

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Armour Group Ltd. v. Halifax (Regional Municipality),
2008 NSSC 81

Date: 20080331

Docket: S.H. 288775

Registry: Halifax

Between:

The Armour Group Limited

Plaintiff

and

Halifax Regional Municipality, a body corporate

Defendant

Judge: The Honourable Justice Walter R.E. Goodfellow

Heard: March 17, 2008, in Halifax, Nova Scotia

Written Decision: March 31, 2008

Counsel: Jane O'Neill and Jennifer Biernaskie, counsel for
plaintiff

Karen Brown and Sara Knight, counsel for defendant

Goodfellow, J.:

[1] In this application, Armour Group Limited (Armour) is seeking a declaration that the building located at current civic address, 1870 Lower Water Street is not a heritage property under the *Heritage Property Act* 1980 sns ch. 199 (HPA).

Armour is also seeking an order in the nature of a mandamus to require Halifax Regional Municipality (HRM) to process Armour's pending demolition application relating to the property in question.

[2] The property which is the subject of this application is referred to by Armour as the Violet Clarke Building. The civic address of the Violet Clarke Building was 1872 Upper Water Street until the late 1970's when renovations were done on the building. The side door of the building was given the civic number, 1870 while the front door to the building maintained civic address of 1872 Upper Water Street.

[3] The application is supported by the affidavits of A.M. McCrea, Chairman of the Armour Group, Michael Foster, site manager of Historic Properties (Privateer's Wharf) for Armour since June 16, 2004 and Hugh Smith who was President of Historic Properties Limited in 1981. All three were cross-examined on their affidavits.

[4] HRM filed the affidavit of Julia Horncastle, Acting Municipal Clerk, which simply confirmed the existence of various documents attached to her affidavit as exhibits. Additionally, HRM filed the affidavit of Joel Plater, Senior Claims Examiner for HRM since March 1, 2006 and his affidavit simply attaches a series of photographs of the property as of February 14th, 2008 showing the ground floor operated as Sweet Basil Bistro. Access to the Bistro is through the Upper Water Street front entrance.

[5] It is necessary to make a number of findings of fact in order to reach a conclusion whether or not the Violet Clarke Building was designated and registered as a heritage property. The determination is significant because Armour has applied for a demolition permit and if Armour is not required to proceed with a de-registration application, there is probably a substantial saving in time and expense.

FINDINGS OF FACT

[6] A.M. McCrea, Chairman of Armour, in 1976 served as a member of the City of Halifax's Municipal Planning Committee. Mr. McCrea is well known for his co-operation and interest in the preservation of historic buildings. This committee received, reviewed and approved the report "An Evaluation and Protection System for Heritage Resources in Halifax". This report recommended a very detailed point system to be used for heritage building evaluations. The report contains the evaluation system and recommendations for heritage designation of buildings in many categories, including commercial buildings, based on the point system. Apparently, approximately 70 commercial buildings were evaluated using the priority criteria and scoring system. This resulted in the Violet Clarke building at 1872 Upper Water Street failing to be recommended and it was actually recommended for deletion because it did not meet the evaluation standards.

[7] The Municipal Development Committee approved the recommendations so that recommended buildings were designated Halifax Landmarks in 1971 as heritage buildings and clearly the Violet Clarke building was not one of those buildings so-designated as a Halifax Landmark.

[8] HRM makes much of the fact that in the late 1970's there were renovations to the Violet Clarke building including, apparently, windows and doors being added and a side door entrance was given the address, 1870 Upper Water Street. HRM suggests Armour knew or ought to have known that there had to be an application for these renovations, the evidence before me shows clearly that the property was owned by a company controlled by Mr. John Bragg of Oxford. There is no basis whatsoever for inferring that Armour knew or was privy in any way, shape or form to the application for renovation of the Violet Clarke building.

[9] On, or, about December 2005, the Nova Scotia College of Art & Design (NSCAD) advised Armour that it would not continue beyond May 2007 it's tenancy of the spaces above ground floor levels in the 4 buildings in the same block, all of which are registered as Heritage Buildings. These buildings were renovated and occupied for NASCAD's specific use back in 1973. Apparently, the space has many deficiencies including not meeting current fire and safety codes etc.

