

IN THE MATTER of an appeal by Sabharwal Atlantic Holdings Ltd. to designate 10 Prince Street (PID #336321) as a Heritage Resource pursuant to Subsection 5(8) of the *Heritage Places Protection Act*, Section 10 of the *Heritage Places Protection Act Regulations* and Section 3.6 of the *Heritage Preservation By-Law*.

**WRITTEN SUBMISSIONS ON BEHALF OF
THE APPELLANT, SABHARWAL ATLANTIC HOLDINGS LTD.
Re: 10 Prince Street PID 336321
(Appeal #HP24001)**

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PART I – OVERVIEW

A. Defined terms

1. For convenience, the following defined terms are used in these submissions:
 - (a) “City” means the City of Charlottetown;
 - (b) “Commission” means the Island Regulatory and Appeals Commission;
 - (c) “Council” means the Council of the City of Charlottetown;
 - (d) “*Heritage Places Protection Act*” means the *Heritage Places Protection Act*, RSPEI 1988, c H-3.1;
 - (e) “*Heritage Places Protection Act Regulations*” means the *Heritage Places Protection Act Regulations*, PEI Reg EC414/00;
 - (f) “Heritage By-law” means the City of Charlottetown Heritage Preservation By-law;
 - (g) “MGA” means the *Municipal Government Act*, RSPEI 1988, c M-12.1;
 - (h) “Minister” means the Minister of Fisheries, Tourism, Sport and Culture; and
 - (i) “Zoning By-law” means the City of Charlottetown Zoning and Development By-law.

B. Regulatory Context

2. The Minister is responsible for the preservation¹ and the designation² of Prince Edward Island’s heritage places pursuant to the *Heritage Places Protection Act*.
3. The procedures for designating a place as a “heritage place”,³ giving notice of the Minister’s intent to designate a place as a heritage place, and dealing with objections to an intended designation, are prescribed in the *Heritage Places Protection Act Regulations*, PEI Reg EC414/00 (“*Heritage Places Protection Act Regulations*”).⁴
4. Where a municipality has established a heritage plan setting out objectives, policies and programs for the conservation of its heritage, the Minister may, with the agreement of the

¹ *Heritage Places Protection Act*, s. 2(2)(a) [Tab 1 of the Appellant’s Submissions].

² *Heritage Places Protection Act*, s. 5(1) [Tab 1 of the Appellant’s Submissions].

³ “heritage place” means a place in the province which includes or is comprised of an historic resource of an immovable nature (s.1(a) of the *Heritage Places Protection Act*);

“historic resource” means any work of nature or of man that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest (s.1(b) of the *Heritage Places Protection Act*).

⁴ *Heritage Places Protection Act Regulations*, PEI Reg EC414/00 [Tab 2 of the Appellant’s Submissions].

council of that municipality, delegate to the municipality any of his powers under the *Heritage Places Protection Act*.⁵

C. The Heritage By-law

5. The City purports to have enacted the Heritage By-law under the authority of the MGA and the *Heritage Places Protection Act*.⁶
6. The Heritage By-law, among other things, prescribes the provisions for the Designation⁷ of a Heritage Resource⁸ and a process by which the City's Heritage Officer⁹ may request that Council impose a temporary Designation by Council.¹⁰

Designation as a Heritage Resource

7. The process to Designate a Heritage Resource may be initiated by:
 - (a) the Heritage Officer and/or Heritage Board;¹¹
 - (b) an application by the property owner(s); or
 - (c) an interested third-party.¹²
8. After the process to Designate a Heritage Resource has been initiated, the "Heritage Officer shall carry out research and will prepare a Heritage Assessment Report on a property(ies) proposed for Designation."¹³

⁵ *Heritage Places Protection Act*, s. 9(1).

⁶ Tab 53, City's Record, s. 1.2.1 of the Heritage By-law.

⁷ Tab 53, City's Record, pursuant to s. 9.6 of the Heritage By-law, "Designate, Designated or Designation" means a Heritage Resource or Heritage Preservation Area recognized for its heritage value in which the criteria have been applied and evaluated, researched, and validated pursuant to [the Heritage By-law], and includes those Heritage Resources that were Designated prior to the adoption of [the Heritage By-law].

⁸ Tab 53, City's Record, pursuant to s. 9.13 of the Heritage By-law, "Heritage Resource" means any Building, special historic place, site, streetscape, or area recognized for its historic value and for which its protection may serve a social, economic and/or cultural benefit for the community.

⁹ Tab 53, City's Record, pursuant to s.9.10 of the Heritage By-law, "Heritage Officer" means any person appointed by the Council and charged by the City with the duty of administering the provisions of [the Heritage By-law].

¹⁰ Tab 53, City's Record, see s. 3.4 of the Heritage By-law.

¹¹ Tab 53, City's Record, pursuant to s. 9.9 of the Heritage By-law, "Heritage Board" means the standing committee of Councilors [sic] and resident members appointed by the Mayor and Council of the City of Charlottetown.

¹² Tab 53, City's Record at s. 3.1.1 of the Heritage By-law.

¹³ Tab 53, City's Record, s. 3.2.1 of the Heritage By-law.

9. A "Heritage Assessment Report" is a report prepared by the Heritage Officer describing the heritage value of a Heritage Resource with respect to the criteria for evaluation for Designation, or the criteria for evaluating an application for a Heritage Permit.¹⁴
10. The Heritage By-law prescribes the factors that shall be taken into consideration in the Heritage Assessment Report.¹⁵
11. The Heritage Board shall consider the Heritage Assessment Report and any additional information provided by the applicant to Designate a Heritage Resource, if applicable, and make a recommendation to Council to consider the Designation of a Heritage Resource.¹⁶
12. Before Council Designates a Heritage Resource, a Notice¹⁷ of the Intention to Designate shall be published in a newspaper having general circulation in the area, posted on the City's website, and served on the Owner(s)¹⁸ of the property(ies), when the Owner is not the applicant to Designate the Heritage Resource.
13. The Heritage By-law prescribes what the Notice of Intention to Designate a Heritage Resource shall contain.¹⁹

¹⁴ Tab 53, City's Record, s. 9.8 of the Heritage By-law.

¹⁵ Tab 53, City's Record, s. 3.2.2 of the Heritage By-law:

The Heritage Assessment Report shall take into consideration the following:

- a. *The age of the Building or Structure;*
- b. *Architectural/archeological/aesthetic value, including but not limited to the following elements:*
 - i. *Style/tradition;*
 - ii. *Design/craftsmanship;*
 - iii. *Setting/streetscape;*
 - iv. *Integrity;*
 - v. *Construction methods and materials;*
 - vi. *Exterior or outward appearance/condition; and*
 - vii. *Landmark status.*
- c. *The historic value, including but not limited to the following elements:*
 - i. *Architect/builder;*
 - ii. *Political/economic influence;*
 - iii. *Social/cultural influence;*
 - iv. *Historical context; and*
 - v. *Association with event/person/activity.*

¹⁶ Tab 53, City's Record at s. 3.3.1 of the Heritage By-law.

¹⁷ Tab 53, City's Record, pursuant to s. 9.14 of the Heritage By-law, "Notice" means information sent by ordinary mail explaining the necessary information as required by [the Heritage By-law].

¹⁸ Tab 53, City's Record, pursuant to s. 9.16 of the Heritage By-law, "Owner" means a person or corporation who legally owns a lot and is the registered land owner, or is an executor, administrator, trustee, agent or other person managing the subject lot or Building on behalf of the Owner.

¹⁹ Tab 53, City's Record, s. 3.3.4 of the Heritage By-law:

14. An Owner or any person, group or organization interested in, or likely to be affected by a proposed Designation, may object to the proposed Designation by submitting comments or concerns in writing within 30 calendar days of the date of the Notice of Intention to Designate.²⁰
15. Where a Notice of Intention to Designate a Heritage Resource has been issued, "no person shall move, alter, develop or demolish any Building(s), Structure(s), site or area for a period of 120 calendar days from the date of the Notice, unless the Notice is revoked or cancelled".²¹
16. Where no objection to the Notice of Intention to Designate is received, Council may by resolution Designate the Heritage Resource.²²
17. However, if a written objection has been filed, the application to Designate the Heritage Resource "will be reviewed by the Heritage Board, which shall consider the objection(s) filed along with any further information provided by the Heritage Officer."²³ After the Heritage Board has considered the objection(s) filed and any further information provided by the Heritage Officer, the Heritage Board shall make a recommendation to Council to:
 - (a) Designate the Heritage Resource or Heritage Preservation Area as described in the Notice of Intention to Designate;
 - (b) amend the Notice of Intention to Designate; or
 - (c) cancel the intent to Designate the Heritage Resource or Heritage Preservation Area.²⁴
18. The Heritage By-law indicates that it is only after Council has Designated a Heritage Resource that written Notice of the Designation shall be filed on the Register of Heritage Places.²⁵
19. If an application to Designate a property as a Heritage Resource is not approved or is cancelled by Council, the subject property may not be considered for Designation as a

The Notice of Intention to Designate a Heritage Resource or Heritage Preservation Area shall contain:

- a. The civic address and parcel identification number (PID) of the Heritage Resource, or a boundary description and a map for a proposed Heritage Preservation Area;*
- b. A summary of the consequences of Designation;*
- c. The date and time by which written comments or objections must be received on the proposed Designation; and*
- d. Such other particulars as Council deems necessary or relevant.*

²⁰ Tab 53, City's Record, s. 3.3.5.

²¹ Tab 53, City's Record, s. 3.3.6.

