 9 out of 10 for its relationship to the surrounding area, even though the surrounding area lacks heritage character and is an area for multi-unit residential and institutional uses as well as residential dwellings of a different character.

143. Had HAC approached its job with an open mind, Council may not have considered the Heritage Application at all or, at the very least, it would have a more balanced picture of the Property’s heritage attributes when making its Decision. Instead, **Council was left with a recommendation skewed by a closed-minded HAC that had one goal in mind: generate a positive heritage recommendation to Council by any means necessary. Dalhousie was set up to fail at Council.**

[My bolding added]

[220] I generally agree with these arguments. Let me add some of my own observations.

[221] Dalhousie’s written arguments provide a good starting point for examining its position. As the circumstances of this case demonstrate, an objective onlooker could have concerns that members of the HAC (two of whom are HRM Councillors) and HRM Council may have felt “pressured” by, *inter alia*, 5000-6000 voters who signed the online petition to designate the property as a “municipal Heritage Property”.

[222] For example, pressure may have felt more acute when the third-party co-applicant wrote in her **July 11, 2022**, email (shortly before the July 15 HAC meeting) to the Mayor and Councillors of HRM, under that subject title “Urgent – Dalhousie’s precedent-setting demolition violation at 1245 Edward Street, Halifax” that:

“I am writing to request that you do not issue a demolition permit to Dalhousie for the demolition of 1245 Edward Street until such time as a full investigation has taken place. I am concerned that... Dalhousie believes it is above the law. ... As you would be aware, almost 6000 citizens have signed a petition asking Dalhousie to not demolish this building. As well, you would be aware at heritage designation application has been filed with the city. Mr. Mayor – you or any Councillor – are able to ask that this application be expedited for immediate processing. Councillor Outhit recently did this for a property in his district. You can also ask for an emergency meeting of the heritage advisory committee to address this urgent issue, otherwise it does not meet for two weeks. So it is within your powers to save this building by having an investigation of the demolition without a permit and the safety concerns; expediting the heritage designation application; and calling an emergency meeting of the Heritage Advisory Committee. **Staff’s report and recommendations are ready to go – let’s not delay hearing what they have to say about the importance of this building to Halifax’s history and heritage.** As you will be aware **almost 6000 citizens are watching how the Halifax Regional Municipality responds to this precedent-setting and flagrantly offensive violation of due process by Dalhousie**

University. I respectfully ask that you take the appropriate measures outlined in this letter. I look forward to hearing from you on this urgent matter. Yours truly, Peggy Walt.”

[My emphases added]

[223] See also the earlier HAC Committee minutes of **June 22, 2022**, item 7.2.1 being page 111 of Kayla MacDonald’s affidavit; and the Special Meeting [HAC] minutes of July 15, 2022, page 100 where one finds that before the Committee that day were the following:

“staff recommendation report dated June 24, 2022; staff presentation dated July 15, 2022; correspondence from Janet Morris, Heritage Trust of Nova Scotia; Diana Torbert; Peggy Walt; Mary Vingoe; Lukas Pearse; and Peter Rogers [Dalhousie’s Legal Counsel].”

[224] Janet Morris’s **July 11, 2022**, letter to HRM Council reads in part:

“Heritage Trust of Nova Scotia has, as part of its mandate, the conservation of heritage buildings and education about their value. The Trust sees the precedent being set with 1245 Edward St. as cause for concern. **We’ve been shocked by the attempt of Dalhousie University to ‘outrun’ the municipal heritage designation process.** Rather than acting as what it should be, one of the most well-respected institutions in the municipality, Dalhousie is emulating some of the municipality’s less well-regarded ‘developers’. ...Heritage Trust urges Council to expedite the process by asking staff to convene a special meeting of the HAC immediately so that Council can consider the outcome of the HAC meeting at its next meeting, thereby giving the property a fair chance to be considered for protection.”

[My emphasis added]

[225] I keep in mind that HRM did issue a demolition permit to Dalhousie on or about July 14, 2022, but that that was negated when the **HAC** made its

recommendation on July 15 - see the **June 22, 2022, Minutes**⁹³ at item 7.2.1 where it states:

“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 the next meeting of this Committee in July. If the application is approved the property would be protected by the Act for 90 days.”

[226] At page 101 of Kayla MacDonald’s affidavit, the **Special Meeting Minutes of the July 15, 2022, HAC meeting include:**

“Moved by David Atchison, seconded by Councillor Stoddard that the Heritage Advisory Committee recommend that Halifax Regional Council: 1-set a date for a Heritage Hearing to consider the inclusion of the subject property in the Registry of Heritage Property for the Halifax Regional Municipality; and 2-Approve the request to include 1245 Edward Street, Halifax in the Registry of Heritage Property for the Halifax Regional Municipality, as shown on Map 1 of the Staff Report dated June 24, 2022, as a Municipal Heritage Property under the Heritage Property Act. Motion Put and Passed. ... The Committee acknowledged the correspondence received to assist with their deliberations.”

[My bolding and underlining added]

[227] The Committee gave the property a total score on the Heritage Evaluation of 64/100 possible points.

[228] Although the intentional urgency to “save” the building on 1245 Edward Street may be an indicator of a reasonable apprehension of or actual closed-mindedness by members of the HAC, I keep in mind it could also be more

⁹³ P. 111, Exhibit “J” of Kayla MacDonald’s affidavit.

benignly an attempt to ensure that the applicants have a fair opportunity to present their case to the HAC, before Dalhousie was able to act on the demolition permit issued July 14, 2022.

