

Saint-Romuald (City) v. Olivier, [2001] 2

SCR 898

Binnie J. (McLachlin C.J.C., Major, Arbour JJ. concurring):

[1] The Court’s objective on this appeal is to find the proper balance between an individual’s right to the continued use and enjoyment of his or her property and the power of the community, expressed through the local municipality, to enhance, by changing the land use regulations, the amenities of surrounding and other affected landowners. As the case arises in Quebec, the specific issue raised is the limitation of previously acquired rights under the *Civil Code*. However, as this is a *public* law matter, the principles of land use regulation applicable in the common law provinces concerning legal non-conforming uses are also relevant.

[2] The facts are straightforward. The respondents’ country and western cabaret was renamed *L’Extase* (“Ecstasy”) and the singing cowboys and cowgirls were replaced by nude dancers. Business improved. The bar was said to be [translation] “very busy”. The police increased surveillance, but their heightened interest seemed related to a concern over potential impaired drivers (a concern they have with other bars and nightclubs as well) and the opportunity to look for people against whom warrants were outstanding or who were thought to be in breach of court orders. The evidence was that there was no problem of discipline within the bar itself. Further, there was no evidence that nude floor shows attract more clients in trouble with the law than regular bars or that *L’Extase* in fact attracted a more problematic clientele than it did when it was a country and western bar.

[3] My colleague Gonthier J. takes the view that by changing the form of entertainment the respondents forfeited their acquired right to operate the nightclub. With respect, I believe such a result would tilt the balance too far in favour of the municipality. I agree with the conclusion of the unanimous Quebec Court of Appeal and would dismiss the appeal.

I. The Issue

[4] The facts and applicable enactments are outlined in my colleague’s reasons for judgment. I fully agree with his rejection of the “categorical” approach. This is the theory under which an owner, whose use of land does not conform to a new by-law, nevertheless has an “acquired right” to expand, alter or modify an existing use to include anything and everything permitted on that land under the “use category” defined in the prior law (if indeed there was a prior law). While the “categorical” approach may produce a fair result on the facts of this case, it does so only because the categories of use created by the prior by-law were quite narrow [...]

[5] However, as my colleague Gonthier J. demonstrates, the “categorical” approach is wrong in principle and will often deliver a result that unduly favours

individual landowners at the expense of the community interest. The protected “acquired right” properly relates only to the status quo. It does not protect a potential or contemplated use that has never materialized. A similar rule prevails in the common law provinces: see *Heutinck v. Oakland (Township)* (1997), 42 M.P.L.R. (2d) 258 (Ont. C.A.), at para. 6:

Central to this analysis is our reliance upon the well established rule that the nature of a non-conforming use is not defined by reference to definitions in the by-law. Rather, it must be determined by reference to the use to which the property was put at the time the by-law was passed.

To the same effect, see: *Vancouver (City) v. Victoria Block Ltd.* (1964), 45 D.L.R. (2d) 118 (B.C. C.A.), at p. 121; *Glenelg (Township) v. Davis* (1992), 10 M.P.L.R. (2d) 260 (Ont. C.A.); *Nanaimo (City) v. Brickyard Enterprises Ltd.*, [1993] B.C.J. No. 992 (B.C. S.C.), at para. 20. The acquired right is no more than a right to carry on using the land for the purpose to which it was *in fact* previously being put. The issue, of course, is how widely or narrowly to circumscribe the description of the purpose of that “pre-existing use”.

II. The Pre-Existing Use

[6] As stated, the premises in question here have been used as a nightclub (or “cabaret”) for many years. Such use is no longer permitted in the relevant zone under the revised provisions. Choice of a broad definition (“nightclub”) or a narrow definition (“country and western nightclub”) of the pre-existing use will largely determine the outcome of the appeal.

[7] The necessity of making a careful choice of definition requires us to look realistically at the business being conducted on the premises prior to the new zoning by-law. Nightclubs or “cabarets” constitute a fickle industry. They rise and fall on swings of popularity. Their operators are forever in search of a “winning formula”. Location, we are told, is basic, but beyond that the elements of food, drink, ambiance and entertainment are endlessly varied to generate customer interest. A few years ago, customers may have flocked to hear western singers accompanied by steak and potatoes. Some still do. Irish pubs usually offer Irish melodies, but may have to be transformed next season into a different ambiance offering Karaoke. Last year’s successful disco may give way to this year’s Texas line dancers. Land used for these purposes serves merely as a platform for a business offering a marketable mix of food, drink and lawful entertainment to the public.

[8] The appellant takes the position that substitution of nude dancers for western singers is such an extreme variation in the nightclub or cabaret formula as to constitute a wholly different use. I do not agree. It is open to the municipality as a legislator to introduce such value judgments into its land use controls (as it did here under the new by-law), but I do not think the landowner’s “acquired right” to continue to carry on business can retroactively be truncated in this way on the present state of the law.

