

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Morrison v. Halifax (Regional Municipality), 2008 NSSC 375

**Date:** 2008/12/10

**Docket:** S.H. No. 286194

**Registry:** Halifax

**Between:**

Vivian Sara Morrison

Applicant

and

Halifax Regional Municipality and  
Attorney General of Nova Scotia

Respondents

**Judge:** Justice N. M. Scaravelli

**Heard:** November 21, 2008, in Halifax, Nova Scotia

**Counsel:** Allen C. Fownes for the Applicant  
Joshua Judah for the Respondent, Halifax Regional Municipality  
Edward Gores, Q.C., for the Respondent, Attorney General of Nova  
Scotia

**By the Court:**

**BACKGROUND**

[1] The Applicant in this proceeding owns a waterfront residential property at 1430 Birchdale Avenue, Halifax which is located, for the purpose of the Halifax Regional Municipality Land Use By-law, in a “R-2 Zone”. The Applicant built a boat house and floating dock on her property after obtaining the necessary permits.

These permits included:

- (1) A permit to build a floating dock under the *Federal Navigable Waters Protection Act*;
- (2) A permit to build a floating dock under the *Provincial Beaches Act*;
- (3) A permit to build a boat house as an “accessory building” under the HRM Land Use By-law.

[2] The boat house exceeds the height limit of 14 feet prescribed in the Land Use By-law for an “accessory building”. As such, the Applicant has been charged in Provincial Court for breach of Section 35(3) of the HRM Land Use By-law for Halifax Peninsula pursuant to Section 505(1) of the *Municipal Government Act*.

The Provincial Court matter has been adjourned pending this Application.

[3] The Applicant challenges the constitutional validity of the provisions of the HRM Land Use By-law that purports to regulate the height or other construction characteristics of the boat house located on her property. Specifically, the Applicant seeks a declaration that these provisions contained in the By-law are “*ultra vires* the constitutional, legislative powers of the Halifax Regional Municipality to enact”.

[4] The Applicant has given notice of the Application to both the Attorney General of Nova Scotia and the Attorney General of Canada. The Attorney General of Canada did not participate in the proceeding. Counsel for the Attorney General of Nova Scotia appeared at the hearing in support of the position of the Respondent that the Land Use By-law is *intra vires* the HRM as it applies to the property upon which the Applicant built a boat house.

[5] The Applicant acknowledges there are no federal land use laws or regulations currently in place regarding the Applicant’s land. As I understand it, the Applicant argues that the use of the boat house constitutes matters of maritime navigation and shipping which are within the exclusive jurisdiction of the federal

government under the *Constitution Act, 1867*. Therefore, it is argued, HRM lacks the constitutional power to regulate in this area of exclusive federal jurisdiction. The Applicant filed an Affidavit to the effect that the boat house is essential to the Applicant's enjoyment of boating and shipping in the waters of the North West Arm. It is used for the storage of boating equipment and is used by the Applicant's family and guests to observe boating activities on the North West Arm.

## **ANALYSIS**

### *CONSTITUTION ACT, 1867*

[6] **Section 91** - The exclusive legislative authority of the Parliament of Canada extends to:

**(10) Navigation and Shipping**

[7] **Section 92** - Each provincial legislature may make laws in relation to:

**(13) Property and civil rights in a province**

- (16) **Matters of a merely local or private nature in a province.**

*MUNICIPAL GOVERNMENT ACT*

[8] *Section 90* - The purpose of this part is to:

- (a) **Enable the province to identify and protect its interest in the use and development of land;**
- (b) **Enable municipalities to assume the primary authority for planning within their respective jurisdictions, consistent with their urban or rural character, through the adoption of municipality planning strategies and land-use by-laws consistent with interests and regulations of the province;**

[9] *Section 220 (4)* - A land-use by-law may:

- (d) **Regulate the height of structures.**

[10] *HRM Land Use By-Law*

**s.1 - “Accessory” means naturally and normally incidental, subordinate, and exclusively devoted to.**

**“Accessory Building” means a detached subordinate building not exceeding one storey and 14 feet in height, not used for human habitation, located on the same lot as the main building ...**

...