²² Tab 53, City's Record, s. 3.3.7.

²³ Tab 53, City's Record, s. 3.3.8. [emphasis added]

²⁴ Tab 53, City's Record, s. 3.3.8.

²⁵ Tab 53, City's Record, s. 3.3.9(c).

Heritage Resource in accordance with the procedure set out in the Heritage By-law until one year has elapsed.²⁶

Temporary Designations

20. A Heritage Officer may request that Council impose a temporary designation if the Heritage Officer is of the opinion that a property with characteristics that may meet the criteria for Designation as a Heritage Resource "is at risk of imminent irreparable or costly damage to the site's heritage nature".²⁷
21. The Heritage By-law does not require the Heritage Officer to provide Notice that they are requesting Council issue a temporary Designation.²⁸
22. When Council approves a temporary Designation, a Notice of the temporary Designation shall be published in a newspaper having general circulation in the area, posted on the City's website, and served on the Owner(s) of the property(ies) in question.²⁹
23. The Heritage By-law prescribes what the Notice of temporary Designation of a Heritage Resource shall contain.³⁰
24. Where a temporary Designation of a Heritage Resource has been ordered by Council, "no person shall move, alter, develop or demolish any Building, Structure, site or area for a period of 45 calendar days from the date of service of the Notice under this section, unless the Notice is revoked or cancelled".³¹
25. Within 45 calendar days of the date of the Notice of temporary Designation of a Heritage Resource, the temporary Designation status will expire unless Council proceeds with the process to Designate the Heritage Resource by posting a Notice of Intent to Designate.³²

D. The Zoning By-law

26. The City enacted the Zoning By-law under the authority of the MGA and the *Planning Act*, RSPEI 1988, c P-8.³³

²⁶ Tab 53, City's Record, s. 3.3.10.

²⁷ Tab 53, City's Record, s. 3.4.1.

²⁸ Tab 53, City's Record, s. 3.4.1.

²⁹ Tab 53, City's Record, s. 3.4.2.

³⁰ Tab 53, City's Record, s. 3.4.3

The Notice of Intention to Designate a Heritage Resource or Heritage Preservation Area shall contain:

a. The civic address and parcel identification number (PID) of the Heritage Resource;

b. A summary of the consequences of Designation;

c. The date and time by which written comments or objections must be received on the temporary Designation; and

d. Such other particulars as Council deems necessary or relevant.

³¹ Tab 53, City's Record, s. 3.4.4.

³² Tab 53, City's Record, s. 3.4.5.

³³ Zoning By-law, s. 1.2.1 [Tab 3 of the Appellant's Submissions].

27. The Zoning By-law prescribes a Design Review process for properties located within the 500 Lot Area.³⁴ The Design Review process is set out at sections 3.14.1 – 3.14.4 of the Zoning By-law.
28. This Design Review process requires, among other things:
 - (a) a development permit application to be reviewed by the Development Officer to confirm compliance with all other applicable provisions of the Zoning By-law;³⁵
 - (b) compliant development permit applications to be forwarded to a Design Reviewer, (as appointed as a member of the Design Review Roster³⁶) who shall, among other things: “[p]rovide written feedback, comments, and a final recommendation within a specified 10 business day review period.”³⁷
 - (c) comments and markups from the Design Reviewer to be forwarded to the applicant, so that the applicant may revise their submission accordingly.³⁸
29. The development permit applicant may revise their submission in accordance with the comments and markups from the Design Reviewer and resubmit them to the City.³⁹ These revised plans are then forwarded to the Design Reviewer for the compliance review,⁴⁰ and if the review is satisfactory, the plans are granted conditional approval.⁴¹
30. Upon conditional approval by the Design Reviewer, applications for development permits shall be referred to the Design Review Board.⁴² The Design Review Board then reviews the written feedback, comments, and recommendation by the Design Reviewer, and is required to provide a recommendation on the disposition of the application⁴³ in accordance with the following:
 - (a) when the application is jointly supported or rejected by the Design Reviewer and Design Review Board, the disposition of the application shall be determined; and

³⁴ Pursuant to Appendix A of the Zoning By-law “500 Lot Area” means the Heritage Resource area identified with the City of Charlottetown that is generally located south of Euston Street, and is more specifically described in Appendix H [of the Zoning By-law]. **[Tab 3 of the Appellant’s Submissions].**

³⁵ Zoning By-law, s. 3.14.3 **[Tab 3 of the Appellant’s Submissions].**

³⁶ Pursuant to Appendix A of the Zoning By-law “Design Review Board” means the Board or Committee established by the City to process Development applications subject to the Design Review process as per the provisions of this by-law. **[Tab 3 of the Appellant’s Submissions].**

³⁷ Zoning By-law, s. 3.14.3(b)(iii) **[Tab 3 of the Appellant’s Submissions].**

³⁸ Zoning By-law, s. 3.14.3 (b)(iv) **[Tab 3 of the Appellant’s Submissions].**

³⁹ Zoning By-law, s. 3.14.3(b)(iv) **[Tab 3 of the Appellant’s Submissions].**

⁴⁰ Zoning By-law, s. 3.14.3(b)(v) **[Tab 3 of the Appellant’s Submissions].**

⁴¹ Zoning By-law, s. 3.14.3 (b)(vi) **[Tab 3 of the Appellant’s Submissions].**

⁴² Zoning By-law, s. 3.14.3(c) **[Tab 3 of the Appellant’s Submissions].**

⁴³ Zoning By-law, s. 3.14.3(d) **[Tab 3 of the Appellant’s Submissions].**

- (b) where the Design Review Board does not support the recommendation of the Design Reviewer than the Design Review Board shall make a recommendation to Council, and Council shall determine the disposition of the application.⁴⁴

E. Jurisdiction of the Commission

31. The *Heritage Places Protection Act* provides that an owner of any property designated as a heritage place may appeal to the Commission against the decision of the Minister.⁴⁵
32. The *Heritage Places Protection Act Regulations* provide that the owner of a property containing a "heritage place" may appeal a designation by written notice to the Commission.⁴⁶
33. The Heritage By-law provides that the decision of Council to Designate a Heritage Resource may be appealed by written Notice to the Commission.⁴⁷

F. Factual Background

34. On January 28, 2014, Dr. Vivek Sabharwal and Dr. Josephine Lyngdoh Sabharwal purchased 10 Prince Street, in Charlottetown, Prince Edward Island ("10 Prince Street").⁴⁸ 10 Prince Street is identified as PID No. 336321 and is located within the 500 Lot Area of the City.
35. Prior to the purchase, Dr. Vivek Sabharwal and Dr. Josephine Lyngdoh Sabharwal's submitted a zoning inquiry to the City as part of their due diligence inquiries. The zoning inquiry confirmed that 10 Prince Street was not a Heritage Resource.⁴⁹
36. On February 9, 2015, Dr. Vivek Sabharwal and Dr. Josephine Lyngdoh Sabharwal transferred 10 Prince Street to Sabharwal Atlantic Holdings Limited ("Sabharwal Holdings").⁵⁰
37. In or around early 2022 Sabharwal Holdings began working with the City's Planning Department staff on development plans for 10 Prince Street. Sabharwal Holdings' contractor, Noel Doucette, was advised by the City's Planning Department staff on various occasions that the Property could be demolished and developed, provided that the Lot 500 Area Development Standards & Design Guidelines, and the extensive Design Review Process were complied with.⁵¹ The City's Planning Department staff also advised that design plans and a general layout of the proposed site would be required to properly consider the development proposal.

⁴⁴ Zoning By-law, s. 3.14.3 (d)(i) & (ii) [Tab 3 of the Appellant's Submissions].

⁴⁵ *Heritage Places Protection Act*, s. 5(8) [Tab 3 of the Appellant's Submissions].

⁴⁶ *Heritage Places Protection Act Regulations*, s. 10(1) [Tab 3 of the Appellant's Submissions].

⁴⁷ Tab 53, City's Record, s. 3.6.1.

⁴⁸ Deed registered January 28, 2014. [Tab 4 of the Appellant's Submissions].

⁴⁹ Tab 29, City's Record, at p. 472.

⁵⁰ Deed registered February 9, 2015. [Tab 5 of the Appellant's Submissions].

⁵¹ Tab 29, City's Record, at p. 472.

38. A preliminary set of plans were submitted on Sabharwal Holdings' behalf to the City's Planning Department for review in early 2022. However, Planning Department staff advised that these plans did not have sufficient detail and instructed Sabharwal Holdings to hire an architect to assist with the development process.⁵²
39. Sabharwal Holdings complied with these instructions and retained architect Robert Haggis to develop a full set of plans, renderings and elevations for consideration by the City's Planning Department. Mr. Haggis met and communicated with Department staff on several occasions to review these plans and incorporated design changes at their request.⁵³
40. At no point during this Design Review process was Sabharwal Holdings, its contractor, or Mr. Haggis advised by the Planning Department or any of its staff that 10 Prince Street was considered to potentially have historical significance or that the Department was going to initiate a process to have it Designated as a Heritage Resource under the Heritage By-law.
41. Instead, the Department continued to instruct Sabharwal Holdings and its representatives on the requirements for development of 10 Prince Street.⁵⁴
42. Draft site plans and drawings were provided by Mr. Haggis to the City's Planning and Heritage Department on January 27, 2023.⁵⁵ Over the course of the next three months, Mr. Haggis communicated with Planning and Heritage Department staff on several occasions revising these plans and incorporating recommended design changes.⁵⁶
43. Through this revision process, Mr. Haggis was able to effectively confirm the Development's compliance with the Zoning By-Law prior to submitting the Design Review Application.
44. On May 5, 2023, Mr. Haggis delivered, on behalf of Sabharwal Holdings, a Design Review Application to the Planning and Heritage Department in the form prescribed by the City. This application was accompanied by maps, a survey plan, architectural plans and drawings, specifications for the exterior materials to be used, and payment of \$1,900 for the application and design review fees.⁵⁷
45. By June 1, 2023, Mr. Haggis had not received any comments or feedback with respect to the Design Review Application. Since roughly a month had passed since it was submitted, Mr. Haggis wrote to Development Officer Laurel Thompson inquiring about the status of the Design Review Application.⁵⁸

⁵² Tab 29, City's Record, at p. 473.