III. The Role of Zoning

[9] Private law has long protected adjoining owners in the enjoyment of the amenities of their land. Article 947 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, protects that enjoyment, as does the tort of nuisance at common law. Thus neighbours obtained an injunction in nuisance against a tobacco factory that emitted “noxious odours” in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Ont. C.A.), and on the same basis successfully opposed the establishment of a dog hospital in a residential area in *Macievich v. Anderson*, [1952] 4 D.L.R. 507 (Man. C.A.). The doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K. H.L.), imposes virtually absolute liability on owners who bring on their land “anything likely to do mischief if it escapes” and causes damage to a neighbour, unless the escape was due to the neighbour’s default (pp. 339-40). These private law remedies were designed, in a general sense, to protect neighbourhood amenities.

[10] The objectives of modern zoning were also accomplished to some extent by private arrangement using restrictive covenants as in *Daly v. Vancouver (City)* (1956), 5 D.L.R. (2d) 474 (B.C. S.C.), and building schemes as in *Lorne Park, Re* (1913), 30 O.L.R. 289 (Ont. C.A.). These earlier developments in the law are noted in *Boykiw v. Calgary (City) Development Appeal Board* (1992), 90 D.L.R. (4th) 558 (Alta. C.A.), at p. 563, and described in some detail in J. B. Milner, *Community Planning* (1963), at p. 357 et seq. Initially, local government occupied itself with noxious uses, and established building standards in the interest of fire prevention and safety.

[11] The objection to more sophisticated land use controls, when they emerged as an instrument of good government, was that they were to some extent confiscatory of the owner’s rights: see *Dinnick v. Toronto (City) Architect* (1913), 28 O.L.R. 52 (Ont. C.A.), at p. 58, *Regina Auto Court v. Regina (City)* (1958), 25 W.W.R. 167 (Sask. Q.B.), at pp. 168-69; and *Canadian Occidental Petroleum Ltd. v. North Vancouver (District)* (1983), 148 D.L.R. (3d) 255 (B.C. S.C.), at p. 269.

[12] To counter the concern about confiscation without compensation, lawful existing uses came to be protected under the concept of “acquired rights” both under the *Civil Code* in Quebec, and by judicial interpretation in the common law provinces: *Toronto (City) v. Wheeler* (1912), 4 D.L.R. 352 (Ont. H.C.), per Middleton J., at p. 353:

[I]t is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment.

See also *R. v. Howard* (1884), 4 O.R. 377 (Ont. H.C.), at p. 381, and *R. v. Clark Brothers & Hughes Ltd.* (1924), [1925] 1 D.L.R. 49 (Man. C.A.), at pp. 51 and 53.

[13] It is against that background that the modern regime of land use controls,

with their inherent tension between the owner's interest in putting its own property to what it regards as the optimal use and the municipality's interest in having all of the land within its boundaries organized in a plan which it thinks will maximize the benefits and amenities for all inhabitants, should be interpreted.

IV. The Applicable Legislation

[14] *An Act Respecting Land Use Planning and Development*, R.S.Q., A -19.1, authorizes Quebec municipalities to regulate the use of land by dividing their territories into zones to which are allocated various groups and classes of uses. This is to be done: [translation] "based on common characteristics of land occupation relating to volume, nuisance, compatibility, use and aesthetics". The impact of a particular land use on neighbouring lands is clearly a key concern, which is shared by common law jurisdictions. The loss of amenities by noise and air pollution, increased traffic, increased demands on municipal services, or other disruptions, may conveniently be referred to as "neighbourhood effects". The minimization of such adverse effects on surrounding owners or the community as a whole is one of the principal objectives of zoning controls.

[15] With respect to acquired rights (or legal non-conforming uses), s. 113(18) of the provincial Act allows Quebec municipalities to regulate them, prevent their substitution by other non-conforming uses, and to prohibit their extension and alteration. The municipality may not, however, order the *cessation* of such uses unless they have been abandoned or interrupted for "a reasonable period" no shorter than six months. In other words, the provincial legislation not only respects the doctrine of acquired rights, but makes it clear that municipalities must do so as well.

[16] Here the municipality did not purport to prohibit the alteration (or "*modification*") of acquired rights, although it was empowered to legislate in that regard under s. 113(18)(c) of the provincial Act. Nor, as the Court of Appeal pointed out, did it purport to suppress nude dance bars under the *Cities and Towns Act*, R.S.Q., c. C-19, whether under s. 414 ("decency and good morals") or s. 410 ("general welfare in the territory of the municipality"). We therefore do not need to decide whether such a prohibition would have been valid or effective under the existing law.

[17] Exercising its statutory powers of delegated legislation, the City of Saint-Romuald did enact zoning by-law 273-90, which came into force on May 22, 1991. The appellant places weight on s. 9 of the by-law which provides:

9. Permitted Uses

The uses listed in the specification grid correspond to the description of uses set out in chapter IV. *A line appearing opposite a class of uses means that all principal uses in that class are permitted, to the exclusion of all other uses.* [Gonthier J.'s emphasis.]

[18] In the appellant's submission, the underlined words constitute a specific

prohibition of the respondents non-conforming use. Read in that way, of course, it is a prohibition of all non-conforming uses, and if applied in derogation of acquired rights would serve to nullify them. On this point, I prefer the view taken by the Quebec Court of Appeal that the general language of s. 9 is not sufficient to constitute an express prohibition sufficient to overcome the respondents acquired rights.

