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CASE COMMENT ON

***IMMEUBLES JACQUES ROBITAILLE INC. V. QUEBEC (CITY)*,** 2014 SCC 34

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INTRODUCTION

The Supreme Court of Canada, on 2 May 2014, issued its decision in *Immeubles Jacques Robitaille Inc. v. Quebec (City)*. This unanimous judgment was written by Justice Wagner, formerly of the Quebec Court of Appeal. The judgment is relatively short at 39 paragraphs. [1]

At first glance, the decision might appear limited in scope. Justice Wagner, at paragraph 2 of the judgment, defines the issue: "The appeal relates exclusively to the circumstances in which the doctrine of estoppel can be relied on in order to avoid penal liability." But he then goes on to touch upon several important aspects of municipal law. In doing so, the Judgment becomes a ready source of reference and authority for future cases.

ZONING BASICS

The use and development of land is regulated by zoning. Zoning bylaws typically divide the municipality into zones, which are shown on maps adopted as part of the bylaw. The bylaw text then authorizes certain uses as permitted or discretionary within the zone and establishes regulations to control certain uses. A person may commence any permitted use, but must first obtain Council approval for a discretionary use. If a use is not listed as permitted or discretionary, then it is prohibited, unless found to be accessory to a permitted or discretionary use for which approval has been granted. [2] Zoning bylaws also controls development by restricting what can be built, where buildings can be sited, and setting other development standards for buildings.

Municipalities may enforce zoning bylaws through legal action, including by prosecution in Provincial Courts, with sanctions of fines and court orders to comply, and in superior courts seeking court orders in the nature of injunctions. Once the municipality proves that the current use is prohibited (not expressly allowed by the zoning bylaw), then the onus shifts to the defendant landowner or occupant to establish an exception or exemption, such as that the current use is accessory to a permitted principal use (ie. parking a personal vehicle in a garage or on a driveway constructed on the lot as accessory to the principal development and use of a residential house) or that the current use is legally non-conforming.

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1 *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34

2 *R. v. Cunningham*, (1994) 120 Sask R 117, 110 DLR (4th) 640 (CA)

HOW DID THIS APPEAL ARISE?

Municipal Zoning Prosecutions

The case arose in the context of a prosecution by the City of Quebec against the owner of a commercial parking lot for contravening the City zoning bylaw.

Les Immeubles Jacques Robitaille Inc. owned properties in the City of Quebec which it used for its commercial parking lot business. Although these properties had been used in this manner for some years, the City began to more strictly enforce its zoning bylaw, which had been in place since 1979.

Trials and Convictions

Les Immeubles Jacques Robitaille Inc. was charged with contraventions of the zoning bylaw. On 14 January 2010, after trial, Justice Louis-Marie Vachon of the Quebec Municipal Court found the owner guilty and imposed a fine of $300, relating to a 2007 offence at its parking lot at 7175, boulevard Wilfrid-Hamel. [3] On 6 June 2011, following another trial, Judge Gilles Gaumond of the Quebec Municipal Court found the owner guilty and imposed the minimum fine of $200, relating to a 2008 offence at its parking lot at 800-816, côte d'Abraham. [4]

Appeal of Conviction

The owner appealed the 2011 conviction, which was set aside by the Quebec Superior Court in 2012, [5] but restored by the Quebec Court of Appeal in 2013. [6] The owner appealed to the Supreme Court of Canada, which granted leave to appeal on 11 July 2013, heard the appeal on 20 February 2014 and issued its judgment on 2 May 2014.

THE OWNER'S DEFENCES

The owner conceded that the City zoning bylaw did not allow the use of this property as a commercial parking lots, but argued as a defence the doctrine of acquired rights and the doctrine of promissory estoppel. The first defence was put forward by the owner at trial, while the second defence was added

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3 *Quebec (Ville de) v. Immeubles Jacques Robitaille Inc*., 2010 QCCM 28 (CanLII)

4 *Quebec (Ville de) v. Immeubles Jacques Robitaille Inc*., 2011 QCCM 167 (CanLII)

5 *Quebec (Ville de) v. Immeubles Jacques Robitaille Inc.*, 2012 QCCS 806 (CanLII)

6 *Quebec (Ville de) v. Immeubles Jacques Robitaille Inc.*, 2013 QCCA 219, 6 M.P.L.R. (5th) 36

on appeal. A third defence, related to the alternate methods of enforcement available, was introduced by the first appeal court, as described below.