⁵³ Tab 29, City's Record, at p. 473.

⁵⁴ Tab 29, City's Record, at p. 473.

⁵⁵ Tab 50, City's Record at p. 1 - email from Mr. Haggis to Laurel Thompson dated January 27, 2023 (pages in this Tab are not numbered sequentially).

⁵⁶ Tab 50, City's Record, see generally pgs. 1-6 (pages in this Tab are not numbered sequentially).

⁵⁷ Tab 50, City's Record, at p. 449. (pages in this Tab are not numbered sequentially).

⁵⁸ City's Record, Tab 50, pg. 448. (pages in this Tab are not numbered sequentially).

46. Mr. Haggis received no response so on June 9, 2023, he followed up with the Planning and Heritage Department staff again.⁵⁹ Development Officer Emily Trainor responded on June 13, 2023, informing Mr. Haggis that the application had not yet been assigned to anyone for review.⁶⁰
47. On July 19, 2023, Mr. Haggis wrote once more to the Planning and Heritage Department stating that they still had not received any comments or update regarding the Design Review Application.⁶¹
48. On July 21, 2023, at 3:42 p.m., Ms. Trainor replied to Mr. Haggis and informed him that her and Ms. Thompson would be reviewing the proposal against the Zoning By-Law and that they would be scheduling a meeting with the City's Heritage Officer, Todd Saunders early next week "to discuss" before forwarding the application on to a Design Reviewer.⁶²
49. On July 21, 2023, at 3:44 p.m., Ms. Trainor emailed the City's Heritage Officer, Todd Saunders to ask if she could discuss the proposed development of 10 Prince Street.⁶³
50. On July 24, 2023, Ms. Trainor inquired with Mr. Haggis whether there were any additional materials for the Planning and Heritage Department to review.⁶⁴ On July 24, 2023, Mr. Haggis replied:

...The full package and application was submitted about 7 weeks ago now but we also shared the initial site plan drawings and reviewed it with Laurel and Brandon from a zoning perspective back in Feb/March of this year. We did so before investing time into the material palette and renderings carried in the package. Based on our past discussions and emails with the department on it, I believe all should be good from a zoning / development bylaw perspective but let us know if you need anything else.⁶⁵

51. There is no indication that Planning and Heritage Department staff ever identified any issues concerning the Design Review Application's compliance with the Zoning By-law.
52. A meeting between Ms. Trainor, Ms. Thompson, and Ms. Saunders was scheduled for Wednesday July 26, 2023.⁶⁶
53. On August 21, 2023, Todd Saunders wrote to Ms. Trainor:

I believe we spoke some time ago regarding an application for 10 Prince Street and the possible implications for any possible heritage

⁵⁹ City's Record, Tab 50, pg. 444 & 436 (pages in this Tab are not numbered sequentially).

⁶⁰ City's Record, Tab 50, pg. 435-436 (pages in this Tab are not numbered sequentially).

⁶¹ City's Record, Tab 50, pg. 405 (pages in this Tab are not numbered sequentially).

⁶² City's Record, Tab 50, pg. 405 (pages in this Tab are not numbered sequentially).

⁶³ City's Record, Tab 50, pg. 411 (pages in this Tab are not numbered sequentially).

⁶⁴ City's Record, Tab 50, pg. 405 (pages in this Tab are not numbered sequentially).

⁶⁵ City's Record, Tab 50, pg. 382 (pages in this Tab are not numbered sequentially).

⁶⁶ Tab 50, City's Record at p. 403 (pages in this Tab are not numbered sequentially).

*value of the existing building. I will be completing a package for next Mondays Heritage Board meeting on Wednesday and am wondering if this should d [sic] be included to determine if there is any interest in designating the property as a Heritage Resource...*⁶⁷

54. On August 24, 2023, approximately six months after the draft Development design materials were delivered to the Planning and Heritage Department, and approximately three months after the Design Review Application was submitted, Ms. Trainor forwarded the Design Review Application to Design Reviewer, Greg Munn.⁶⁸
55. Given the extensive communications between Mr. Haggis and Planning and Heritage Department staff up to this point, it is perplexing that a Development Officer was unable to confirm the application's compliance with the Zoning By-law for almost three months.
56. In Ms. Trainor's correspondence forwarding the Design Review Application to Design Reviewer, Greg Munn, she informed him that the Heritage Board was meeting on August 28, 2023, to decide on whether to Designate the Property as a Heritage Resource.⁶⁹
57. Ms. Trainor also confirmed in this correspondence that, "the proposal appears generally compliant with all other applicable regulations of the Zoning By-law in terms of building location, height, parking, etc."⁷⁰

August 28, 2023 Heritage Board Meeting

58. At the August 28, 2023 Heritage Board meeting, Ms. Saunders presented the Planning and Heritage Department's case for the temporary Designation.
59. Ms. Saunders noted that, if Sabharwal Holdings' development proposal:

*[W]ere to be approved, it would involve the demolition or removal of the existing building, and the demolition is an as of right under the Zoning and Development Bylaw. So, we're just asking today whether or not Heritage Board feels there is a desire for Council to impose a temporary designation on the property, thus slowing or preventing its demolition.*⁷¹
60. Councillor McCabe asked for clarification about whether the owners of 10 Prince Street were asking for a designation. Ms. Saunders confirmed that the proposed Designation was "coming from staff" so that "we don't permit something to happen that Heritage Board wouldn't want to happen."⁷²
61. According to Ms. Saunders, the Planning and Heritage Department was making no recommendation to the Heritage Board regarding the temporary Designation. Instead, the

⁶⁷ Tab 50, City's Record at pg. 375 (pages in this Tab are not numbered sequentially).

⁶⁸ Tab 50, City's Record at p. 291 (pages in this Tab are not numbered sequentially).

⁶⁹ Tab 50, City's Record at p. 291 (pages in this Tab are not numbered sequentially).

⁷⁰ Tab 50, City's Record at p. 291 (pages in this Tab are not numbered sequentially).

⁷¹ Tab 6, City's Record at p. 58.

⁷² Tab 6, City's Record at p. 59.

staff was simply asking whether the Heritage Board itself wanted to recommend the Designation.⁷³

62. The Heritage Board passed a motion to recommend to Council to put a temporary Heritage Designation on 10 Prince Street.⁷⁴
63. Following the Heritage Board meeting of August 28, 2023, the Heritage Board held its recommendation to Council to put a temporary Heritage Designation on 10 Prince Street in abeyance at the request of the Chair of the Heritage Board, pending a recommendation to the Heritage Board from staff.⁷⁵
64. On August 29, 2023, Ms. Saunders told Greg Munn's office that the Heritage Board was recommending to Council that a temporary Designation be imposed on the Property, and that this would be presented to Council at their September meeting.⁷⁶
65. On August 29, 2023, in the absence of any orders from Council or recommendations to Council with respect to a Heritage Designation, the Design Reviewer, Greg Munn asked Ms. Trainor and Ms. Saunders whether he should hold off on performing the Design Review until further decisions were made regarding 10 Prince Street.⁷⁷
66. It does not appear as though Ms. Trainor or Ms. Saunders ever definitively confirmed what Greg Munn should do with respect to his Design Review.⁷⁸
67. Donna Miller-Ayton, Manager (Policy and Heritage) with the City, met with Deputy Mayor Jankov in September 2023 and decided to re-introduce the temporary Designation of 10 Prince Street to the Heritage Board at its next meeting.⁷⁹ In an email from Donna Miller-Ayton to Todd Saunders, she noted that Deputy Mayor Jankov:

[A]sked about the Developer being notified. She talked about the Developer being told when buying the property that it was not designated heritage. However, the Bylaw empowers the Heritage Officer to recommend Temporary Designation without prior notice.⁸⁰

September 25, 2023 Heritage Board meeting

68. At a September 25, 2023 Heritage Board meeting, Ms. Saunders formally recommended to the Heritage Board that a temporary Designation be imposed on the Property.⁸¹

⁷³ Tab 6, City's Record at p. 60.

⁷⁴ Tab 6, City's Record at pg. 61-62.

⁷⁵ Tab 8, City's Record at pg. 90.

⁷⁶ Tab 50, City's Record at pg. 217.

⁷⁷ Tab 50, City's Record at pg. 216.

⁷⁸ Tab 50, City's Record at pg. 215-216.

⁷⁹ Tab 48, City's Record at p. 692.

⁸⁰ Tab 48, City's Record at p. 692.

⁸¹ Tab 9, City's Record.