V. Scope of the “Acquired Right”

[19] Under the doctrine of “acquired rights”, the respondents were not only entitled to continue to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use. My colleague Gonthier J. notes that regard is to be had in such cases to “the real and reasonable expectations” of the landowner caught by changes in the zoning (para. 63). Gonthier J. also acknowledges (para. 62) that “normal evolution” may occur in some uses with the passage of time, and that “a use protected by acquired rights may be exercised more intensively (*Anjou (Ville) c. Vanier* (March 8, 1983), Doc. C.A. Montréal 500-09-001305-788 (C.A. Que.), J.E. 83-325; *Huot c. L’Ange-Gardien (Municipalité)*, [1992] R.J.Q. 2404 (C.A. Que.); *Soudure mobile D. Pilon Inc. c. Larose*, [1990] R.L. 93 (C.A. Que.)) and adapt to the demands of the market or the technology that are relevant to it (*Cie 1846-0832 Québec Inc. c. Ste-Jean-Chrysostome (Ville)*, [1994] R.J.Q. 618 (C.A. Que.)), at p. 624, Tourigny J.A. dissenting”. In my view, that is what happened here.

[20] Similar flexibility also exists at common law. Thus in *Toronto (City) v. Central Jewish Institute*, [1948] S.C.R. 101 (S.C.C.), a legal non-conforming use (private school) previously carried on only in part of the building was lawfully extended throughout the entire building, per Kellock J., at p. 114:

I do not think that the use made of the premises by the appellant after the school term recommenced in September was for a *different purpose* within the meaning of the statute from the use being made of them on July 24th. [Emphasis added.]

[21] At this point, a distinction should be drawn between the *type* of legal non-conforming use and the *intensity* of such use. A legal non-conforming nursing home, for example, may want to double its 15 beds. The type of use would remain the same, but the intensity of that use would be substantially increased.

A. Intensity of Use

[22] The respondents nightclub has substantially increased its business since switching from cowboy singers to nude dancers. There are more customers. More cars. More noise. Assuming for the moment that the “type” of use has not changed, is this increased intensity of use a basis for objection?

[23] In *Central Jewish Institute*, supra, this Court concluded that so long as the type of use was continued (private school facilities), the owner was not limited to the then existing intensity (at the relevant time only the kitchen and a ground floor room of the building were used for school purposes). Rather, the appellant was entitled to expand the non-conforming use throughout its building. To some

extent, the Court's treatment of intensity of use was tied to the specific text of the provincial Act (which extended the immunity to the building itself), but the case has subsequently been applied more generally (I think correctly) to sanction increases in intensity of use so long as the same type of use is continued. My colleague, Gonthier J., has referred to the Quebec authorities. A similar principle operates in the common law provinces: see *Canadian Occidental Petroleum*, supra, at p. 268 (expanded manufacture of hazardous substances); *O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie (City)*, [1961] O.R. 413 (Ont. H.C.) (infrequent use of a funeral parlour no bar to expanded activity); *Kiss v. Phil Dennis Enterprises Ltd.* (1974), 46 D.L.R. (3d) 196 (Ont. H.C.) (where, at p. 202, the court noted approvingly that "the proposed change is one of degree, and not of kind of use"); *Perth (Town) v. Perth Mews Ltd.* (1991), 7 M.P.L.R. (2d) 259 (Ont. Gen. Div.) (the legal non-conforming right to use pinball machines in one part of the building was extended to all of it); *Magdalena's Rest Home Ltd. v. Etobicoke (City)* (1992), 12 M.P.L.R. (2d) 316 (Ont. Gen. Div.) (rest home expanded from 15 to 17 beds); *Moncton (City) v. Como* (1990), 103 N.B.R. (2d) 286 (N.B. Q.B.) (expansion of existing equipment storage and repair business); *Borins v. Toronto (City)* (1988), 50 R.P.R. 43 (Ont. Dist. Ct.) (conversion of office space); 382671 *Ontario Ltd. v. London (City) Chief Building Official* (1996), 32 M.P.L.R. (2d) 1 (Ont. Gen. Div.) (addition of a unit in an apartment building).

[24] There are, however, some limitations at the outer boundaries of increasing the intensity of use. This appears from the decision of Cory J.A. (as he then was) in *R. v. Grant* (1983), 23 M.P.L.R. 89 (Ont. C.A.), where the court refused to allow a legal non-conforming two-unit apartment building to be further subdivided into four units. While the precise result may to some extent conflict with this Court's decision in *Central Jewish Institute*, supra (which was not cited by Cory J.A.), even *Central Jewish Institute* proceeded on the basis that the expansion of school activity would be reasonable and limited — in that particular case limited to the existing building.

[25] In general, merely continuing the precise pre-existing activity, even at an intensified level, is clearly protected, but the intensification may be of such a degree as to create a difference in kind. A family farm which has a few pigs on the fringe of a town may continue as a legal non-conforming use, but the result may be otherwise if it is sought to expand its pork operation into "factory in the country" type intensive pig farming. While in one sense the "use" has continued, in another sense its *character* has been so altered as to become, in terms of its impact on the community, an altogether different use.