[229] However, there are also strong indications that HRM Heritage staff, the HAC, and HRM Council were working in tandem, without any serious regard to Dalhousie's position, with a view to ensuring there would be a speedy meeting/hearing to have considered the HUNA third-party Application at the HAC, and ultimately at the HRM Council level.⁹⁴

⁹⁴ At no time before the July 15, 2022, HAC meeting to assess 1245 Edward Street as a potential municipal Heritage building/property, did HRM take any steps to alert Dalhousie about the potential consequences to its property. In spite of that lack of notice to Dalhousie, noteworthy is the Heritage staff Report dated July 15, 2022, which obviously was prepared in advance, to assist HAC members [Exhibit "F" MacDonald affidavit) because it states under "Alternative Recommendations": **Heritage staff suggests that the HAC "recommend that Regional Council: 1 - waive the requirement for notice of motion under Administrative Order One section 49 (1); and 2 - conditional on the HAC making a recommendation on 1245 Edward St. pursuant to the Heritage Property Act, direct the Office of the Municipal Clerk to schedule a Heritage Hearing within the statutory notice period, and serve notice on the property owner, as provided by the Act."** Remarkably, on July 12, 2022, HRM's Council minutes ((pp. 57 and 80-81 Record) show that Councillor Wayne Mason exceptionally requested that item 18.2 be late-added to the Agenda, which motion was unanimously passed: "**That Halifax Regional Council: 1 - waive the requirement for notice of motion under Administrative Order One section 49(1); and 2 - conditional on the HAC making a recommendation on 1245 Edward Street, pursuant to the *Heritage Protection Act*, direct the Office of the Municipal Clerk to schedule a Heritage hearing within the statutory notice period, as provided by the *Act* and serve notice on the property owner as provided by the *Act*."** [not present were Councillors Hendsbee, Stoddard and Kent]. Later in the meeting **that motion was unanimously passed**. It is important to recall that **Dalhousie was unaware until July 11, 2022, that the HAC was having a hearing on July 15 about 1245 Edward Street**; and since HRM had not provided Dalhousie with the application and documents in support to that point, **Dalhousie was simply fortunate on July 12, 2022, to have located the original application online via a media report**. I should note here that I have considered that two members of the HAC (David Atchison and Jennifer Hines) have email addresses ending with the domain "dal.ca". The latter did declare a conflict on July 15, 2022, in relation to this property of Dalhousie (p. 100, MacDonald affidavit; and did not attend the June 22, 2022, meeting - p. 110, MacDonald affidavit). Nevertheless, the Record as supplemented does not permit me to go on and conclude that by virtue of their association with Dalhousie University that therefore

[230] There are also a number of comments made by HRM staff and HAC members which belie an inappropriate, and perhaps purposefully problematic, attitude towards Dalhousie's position in opposition to the Application to designate 1245 Edward Street a municipal Heritage Property.

[231] On **June 20, 2022**, HAC member/citizen advocate Lois Yorke wrote to Legislative Assistant, Simon Ross-Siegel (p. 5 Exhibit "A" MacDonald affidavit):

I've had a request from **a concerned citizen** that 1245 Edward Street be fast tracked for consideration by HAC... **wants it on this Wednesday's [June 22, 2022] agenda**" (pp. 14-15 Exhibit "B" MacDonald affidavit).

[232] At the **June 22, 2022, meeting** of the HAC the 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...** A demolition permit has been requested and is being finalized. A third-party heritage application is being processed and will be considered at the next meeting of the Committee in July. [July 27, 2023] **If the application is approved the property would be protected by the Act for 90 days.**⁹⁵

[233] As Patrick Connor, the Chair of the HAC, noted in the June 22, 2022, meeting video, "this is the first time we have received a petition in a long time".

Dalhousie University was aware of information to which HRM was privy regarding the property at 1245 Edward Street at any time before Dalhousie was formally made aware by HRM. [My bolding and underlining added]

⁹⁵ The HAC minutes of June 22, 2022, item 7.2.1 (p. 111 Exhibit "J" of Kayla MacDonald's affidavit).

[234] Upon watching the video of the **June 22, 2022**, HAC meeting, one can see Chair Patrick Connor also expressly request guidance from staff as to what to do, namely, how the Committee is to procedurally react to this petition. Aaron Murnaghan, Principal Planner responds in a substantive manner, that: “I can speak to this fairly succinctly”. He goes on to say:

... You might be aware that the University has been purchasing single-family residences/duplexes in that neighbourhood to expand the campus over the last several decades.... There is a plan to demolish the building and use it as a surplus parking lot. I do not believe that that use is currently permitted under the Centre Plan. We are currently processing a third-party Heritage Application.... [when further asked whether the demolition permit will be approved before the HAC can meet to consider the third-party Application, he reassured the HAC membership that if the Heritage evaluation criteria for 1245 Edward Street] “scores over 50 [points] it will be protected for 90 days [within which period HRM Council would be able to hear the third-party Application with the benefit of the HAC recommendation].