69. The transcript of the Heritage Board's September 25, 2023 meeting confirm that the Planning and Heritage Department had been instructing Sabharwal Holdings and Mr. Haggis to make design changes to the proposed development for 10 Prince Street.
70. The transcript of the hearing also confirms that the Planning and Heritage Department staff were recommending the Property for Designation, not because of its heritage value, but because of their design concerns with the new Development:

Laurel Palmer: ... when we originally met in early winter, Robert and I both met in my office and discussed this project and I did voice my concerns with the bulk and the scale and the mass and its presence on the streetscape and where it was located on the corner and relevance to other buildings in relation and I said at that time that I felt that it would be a challenge with Design Review and that I felt that Heritage Board would more than likely have concerns with the building and I felt it should be scaled down before it came back either to Design Review or Heritage Board.⁸²

71. The Heritage Board resolved to recommend that Council impose a temporary Designation on 10 Prince Street.⁸³
72. On October 10, 2023, Council imposed a temporary Designation on the Property.⁸⁴
73. By this point, a total of 158 days had passed since the fully compliant Design Review Application was submitted to the Planning and Heritage Department.
74. A total of 47 days had passed since the Design Reviewer Greg Munn received the Design Review Application.
75. As noted, the Design Review process in the Zoning By-law requires a Design Reviewer who has been forwarded a compliant development permit application to "[p]rovide written feedback, comments, and a final recommendation within a specified 10 business day review period."⁸⁵
76. To date, Sabharwal Holdings has not received any feedback, comments, or recommendations concerning its Design Review application.

Expiry of the temporary Designation

77. Section 3.4.5 of the Heritage By-law states that within 45 calendar days of the date of the Notice of temporary Designation of a Heritage Resource, the temporary Designation status will expire unless Council proceeds with the process to Designate the Heritage Resource by posting a Notice of Intent to Designate.⁸⁶

⁸² Tab 9, City's Record at p. 124.

⁸³ Tab 9, City's Record at pg. 125.

⁸⁴ Tab 11, City's Record.

⁸⁵ Zoning By-law, s. 3.14.3(b)(iii) **[Tab 3 of the Appellant's Submissions]**.

⁸⁶ Tab 53, City's Record at s. 3.4.5.

78. The temporary Designation imposed by Council on October 10, 2023, was in effect until November 24, 2023.
79. In preparation for a November 16, 2023 Heritage Board meeting, Planning and Heritage Department staff collaborated with a heritage consulting firm, Brighter Community Planning & Consulting, to draft a revised report concerning 10 Prince Street (the "Brighter Planning Report").⁸⁷
80. The Brighter Community Planning & Consulting expert sent the Brighter Planning Report to the Planning and Heritage Department in draft form and asked if any changes or additional information to the draft report were required.⁸⁸
81. Several Planning and Heritage Department staff members then directly edited the Brighter Planning Report.⁸⁹
82. The Planning and Heritage Department staff also suggested other changes to strengthen their position, such as the addition of a numerical score:

*Thanks again for your work on this on such short notice. I read through and made a minor change, and suggested another. Quick questions, would it add more to our position if a score was added based on the assessment criteria outline? An in-house score was added to our overall report, but providing another score might be beneficial in advancing our argument and your recommendation for Designation.*⁹⁰

[emphasis added]

83. The Brighter Community Planning & Consulting expert met with Ms. Saunders to ensure that they had a "consistent interpretation of the criteria" and then assigned 10 Prince Street a numerical score.⁹¹
84. The Brighter Community Planning & Consulting expert never visited 10 Prince Street in person.⁹² Instead, she relied on the information provided to her by the Planning and Heritage Department. The Brighter Planning Report awarded the Property five points for its age, four points for its historical value, and 59 points for its "Architectural/archeological/aesthetic value".⁹³

⁸⁷ Tab 48, City's Record at p. 649.

⁸⁸ Tab 48, City's Record at p. 631.

⁸⁹ Tab 48, City's Record at pp. 630-631.

⁹⁰ Tab 48, City's Record at p. 630.

⁹¹ Tab 48, City's Record at p. 628.

⁹² Tab 48, City's Record at p. 639.

⁹³ Tab 25, City's Record at pp. 419-420.

85. At the November 16, 2023 Heritage Board meeting, Ms. Saunders presented the Brighter Planning Report as that of an "independent consultant's" and recommended that the Heritage Board Designate the Property.⁹⁴
86. Ms. Saunders began her submissions to the Heritage Board by stating that: "[p]lanning and Heritage Department is initiating the Designation of 10 Prince Street by including it on the inventory of Designated Heritage Resources."⁹⁵
87. The Heritage By-law indicates that it is only after Council has Designated a Heritage Resource that written Notice of the Designation shall be filed on the Register of Heritage Places.⁹⁶
88. The Heritage Board resolved to recommend to Council that the Property be Designated as a Heritage Resource.⁹⁷
89. On November 23, 2023, Sabharwal's counsel Margaret Anne Walsh delivered correspondence outlining objections to the Designation and procedural errors made by the Planning and Heritage Department and the Heritage Board.⁹⁸ In brief, the objections consisted of the following:
 1. ***Inappropriate consideration of the potential new development:*** *The design features of a development that may, or may not, be constructed is not one of the enumerated factors to be considered under section 3.2.3 of the Heritage By-law.*
 2. ***Procedural failures under the By-law:***
 - (a) ***Temporary Designation was not appropriate:*** *A temporary Designation can only be imposed where there is a "risk of imminent, reparable or costly damage to the site's heritage nature", pursuant to Section 3.4.1 of the Heritage By-law. Although the Appellant had submitted a Design Review Application, it had not been approved. The Appellant was not in a position to remove, demolish, alter or otherwise develop the Property; and,*
 - (b) ***Inadequate Notice:*** *Notice of the temporary Designation was not served on the Appellant, as required by Section 3.4.2 of the Heritage By-law. Also, the notice posted in the Guardian and on the City's website do not contain the information required under Section 3.4.3 of the Heritage By-law.*

⁹⁴ Tab 27, City's Record at p. 438.

⁹⁵ Tab 27, City's Record at p. 437.

⁹⁶ Tab 53, City's Record at s. 3.3.9(c) of the Heritage By-law.

⁹⁷ Tab 29, City's Record at pg. 445.

⁹⁸ Tab 29, City's Record.

3. ***Property does not meet criteria for Heritage Designation: The Planning and Heritage Department have failed to provide any evidence suggesting that the Property has historical value, as required by Section 3.2.2 of the Heritage By-law.***

90. On November 24, 2023, the temporary Designation expired.
91. On November 27, 2023, Council met and deferred ordering a Notice of Intention to Designate until after it had obtained legal advice.⁹⁹
92. On November 28, 2023, Margaret Anne Walsh, counsel for Sabharwal Holdings, wrote further correspondence to the Planning and Heritage Department setting out a number of additional objections to the Designation.¹⁰⁰
93. Notwithstanding these objections, the correspondence communicated that Sabharwal Holdings remained “open to working with the Heritage Board through the Design Review process to come to a design that complements this streetscape in the Lot 500 Area.”¹⁰¹
94. With the expiry of the temporary Designation, the Planning and Heritage Department was required to process the Design Review Application.
95. However, in contravention of the Zoning By-law, Sabharwal Holdings received no comments, feedback, or recommendations for the Development from the Planning and Heritage Department.
96. On January 20, 2024, Margaret Anne Walsh wrote correspondence to the Planning and Heritage Department requesting an update on the status of the Design Review Application and reminded them that the temporary Designation had expired and that there was no reason to delay the processing of the application.
97. In response to Ms. Walsh’s correspondence, dated November 28, 2023, counsel for the City replied on March 18, 2024 to provide a contrary interpretation of the Heritage By-law. The correspondence did not address why the Design Review Application was not being processed.¹⁰²

Formal Notice of Intention to Designate

98. On April 25, 2024, the City delivered to Ms. Walsh a Notice of Intention to Designate the Property, effective May 1, 2024 (the “Notice of Intention”).¹⁰³

⁹⁹ Tab 30, City’s Record at pp. 482-483.

¹⁰⁰ Tab 31, City’s Record.

¹⁰¹ Tab 31, City’s Record at p. 489.

¹⁰² Letter from M. McKenna to M. Walsh dated March 18, 2024. **[Tab 6 of Appellant’s Submissions]**

¹⁰³ Letter from City of Charlottetown to Sabharwal Atlantic Holdings Inc., dated April 25, 2024. **[Tab 7 of Appellant’s Submissions]**

99. 159 days passed between the expiry of the temporary Designation and the posting of the Notice on Intention. In total, the Planning and Heritage Department staff refused to process the Design Review Application without lawful authority for a total of 317 days.
100. The Notice of Intention stated that the Appellant had until May 31, 2024, to submit objections to the Planning and Heritage Department. The correspondence expressly stated that objections could be submitted by email to planning@charlottetown.ca.¹⁰⁴
101. On May 31, 2024, the Appellant submitted objections to the Planning and Heritage Department in a letter delivered via email correspondence to planning@charlottetown.ca.¹⁰⁵
102. On July 2, 2024, Ms. Walsh received a letter referencing a second Notice of Intention to Designate the Property (the "2nd Notice of Intention").¹⁰⁶
103. The letter concerning the 2nd Notice of Intention was dated to June 13, 2024. However, the 2nd Notice of Intention itself was apparently posted on June 18, 2024. According to this letter, the Appellant's objections had to be filed by July 18, 2024.¹⁰⁷
104. On July 4, 2024, Ms. Walsh responded to inquire whether the City was requesting further submissions.¹⁰⁸
105. On July 9, 2024, the Planning and Heritage Department expressed that it had no record of any objections having been submitted in response to the initial Notice of Intention.¹⁰⁹
106. On July 16, 2024, the Planning and Heritage Department acknowledged that it had "missed" the objections previously submitted by the Appellant on May 31, 2024.¹¹⁰
107. On the same date, the Planning and Heritage Department assured Ms. Walsh that she would be given an opportunity to make oral submissions at the Heritage Board meeting scheduled for August 26, 2024, where a final decision was going to be made regarding the Designation.¹¹¹

August 26, 2024 – Heritage Board Meeting

108. On August 26, 2024, the Heritage Board met to consider whether to recommend that Council place a permanent Heritage Designation over the Property (the "Hearing").