[26] In the more usual type of situation, a non-conforming commercial use in a residential neighbourhood that enjoys increasing business should not ordinarily be penalized for its success by losing its "acquired right" to operate, even if a by-product of that success is some increased traffic and noise.

[27] The analogous U.S. principle is succinctly stated in McQuillin, *The Law of Municipal Corporations* (3rd ed. 1976), vol. 8A, at p. 126:

The distinction is between an increase in the amount of business, even a great increase, which does not work a change in use, and an enlargement of a non-conforming business *so as to be different in kind in its effect on the neighbourhood*. [Emphasis added.]

[28] This is a high threshold which it is unnecessary to explore on this appeal. Based on the evidence here, no valid objection could be taken to the respondents' nightclub based on increased intensity of use.

B. Type of Use

[29] The appellant argues that a nightclub offering western music is a different *type* of use than a nightclub presenting nude dancers. This is the real battleground between the appellant and the respondents.

[30] A "use" may include a number of activities. A nightclub, as stated, serves food and drink and provides entertainment. The question here is how many of these activities, and of what nature, can be added, subtracted or modified before it can no longer be called the same "type" of use?

[31] In *R. v. Cappy* (1952), 103 C.C.C. 25 (Ont. C.A.), Oakwood Stadium in Toronto, a general venue for sports activities, was modified to accommodate stock car racing. The neighbours complained about the increased noise and disruption. The municipality launched a by-law prosecution. The stadium owners defended on the basis of a legal non-conforming use. The majority of the Court of Appeal, per Laidlaw J.A., acquitted the stadium owners on the basis that they operated a "general purpose" stadium whose permissible program (which presumably accorded with the owners' "real and natural expectation") was not limited to the type of specific events on "the day of the passing of the by-law" but included "public exhibitions and performances of all kinds" (p. 33). The dissenting judge concluded that the pre-existing use had been limited to certain types of exhibitions and performances, and stock car racing was obviously not included because the owners had been required to undertake a "substantial expenditure of money and complete reconstruction of the facilities so as to enable motor-racing to be carried on" (p. 29). The interesting question is why the majority took a broad view of the existing use and the dissent took a narrow view. Both of these views were sustainable on the facts. The majority seemed influenced by the idea of remoteness, i.e., that the new activity, while different, was not remote but was closely related to what had gone before. Although "neighbourhood effects" were not mentioned by the dissenting judge, I think it fair to say that if the facts were reversed so that the stadium had been reconstructed to eliminate stock car racing in favour of less noisy exhibitions such as walk-a-thons or lawn tennis, the neighbours (and the dissenting judge) might have taken a more expansive view of the pre-existing use.

[32] The more recent common law jurisprudence on "non-conforming uses" is no less divided than the Quebec jurisprudence on "acquired rights": see I.T. Kagan, *But I Do Not Want to Be Legal* (1993) 13 M.P.L.R. (2d) 252. The more restricted end of the definitional spectrum is illustrated by *R. v. Kelly Landscape*

Contractors Ltd. (1980), 13 M.P.L.R. 67 (Ont. Co. Ct.), where it was held that a legal non-conforming business which grew flowers for sale could not lawfully sell the flowers (or fertilizers, etc.) from its premises. The added business, while closely related, was not the same.

[33] The more generous end of the definitional spectrum is illustrated by *Campbellton (City) v. Thompson* (1994), 151 N.B.R. (2d) 1 (N.B. C.A.), where a landowner was permitted to add a rock-crusher to its existing non-conforming quarry operation. The trial judge had concluded that crushing rock was a different activity than extraction, and upheld the municipality's objection. This was reversed by the Court of Appeal which applied its previous decision in *Lordon v. Pitman* (1980), 33 N.B.R. (2d) 23 (N.B. C.A.), in asking itself whether the introduction of the "new element" changed "the essential general use of the land" (para. 10). The added activity, it decided, did not do so. Again, the trial judge's narrower view of the pre-existing use (extraction and sale of rock) was as open on the facts as the broader view taken by the Court of Appeal (a quarry operation includes an activity reasonably incidental thereto). The trial judge was worried about the neighbourhood effects of the added activity. The Court of Appeal seems to have decided the case on considerations of remoteness.

[34] In my view, both remoteness and neighbourhood effects have a role to play in the proper disposition of this type of case. Each contributes to what Gonthier J. refers to as the real and natural expectation of the landowner. The Court's objective is to maintain a fair balance between the individual landowner's interest and the community's interest. The landowner overreaches itself if (i) the scale or intensity of the activity can be said to bring about a change in the type of use, as mentioned above, or if (ii) the addition of new activities or the modification of old activities, (albeit within the same general land use purpose), is seen by the Court as too remote from the earlier activities to be entitled to protection, or if (iii) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours, as compared with what went before. The factors are balanced against one another. Thus, adding a metal panel beating operation to an automobile repair shop in a residential neighbourhood will probably (despite the logical business affinity) be characterized as a new type of use, whereas a local non-conforming grocer store use that adds an innocuous fax machine — clearly an activity unrelated to selling groceries — will likely succeed (assuming someone wished to challenge it) by defining its prior operation as a "convenience store" rather than a "grocery store".