[10] McCrea in his affidavit recites that in May, 2006 he contacted Maggie Holm, a heritage planner, who was the HRM staff person responsible for the heritage

property program. McCrea further deposes that in May, 2006 he was provided with a copy of Form A relating to the registration of the Historic Waterfront buildings from HRM files and that Ms. Holm agreed the address shown on the Form A as 1870 Upper Water is incorrect and it should have been 1869 Upper Water Street. McCrea emphatically says that Holm agreed that the registration of the Violet Clarke Building was an error. In November, 2006 McCrea states that Holm confirmed the view that an error had been made in registering the Violet Clarke building as a heritage building. HRM subsequently changed their position and now claim the Violet Clarke building was designated and registered as a Heritage Building.

[11] I have no evidence before me as to the authority of Ms. Holm and, generally speaking, the employees of a municipal unit do not automatically have authority to bind the municipal unit. Taking a cautious approach I do not consider, as a fact, that HRM is bound by Ms. Holm's being in agreement with Armour, however, it is undisputed evidence that the person responsible for the heritage property program agreed with Armour that the registration of the Violet Clarke building was clearly in error.

[12] On, or about, the 17th of April, 2007 McCrea met with Paul Dunphy, the Director of Community Development for HRM, and Roger Wells, Manager of Cultural and Heritage for HRM, and it is uncontradicted that McCrea swears both Dunphy and Wells acknowledged and agreed that the records of HRM showing the Violet Clarke building at 1872 (1870) Upper Water Street as a registered heritage building were in error. Again, I take the cautious approach and do not make a determination that this amounted to a binding admission, however, it is again uncontradicted evidence that knowledgeable persons, after checking records and reflecting, agreed that as a fact the registration was in error.

[13] By July, 2007 HRM took a position to the contrary. The root of the error lies in the simple fact that Historic Properties, (1869 Upper Water Street) for a period of time, had it's head office in the Violet Clarke building at 1870 (1872) Upper Water Street.

[14] On August 12, 1971 the then city of Halifax approved the recommendation of it's Landmark's Commission and declared a listing of various buildings as Halifax landmarks. The "Historic Waterfront Buildings" appear on this listing

which refers to the group of buildings located between Upper Water Street and the Halifax Harbour.

[15] Council of the City of Halifax on August 12, 1971, as evidenced by the minutes, designated as Historic sites and Landmarks, a number of properties including Historic Waterfront Buildings, 1880-1850, and the list does not include the Violet Clarke Building.

[16] The relevant portions of the evaluation report entitled An Evaluation and Protection System for Heritage Resources in Halifax cited a list of buildings using priority criteria and the scoring system, in effect. The Violet Clarke Building was not so-designated and, in fact, the report indicates **“although these buildings were of interest, it was not felt that they had sufficient architectural and/or historic merit to include their names in the list of buildings recommended for designation”** and within that list is 1872 Upper Water Street. The Violet Clarke Building, therefore, was not included and further it was specifically excluded. The Historic Waterfront Buildings were so designated. Armour’s evidence advanced through Mr. McCrea that these Historic Waterfront Buildings are situate

at 1869 Upper Water Street and comprised of 7 waterfront buildings are, in fact, the ones recommended for designation as landmark buildings.

[17] The evaluation report did contain a heritage conservation area that is recommended for designation and that area included the Violet Clarke Building, however, there is no evidence before me that the heritage conversation area was ever so-designated or, if so, it's impact on a particular property within the area.

[18] *The 1980 Heritage Property Act* creates two types of heritage property: Provincial heritage property, to be designated by the Minister, upon recommendation of the Provincial Advisory Council; and, Heritage Property as Municipal Heritage to be designated by a municipality pursuant to it's bylaws. In either case, the property is required to be registered.