¹⁰⁴ Letter from City of Charlottetown to Sabharwal Atlantic Holdings Inc., dated April 25, 2024. **[Tab 7 of Appellant's Submissions]**

¹⁰⁵ Tab 49, City's Record at p. 739.

¹⁰⁶ Tab 48, City's Record at p. 575.

¹⁰⁷ Tab 48, City's Record at p. 574.

¹⁰⁸ Tab 48, City's Record at p. 574.

¹⁰⁹ Tab 48, City's Record at p. 574.

¹¹⁰ Tab 48, City's Record at p. 572.

¹¹¹ Tab 48, City's Record at p. 572.

109. The Hearing began with Ms. Saunders providing an account of the proceedings up to that point.¹¹²

110. Ms. Saunders noted the Heritage Board's prior reliance on the "independent heritage assessment" from November 2023:

*... Following an independent heritage assessment report in November 2023, Heritage Board made a recommendation to City Council for permanent Designation of the property.*¹¹³

111. She then discussed the reason for Council's deferral on November 27, 2023, and the legal advice that was obtained.

112. In her submissions to the Heritage Board, Ms. Saunders repeatedly relied upon a legal opinion obtained in response to Sabharwal Holdings' objections – which Ms. Saunders indicated stated that "the City had conducted the review process in substantial compliance with the Bylaw".¹¹⁴

113. At the conclusion of Ms. Saunder's opening remarks, Councillor McCabe put forward a motion to accept the Planning and Heritage Department's recommendation.¹¹⁵

114. In reliance upon the "independent" report, and a misreading of the 1879 atlas, Mayor Brown stated that he was "supporting the resolution".¹¹⁶

115. Deputy Mayor Jankov then invited Ms. Walsh to make submissions on behalf of the Appellant.¹¹⁷

116. Ms. Walsh began her submissions by remarking that the Heritage Board had nearly just skipped the part of the Hearing where the Heritage Board listens to the concerns of the property owner.¹¹⁸

117. Despite this being the only stage in the Designation process that the Heritage By-law demands that the owner's objections are reviewed, Mayor Brown suggested that it was already too late:

Mayor Brown: *You're quite familiar with the 500 Lots, its South of Euston to the water, down by Victoria Park and Esher Street, that's the 500 Lots. So, I grew up in the 500 Lots, our home is Designated as a Heritage property, so are many others. The point is, is that there were lots of opportunities, its been going on for a year and a*

¹¹² Tab 38, City's Record at pgs. 513-515.

¹¹³ Tab 38, City's Record at p. 513.

¹¹⁴ Tab 38, City's Record at p. 514.

¹¹⁵ Tab 38, City's Record at pg. 515.

¹¹⁶ Tab 38, City's Record at p. 515-516.

¹¹⁷ Tab 38, City's Record at p. 516.

¹¹⁸ Tab 38, City's Record at p. 516.

half that you and your client could have come to this board to say,
put the brakes on.¹¹⁹

[emphasis added]

118. At the conclusion of the Hearing, the Heritage Board voted in favour of recommending the Heritage Designation to Council.¹²⁰
119. The recommendations from the Heritage Board and the Planning and Heritage Department were put forward at a Regular Meeting of Council on September 10, 2024.¹²¹
120. Councillor Bernard noted that it was unprecedented for the City to designate a property as a Heritage Resource "without the owner's permissions or without the owner asking for it."¹²²
121. Nonetheless, Council resolved to accept the Heritage Board's recommendation and Designate 10 Prince Street a Heritage Resource.¹²³
122. Mayor Brown, Deputy Mayor Jankov, Councillor Beck, and Councillor McCabe each voted at both the August 26, 2024 Heritage Board meeting and the September 10, 2024 Council meeting.
123. With reference to the Notice of Intention to Designate dated May 1, 2024, Council issued a Notice of Heritage Resource Designation on September 12, 2024.¹²⁴

¹¹⁹ Tab 38, City's Record at p. 520.

¹²⁰ Tab 38, City's Record at p. 526

¹²¹ Tab 40, City's Record at p. 551-552.

¹²² Tab 40, City's Record at p. 552.

¹²³ Tab 40, City's Record at p. 554.

¹²⁴ Tab 42, City's Record at p. 556.

PART II – ISSUES

124. The issue for the Commission to consider on this appeal is whether the decision to Designate 10 Prince Street (PID No. 336321) as a Heritage Resource should be set aside due to:

- (a) A reasonable apprehension of bias in relation to the Heritage Board's decision to Designate the Property;
- (b) Procedural unfairness and closed-mindedness throughout the Heritage Designation investigation and recommendation process; and/or,
- (c) The expiry of Council's jurisdiction prior to ordering the September 10, 2024, Heritage Designation.

PART III – SUBMISSIONS

125. The Council's decision to Designate the Property as a Heritage Resource is substantively unreasonable due to the City's failures at each stage of the process to satisfy its duty of procedural fairness.
126. To begin, the section immediately below outlines the duty of fairness owed to the Appellant throughout the Heritage Designation process.
127. Building on this, these submissions outline comments from Heritage Board members at the August 26, 2024 Heritage Board meeting that give rise to a reasonable apprehension of bias.
128. In addition to these concerns, the section that follows sets out the City's various other breaches of the duty of fairness throughout the Heritage Designation process.
129. Finally, the submissions conclude by demonstrating that, aside from the substantial breaches of procedural fairness, Council was out of time to Designate the Property prior to issuing its order on September 10, 2024.

A. The Duty of Procedural Fairness

130. It is clear that a duty of procedural fairness applies with respect to the imposition of Heritage Designations:

The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness.¹²⁵

131. Issues of procedural fairness are reviewable for correctness.¹²⁶

132. The level of procedural fairness owed varies depending on the role served by the administrative bodies involved in the decision:

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.¹²⁷

133. There are two possible tests concerning bias that are applicable to administrative decision-makers depending their function and purpose. These are (1) the reasonable apprehension of bias test, and (2) the closed mind test:

[96] The decision in Newfoundland Telephone, supra, further illustrates the principle that the test for bias is contextual and varies depending on the context and the type of function performed by the administrative decision-maker. It appears to me from these cases,

¹²⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 20. **[Tab 8 of Appellant's Submissions]**

¹²⁶ *Mission Institution v. Khela*, 2014 SCC 24 at para. 79. **[Tab 9 of Appellant's Submissions]**

¹²⁷ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC) [1992] 1 SCR 623 [*Newfoundland*] at 636. **[Tab 10 Appellant's Submissions]**

*that the applicable standard for disqualifying bias is a sliding scale of sorts, moving from a reasonable apprehension of bias test to a closed mind test.*¹²⁸

134. The closed mind test applies where an administrative body is performing a merely investigative or policy-making role. The Supreme Court of Canada provided the following description of the closed mind test:

*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.*¹²⁹

135. Alternatively, where decision-makers preside over a hearing at which opposing parties present submissions, the decision-makers take on an adjudicative function and therefore are subject to the stringent reasonable apprehension of bias test:

*Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias.*¹³⁰

136. The more stringent “reasonable apprehension of bias” test applies to elected municipal officials where they are serving an adjudicative function:

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... 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.¹³¹

[emphasis added]

137. The duty of fairness requires that there be no appearance of bias on the part of the decision-maker:

That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator

¹²⁸ *Kiann v HRM*, 2024 NSSC 305 at para 96. [Tab 11 Appellant’s Submissions]

¹²⁹ *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170 at p. 1197. [Tab 12 Appellant’s Submissions]

¹³⁰ *Newfoundland*, *supra* note 127 at 644. [Tab 10 Appellant’s Submissions]

¹³¹ *McLaren v. Castlegar (City)*, 2011 BCCA 134 at para 35. [Tab 13 Appellant’s Submissions]

*who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias...*¹³²

[emphasis added]

138. The reasonable apprehension of bias test does not examine whether there is, in fact, bias from the decision-maker. Instead, it focuses on whether there are elements that give rise to a reasonable perception of bias:

*The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.*¹³³

B. Reasonable apprehension of bias at the August 26, 2024 Heritage Board meeting

139. The decision to permanently Designate the Property was effectively made at the August 26, 2024 Heritage Board meeting.
140. At the subsequent meeting where the Designation was formally imposed by Council, no submissions were made, and very limited reasons were ultimately provided. While the Heritage By-law technically endows Council with the power to impose Heritage Designations, the Appellant had no participatory rights before Council.
141. Instead, the Appellant was only given an opportunity to raise objections to the Heritage Board. Council then reached its decision in reliance on the recommendations from the Heritage Board and the Planning and Heritage Department.
142. The Appellant had no opportunity to remedy errors in the Heritage Board's decision to recommend the Designation by presenting oral or written objections to Council. Any unfairness at the level of the Heritage Board decision necessarily taints the decision from Council.
143. On July 16, 2024, counsel for the Appellant asked Planning and Heritage Department staff if she would have an opportunity to make submissions at the August 26, 2024 Heritage Board meeting.¹³⁴
144. On the same date, the Planning and Heritage Department staff replied and informed counsel for the Appellant that she would be granted an opportunity to state her objections during the meeting.¹³⁵
145. This correspondence occurred prior to the deadline for filing written objections.