[My words in brackets, and bolding added]

[235] His comments were inappropriate.⁹⁶ They were prompted by a petition that should not have been before the HAC, and they introduced factual matters which were irrelevant to the HAC's specific task.⁹⁷

[236] Neither should the HAC have considered the other letters from the public, such as Janet Morris's letter from the Heritage Trust of Nova Scotia. They were irrelevant to its task regarding 1245 Edward Street.⁹⁸ The Committee should only have had access to: the HRM Heritage staff Report, and Dalhousie's written submissions.⁹⁹

⁹⁶ Mr. Murnaghan exacerbated the unfairness to Dalhousie when he gave no source for his belief regarding Dalhousie's plans for 1245 Edward Street and, Dalhousie having no knowledge of his comment, insinuating Dalhousie's "plan to demolish the building and use it as a surplus parking lot", nor did it therefore have an opportunity to respond. It is a realistic possibility that those comments would have remained in the memory of the HAC members when they considered the third-party Application merits on July 15, 2022, when they only permitted Dalhousie to file written submissions, and Dalhousie did not appear. Notably, at the October 18, 2022, HRM Council meeting, after Mr. Rogers responded to a question from a Councillor and confirmed Dalhousie's consistent position that there were no immediate plans for use of the property, Councillor Cleary alluded to "rumours in the community" that the property would be used as a "parking lot". [My underlining added]

⁹⁷ See HRM's brief at paras. 4-6, where it agrees with this conclusion: "the HAC assessment is not a process with discretion to consider factors unrelated to the listed criteria of exterior features of the building or to weigh the value of different perspectives...".

⁹⁸ It is unclear who authorized it as appropriate for the members of the HAC to be aware of and receive these documents, and what reasoning lay behind making them available to the HAC. I incline to the view that the HAC also should not have had access to the Application and its supporting documentation.

⁹⁹ I appreciate that two of the members of the HAC were HRM Councillors, who in that capacity could have been privy to these documents. However strictly speaking, in their capacity as HAC members, the information was irrelevant and should have been ignored by them.

[237] On June 22, 2022, Dalhousie remained unaware that there was an Application before the HAC.

[238] Furthermore, it appears that Peggy Walt knew that the staff Research Report had been completed – Dalhousie did not. In her July 11, 2022, email to the Mayor and Councillors of HRM under the subject title: “Urgent – Dalhousie’s precedent-setting demolition violation at 1245 Edward Street, Halifax”, she stated in part:

As you would be aware, almost 6000 citizens have signed a petition asking Dalhousie to not demolish this building. As well you would be aware Heritage designation application has been filed with the city. Mr. Mayor – you or any Councillor – are able to ask that this application be expedited for immediate processing... **You can also ask for an emergency meeting of the Heritage Advisory Committee to address this urgent issue, otherwise it does not meet for two weeks. So it is within your powers to save this building by having an investigation of the demolition without a permit and the safety concerns; expediting the heritage designation application; and calling an emergency meeting of the heritage advisory committee. Staff’s report and recommendations are ready to go – let’s not delay hearing what they have to say about the importance of this building to Halifax’s history and heritage.** As you will be aware almost 6000 citizens are watching how the Halifax Regional Municipality responds to this precedent-setting and flagrantly offensive violation of due process by Dalhousie University... I look forward to hearing from you on this urgent matter.¹⁰⁰ [My emphasis added]

¹⁰⁰ It is unclear who authorized the release of the information which Peggy Walt appears to have been aware of and referred to, that the staff Report regarding 1245 Edward Street was “ready to go”. Her email suggests that she may also have known about the contents/staff conclusions regarding 1245 Edward Street before they were made public. This all is highly suggestive of a problematic “cozy-ness” between HRM Council, Staff or HAC members - and citizen advocates.

[239] The HAC should not have been given this material - they did not need such information to carry out their very specific functions under the *HPA* and By-law H-200.

[240] I note that the HAC Minutes of July 15, 2022 “acknowledge the correspondence received to assist with their deliberations”, which correspondence was noted as including those coming from: “Janet Morris, Heritage Trust of Nova Scotia; Diana Torbert; Peggy Walt; Mary Vingoe, Lucas Pearse and Peter Rogers”.¹⁰¹

[241] I am satisfied that the reference to correspondence from Janet Morris is to her July 11, 2022, letter to HRM Council which reads, in part:

The Trust sees the precedent being set with 1245 Edward St. as cause for concern. We’ve been **shocked by the attempt of Dalhousie University to ‘outrun’ the municipal heritage designation process**. Rather than acting as what it should be, one of the most well-respected institutions in the municipality, Dalhousie is emulating some of the municipality’s less well regarded ‘developers’.... **Heritage Trust urges Council to expedite the process by asking staff to convene a special meeting of the HAC immediately so that Council can consider the outcome of the HAC meeting at its next meeting...**

¹⁰¹ PP. 100-101, MacDonald affidavit.

[242] This letter should also not have been provided to, or been considered by, the Committee.¹⁰²

[243] The HAC's only responsibility is to advise HRM Council specifically on the issue of the proposed Heritage Property, applying the scoring evaluation criteria.

[244] Cumulatively, these observations, in the context of the other information available, confirm that, at a minimum, there was an ongoing communication/familiarity between HRM (staff or those associated with the HAC) and Heritage Property preservation citizen advocates generally, and specifically in relation to 1245 Edward Street.