[35] The relevance of remoteness is self-explanatory, but the relevance of neighbourhood effects perhaps requires some discussion. The balancing of interests takes place in the framework of zoning control. The Quebec law, as mentioned, expressly takes neighbourhood effects into account in the legislative establishment of use categories. The by-law in this particular case speaks of "volume, nuisance, compatibility, use and aesthetics", and see *2550-9613 Québec Inc. c. Val d'Or (Ville)*, [1997] R.J.Q. 2090 (C.A. Que.). It stands to reason that in attempting to

accommodate the landowner's real and natural expectation of the continuation of the status quo, and to properly maintain the balance between the interests of the landowner and the community, the Court should also have these "neighbourhood effects" in mind in considering the situation of a landowner who has somewhat modified or extended pre-existing activities within the same general use category. The adverse impact of neighbourhood effects generated by added or modified activities constitutes one of the guiding principles under the somewhat different regulatory systems in Britain (see, for example, *East Barnet Urban District Council v. British Transport Commission* (1961), [1962] 2 Q.B. 484 (Eng. Q.B.), and *Thames Heliport Plc v. London Borough of Tower Hamlets* (1996), 74 P. & C.R. 164 (Eng. C.A.), and in the United States (see *Bridgewater (Town) v. Chukran*, 217 N.E.2d 726 (U.S. Mass. 1966), at pp. 727-28, *Conforti v. Manchester (City)*, 677 A.2d 147 (U.S. N.H. 1996), at p. 150, *Belleville (Town) v. Parrillo's Inc.*, 416 A.2d 388 (U.S. N.J. 1980), and *Cape Resort Hotels Inc. v. Alcoholic Licensing Bd. of Falmouth*, 431 N.E.2d 213 (U.S. Mass. 1982), at p. 217). In those jurisdictions, as in Canada, planning is concerned not only with the physical use of land but also with any adverse effects of such uses on the surrounding area. It is appropriate to carry that concern forward into the Court's consideration of added, altered or modified activities which are claimed to be protected by the prior existing use.

[...]

[36] A concern for the twin criteria of remoteness and neighbourhood effects is also, I think, implicit in *Prince Edward Island Museum & Heritage Foundation v. Charlottetown (City)* (1998), 161 Nfld. & P.E.I.R. 56 (P.E.I. T.D.). A museum and heritage foundation had for many years used its parcel of land, which included several buildings, for museum-related activities. In 1979, its operation became a legal non-conforming use. Subsequently, the owners began to expand the activities in one of the buildings ("the Carriage House") to include receptions and dinners catered by a local hotel. Some of these soirées were for fundraising purposes. The neighbours objected to the added noise and commotion. Notwithstanding the owner's ingenious efforts to tie its hospitality activities to museum functions (e.g., it argued it would "make heritage more palatable by concealing it in another activity such as a concert" (para. 15)), DesRoches J. concluded that the hospitality functions were too remote from the prior non-conforming use to be permitted.

[37] At the same time, though, he permitted other added or altered museum activities, including a gift shop, a genealogy centre for research and facilities for public lectures. Although the rationale is not articulated in his reasons, it is apparent that the activities he upheld created fewer adverse neighbourhood effects than those he found to be prohibited, and were, indeed, not the subject of public complaint.

C. Summary of Approach

[38] I therefore approach the issue of limitations on the respondents' acquired

right as follows:

1. It is firstly necessary to characterize the *purpose* of the pre-existing use (*Central Jewish Institute*, supra). The purpose for which the premises were used (i.e., “the use”) is a function of the activities actually carried on at the site prior to the new by-law restrictions.
2. Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection. However, where the intensification is such as to go beyond a matter of degree and constitutes, in terms of community impact, a difference in kind (as in the hypothetical case of the pig farm discussed above), the protection may be lost.
3. To the extent a landowner expands its activities beyond those it engaged in before (as where a custom picture-framing shop attempted to add a landscaping business in *Nepean (City) v. D’Angelo* (1998), 49 M.P.L.R. (2d) 243 (Ont. Gen. Div.), the added activities may be held to be too remote from the earlier activities to be protected under the non-conforming use. In such a case, the added activities are simply outside any fair definition of the pre-existing use and it is unnecessary to evaluate “neighbourhood effects”.
4. To the extent activities are added, altered or modified *within* the scope of the original purpose (i.e., activities that are ancillary to, or closely related to, the pre-existing activities), the Court has to balance the landowner’s interest against the community interest, taking into account the nature of the pre-existing use (e.g., the degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right) and the new or aggravated neighbourhood effects (e.g., the addition of a rock crusher in a residential neighbourhood is likely to be more disruptive than the addition of a fax machine). The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right. This approach does not rob the landowner of an entitlement. By definition, the limitation applies only to added, altered or modified activities.
5. Neighbourhood effects, unless obvious, should not be assumed but should be established by evidence if they are to be relied upon.
6. The resulting characterization of the acquired right (or legal non-conforming use) should not be so general as to liberate the owner from the constraints of what he actually did, and not be so narrow as to rob him of some flexibility in the reasonable evolution of prior activities. The degree of this flexibility may vary with the type of use. Here, for example, the pre-existing use is a nightclub business which in its nature requires renewal and change. That change, within reasonable limits, should be accommodated.
7. While the definition of the acquired right will always have an element of subjective judgment, the criteria mentioned above constitute an attempt

to ground the Court's decision in the objective facts. The outcome of the characterization analysis should not turn on personal value judgments, such as whether nude dancing is more or less deplorable than cowboy singing. I am unable, with respect, to accept as legally relevant my colleague's observation that "[w]hereas erotic entertainment seeks to sexually arouse the audience by the stripping and suggestive behaviour engaged in by the performers, country and western shows seek to entertain by providing a showcase for the special talents of singers, musicians and dancers" (para. 76). Serious music is also commonly thought to arouse the passions profoundly, but in terms of acquired rights, music stores should not be differentiated by whether they offer Muzak or Mozart.