¹³² *Newfoundland, supra* note 127 at 636. [Tab 10 Appellant's Submissions]

¹³³ *Newfoundland, supra* note 127 at 636. [Tab 10 Appellant's Submissions]

¹³⁴ Tab 48, City's Record at p. 572.

¹³⁵ Tab 48, City's Record at p. 572.

146. The laws of natural justice provide that where a claimant has legitimate expectations concerning procedure, a failure to follow this procedure is a breach of the duty of fairness:

*If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.*¹³⁶

[emphasis added]

147. Legitimate expectations arise where a decision-maker or a relevant actor represents to a claimant that a particular procedure will be followed:

*The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated.*¹³⁷

[emphasis added]

148. The Appellant was entitled to expect that the Heritage Board would hear oral submissions presented on its behalf prior to reaching any decision at the August 26, 2024 Heritage Board meeting.
149. Counsel for the Appellant attended the August 26, 2024 Heritage Board meeting and observed as, prior to hearing any submissions from the Appellant's representative, both Mayor Brown and Councillor McCabe stated that they would be supporting the motion to recommend the Designation to Council. Mayor Brown and Councillor McCabe were voting members of both the Heritage Board and Council.
150. Before the vote on the resolution was completed, Deputy Mayor Jankov, acting as Chair, invited Margaret Anne Walsh, Sabharwal Holdings' representative, to speak.
151. Mayor Brown and Councillor McCabe both maintained their support for the Designation even after hearing the submissions on behalf of Sabharwal Holdings.
152. Even after becoming aware that the Heritage Board had nearly voted without considering the Appellant's oral submissions, Mayor Brown made comments that appear to suggest he had already closed his mind regarding the matter:

***Mayor Brown:** Right. So, this has been going on a year plus. Fifteen months let's say. We've had public meetings, you've been aware of those public meetings, I'm sure Dr. Vivick has been aware of those meetings, just like what the Chair did today, she invited you, that's her call as Chair, to come up and speak to the issue. I am sure we; the Chair would have done the same if Dr. Vivick or any of his family showed up to speak to, they bought a property,*

¹³⁶ Baker, *supra* note 124 at para 26. [Tab 8 of Appellant's Submissions]

¹³⁷ Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36 at para 95, citing: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710. [Tab 14 of Appellant's Submissions]

now they're being told its going to be Designated as an historic, heritage, historic property.

...

Mayor Brown: ... *The point is, is that there were lots of opportunities, its been going on for a year and a half that you and your client could have come to this board to say, put the brakes on.*¹³⁸

[emphasis added]

153. The above comments disregard the fact that the Appellant had been working to contest the Heritage Designation by whatever means available to it as soon as it became aware of the impending Designation.
154. It is worth highlighting that, under the Heritage By-law, the only opportunity for a property owner to object to a Heritage Designation is at this very stage of the process.
155. The August 26, 2024 Heritage Board meeting was precisely the forum where the interests of the owner were to be weighed against the interests in favour of the Designation. The Heritage Board is the only administrative body in the entire process where the Heritage Bylaw requires a review of a property owner's objections.
156. The Heritage Board was clearly serving an adjudicative function at this meeting, as its role was to hear and consider opposing submissions from the Planning and Heritage Department and the Appellant.
157. Accordingly, the reasonable apprehension of bias test applies to the Heritage Board's decision.
158. In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, the Supreme Court of Canada held that public statements made by a tribunal member concerning a hearing, which was already underway, could readily be understood by a reasonable observer as demonstrating that he had pre-judged the matter before all the evidence had been presented:

*On January 24, while the hearing was already in progress, Wells was making statements that might readily be understood by a reasonable observer, as they were by the telecast reporter Jim Thoms, that Wells had made up his mind what his judgment would be even before the Board had heard all the evidence. Evidence sufficient to create a reasonable apprehension of bias can be found in some of the statements made by Wells during the course of a January 24th telecast, and in the subsequent comments to the press and to the radio.*¹³⁹

¹³⁸ Tab 38, City's Record at p. 520.

¹³⁹ *Newfoundland*, supra note 128 at 643. [Tab 10 of Appellant's Submissions]

159. The Supreme Court of Canada held that the evidence that the tribunal member had pre-judged the matter demonstrated, not only a reasonable apprehension of bias, but also a closed mind on the subject.¹⁴⁰
160. By voicing their support for the Designation prior to hearing the submissions from the Appellant, and then responding to the Appellant's submissions in a manner suggesting that the objections were too late, the Heritage Board created a reasonable apprehension of bias and demonstrated closed minds.
161. The Supreme Court of Nova Scotia recently considered whether city councillors for the Halifax Regional Municipality demonstrated a reasonable apprehension of bias while refusing to approve a site plan for a proposed development.¹⁴¹
162. In *Kiann v HRM*, a number of city councillors agreed on a blanket denial of a site plan for a proposed development based on the location where the proposed development was to be constructed, instead of considering the relevant criteria. The Court found that the test for reasonable apprehension of bias was applicable, but that, in any case, two of the city councillors demonstrated a closed-mind:

*[122] As noted above, **councillors sitting on Community Council are elected members**, and it is to be expected they will opine on issues of importance to their constituents, including potential reforms of HRM policies, such as land use bylaws relating to C&D facilities and their locations. Any test of bias must be sensitive to the institutional context in which the decision is being made. **However, councillors must still approach a site plan appeal hearing fairly and give due consideration to the parties' positions** in assessing whether the site plan in question meets the criteria. **Councillors Purdy and Hendsbee did not engage with the site plan appeal process, fixating instead on their belief the Property was simply not an appropriate location for a C&D facility.***

*[123] I am of the view the comments from Community Councillors Purdy (Chair) and Hendsbee illustrate both an **apprehension of bias and a closed mind**. Their comments would make it apparent to a reasonable bystander that Kiann was not given a fair hearing in front of decision makers that were open to persuasion. As the respondent at the appeal hearing, Kiann was entitled to procedural fairness. **The Councillors were required to conduct themselves so that there would be no reasonable apprehension of bias**. Their comments undermined any sense of impartiality. The comments strayed so far outside the reasonable realm of proper consideration that one cannot conclude otherwise than that they raise a reasonable apprehension of bias. The clear impression is that **they were not deciding based on the applicable statutory scheme and the evidence before them.***

¹⁴⁰ Newfoundland, *supra* note 128 at 644. [Tab 10 of Appellant's Submissions]

¹⁴¹ *Kiann v HRM*, 2024 NSSC 305. [Tab 11 Appellant's Submissions]

Their comments indicate a disqualifying predisposition to denying Kiann's appeal on the basis of their view that the site was inappropriate for a C&D facility. Therefore, because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias (and also a closed mind), I would allow this judicial review.¹⁴²

[emphasis added]

163. Mayor Brown stated that the City could blanketly Designate any property within the 500 Lot Area as a Heritage Resource. In support of the Designation, Mayor Brown cited the fact that the Property was in the Lot 500 Area, his personal relationship to the area, and the history of Charlottetown in general:

Mayor Brown: No, I know that, so by that designation, that 500 Lot, that really put a, placed a blanket over the 500 Lots to say properties that could be, should be designated are in line or could be in the que like today. Is that valid to say?

Todd Saunders: Possibly, I don't think it was ever explicitly said like that, but it was certainly defined as a heritage area.

...

Mayor Brown: ... And you have to remember Margaret, that Charlottetown is an historic city. It was established in 1765 as part of Samuel Hollands survey, and then go fast forward to 1855 when we received our Charter as a city, but we, we have to look at that historic significance and that's what Im putting into this, when I'm making my, when I plan to make my decision.

Margaret Anne Walsh: So are you saying that any property in Charlottetown could be unilaterally designated at any point in time with such little input from the owner, this is a very slippery slope here, if, you know.

Mayor Brown: That's why I talked about the 500 Lot designation, so there's a blanket over the 500 Lots.

Margaret Anne Walsh: Certainly

Mayor Brown: Youre quite familiar with the 500 Lots, its South of Euston to the water, down by Victoria Park and Esher Street, that's the 500 Lots. So, I grew up in the 500 Lots, our home is designated as a heritage property, so are many others. The point is, is that there were lots of opportunities, its been going on for a year and a half that you and your client could have come to this board to say, put the brakes on.