[245] Before the HAC, **Dalhousie was only permitted to file written submissions**; it was not permitted to appear in person to make oral submissions.¹⁰³

¹⁰² The email correspondence between HRM Clerk's Office and Councillors (Kayla MacDonald affidavit at Exhibit "A") at 4:32 pm July 11, 2022, demonstrates that **there was a collective effort to expedite the HAC hearing: the Clerk emailed** the Chair and HAC members about having "**received a request from Councillors Hendsbee and Stoddard to hold a special meeting of the Heritage Advisory Committee prior to your regularly scheduled July 27, 2022 meeting to hear... request to include 1245 Edward Street, Halifax in the Registry of Heritage Property...** as outlined in Administrative Order One... a special meeting may be called with at least three days notice. **The earliest the Committee could meet is Friday, July 15... I propose the meeting be held virtually and would ask members to confirm availability for the 15th or the week thereafter.**" [My bolding and underlining added]

¹⁰³ As I have noted earlier, section 5(4) of HRM By-law H-200 states that: "All meetings of the Committee **shall be open to the public**" - thus Dalhousie would at least have been entitled to observe that meeting. HRM staff do not appear to have advised Dalhousie that although it would not be permitted to present its position in person, it was entitled to be in attendance at the July 15, 2022, HAC meeting.

[246] However, having permitted written submissions from Dalhousie, it appears likely that many of the members present, and certainly, Patrick Connor, the Chair of the HAC, did not even read Dalhousie's submissions before the July 15, 2022, HAC meeting, or before the close of that meeting;¹⁰⁴ nor did they/he request an opportunity to do so, or ask staff to comment on Dalhousie's submission, before the meeting began.

[247] As I have noted elsewhere, **Dalhousie's written submissions were delivered at a late hour, because of the inaction and late actions of HRM** – for example, Dalhousie did not become aware of the July 15, 2022, HAC meeting until July 11, and it was only communicated to Dalhousie by the HAC on July 14 that Dalhousie was not permitted to appear in person to make oral submissions, but it could make written submissions to the HAC. **As Dalhousie submits:**¹⁰⁵

“In the single day left before the HAC meeting, Dalhousie did its best to put together a written submission, which was provided to HRM together with the Engineer Report on the building's condition and a video, [taken July 6, 2023] which was circulated to the HAC by HRM's Clerk's office by 12:22 pm on July 15, just over 30 minutes before the meetings start time. HAC members did not have adequate time to review Dalhousie submissions before the emergency meeting. Mr. Connor, the HAC Chair admitted at the close of the meeting that he had not looked at Dalhousie's materials at all [MacDonald affidavit, Exhibit “M” minute 32:39]”.

¹⁰⁴ This admission is made by him during the video of the meeting: “I haven't looked at it yet” minute 32:39 of the video Exhibit “M” MacDonald affidavit.

¹⁰⁵ At paras. 46-7 of its May 15, 2023, Brief.

[248] **The delays in Dalhousie’s written response being available to the HAC were prompted by HRM’s failure to respond in a timely manner to Dalhousie’s repeated requests to confirm it could attend in person to make submissions to the HAC. Dalhousie’s emails began at 6:13 pm on July 12 - but it only received a response from HRM’s Legislative Assistant Jill McGillicuddy on July 14 at 10:28 am.**

[249] Moreover, she had written to Patrick Connor on July 13 at 11:52 am, who responded at 4:30 pm:

“While I imagine the HAC would be fascinated to hear from the property owner on 1245 Edward Street it is rather unusual for the Committee to hear such a presentation. As Aaron pointed out, there are other more appropriate venues for the property owner to be heard, so I think we ought to stick to protocol in this case. Please convey my regrets to Dalhousie that the HAC is unable to accommodate their request at this time.”

[My bolding added]

[250] Mr. Connor is the Chair of the HAC – see p. 213, of the Record and p. 24 Exhibit “B” MacDonald affidavit.

[251] These circumstances gave the appearance that members of the HAC were not interested in what Dalhousie had to say – arguably indicia of a closed-mindedness.

[252] Dalhousie received no answer between 6:13 pm on July 12 and July 14 at 10:28 am. As noted earlier, Dalhousie only became informally aware of the July 15, 2022, meeting on July 11 – thereafter it was never formally advised of the HAC meeting on July 15, 2022. Notably, as the Councillors’ emails make clear, such a special meeting requires at least three days advance notice thereof. If HRM accepts that affected parties are entitled to file written submissions to the HAC, presumably at a minimum Dalhousie should have been formally made aware of this with sufficient notice before the hearing was to take place.

[253] The HAC recommended on July 15, 2022, to HRM Council that the building be registered in the HRM Registry of Heritage Property.

[254] Pursuant to sections 14 and 15 of the *Heritage Property Act*, the effect of this recommendation was that the Demolition Permit issued on July 14, 2022, was suspended for 120 days, during which Council is to hold a registration hearing, and register the property or decline to do so.

(ii) At HRM Council

[255] Dalhousie’s submission in this regard states:

iii) The Heritage Registration Hearing was Procedurally Unfair

144. We anticipate HRM to argue that Dalhousie's procedural fairness rights did not crystalize until the Registration Hearing. For the reasons above stated, this is not the case. However, **even if Dalhousie only had common law procedural protections at the Registration Hearing stage, the Decision must nonetheless be quashed for want of procedural fairness. The process before Council itself was also unfair. There are at least three reasons for this:**

1. HRM refused Dalhousie's request for a reasonable amount of time to present its arguments.
2. Council conducted the registration hearing in a manner that allowed HRM staff to split their pro-registration case.
3. The involvement of some councillors in staking out a pro-registration position even before the HAC Emergency Meeting, the conduct of the Registration Hearing and the remarks made within it all give rise to a reasonable apprehension of bias.