VI. Application to the Facts

[39] As stated earlier, I believe the respondents' pre-existing use can appropriately be characterized as the commercial offering of a combination of food, drink, ambiance and lawful entertainment to the public.

[40] The switch to a different form of entertainment, as in the change from western-style concerts to nude dancers, is within this general nightclub purpose. The substitution of nude dancers is no more remote in law than would be the substitution of karaoke singing. My colleague Gonthier J. takes the view that nude dancing raises "considerations of a moral nature" (para. 77) that presumably would not be raised by karaoke singing, but in my view, with respect, it is not our function to create a moral hierarchy of different forms of entertainment. Objectively speaking, there is no problem of remoteness. There is no replacement of one use by a different use.

[41] While it appears that the substitution of nude dancing has improved the business, the municipality does not rely on an *intensification* of the existing use as a disqualification.

[42] There is no serious evidence of adverse neighbourhood effects. My colleague Gonthier J. relies on the comment of Constable Gelly about increased police surveillance, but the municipality made no effort to demonstrate a link between criminal elements and nude dancing. The police themselves did not make much of a point of added surveillance and the trial judge went out of his way to say that there was no problem of discipline within the premises. In my view, if the appellant's case were to rest on adverse neighbourhood effects, a better evidentiary base ought to have been provided.

[43] In terms of "added" activities, my colleague Gonthier J. points out that the respondents created five private viewing booths in which a customer and the dancer were distanced from the general audience. This, he points out, is a form of private entertainment. The uncontradicted evidence, however, was that there was no sexual touching and that nothing occurred in the booth that did not occur in the general viewing area. Admission to the booths was open to any member of the public. Morality apart, I do not see how this changes the legal

nature of the use, any more than would be the case if an ordinary restaurant sought to upgrade its facilities by offering private dining-rooms

VII. Conclusion

[44] In my view, the change in entertainment offered by the respondents did not constitute the illegal replacement of the original non-conforming use with a different and therefore unprotected non-conforming use.

[45] If nude dancing is thought to be objectionable on moral or other grounds, the topic could be further considered by legislators rather than by judicial curtailment of acquired rights.

[46] I would therefore dismiss the appeal with costs to the respondents.

Gonthier J. (dissenting) (L’Heureux-Dubé, Bastarache JJ. concurring):

I. Introduction

[47] This appeal deals primarily with the extent of the protection conferred by acquired rights in Quebec municipal law. The issue to be determined is the limits of the protection where the use initially exercised has been transformed. Specifically, the Court must decide in the instant case whether acquired rights continue to exist when a bar that had been presenting country and western entertainment subsequently becomes a bar that presents erotic entertainment.

II. Facts

[48] The respondents Claudette Olivier, Louise Bolduc and Roger Bolduc are owners of a building located within the territory of the appellant City of Saint-Romuald. Since 1990, several tenants in succession have operated a bar in the building, presenting country and western entertainment. At the time, the City’s zoning by-law (C-600) permitted the operation of [translation] “cabarets” in the zone where the building is located. However, a new zoning by-law, No. 273-90, came into force on May 22, 1991. Like a number of other by-laws of its type, it sets out the authorized and prohibited uses for a given zone, using a grid known as the [translation] “specifications grid” (s. 7). Different uses are first divided into “groups” and then into “classes”. Uses are allocated to the various classes [translation] “based on common characteristics of land occupation relating to volume, nuisance, compatibility, use and aesthetics” (s. 16). This type of classification enables the City to authorize or to prohibit an entire class of uses or a specific use, at its option. To this end, ss. 9 to 11 of the by-law state:

[TRANSLATION]

9. Permitted Uses

The uses listed in the specifications grid correspond to the description of uses set out in chapter IV. *A line appearing opposite a class of uses means that all principal uses in that class are permitted, to the exclusion of all other uses.* [Emphasis added.]

10. Other Permitted Use

Where a principal use is specifically permitted, this means that even if the class corresponding to that use is not permitted, that particular use is permitted.

11. Prohibited Use

Where a principal use is specifically prohibited, this means that even if the class corresponding to that use is authorized, that particular use is prohibited.

[49] In the new by-law, uses [translation] “restaurant or bar with entertainment” (585) and [translation] “restaurant or bar with erotic entertainment or films” (586) — which correspond to the former use “cabaret” — are in the [translation] “commercial services” class (s. 22). For the zone in which the building is located, there is no line opposite “commercial services” on the specifications grid. Moreover, uses 585 and 586 are not shown on the grid as expressly permitted. Although use [translation] “hotel, motel, guest house” (181) is also part of the “commercial services” class, it is shown on the grid as expressly prohibited. The new by-law also governs the issue of acquired rights, in part. It specifically provides, *inter alia*, that a non-conforming use protected by acquired rights may not be replaced by another non-conforming use (s. 204).