**“Building” includes every structure placed on, over or under the land and every part of the same and any external chimney, staircase, porch, sign or other structure use in connection with such building and shall include any tent, awning or other covering.**

...

**“Lot” or “Property” means a parcel of land whether or not occupied by a building or structure.**

**s. 10(1) - Every building hereafter erected shall be located on a lot as herein defined and in no case shall there be more than one building on one lot or one building on more than one lot except as otherwise provided in the by-law.**

**s. 27(1) - The following uses shall be permitted in any R-1 Zone:**

**(a) a detached one-family dwelling house;**

...

**s. 35 (1) - The following uses shall be permitted in any R-2 Zone:**

**(a) R-1 uses as hereinbefore set out;**

...

**(f) uses accessory to any of the foregoing uses**

...

**s. 35(3) - No person shall in any R-2 Zone use or permit to be used any land or building in whole or in part for any purpose other than one or more of the uses set out in subsection (1).**

[11] The first step in a constitutional analysis is to determine the pith and substance of the impugned legislation. If the matter to which the legislation

relates is within provincial legislative jurisdiction, the legislation is *intra vires*. If not, it is *ultra vires*. In determining pith and substance the Court examines the purpose and effect of the legislation, *Canadian Western Bank v. Alberta* (2007) 2 S.C.R. 3.

[12] In *Ordon Estate v. Grail* (1998) 3 S.C.R. 437 the Court stated:

73. ... It must be determined whether the facts of a particular case raise a maritime or admiralty matter, or rather a matter in which is in pith and substance one of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*. The test for making this determination is to ask whether the subject matter under consideration in the particular case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence. As is clear from this Court's recent jurisprudence on the issue, the answer to this question is to be arrived at through an examination of the factual context of the claim.

[13] In the present case I find the pith and substance of the relevant HRM By-law relates to land use, development and planning within the Halifax peninsula.

Through this enactment, the Municipal Government intended to regulate activities on privately owned land, as evidenced by a notation added to the beginning of the HRM Land Use By-law stating that the provisions do not apply to federally or provincially owned land, or private land used for a federally regulated activity.

Section 35, read in conjunction with Sections 1 and 27, intend to regulate the types

of buildings on privately owned land within the municipality. These are matters of property and civil rights which are *intra vires* the Province of Nova Scotia.

[14] The Land Use By-law does not have an essential or even incidental effect on Parliament's power over navigation and shipping under the *Constitution Act, 1867*. The By-law is clear that it has no effect on federal lands or private lands used for federally regulated activities. The construction and use of the boat house as described by the Applicant lacks any connection to Maritime matters as to constitute Maritime law within federal legislative competence.

[15] There is no issue of federal paramountcy. In *Canadian Western Bank, (supra)*, Justices Benny and Labelle stated that a provincial law will only be declared invalid under the paramountcy doctrine if it is in direct conflict with a federal law. The only possible conflict is within the *Canada Marine Act*. The *Act* gives the Minister power to make regulations under s. 74(1)(d) for "the maintenance of order and the safety of persons and property within the limits of a public port or at a public port facility". There are no regulations issued by the Minister which dictate building standards for public ports. Nor is there evidence



the Applicant's property has been classified as public port under the *Act*. Thus there is no conflict, and no application of the paramountcy doctrine.

## **CONCLUSION**

[16] The HRM Land Use By-law is *intra vires* the HRM municipal government. The By-law relates to matters coming within the powers given to the provincial government in s. 92 of the *Constitution Act, 1867*. There is no effect on the navigation or shipping jurisdiction of the federal government.

[17] Accordingly, the Application is dismissed.

J.