Acquired Rights (legally non-conforming use)

In support of the application of the doctrine of acquired rights, the owner called evidence at trial that the property in question had been used as a parking lot since 1970, before the zoning prohibition came into effect. (Canadian lawyers in common law provinces would understand this as a "legally non-conforming use", entitled to grandfathered protection against a subsequent change in zoning.) The trial judge rejected this defence as based on hearsay, indicating an accessory rather than principal use. Further, the fact the City had tolerated the use over the years could not provide a basis for acquired rights.

Promissory Estoppel

In support of the application of the doctrine of promissory estoppel, the owner cited several acts or omissions by the City. The owner had acquired the Abraham property in 1998, but the parking lot had been in operation since 1995. The owner relied upon several acts or omissions by the City, including: assessment and taxation of the property at a commercial rate; compensation paid by the City in 2001 for loss of parking income resulting from freeway construction work next to the property; a 2002 sale of a piece of the property by the owner to the City, in which the sale agreement provided for "preservation of the vendor's present rights"; construction by the City, at the time of its purchase of a piece of the property in 2002, of a vehicle entrance to provide access to the remaining parking lot; and installation of signage on the public road to indicate public parking at the property. Further, the City took no enforcement action until 2008.

Enforcement Method

Justice Pronovost of the Quebec Superior Court, on appeal, noted that the City had prosecuted the owner, as provided by *The Cities and Towns Act*, CQLR, c. C-19, s. 576, rather than seeking an order from the superior court, as authorized by *The Planning and Development Act*, s. 227. Justice Pronovost held that the City, by instituting penal proceedings in a court of inferior jurisdiction, rather seeking injunctive relief in superior court, effectively deprived the owner of the ability to rely upon its equitable defence of estoppel, since only a superior court could exercise its discretion not to grant the order.

The Quebec Court of Appeal held that Justice Pronovost erred in law. The Court of Appeal held that the trial judge properly convicted the owner once it was satisfied that the owner had committed an offence and had no valid claim to acquired rights. The mere fact of an alternate method of enforcement, with the possibility that the court might deny the relief sought, could not raise a reasonable doubt as to the owner's penal liability.

WHY IS THE SUPREME COURT'S JUDGMENT SIGNIFICANT?

This is a unanimous decision of the Supreme Court of Canada in the field of municipal law. That alone is significant, since the Supreme Court decides only about two municipal law cases each year. And of the twenty municipal law cases decided in the past ten years (treating judgments issued at the same time and on the same issue as a single case), ten were on appeal from the province of Quebec. So one should not undervalue the influence of the judgment because of its province of origin.

The significance of this short judgment lies in the several aspects of municipal law addressed in the judgment. While some of the statements may be *obiter, obiter* statements from a unanimous judgment of the Supreme Court remain highly persuasive authority.

WHAT DID THE SUPREME COURT DECIDE?

The Supreme Court dismissed the appeal, upholding the conviction. In doing so the Court addressed several important aspects of municipal law. These several aspects are reviewed below.

Judicial Approval of Zoning Bylaws

The Court expressly recognized the purpose of zoning regulation and the public interest in adopting zoning laws, which may require balancing and sometimes sacrifice of individual rights. [7]

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[7] *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34, at paragraph 23

See also: *Bell v. R.*, [1979] 2 S.C.R. 212, at 222

> I am in agreement with the view as expressed so aptly by Masten J.A. in *Re Howard v. City of Toronto*, at p. 575:
>
> > What is or is not in the public interest is a matter to be determined by the judgment of the municipal council; and what it determines, if in reaching its conclusion it acted honestly and within the limit of its power, is not open to review by the Court…
> > The question of the relative balance of convenience or detriment to different persons is a matter which the Legislature has committed to the consideration and determination of the municipal council, and their judgment on that question, if bona fide exercised in what they believe to be the public interest, will not be interfered with by the Court: *In re Inglis and City of Toronto*, 9 O.L.R. 562, *per* Anglin, J., at p. 568; *Re Mills and City of Hamilton* (1907), 9 O.W.R. 731.
>
> (per: Judson, J. for the majority)