[256] At this stage, I am only addressing the third point.

[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):¹⁰⁶

¹⁰⁶ At the HAC level, both Councillors Hendsbee and Stoddard voted for an expedited hearing by the HAC regarding 1245 Edward Street. I have noted elsewhere what facts I rely upon to come to this conclusion. The Councillors present on October 18, 2022, who voted against designating the property a municipal Heritage Property,

David Hendsbee:

A - as a member of the HAC: stated in a **July 11, 2022**, 12:28 pm email – “in my opinion Dalhousie should consider moving the building instead of removing it”; and as a member of Council (**October 18, 2022**) – “building relocation is always an option” (see p. 10 Exhibit “A” MacDonald affidavit);

B - October 18, 2022 - early in his remarks he noted that he “took offence” to the comments Mr. Rogers made about the HAC process, and (at approx. 1:47 in video) commented on his view of the difference between HRM Heritage staff scoring evaluation and that of Dalhousie’s consultant Mr. White: “you always pay for what you get”; and lauded HRM staff: “I’ll put them up against anyone, any day”.

Iona Stoddard:

Together with Councillor Hendsbee, at HAC level, she requested that an emergency hearing of the HAC take place regarding 1245 Edward Street - see Kristin Vining’s **July 11, 2022**, 4:32 pm email to all HAC members (p. 5 Exhibit “A” MacDonald affidavit); and stated at the hearing that: “grants can be applied for ... easy fix to keep exterior [as it is]”, which I infer meant she favoured the outcome that Dalhousie should keep the building, and repurpose it rather than demolish it.

Lois Yorke:

A - “I’ve had a request from a concerned citizen that 1245 Edward Street be fast tracked for consideration by HAC. I’m told the citizen’s interest group is ‘ready to go’ with their application and has 5700 names on the petition to prevent the owner from demolishing the structure. The individual, a member of the larger group, has already been in contact with HRM concerning the need for speed – wants it on this Wednesday’s agenda – but feels the request is being blocked.... Possibly via a special HAC meeting in the coming weeks? The concerns here are that if the matter isn’t kept directly in the public eye, the building’s owner will proceed to demolition before the matter can be raised in HAC” – **June 20, 2022** email to Simon Ross - Siegel Legislative Assistant (p. 15, Exhibit “A” MacDonald affidavit) who responded “we are able to circulate the petition prior to the meeting to

were: **Councillor Purdy** [who noted the fact that Dalhousie’s lack of support “is not seriously being considered is disconcerting”] **Councillor Mancini** [who questioned the large discrepancy in points awarded – 64 versus 32 and asked “what does the HAC want to accomplish?... Have we kept buildings we should not keep?”], **Councillor Russell** [who asked what “obligations Dalhousie has to maintain the existing exterior?” if the house is designated a Heritage Property – Mr. Murnaghan, Principal Planner, responded: “there is no obligation”] and **Councillor Outhit** [he questioned whether this house is so “unique” and “worth saving”? which prompted Mr. Murnaghan to reiterate his own heritage expertise, and that it is so; and Mr. McGreal, Planner III, emphasized that 1245 Edward Street “stands out” from the 16 plain Victorian houses on the same street.] The remainder all voted in favour of the designation. I will next examine the relevant circumstances of each of them. [My underlining added]

members and discuss it during the ‘petitions’ portion of the agenda tomorrow. To do so, it would be best if you can ask the petitioners to send the petition as soon as possible to clerks@halifax.ca and we can log and circulate to the members.” She responded in part shortly thereafter: “I’ve suggested to the individual concerned that they forward their petition to the Clerk’s Office at once... I’ll follow up tomorrow to see if it has arrived and is progressing along”;

B - July 11, 2022 - email: “yes, I support an emergency meeting of HAC and I particularly like your idea of moving instead of removing. Adaptive reuse may be highly appropriate to demonstrate ‘University leadership within the wider community’

C - At the July 15 HAC meeting, while giving her comments in support of nine points [based on staff’s recommended of range of 6-10 points] for the criteria in “Relationship to surrounding area” she stated: “if this house gets demolished it would very much diminish the street and may put the other houses at risk”

Waye Mason:

A - At the July 12, 2022, HRM Council meeting he had requested item 18.2 Re 1245 Edward Street be late-added as an item to the agenda (p. 59, Record); see also his email requesting support to add item 18.2 – 1245 Edward Street to the July 12 HRM Council meeting (p. 2, Exhibit “A”, MacDonald affidavit). He stated: “...it not being my first rodeo when it comes to saving a Heritage Property” (10:42 video p. 84, Record). He then put the motion, seconded by Councillor Morse, which was unanimously passed:

That Halifax Regional Council

1– waive the requirement for notice of motion under Administrative Order One section 49 (1); and

2– *conditional* on the Heritage Advisory Committee making a recommendation on 1245 Edward Street, pursuant to the Heritage Protection [sic] Act, direct the Office of the Municipal Clerk to schedule a heritage hearing within the statutory notice period as provided by the Act, and serve notice on the property owner, as provided by the Act.