[50] In the fall of 1994, after buying out the business from the owner of the country and western bar, the respondent 9010-4407 Québec Inc. began operating a bar which presented entertainment involving nude dancers. The appellant then decided to apply to the Superior Court under s. 227 of the *Act respecting land use planning and development*, R.S.Q., c. A-19.1, for an order requiring the cessation of what it regarded as the unlawful replacement of one non-conforming use by another.

[...]

B. Replacement of Use

[51] As indicated above, a change in the nature of the use actually made prior to the zoning amendment will result in loss of the immunity conferred by acquired rights. Whether such a change has occurred must be determined on the basis of the real and natural expectations of the user and the relevance of the changes as regards the purposes of land use by-laws. Nevertheless, each case turns on its own facts and the nature of the use protected by acquired rights must be determined by the court having regard to the unique facts of each situation.

[52] In the instant case, a country and western bar was replaced by a bar that presented erotic entertainment. The respondents contend that the building has never housed anything but a bar with entertainment and that the nature of the entertainment provided should not have any effect on acquired rights. With respect, I am unable to agree with that assertion. First, I do not believe that the real and natural expectations of the owner of a country and western bar include

operating a bar with nude dancers. There is a significant *prima facie* difference in the nature of the entertainment being presented. Whereas erotic entertainment seeks to sexually arouse the audience by the stripping and suggestive behaviour engaged in by the performers, country and western shows seek to entertain by providing a showcase for the special talents of singers, musicians or dancers. That difference is further apparent in some of the physical alterations made to the building and the business it houses because of the transformation from a country and western bar to a bar with nude dancers. Among other things, five closed booths were added so that customers could be offered erotic dances in a private setting. I further find it relevant to note the contrast between *private* dances performed in booths and country and western entertainment presented in *public*. In my view, these factors provide further support for the impression that one use has indeed been replaced by another, rather than that the same use has been continued.

[53] The foregoing exercise therefore plainly leads me to finding that there is an obvious difference between a bar that presents country and western entertainment and a bar that presents erotic entertainment, even if we disregard individual opinion about the moral value of erotic entertainment. However, that distinction becomes even more germane when we examine it with the objectives of harmonious development and welfare, which land use legislation is intended to advance, in mind. Efforts to advance those objectives may indeed be informed by considerations of a moral nature, as long as those considerations relate to the primary purposes of the by-laws. For example, it would obviously be proper, for the purposes of those by-laws, to distinguish between establishments that serve liquor and establishments that do not. *A fortiori*, it should be apparent that there is a fundamental difference between an establishment that presents country and western entertainment and another establishment that presents entertainment of an erotic nature. As well, the observation that both types of entertainment are legal does nothing to advance the analysis, since by definition, land use planning presupposes a classification of legal uses for the purposes of dividing and organizing the territory.

[54] Nonetheless, the nature of an activity must be defined in reference to the perception and values of the society. Accordingly, while it may be legal to operate establishments that present erotic entertainment, those establishments have a particular social and moral connotation that justifies treating them as distinct for land use planning purposes. First, the kind of entertainment presented involves an increased possibility of indecent excesses and illegal acts (see, for example, s. 163(2)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46: exhibiting an indecent show; s. 167: immoral theatrical performance; and s. 173(1): indecent act). Second, that kind of entertainment tends to condone the violation of respect for and the dignity of the performers, whose sexuality and persons are then subservient to and exploited for lewd and commercial purposes. And third, it is worth noting that the police officer, Gelly, testified at trial that the opening of an establishment presenting erotic entertainment prompted the police service to tighten its surveillance in the surrounding neighbourhood, and that it was

attracting a criminal element.

[55] The decisive question of whether the conversion of an establishment that presents entertainment that is devoid of any sexual or erotic aspect into an establishment that presents erotic entertainment means that the protection offered by acquired rights is lost has only seldom been addressed by the courts. In Quebec, there is only *Saint-Raymond (Ville) c. Entreprises Benoît Demers Inc.*, [1996] Q.J. No. 4387 (C.S. Que.), in which Goodwin J. held that a transformation of this sort had resulted in replacement of one prohibited use by another, and led to the loss of the acquired rights. The courts of the other provinces of Canada do not seem to have had occasion to deal specifically with this question. The American courts, however, have examined it on a few occasions.

[56] In *Squillante v. Zoning Board of Appeals of the City of Hartford* (September 26, 1997), Doc. CV 960566513s (U.S. Conn.), the plaintiffs had obtained a certificate of occupancy from the municipality to operate a “café liquor” (p. 2). At the time the certificate was issued, it would have been open to them to present “adult” entertainment under the by-laws then in force. However, there was nothing in the evidence to show that they had done any such thing. The city then amended its zoning by-laws, and “adult” entertainment establishments were prohibited in the zone where the plaintiffs’ business was located. The plaintiffs subsequently began to operate an establishment of that nature. The city had issued a notice of violation to the plaintiffs, who then claimed that their activities were protected by acquired rights. The Court rejected that argument, stating, at pp. 12-13:

[T]he simple fact is that the record reflects that no adult entertainment was actually being provided on the premises prior to the time the municipal code was amended on May 9, 1994, to exclude adult entertainment from a B-1 zone.