> [23] The penal recourse exists to enable a municipality to enforce zoning by-laws, which are adopted to ensure harmonious development of the urban area (M.-A. LeChasseur, *Le zonage en droit québécois*, (2006), at p. 1). Moreover, [TRANSLATION] "zoning is established for the benefit of each of the various owners in a zone, and unlawful use by one owner is generally at the expense of the rights of the others" (*Mascouche (Ville) v. Thiffault*, 1996 CanLII 6503, at p. 3 (Que. C.A.)). In my opinion, the public interest must be taken into account in adopting a zoning by-law, and the by-law's penal provisions ensure that it is complied with. Given how explicit this provision is, the doctrine of estoppel is of no assistance to the appellant.

Municipal Duty and Discretion in Bylaw Enforcement

The Supreme Court of Canada long ago accepted that municipalities had discretion over enforcement of bylaws. [8] The Court in this case recognizes both a duty and discretion over bylaw enforcement on the part of the municipality. This indicates that the municipality does not have an entirely free hand and must exercise its authority responsibly and impartially.

> [25] Although a municipality is not under an obligation to do everything it can to ensure compliance with its by-laws and cannot be compelled to enforce them (s. 576 of the *Cities and Towns Act*; Hétu and Duplessis, at para. 8.203), neither can it grant citizens a right to non-conforming uses on its territory. The authorization by a municipal employee or elected official of a use that violates a provision of a by-law cannot create rights or oust the applicable standards set out in the by-law….
>
> [26] Insofar as the appellant in the case at bar is arguing that the substance of the promise was an authorization to violate the zoning by-law (a "promise" that flowed from the respondent's actions or from a tolerance on its part), the only possible conclusion is that such a promise cannot lead to the application of public law estoppel. Since a municipality cannot deviate from its zoning by-laws or authorize such a deviation (with the exception of minor exemptions under s. 145.1 of the *Act respecting land use planning and development*), it cannot be forced to do so by means of the doctrine of estoppel.

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[8] *Chateau-Gai Wines Ltd. v. Institut National des Appellations d'Origine des Vins et Eaux-de-Vie et al.*, [1975] 1 S.C.R. 190, at 207

> As this Court recently held in *Polai v. City of Toronto*, no one who infringes a public policy statute can plead as a defence to an action for an injunction the fact that others who were in breach have not been prosecuted.
> (Pigeon, J. for the majority)

Polai v. City of Toronto, [1973] S.C.R. 38

Alternate Methods of Enforcement

The choice of method of enforcement – by prosecution in Provincial Court or by seeking injunctive relief in superior court – is common across Canada. The method of proceeding does not change the essentially civil nature of the proceeding. The mere fact of enforcement through summary conviction procedure does not convert such matters from civil to criminal matters. [9]

The Supreme Court recognized both the legitimacy and purposes of the alternate methods of enforcement by either prosecution or civil proceeding. [10]

> (2) Duality of Recourses Established by the Legislature
>
> [31] The legislature has given municipalities two types of recourses for enforcing zoning by-laws, one that is penal in nature and another that is civil in nature. A municipality is free either to issue a statement of offence and institute a penal proceeding in order to sanction a use that contravenes its planning by-laws, or to bring a civil proceeding, such as the one provided for in s. 227 of the *Act respecting land use planning and development*. Section 227 provides that the Superior Court may order the cessation of a use of land or a structure that is incompatible with a zoning by-law. It also authorizes the court to order, at the owner's expense, the demolition of the structure or the carrying out of works to bring the use of the structure into conformity with the by-law.
>
> [32] This duality of recourses is a legislative choice that must be preserved and that is not a source of injustice. Each of the recourses is clearly defined, and they have different purposes. Whereas the purpose of the penal proceeding is essentially to punish past conduct by means of a fine and to deter the non-conforming use in the future, the civil proceeding can result in an order that a particular use cease for the future, although it is more cumbersome, complex and costly (L. Giroux and I. Chouinard, "Les pouvoirs municipaux en matière d'urbanisme", in Collection de droit, vol. 7, *Droit public et*

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[9] *Phillips v. Conroy*, (1982) 14 Sask R 12 (C.A.)