[19] The municipality, in this case, the City of Halifax was empowered to establish a registry and a Heritage Advisory Committee who could, after proper evaluation, make recommendations to Council. This required notice to be sent to the owner of the property and after the owner had an opportunity to be heard by Council, the notice of registration was to be filed in the Registry of Deeds. The

alternate method, under s. 27 of the Act, was that a building listed a heritage resource under the evaluation report could be declared to be a heritage resource by ordinance of City Council.

[20] The evidence with respect to notice is that a copy of a notice with some errors in it was in the City of Halifax file relating to the land and building located at 1870 Upper Water St. (Historic Waterfront Buildings), Historic Properties. Reasons given for this proposed designation I find are not valid as the Violet Clarke property was never designated or declared to be a landmark. As well, it is noted that 1870 Upper Water Street is not a waterfront building. The notice itself is unsigned, undated and HRM acknowledges that it has no proof to provide the court that the notice was, in fact, forwarded to the owner.

[21] The file copy of the notice gives notice for the 5th of October, 1981 and Hugh Smith was in attendance at that Council meeting. The strongest evidence advanced by HRM is the minutes of an October 5th, 1981 Council meeting which briefly recites Mr. Hugh Smith, Historic Properties, addressed Council indicating agreement and approval of registering the following properties and it lists for proceeding for hearing, 1870 Upper Water Street - Historic Waterfront Buildings.

Throughout, I conclude that the major error occurred and the problem was that City of Halifax and, subsequently, HRM treated 1870 Upper Water Street, the location for a period of time of the office for Historic Properties, (Violet Clarke building) as if it were part of Historic Waterfront Buildings. Mr. Smith, in his affidavit, and evidence before the court, acknowledges his attendance at that meeting but I do not recall any evidence that he acknowledged receipt of any notice or that he was in attendance pursuant to the undated, unsigned notice for which I have only a file copy.

[22] I accept the evidence of Mr. Smith set out in paragraphs 2, 3, and 4 of his affidavit as follows:

2. On October 5, 1981, I attended a Halifax City Council meeting on behalf of Historic Properties Ltd., in regards a number of properties the City was proposing to register as heritage properties. At the meeting, I consented to the registration of the Historic Waterfront Buildings, located at 1869 Upper Water Street. The Violet Clarke Building, located at 1872 (1870) Upper Water Street, is not one of the Historic Waterfront Buildings and my consent did not relate to that building.
3. In the discussions regarding the Historic Waterfront Buildings at the October 5, 1981 meeting of Halifax City Council, it was apparent that the buildings referred to were those which lie to the east of Upper Water Street only. There was nothing said by anyone at those meetings that would suggest that the Violet Clarke Building was included in the registration of the Historic Waterfront Buildings as a heritage property.

4. At no time did Historic Properties Limited consider the Violet Clarke Building to be of historic value such that it should be registered as a heritage property.

HERITAGE PROPERTY ACT - CHAPTER 199 OF THE REVISED STATUTES 1989

[23] This Act establishes a Heritage Advisory Committee that may recommend registration of a municipal heritage property. The procedure outlined in s. 14 requires notice to the registered owner of the building and s. 14 (5) requires that a copy of the notice served shall be deposited in the Registry of Deeds for the registration district in which the building is situate.

[24] There is a specific mandatory manner of entry of notice in the registry required by the *Heritage Property Act* and it is s. 22.

Manner of Entry of Notice in Registry

22 A notice deposited in a registry of deeds pursuant to this Act shall be indexed as if it were a conveyance by or to, as the case may be, the registered

owner of the building, streetscape or area.. (*This section is retained as s. 24 in the Heritage Property Act.*)

[25] Counsel for both parties agree that the *Heritage Property Act* SNS 1980 Chapter 8, predecessor of the *Heritage Property Act* RSNS 1989 Chapter 199 was in effect at the time of the alleged registration of “1870 Upper Water Street (Historic Waterfront Buildings), Historic Properties” in October, 1981.

ISSUES

1) Was the Violet Clarke building designated a Heritage Property pursuant to the *Heritage Property Act*?