Accordingly, because a “café liquor” and an adult entertainment establishment are entirely different in nature, operation of the former could not mean that operation of the latter was protected by acquired rights.

[57] In *Marzocco v. City of Albany* (1995), 629 N.Y.S.2d 847 (U.S. N.Y.A.D. 3rd Dept.), the petitioner had purchased a tavern featuring male strippers as entertainment, which catered primarily to the area gay population. That use was prohibited by the zoning by-laws in force, but was protected by acquired rights. The petitioner first replaced the male strippers with topless female dancers. He then decided to surrender his liquor licence and establish a “juice bar”, and present totally nude female dancers and other forms of erotic entertainment. He therefore applied to the City of Albany Board of Building, Zoning and Housing Appeals for permission to change the use of the premises. When the request was denied, he turned to the courts, which affirmed the Board’s decision. The Appellate Division of the New York State Supreme Court held, at p. 848:

Initially, we agree with Supreme Court that there is rational basis and substantial evidence in the record to support respondent’s factual

determination that petitioner's change in the character of his property was sufficient to require a use variance. . . . Notably, the abandonment of petitioner's tavern trade and surrender of his liquor licence freed him from the restrictions (and the public from the protections) of the Alcoholic Beverage Control Law and the rules of the State Liquor Authority. *In the same connection, the primary purpose and profit motive of the business changed from the sale of food and beverages, with adult entertainment a mere incidental attraction, to the exhibition of nude dancing, thereby effecting a fundamental change in the character of the clientele and, as a consequence, the impact of the business on the neighborhood.* [Emphasis added.]

[58] The dissimilarity between a country and western bar and a bar that presents entertainment involving nude dancers is also revealed by a line of more general cases concerning the validity of land use planning provisions governing establishments that present erotic entertainment. In *2550-9613 Québec Inc. c. Val d'Or (Ville)*, [1997] R.J.Q. 2090 (C.A. Que.), it was argued that the distinction made by the municipality between [translation] "taverns, bars and night clubs" and establishments that present entertainment with male and female nude dancers was discriminatory, as that term is understood in administrative law. Chamberland J.A., writing for the Court of Appeal, rejected that argument and stated in his reasons, at p. 2095:

[TRANSLATION]

It is clear from the evidence in this case that the adoption of the zoning by-law (June 7, 1993) and the decision to refuse the [respondent's] request to amend the by-law (July 17, 1995) were based on considerations involving the proximity of a church and an elementary school, child protection, crime prevention and the safety and welfare of the public, as well as the improvement of the image of downtown Val-d'Or. These are relevant considerations in zoning and urban planning matters.

The distinction was therefore held to be permitted under the Act respecting land use planning and development. As well, in *Moncton (City) v. Steldon Enterprises Ltd.* (2000), 225 N.B.R. (2d) 11 (N.B. Q.B.), it was concluded that a by-law adopted under the *Community Planning Act*, R.S.N.B. 1973, c. C-12, prohibiting the operation of "adult cabarets" within the city, was valid. Those cases are also consistent with the opinion stated by the United States Supreme Court regarding the validity of similar zoning ordinances (*Young v. American Mini Theatres Inc.* (1976), 427 U.S. 50 (U.S. Sup. Ct.); *City of Renton v. Playtime Theatres Inc.* (1986), 475 U.S. 41 (U.S. Sup. Ct.)).

[59] As a final point, I consider it worth noting that in Ontario, the *Municipal Act*, R.S.O. 1990, c. M.45, specifically delegates to municipalities the power to regulate "adult entertainment parlours" (see, for example, *538745 Ontario Inc. v. Windsor (City)* (1988), 64 O.R. (2d) 38 (Ont. C.A.)). Section 225 of that Act

provides:

- (1) By-laws may be passed by the councils of local municipalities for licensing, regulating, governing, classifying and inspecting adult entertainment parlours or any class or classes thereof and for revoking or suspending any such licence and for limiting the number of such licences to be granted, in accordance with subsection (3).

...

- (3) Despite subsection 257.2 (4), a by-law passed under this section may define the area or areas of the municipality in which adult entertainment parlours or any class or classes thereof may or may not operate and may limit the number of licences to be granted in respect of adult entertainment parlours or any class or classes thereof in any such area or areas in which they are permitted.

[60] To conclude, I believe that these are significant indications that the distinction between a bar that presents country and western entertainment and a bar that presents entertainment involving nude dancers is relevant in the exercise of general land use planning powers.

[61] I am of the view therefore that operating a bar that presents erotic entertainment constitutes the illegal replacement of the original non-confirming use by a different non-confirming use. Replacing the one with the other accordingly results in loss of the protection conferred by acquired rights.

VII. Conclusion

[62] For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal, and order the respondents to immediately cease using the premises located at 643 4th Avenue in Saint-Romuald as a bar that presents erotic entertainment, with costs throughout.