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, at 1302 - 1303, 85 D.L.R. (3d) 161, at 165

> In the present appeal the Court is concerned with offences variously referred to as "statutory," "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. (*Sherras v. De Rutzen*) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.
> (per: Dickson, J. for the Court)

[10] *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34, at paragraphs 31 - 33

> *administratif* (2013-14), 439). Instituting the penal proceeding enables the municipality to raise the question of acquired rights before initiating the civil proceeding, which could have serious consequences for the owner if the court were to order the cessation of the use of the structure, or the carrying out of works at the owner's expense in order to bring the use of the structure into conformity with a by-law.

Res Judicata **Rejected**

The Supreme Court ruled that, given the different purposes of the alternate enforcement procedures, *res judicata* would not apply to bar instituting one after the lack of success of the other. [11]

Complementary Statutory Enforcement Regimes

The alternate methods of enforcement in this case were found in two different statutes: prosecution of an offence in Municipal Court under *The Cities and Towns Act*, CQLR, c. C-19, s. 576; and civil proceedings to obtain an order from superior court in *The Planning and Development Act*, s. 227. The separation of the enabling municipal statute and planning statute (and other statutes administered or enforced by municipalities) is common across Canada. The Supreme Court inferentially accepts the separate enforcement regimes as complementary, rather than exclusive. This is significant in providing authority to overcome the argument that the municipality is restricted to the procedures set out in the provincial planning statute, which authorizes the zoning bylaw, as a complete and exclusive code.

Exercise of Judicial Discretion

Orders in the nature of *injunctions*, *mandamus*, *prohibition* and *quo warranto* are considered extraordinary relief. Superior courts have inherent jurisdiction to refuse to grant an order even where the usual criteria are satisfied. It is significant then that the Supreme Court stated that, where the municipality seeks an order from the superior court, "there must be exceptional circumstances before a court will refuse to order the cessation of a non-conforming use".

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[11] Ibid, at paragraph 33

> [33] As I mentioned above, the two recourses have different purposes. Moreover, as the Quebec Court of Appeal properly noted in the instant case, neither of them results in *res judicata* as regards the other. Although a municipality could theoretically persist in issuing penal statements of offence after the Superior Court has refused to order the cessation of a non-conforming use in a civil proceeding, the doctrine of abuse of process would be available to remedy such abuse, which, it bears mentioning, nevertheless remains highly hypothetical. I should also point out that there must be exceptional circumstances before a court will refuse to order the cessation of a non-conforming use under s. 227 of the *Act respecting land use planning and development* (*Chapdelaine*).

Strict Liability Offence

The Supreme Court recognized strict liability offences in its 1978 decision in *R. v. Sault Ste. Marie*. [12] The Supreme Court, in this case, ruled that the elements of a strict liability offence apply whether the bylaw is enforced by prosecution or by civil proceeding. [13] As the court observed, in this case, the owner did not present sufficient evidence to support a defence of due diligence by proving "that all possible and reasonable precautions were taken to avoid committing the offence." [14]

Acquired Rights (legally non-conforming)

The Supreme Court recognized the defence of acquired rights (or legal non-conformity), but agreed with the trial judge and Court of Appeal that the owner had not discharged its burden of proof to establish that defence, confirming that the onus of proof is on the person claiming the exemption. [15]

Promissory Estoppel

While recognizing the existence of promissory estoppel, the Court ruled that it could not apply to defeat the application of statute law. This is the clear *ratio* of the judgment.