The motion was put and passed unanimously [not present were Councillors Hendsbee, Stoddard and Kent].¹⁰⁷

¹⁰⁷ The need to “reserve” time on HRM Council’s calendar to ensure that this registration application would be heard in a speedy manner was ensured by Councillor Mason’s motion which was unanimously passed. Clearly the impetus for this late-added motion was to ensure that HRM Council could hear and deliver a decision on a proposed

B - **October 18, 2022** - He noted in his remarks: “the inside of the building doesn’t matter...the foundation can be replaced- I did it [myself] in my [older home]”

Sam Austin:

October 18, 2022 – He was concerned that Dalhousie had no plans for the property and how it will grow as a campus, since he noted that the property is in a “residential” zoning area and that if Dalhousie is stuck with that zoning, without a rezoning or variation permitted by HRM, the property will stay as it is presently zoned, a situation for Dalhousie that he described as “buyer beware”. His later comments suggest his preference that the present highest and best use in a residential zoned area is to make use of it as a residential building now – otherwise he noted Dalhousie could just wait three years and demolish it in any event.¹⁰⁸

Patty Cuttell:

October 18, 2022 – She stated: “there is a learning opportunity here – instead of demolishing buildings... re-purpose them”; “we have to draw a line in the sand” to preserve our built heritage.”

Becky Kent:

October 18, 2022 – She acknowledged that Dalhousie has been a leader in heritage preservation, but concluded that because Dalhousie had no present plan for the property, the fact that there is a housing stock crisis where residential properties are needed now, as

registration of 1245 Edward Street before the stay of the demolition permit which flowed from the HAC’s decision to recommend would expire, and the 120 days within which Council had to consider the proposed registration and make its decision. Under section 14(2), HPA, HRM must give at least 30 days notice to a registered owner of property in advance of its decision to register a property as a municipal Heritage Property: “The municipality **shall cause notice of the recommendation to be served upon each registered owner of the building**... that is the subject of the recommendation at least 30 days prior to registration of the building...in the municipal registry of Heritage Property”. Section 14(4) reads: “No person shall substantially alter the exterior appearance of or demolish a building... for 120 days after a notice respecting the building... has been served pursuant to subsection (2) except in those cases where, prior to the expiration of 120 days, the municipality refuses to register the property.” Section 15(1), HPA, reads: “At any time not less than 30 days nor more than 120 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.”; and section 15(2) reads: “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.” [My bolding and underlining added]

¹⁰⁸ Councillor Paul Russell asked Principal Planner Aaron Murnaghan whether Dalhousie had any obligations to maintain the building if it is designated a municipal Heritage Property – to which he replied that he believed “there is no obligation”. [My underlining added]

opposed to demolishing the house and consequentially she liked “adaptive re-use... in a crisis for space” (1:32 pm video).

Cathy Deagle Gammon:

October 18, 2022 – Her comments suggest that the Dalhousie’s absence of a plan to do something with the property in the short term is a problem and therefore that she prefers “adaptive reuse” by Dalhousie.

Shawn Cleary:

October 18, 2022 – Prefaced his questions to Dalhousie’s Director of Government Relations Laura Hynes Jenkins by noting that the property was purchased in July 2021, Dalhousie says it has no immediate plans for the property, but that there are “many rumours in the community that the property will be used as a parking lot... [communicated to HRM] in emails in particular” as a temporary use after demolition. He directly asks her, “any truth to that?” She responds that Dalhousie will await Council’s decision before they make their decision about what use to make of the property. Then he asks whether Dalhousie has any tentative plans for the property “in the next 2 to 5 years?”

He notes the reason he asks is because... the property is presently zoned residential and that Dalhousie would have to come back to HRM to get a variance to allow it to use the property other than as for a residential building, and that HRM just concluded re-zoning that area in 2021, suggesting it may be difficult for Dalhousie to get approval for a rezoning not consistent with what is known as the “Centre Plan”.

Then, he states, presuming that Dalhousie is permitted to demolish the building and leave the property idle in the short term: “I’m just thinking, as a... taxpayers, ... about half of Dalhousie’s money comes from taxes - is that a wise thing to do with taxpayers’ money- just to buy property and sit on it? Point of clarification, I am just asking.... They have no intention [to do anything with the property] Why did they buy the property and Why are you asking us to do something when [Dalhousie] doesn’t seem to care what happens to the property? ...” – Ms. Hynes Jenkins responded that Dalhousie will have a specific use for the property at some point in the future, but does not at the present time.

Pam Lovelace:

October 18, 2022 – Her comments included asking rhetorically whether Dalhousie had seriously considered “bringing it [the building] back to service” (i.e. rehabilitating it for use as a residence) because Dalhousie might not appreciate (as I infer she does) “that there is actually life in it”; and “at what point could this be safe to house people?”

Seamus McGreal, Planner III:

October 18, 2022 – Stated, in response to a question from Councillor Mancini (during the “split case” portion of the hearing) regarding the difference in scoring (64 by the HAC and 32 by Heritage Architect Terry White) that: Mr. White wrongly did not recognize Victorian eclecticism as a “style”, and that the scoring evaluation “criteria were understood differently by [Mr. White], and the HAC [HRM Heritage staff]”;and that since the HPA focuses on the exterior appearance of the building (and therefore the condition of the interior is irrelevant), the circumstances leave open an opportunity for “adaptive reuse” of the building. In response to a question from Councillor Austin regarding whether the building is not historically “significant” because it is a collection of styles (so-called “eclectic”), Mr. McGreal acknowledged the stark difference of opinion between Mr. White and HRM Heritage staff/HAC but went on to say : “we did review the +VG Architects report” and “I did research on Victorian eclecticism... it is very much a part of our heritage...”.