[26] I repeat my findings of fact and conclude that the evidence overwhelmingly establishes that any registration of the Violet Clarke Building was clearly in error and invalid.

[27] The evidence raises a further issue as to whether or not the erroneous designation was properly registered in accordance with the statutory requirement. It is clear from my findings of fact and the totality of the evidence that the attempt

to meet the prerequisites of the legislation fail. It is clear that the City of Halifax Council held meetings on October 5th and October 15th, 1981 but not on October 22, 1981 as stated in the Form B, Notice of Registration Property. To begin with, there is no record of the prerequisite Form A having been signed, sent or received for the property and the Form B, which was to be deposited in the Registry of Deeds, in strict compliance with s. 22 (above), it is clear that it was not so-filed and a solicitor or a title searcher of competence would not discover the erroneous registration and only someone as meticulous as Charles W. MacIntosh, Q.C. would even think of looking in an index dealing with subdivisions. The City of Halifax failed also to comply with subsection 8 of s.27 as the faulty registration did not take place within the statutory mandated time frame of within 5 days.

[28] Should I conclude that the City of Halifax sufficiently met the prerequisites of registration and, in particular, s. 22? HRM takes the position that it must have been the fault of a Registry official that the notice ended up in an index dealing with subdivisions.

[29] Guidance for the interpretation of legislation is provided in Driedger On The Construction of Statutes, Third Edition, starting with the **Modern Purpose of**

Approach:

Modern purposive approach. Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews J.A. recently wrote in *R. Moore*:

From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation. (1985), 67 N.S.R. (2d) 241, at 244 (C.A.).

[30] In the Supreme Court of Canada purposive analysis is a staple of statutory interpretation. In *Clarke v. Clarke*, Wilson J. wrote:

In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.

...

...*Thomson v. Canada (Minister of Agriculture)*, L'Heureux-Dube J. wrote:

[A] judge's fundamental consideration in statutory interpretation is the purpose of legislation. [1992] 1 S.C.R. 385, at 416.

[31] There is always a public interest that must be considered carefully, however, a Municipality is a creature of statute and can only exercise authority in the manner

directed by statute. HRM takes the position that the registration should not be invalidated by it being wrongfully indexed. It is inescapable the statutory provision required “shall” that the mandatory registration be indexed as if it were a conveyance placing a clear duty on the Municipality to comply and the failure to comply I conclude is more than a technical failure warranting being overlooked. Its purpose was to alert the owner or anyone specifically interested in the specific subject property, hence, the requirement of specific indexing. I must also consider the presumption against interference of property rights which places emphasis on the freedom of a property owner to use a property as he or she sees fit, subject only to clear legislative encroachments properly applied.

ISSUE No. 2

[32] If the Violet Clarke Building is not a heritage property, should this Honourable Court issue an order in the nature of *mandamus* requiring HRM to process Armour’s demolition application accordingly?

RESULT

[33] Based on the overwhelming evidence I conclude it establishes with a high degree of certainty that any designation of the Violet Clarke Building as a Heritage Property was in error. Additionally, I conclude that the registration of the erroneous designation failed to comply with the statutory requirements resulting in the attempted registration being a nullity.

[34] Armour is entitled to a declaration that the Violet Clarke Building has not been designated or registered as a Heritage Property pursuant to the *Heritage Property Act*.

[35] I do not fully understand the process with respect to Armour's application for demolition etc. and I will withhold any determination on whether or not writ of mandamus is an appropriate or necessary order. My preliminary view being that the designation by declaratory judgment should provide such sufficient clarity for the matter to be addressed properly. Leave, however, is granted to Armour should further consideration be required with respect to the possible relief of a writ of mandamus.

COSTS

[36] The parties are entitled to be heard on the issue of costs and I would direct the solicitors for Armour to provide written argument as to entitlement and quantum of costs and disbursements on or before April 14 with HRM to respond on or before April 29 after which I will address the issue of entitlement and, if necessary, taxation of costs and disbursements. The parties are, of course, at liberty to reach agreement on the issue of costs.

J.