> [4] Estoppel is of no assistance to a litigant who wishes to avoid the application of a clear legislative provision, including, as in the instant case, one that establishes a strict liability regulatory offence. [16]

The Court reviewed the elements of promissory estoppel in a public law context, finding it required:

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[12] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161

[13] *Immeubles Jacques Robitaille Inc. v. Quebec (City)*, 2014 SCC 34, at paragraph 34

> [34] Furthermore, the Court of Appeal was right to conclude that the mere possibility of the Superior Court's refusing to order the cessation of a non-conforming use in a proceeding under s. 227 of the *Act respecting land use planning and development* does not raise a reasonable doubt as to the person's guilt in a different proceeding in a penal law context. The elements of a strict liability offence in the latter context do not cease to exist simply because the court exercised its discretion judicially in the civil proceeding.

[14] Ibid. at paragraph 35

[15] Ibid. at paragraph 36

[16] Ibid, at paragraph 4

1. a clear and unambiguous promise;
2. made to a citizen;
3. by a public authority;
4. to induce the citizen to perform certain acts; and
5. reliance on the promise by the citizen who acted on it by changing his or her conduct. [17]

The Court went on, however, to rule that this doctrine may not be invoked to prevent the application of an express legislative provision. [18]

1) Estoppel in the Context of a Strict Liability Offence

> [19] In the public law context, promissory estoppel requires proof of a clear and unambiguous promise made to a citizen by a public authority in order to induce the citizen to perform certain acts. In addition, the citizen must have relied on the promise and acted on it by changing his or her conduct. …
>
> [20] However, the doctrine of estoppel must yield in the public law context to an overriding public interest and may not be invoked to prevent the application of an express legislative provision.
>
> [21] Furthermore, although the doctrine of estoppel has been applied against public authorities in the past, the promises made by the representatives of the authorities in those cases were not unlawful, or were actually consistent with a statutory discretion.
> . . . . .
>
> [28] Analogies with other penal offence schemes are not without relevance in this regard. For example, a public authority cannot be precluded from issuing a statement of offence against an individual who allegedly contravened the highway safety code on the basis that the authority has never done so before or that some of its representatives suggested to the individual that his or her conduct was acceptable. Strict liability regulatory offences are adopted in the public interest (*R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299), are specific and have the force of law — including against the public authority that adopted and enforces them. The doctrine of public law estoppel cannot prevent their being applied.
>
> [29] In short, the doctrine of estoppel cannot be relied on as a defence in the case of a regulatory offence. It is well established that this doctrine cannot be raised in a public law context in the face of a clear legislative provision. In the instant case, the by-law is clear, and it creates a strict liability offence on grounds related to the public interest and does not authorize the municipality to consent to a non-conforming use.

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[17] Ibid. at paragraph 19

[18] Ibid, at paragraph 20

> [30] Nor, it should be added — although it is not necessary to do so to decide this appeal, which arises in a penal law context — can estoppel be raised as a defence in a civil proceeding relating to an express provision of a by-law in which a non-conforming use is at issue. The principle that estoppel cannot be raised in the face of an express legislative provision is valid both in the penal law context and in that of a civil proceeding.

Officially induced error

Finally, the Supreme Court ruled that the lower courts were correct in rejecting officially induced error as a defence. [19] If an employee of the municipality causes damage to the owner by providing incorrect advice, the appropriate recourse is a civil action for damages. [20]

CONCLUSION

As set out above, the Supreme Court ruled or provided useful commentary upon ten aspects of law in a municipal context. This makes the Judgment significant and useful for municipal lawyers.

Moreover, the case arose in a context in which the municipality was open to criticism for its past conduct in failing to enforce its zoning bylaw. As municipal lawyers know, this is not an uncommon case. Municipal enforcement may be delayed for a number of reasons, including policies limiting enforcement, lack of knowledge, limited resources, lack of will, or political influence. It is also not unusual for one arm of the municipal government to act in apparent conflict with the enforcement arm, as occurred in this case. The apparent condoning of the contravention over more than a decade may have influenced the judge on first appeal. The Supreme Court looked beyond these lapses to provide important pronouncements which will limit defences to bylaw violations and assist municipalities in future bylaw enforcement and other municipal activities.

Neil Robertson, Q.C.

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[19] Ibid, at paragraph 37

[20] Ibid, at paragraph 38