Aaron Murnaghan, Principal Planner:

October 18, 2022 - Addressed Council in response to questions (during the “split case” portion of the hearing) and made statements, including that he teaches a course in Planning and therein he often shows his students a map of Halifax from 1878, making the point that in his opinion “any building that is on this map that still exists today, should really be on the municipal Registry of Heritage Property” and suggested that “any building on [Edward Street] greater than 130 years old” should similarly be on the Heritage Property Registry.

F - The standard of review to assess the substantive reasonableness of HRM Council’s decision to register 1245 Edward Street as a Heritage Property

[259] The presumed standard of review applicable to substantive decisions arises directly from the majority reasons in *Vavilov*, 2019 SCC 56:¹⁰⁹

68 Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a

¹⁰⁹ More recently the Court has articulated exceptions to the “reasonableness” standard in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.

decision-maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. **Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.** But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional"

...

III. Performing Reasonableness Review

73 This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

...

78 In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. **Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.**

...

83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. 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. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.), that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. 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.

...

85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, **a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.**

...

E. A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision

99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: ...

100 **The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision.** It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

101 **What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.** There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

102 **To be reasonable, a decision must be based on reasoning that is both rational and logical.** It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, **the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived":** *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139 ...

103 While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: ... **A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken ... or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point ...**

104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

105 In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: ... Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

106 It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, **we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory**

scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

107 A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) Governing Statutory Scheme

108 Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also Green, at para. 44. As Rand J. noted in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: ... Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: ... The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: ...

...

139 **Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted.** It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, **we do wish to briefly address the question of whether a court that**

quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

140 Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: ... However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

141 Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: ...

142 **However**, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: ... **An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: ... Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: ...**¹¹⁰

¹¹⁰ Even what would otherwise be a reasonable outcome can be tainted by unfair process and bias - from *Vavilov*: "86 ... While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, **an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.** 87 This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2,

[My bolding added]

[260] The presumptive “reasonableness” standard is applicable to the present circumstances.

G - Why the decision by HRM Council to designate 1245 Edward Street as a municipal Heritage Property is substantively unreasonable¹¹¹

[261] In summary, the decision is unreasonable, *inter alia*, in the following listed respects.

- a) the underlying scoring by the HAC of the evaluation criteria was tainted by a reasonable apprehension of the closed-mindedness by its members’ “pro-registration” mindset, whose 64 points scoring could have materially affected the outcome before HRM Council;¹¹²

[2018] 1 S.C.R. 6 (S.C.C.), at para. 12. **In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis.** This approach is consistent with the direction in *Dunsmuir* that **judicial review is concerned with both outcome and process.**”

¹¹¹ As the Court in *Vavilov*, at para. 89, reminds us: “... reasonableness remains a single standard, and elements of a decision’s context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. ... “[r]easonableness ... takes its colour from the context”.

¹¹² Notably, the HAC’s choice of scoring trended to the high end of the range that HRM Heritage staff had recommended (except in the case of “Significance of architect/builder” where the HAC gave 1 point, when staff had recommended between 1 and 3 points for the “unknown” builder and architect). Having said that, I acknowledge that even the low scores of the staff-recommended ranges cumulate to 53 points - which is greater than the 50+ point threshold required to recommend HRM Council register the property as a municipal Heritage Property.

- b) the HRM majority Councillors' decision regarding whether to register 1245 Edward Street as a municipal Heritage Property was tainted by a reasonable apprehension of bias in relation to their "pro-registration" mindset;¹¹³
- c) the aspects of procedural unfairness that I have elsewhere referenced cause the integrity of the substantive outcome to be undermined so seriously that it is not a "reasonable" outcome;
- d) the majority HRM Councillors gave an unreasonable level of deference to the HAC scoring by relying upon the HRM Heritage staff Report and HAC scoring (pages 217 and 277 Record) as their starting point, *inter alia*, without reasonably factoring into their decision, that the HAC did not have to consider, as Council did, the Capital Management Engineering Ltd. Report; and only Council had the benefit of Terry White's Report.

[262] Mr. White's qualifications as a Heritage Architect were not disputed. He scored the evaluation criteria total as 32 points - which is 18 points below the

¹¹³ Furthermore, I conclude that any of their pre-existing pro-registration leanings were materially exacerbated by the HRM Heritage staff's statements made during the "split case" portion of the October 18, 2022, Council meeting.

threshold the HAC needed to send the property on to HRM Council for consideration.¹¹⁴ His opinion included, for example, that:

there is no generally recognized “transitional” Victorian/Second Empire-Queen Anne Revival period “style” of architecture. It is either one or the other. Therefore, 0 points should be awarded to the building’s “style” as opposed to the 9 points HAC awarded;

[263] I bear in mind that in the “split case” portion of the process, HRM Heritage staff rigorously disputed his premise that there are no “mixed” categories of Heritage Property – which manifested an unfairness to Dalhousie, as Dalhousie had no opportunity to respond to, or question, HRM Heritage staff regarding this.

[264] HRM Heritage staff did not dispute his assertion that 2 styles were merged in this one building, but claimed that this is what makes 1245 Edward Street special enough to be registered as Heritage Property.¹¹⁵

¹¹⁴ See p. 160 Record.