[emphasis added]

¹⁴² *Kiann v HRM*, 2024 NSSC 305 at paras 122 and 123. [Tab 11 Appellant's Submissions]

164. There are additional requirements for a development in the 500 Lot Area as compared to the rest of the City, most notably: the Design Review process. However, the 500 Lot Area has not been Designated a Heritage Preservation Area and there is no blanket Designation over all of the buildings contained therein.
165. In fact, just prior to the temporary Designation process concerning the Property being initiated, the Heritage Board declined to impose a temporary Heritage Designation on another property in the 500 Lot Area that was older than the building at 10 Prince Street and had a comparable heritage score.¹⁴³ That building has since been demolished to allow for a new development.
166. The Planning and Heritage Department noted in its report that the building, “adds to the streetscape in its scale and placement.”¹⁴⁴ However, it also recognised that, “[t]he Official Plan states new development/re-development should not be discouraged and the 500 Lot Standards and Guidelines are designed to ensure new development fits in and enhances the character of the 500 Lot Area.”¹⁴⁵
167. In parallel with the circumstances in *Kiann v HRM*, the Heritage Board members closed their minds to the Appellants’ submissions based on the location of the Property and other irrelevant criteria.
168. A decision involving a reasonable apprehension of bias on the part of the decision-makers cannot stand. The decision is not only voidable, it cannot be remedied by the decision of a subsequent tribunal:

Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. In Cardinal v. Director of Kent Institution, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 661, Le Dain J. speaking for the Court put his position in this way:

... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as

¹⁴³ June 14, 2023 Heritage Board Meeting Agenda. [Tab 15 of Appellant’s Written Submissions]

¹⁴⁴ June 14, 2023 Heritage Board Meeting Agenda at p. 14. [Tab 15 of Appellant’s Written Submissions]

¹⁴⁵ June 14, 2023 Heritage Board Meeting Agenda at p. 14. [Tab 15 of Appellant’s Written Submissions]

an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

*In my view, this principle is also applicable to this case. In the circumstances, there is no alternative but to declare that the Order of the Board of Commissioners of Public Utilities is void.*¹⁴⁶

[emphasis added]

169. The principle that breaches of procedural fairness require that a subsequent decision be declared void was affirmed by the Supreme Court of Canada more recently in *R v Nahanee*.¹⁴⁷ It is not open to the Commission to speculate as to what might have been found had a fair hearing been conducted.
170. In the circumstances, the appearance of bias and closed-mindedness at the August 26, 2024 Heritage Board meeting requires that the Heritage Designation on the Property be voided.

C. Procedural unfairness throughout the Designation process

171. While, the Planning and Heritage Department staff did not serve an adjudicative function, their investigation and subsequent recommendation are nonetheless subject to the "closed mind" test.¹⁴⁸
172. The close-mindedness of the Planning and Heritage Department staff and the substantial procedural unfairness that resulted, as outlined below, spoiled the information relied upon by the Heritage Board and Council and cannot be remedied by a subsequent hearing.

i. The Designation was put forward based on inappropriate criteria

173. The Designation process arose based, not on the heritage value of the Property, but on concerns from the Planning staff surrounding the appearance of the proposed Development.
174. Deputy Mayor Jankow herself repeatedly stated that the process was initiated due to concerns from Planning staff with the new building:

"... the reason that it even began, without the homeowner prompting the application, is because the homeowner submitted an application for demolition and the demolition was then going to be

¹⁴⁶ *Newfoundland*, supra note 126 at 645. [Tab 10 of Appellant's Submissions]

¹⁴⁷ *R v Nahanee*, 2022 SCC 37 at para 102. [Tab 16 of Appellant's Submissions]

¹⁴⁸ *Kiann v HRM*, 2024 NSSC 305 at para 97. [Tab 11 Appellant's Submissions]

*a new development and the Planning staff did not see that as fitting into the 500 Lot Area...*¹⁴⁹

*“... we wouldn't be here today if it hadn't been for the fact that the owner of the property submitted to the Planning department an application to demolish the existing building to put up a new building of great scale...”*¹⁵⁰

*“Now the history of that, you are correct, was prompted by what was happening within the staff department of Planning staff...”*¹⁵¹

[emphasis added]

175. It is worth noting that the Appellant had not applied for a demolition permit. Allowing the Design Review process to proceed would not jeopardize the existing building. Given that the Planning and Heritage Department's primary reason for seeking the Heritage Designation was the appearance of the proposed Development, their concerns would have been appropriately addressed through the Design Review process.
176. To the extent that there were valid concerns surrounding the scale or design of the new development, these should have been addressed through the Design Review application, not through a Heritage Designation.
177. The vision for the Lot 500 Area in the City of Charlottetown Official Plan provides that: “New development, redevelopment, intensification and changes in land use should not be discouraged as they can have positive influences and make significant contributions to the evolution of the area.”¹⁵²
178. Evaluations of the Property by the Planning and Heritage Department staff demonstrate that their objections were entirely aesthetic.
179. In Ms. Saunders' initial presentation of the Property to the Heritage Board for consideration of a temporary Designation, she provided almost no evidence of any historical significance surrounding the Property and focused much of her presentation on the streetscape and the proposed Development.¹⁵³
180. Laurel Palmer confirmed at the September 25, 2023 Heritage Board meeting that the Planning and Heritage Department staff's issue with the Development centered around “the bulk and the scale and the mass”, and suggested that if the Development were not scaled down, then the Heritage Board would take issue with it:

Laurel Palmer: ... when we originally met in early winter, Robert and I both met in my office and discussed this project and I did voice

¹⁴⁹ Tab 30, City's Record at p. 479.

¹⁵⁰ Tab 30, City's Record at p. 480.

¹⁵¹ Tab 30, City's Record at p. 481.

¹⁵² City of Charlottetown Official Plan, July 1999 (Updated October 31, 2023), at s. 4.2.1. [Tab 17 of Appellant's Submissions]

¹⁵³ Tab 6, City's Record at pp. 58-59.

my concerns with the bulk and the scale and the mass and its presence on the streetscape and where it was located on the corner and relevance to other buildings in relation and I said at that time that I felt that it would be a challenge with Design Review and that I felt that Heritage Board would more than likely have concerns with the building and I felt it should be scaled down before it came back either to Design Review or Heritage Board.¹⁵⁴

181. Throughout the entire Designation process, the Planning and Heritage Department's recommendations were focused on the effect of the new development to the streetscape, as opposed to the historic value of the existing building on the Property.
182. After over a year of working to Designate the Property, the Planning and Heritage Department were unable to uncover any material indicia of historical value:

3. Historic value

3.1 Architect/builder

Unable to ascertain the architect or builder for the design or construction of the building at 10 Prince Street.

3.2 Political/economic influence

No known connection with political or economic influences

3.3 Social/cultural influence

No known connection with social/cultural influences

3.4 Historical context

One owner was the owner of a sail making business while two others were blacksmiths for the railway – both major industries.

3.5 Association with event/person/activity

The building has little known connection with a significant person, institution or event. Mrs. Robert McLaren, Michael Hynes, Tony Hansen were previous owners.¹⁵⁵

183. The Planning and Heritage Department staff's opposition to the Development caused them to approach the Heritage Designation process with a closed mind. This procedural unfairness is not remedied by a subsequent hearing based the biased findings.
184. Additionally, the Planning and Heritage Department's recommendations to the Heritage Board is unreasonable due to its consideration of the new Development, which is not a relevant factor for Heritage Designations.

¹⁵⁴ Tab 9, City's Record at p. 124.

¹⁵⁵ August 26, 2024 Heritage Board Agenda at p. 18. [Tab 18 of Appellant's Submissions]

ii. Undisclosed influence on the "independent" expert

185. The Planning and Heritage Department sought out an expert report to bolster their argument in favour of Designation (the "Brighter Planning Report").
186. This report was presented as being "independent".¹⁵⁶ However, the record demonstrates that it was substantially influenced by Planning and Heritage Department staff.
187. The opinions of the Planning and Heritage Department appear to have been lent greater credence by the portrayal of the Brighter Planning Report as being an "independent" report supporting their findings.
188. The Brighter Planning Report clearly influenced the decisions from the Heritage Board and Council. The Brighter Planning Report was specifically referred to by Mayor Brown at the Heritage Board meeting where he voted to impose a permanent Designation:

Mayor Brown: ... Todd if I go to page 26 of the presentation, you have brighter community planning and consulting. Were they hired by us?

Todd Saunders: They were.

Mayor Brown: They were. And have you done this in the past, where we reached outside of our own heritage department to get a third opinion, a second opinion.

Todd Saunders: No, I haven't, not that I know of no.

Mayor Brown: And if I go to page 37, the recommendation is quite clear. Positive recommendation...

...

Mayor Brown: So again, the 500 Lots, got a second opinion from, from a group out of, a consulting firm out of Winders, Nova Scotia...

... Anyways, I'm supporting the resolution, thank you.¹⁵⁷

189. Likewise, Councillor Beck, who also voted in favour of the Designation at the Heritage Board meeting, referred to the Brighter Planning Report in his reasons for supporting the resolution at the final Council meeting:

"We had a second assessment done on the property which indicated a stronger Heritage score than the previous one... I'm going to be supporting the firm recommendation that came from the Planning and Heritage Department."¹⁵⁸

190. In the circumstances, the Planning and Heritage Department's representation surrounding the independence of the report resulted in a substantially unfair hearing for the Appellant.

¹⁵⁶ Tab 27, City's Record at p. 438.

¹⁵⁷ Tab 38, City's Record at pp. 515-516.