¹¹⁵ This piecemeal /deconstructive manner of characterizing Heritage Property styles could conceivably greatly expand the inventory of potential Heritage Property candidate structures. It is questionable whether that is consistent with the purpose and intention of the legislation. I bear in mind here Mr. Murnaghan’s comments to Council, where he steps out of his role as staff to HRM Council, and into the role of an advocate that, regarding a map of 1878, “**any building that is on this map that still exists today, should really be on the municipal Heritage Property Registry**”; and that: “any building on [Edward Street] greater than 130 years old” should similarly be on the Heritage Property Registry. Notably, 1245 Edward Street was built in either 1897 or 1898, and was therefore 125 years old in 2022.

[265] There was little serious consideration expressed among the majority Councillors regarding how Mr. White's 32 points scoring could be reconciled with that of HRM Heritage staff's recommended ranges/the HAC's scoring.¹¹⁶

[266] Only during the "split case" portion of the process did Mr. McGreal state that staff had reviewed the +VG architect's Report, had done research about "Victorian eclecticism", and had concluded it was "very much a part of our heritage".¹¹⁷

- e) HRM Council members failed to consider some proper factors, considered improper factors, and did not recognize the significant prejudice caused to Dalhousie's interests by the unfairness of the process.

¹¹⁶ Although there were general questions by Councillor Deagle Gammon, and one from Councillor Austin when he asked whether the building "was not historically significant because of the collection of styles".

¹¹⁷ I keep in mind that the members of Council did have the benefit of Mr. Rogers's September 16, 2022, written submissions, Mr. White's Report, and Mr. Rogers's 10 + minutes of oral presentation. Yet the prejudice to Dalhousie at this point in the process arose because it could not respond directly to Mr. McGreal's [and Murnaghan's] comments. Mr. McGreal had the "last word" on this very important aspect - whether the building is "historically significant".

[267] Consequently, the substantive basis for Council’s decision to designate the building a municipal Heritage Property was unreasonable,¹¹⁸ per *Vavilov*:

86 ... While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, **an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.**

87 This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that **a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome** was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 (S.C.C.) , at para. 12. In that case, **although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis.** This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process.

[My bolding added]

f) the HRM Council majority members based their decision on an unreasonable chain of analysis in making their determination whether a

¹¹⁸ For example, the tenor of the majority Councillors’ comments suggest that they were intent on not letting the property sit idle or be demolished, and that the focus of their thinking was to preserve the building to achieve their preferred use of the property-and this thinking caused them to vote in favour of registering the property. As I noted elsewhere, that was an irrelevant basis upon which to ground their decision to register 1245 Edward Street as a municipal Heritage Property. On the other hand, they did not seriously consider a very important factor: the property owner’s vehement opposition to the registration, and the cogent reasons Dalhousie relied upon. For example, in Mr. White’s Report, he stated (p. 156 Record): “The HRM Staff report concludes with the statement that the ‘building remains in sufficient condition to be a candidate for successful restoration’. **The important issues of cost and vitality are not addressed in the HRM Staff report.**” On October 18, 2022, Councillor Purdy specifically drew attention to this issue, in her review of what she considered to be “a very difficult decision”. She noted: “the fact that Dalhousie’s lack of support is not seriously considered is disconcerting”. [My bolding added]

1245 Edward St. should be designated a municipal Heritage Property-
and in doing so-arrived at a clearly unreasonable decision.

[268] HRM Council did so, knowing full well before October 18, 2022, that:

- a) it was Dalhousie's expressed position throughout that it was **cost-prohibitive for it to restore the interior** of the building to a habitable residential building standard (**and it would not do so**);¹¹⁹
and
- b) that Dalhousie **bought the building with the intention of demolishing it** and holding the property for unspecified longer-term uses (**and it would do so**);
- c) together with, **in any event:**
 - i. there being **no legal obligation on a property owner (Dalhousie) to maintain the exterior of the building** even if **Council chose their preferred outcome** - namely that the building be designated a municipal Heritage building on the

¹¹⁹ As Dalhousie points out at paras. 223-224 of its May 15, 2023, Brief: projected costs of rehabilitating it to a 'residential' use were \$329,000 – and Dalhousie never intended that use for the property.

basis that **instead Dalhousie should be effectively forced to re-purpose the existing building or relocate it;** and that

- ii. **ultimately Dalhousie would be entitled to demolish the building without HRM's consent**, pursuant to ss. 18(3) of the *Heritage Property Act*, if it makes an application to demolish the building (which is referred to the HAC for a recommendation/HRM “may take up to three years to consider an application”); and even if refused, Dalhousie may “carry out the demolition at any time after **three years from the date of the application [to demolish, filed by Dalhousie] but not more than four years after the date of the application.**”

H - Conclusion

[269] HRM's decision to register 1245 Edward Street on the HRM Registry of Heritage Property is fundamentally flawed, it being the result of:¹²⁰

¹²⁰ I recognize that this manner of civic duty makes enormous demands of those who are HRM Councillors and Committee members, and they should all be respected for taking on these onerous and extremely important positions. When I refer to Councillors, HAC members, and staff by name herein, I do so because I consider it necessary so that the Decision reasons can be properly understood. I in no way wish to diminish their commendable contributions to our civic life.

- 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-crumbs trail that led to an a 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*.

[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.

[271] The parties have agreed upon costs, and they will be included in the Order when it is issued.

Rosinski, J.