¹⁵⁸ Tab 40, City's Record at p. 553.

iii. Unilateral imposition of a Heritage Designation

191. The Planning and Heritage Department staff's objections to the proposed design caused them to take unlawful actions to halt the Development.
192. By the time that the Planning and Heritage Department received the Design Review Application in May 2023, Mr. Haggis had already spent several months working with the Department to ensure that the application was in accordance with the Zoning Bylaws.
193. The role of a Development Officer who receives a Design Review Application is very clearly set out at Section 3.14.3(a) of the Zoning By-law. That role is to confirm the Design Review Application's compliance with the Zoning By-law, then forward the application to a Design Reviewer.
194. At the initial stage of the Design Review process, the Development Officer is not endowed with the discretion to consider any factors beyond the development's compliance with the Zoning By-law.
195. According to the Commission in Order LA11-01, any grant of discretion in a bylaw must be unequivocal:

[61] The case law is clear. At common law, a property owner may do with his land what he wishes, subject to the rights of surrounding property owners, for example, the law of nuisance. However, these rights may be restricted by statute, regulation or bylaw. Such restrictions must be expressed clearly and with solid legislative authority. To the extent that discretion is permitted by the statute, regulation or bylaw the wording must be clear and the criteria objective. Arbitrary discretion is to be avoided.¹⁵⁹

196. The Property's potential for a Heritage Designation does not concern its current Zoning By-law compliance. Where a property owner's development satisfies the applicable municipal bylaws, the development must be allowed to proceed:

When the plans and specifications of the proposed building conform to the building by-law, the duty of the civic official is to issue the permit.¹⁶⁰

[emphasis added]

197. The Commission has recognised that "*the concept of an 'as-of right' development has a long history within Canadian municipal law.*"¹⁶¹
198. The Appellant's "as-of right" entitlement to proceed with his Design Review Application was recognised in the Planning and Heritage Department's report to the Heritage Board

¹⁵⁹ Order LA11-01, *Biovectra Inc. v. City of Charlottetown* at para 61. [Tab 19 of Appellant's Submissions]

¹⁶⁰ *Mackenzie v. Toronto*, [1915] O.J. No. 699, 7 O.W.N. 820 at para 9. [Tab 20 of Appellant's Submissions]

¹⁶¹ LA16-05, *Marshall MacPherson Ltd. v. Town of Stratford* at para 71. [Tab 21 of Appellant's Submissions]

on August 28, 2023.¹⁶² Upon receipt of the Design Review Application, the Development Officer had a civic duty to process the Design Review Application.

199. Instead of fulfilling their civic duty, the Planning and Heritage Department staff refused to process the Design Review Application and instead moved to block the Development by imposing a temporary Heritage Designation.
200. Despite failing to have the temporary Heritage Designation recommended to Council following the August 28, 2023 Heritage Board meeting, the Planning and Heritage Department continued to frustrate the development of the Property by failing to direct the Design Reviewer to proceed with the Design Review.
201. For a period of 158 days, between the date of filing and the imposition of the temporary Designation on October 10, 2023, the Planning and Heritage Department refused to process the Appellant's Design Review Application.
202. Once the temporary Designation was nearing expiry, Heritage Officer Todd Saunders expressly stated at the November 16, 2023 Heritage Board Meeting that the Planning and Heritage Department was unilaterally Designating the Property:

*So, Planning and Heritage Department is initiating the Designation of 10 Prince Street by including it on the inventory of Designated Heritage Resources.*¹⁶³

203. This statement was not a spontaneous utterance in response to a question from the Heritage Board; it was the first sentence of Ms. Saunders' submissions.
204. The Planning and Heritage Department had no authority to add the Property to the inventory of Designated Heritage Resources.
205. The Planning and Heritage Department was not successful at the November 16, 2023 Heritage Board meeting and the temporary Designation of the Property expired on November 24, 2023.
206. Counsel for the Appellant reached out to the Planning and Heritage Department asking for feedback in response to the Design Review Application on November 28, 2023, on January 30, 2024, and then again on March 6, 2024. The City has steadfastly refused to follow its bylaws and process the Design Review Application.
207. Council did not post a Notice of Intention to Designate until 159 days after the expiry of the temporary Designation. All together, the Planning and Heritage Department refused to process the Design Review Application without any authority or justification for a total of 317 days.
208. It is apparent that, in the absence of any formal Designation, the Planning and Heritage Department took it upon themselves to constructively impose the Designation.

¹⁶² Tab 4, City's Record at p. 28.

¹⁶³ Tab 27, City's Record at p. 437.

209. But for the unlawful actions of the Planning and Heritage Department during the Heritage Designation process, it appears as though the Design Reviewer would have proceeded with his review.
210. The procedural unfairness and closed-mindedness at the level of the Planning and Heritage Department's polluted the information relied upon by the Heritage Board and requires that the Designation be set aside.

C. Council was out of time to impose the Designation

211. The procedural unfairness at the stages leading up to the order from Council to impose a Heritage Designation require the Designation be nullified.
212. In addition to the City's breaches of the duty of procedural fairness, Council exceeded its grant of authority when it ordered a Designation more than 90 days after the Appellant submitted its objections.

i. Statutory Overview

213. The Legislature delegated the power to Designate heritage places to the Minister pursuant to the *Act*.
214. For the purposes of this appeal, the relevant delegations of power from the Legislature to the Minister are set out at subsection 5(1), 5(2), and 5(5) of the *Act*:

5. Designation of heritage places

- (1) *The Minister may by order published in the Gazette Designate any heritage place entered in the register established under section 4 as a Designated site, structure or area.*

Notice, public

- (2) *Before making any Designation under subsection (1), the Minister **shall give proper notice** to the owner, and adequate public notice of his intention to do so and the reasons for the Designation **and shall invite any person objecting to the Designation to make known the reasons for the objection** in the prescribed form.*

...

Procedure

- (5) *The procedures for making a Designation, giving notice and dealing with objections shall be prescribed by regulations.¹⁶⁴*

[emphasis added]

215. With respect to notice requirements, the Legislature required that property owners be given "proper notice" and an opportunity to raise objections.

¹⁶⁴ *Heritage Places Protection Act*, at ss. 5(1), 5(2), and 5(5).

216. The Lieutenant Governor set out the procedures for notice and the consideration of objections in the *Regulations*.
217. The *Regulations* particularise the conditions and constraints on the powers delegated to the Minister under the *Act*.
218. The City's powers with respect to the Designation of Heritage Resources can be no broader than the powers conferred upon the Minister through the *Act* and *Regulations*.
219. The City cannot ignore restrictions on the powers granted to the Minister:

*Certain elementary principles must be kept in mind when dealing with questions such as those here raised. **A municipal council is a legislative body having a very limited and delegated jurisdiction.** Within the limits of its delegated jurisdiction, and subject to the terms of the delegation, its power is plenary and absolute and in no way subject to criticism or investigation by the Courts. **When the municipal council goes beyond its limited jurisdiction or seeks to ignore conditions precedent to the exercise of the power that has been conferred upon it, it is the duty of the Courts to interfere and quash the municipal by-law for illegality.***¹⁶⁵

[emphasis added]

220. The City's by-laws must strictly remain within the framework for the powers granted to it:

*Before dealing directly with the by-laws in issue and their application to this matter, the learned judge discussed generally the powers of a local authority to pass by-laws for the purpose of regulating, controlling and running the area over which it has jurisdiction. I agree with what he says and, has been already pointed out in various decisions of this Court, **there can be no doubt that a local authority or municipal body must draft any such by-laws strictly within the framework of the legislative power delegated to it. It cannot do what it has not been given the power to do.***¹⁶⁶

[emphasis added]

ii. *The Heritage By-law exceeds the scope of the grant*

221. The Heritage By-law clearly mirrors the *Regulations* in many respects.

¹⁶⁵ *Re Howard and City of Toronto*, 1928 CanLII 427 (ON CA), 61 O.L.R. 563, [1928] 1 D.L.R. 952 at p. 580. [Tab 22 of Appellant's Written Submissions]

¹⁶⁶ *Lewvest Ltd. v. Scotia Towers Ltd.*, 1983 CanLII 3119 (NL CA) at para 6. [Tab 23 of Appellant's Written Submissions]

222. Both the Heritage By-law and the *Regulations* provide that a Notice of Intention to Designate freezes the property's development for 120 days.¹⁶⁷
223. Both provide that a property owner has 30 days to file objections in response to a Notice of Intention to Designate.
224. Likewise, where a Designation fails, both the *Regulations* and the Heritage By-law provide that the Designation process may be re-initiated only after a period of one year has passed.
225. However, there is one important point of departure in the Heritage By-law from the *Regulations*.
226. The powers delegated to the Minister require that a decision be made regarding whether or not to impose a Heritage Designation within 90 days from the date that a property owner files an objection:

8. Consideration of objections

(1) The Minister shall consider any Notices of Objection filed, and the Minister may, not later than 90 days from publication of the Notice pursuant to section 6,

(a) Designate the site as described in the Notice of Intention to Designate Heritage Place; or

(b) cancel the Notice of Intention to Designate Heritage Place.¹⁶⁸

227. Given that the powers in the *Act* allow for significant interference with the common law property rights of individuals, it is not surprising that the Legislature imposed this procedural requirement.
228. The Heritage By-law, on the other hand, does not set out any restriction on the length of time that Heritage Board or Council may leave a property owner in limbo while considering a Heritage Designation.
229. Notwithstanding the failure of the Heritage By-law to address this procedural requirement, the City cannot exercise broader powers than which were given to the Minister.
230. Accordingly, Council does not have jurisdiction to impose a Heritage Designation on a property once more than 90 days have passed from the filing of objections by an owner.
231. The Appellant's objections were submitted on May 31, 2024. After August 30, 2024, Council was out of time for ordering a Heritage Designation over the Property.
232. On September 10, 2024, Council resolved to impose a Heritage Designation on the Property without the jurisdiction to do so. As such, the Designation must be set aside

¹⁶⁷ *Heritage Places Protection Act Regulations*, supra note 4 at s. 5. [Tab 2 of Appellant's Submissions]

¹⁶⁸ *Heritage Places Protection Act Regulations*, supra note 4 at s. 8. [Tab 2 of Appellant's Submissions]

PART IV – RELIEF SOUGHT

233. Sabharwal Holdings' seeks the following relief:

- (a) that the Commission nullify Council's decision to accept the recommendation of the Heritage Board and Designate 10 Prince Street (PID #336321) as a Heritage Resource; and
- (b) That the Commission revoke the Notice of Heritage Resource Designation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th day of February, 2026.



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