IN FACT AND IN LAW

Class Actions

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Maintaining a Harmonious Relationship With Your Neighbours Can Prevent Class Actions!

By Anne-Marie Lévesque

The Supreme Court of Canada ended a lengthy legal saga on November 20th[1] *when it ordered St. Lawrence Cement Inc. to compensate residents of Beauport living near its cement plant. Comments on prescription, the assessment of damages and the granting of future damages follow.*

The facts

"Dust they are, and unto dust they shall return, yet human beings have difficulty resigning themselves to living in dust. Sometimes, weary of brooms and buckets of water, they are not unwilling to turn to the courts to get rid of it."[2]

This quote from the introductory paragraph of the Supreme Court of Canada's decision indicates the state of mind of Beauport residents living near the St. Lawrence cement plant. The following is a summary of how the conflict arose.

St. Lawrence Cement Inc. (hereinafter "SLC") wanted to operate a cement plant in the Quebec City area. A special statute was enacted by the Quebec government in 1952 authorizing SLC to build a cement plant in the then municipality of Villeneuve, which was later amalgamated with the city of Beauport. A few years later, SLC began operating the cement plant, but its neighbours soon voiced their displeasure. They complained about the accumulation of dust, unpleasant odours and excessive noise caused by the operation of the plant.

The evidence before the Court showed that SLC invested several million dollars over the years in environmental protection work. For example, a significant amount was invested to install new dust collectors for the kilns.

It was also shown that SLC's equipment was efficient and that it met the standards governing emissions of particulates into the atmosphere that were in force at the time. However, the evidence, which was not contradicted by SLC, showed that, despite these precautions, clouds of dust escaped from hatches or windows on the east side of the plant and dust accumulated at the base of the chimney for the kilns.

As a good neighbour wanting to maintain its relationship with its neighbours, and following interventions by the Department of the Environment, SLC agreed to wash some neighbouring houses which had been dirtied by dust from the plant and offered to pay for washing some residents' cars.

SLC's efforts did not seem to satisfy the residents and a motion for authorization to bring a class action (hereinafter "the Motion for Authorization") was filed in June 1993.

In 1994, the Superior Court authorized the class action and it was commenced during the same year. The class action alleged not only various faults in the operation of the cement plant but also that the neighbourhood annoyances caused by the plant were abnormal or excessive. SLC stopped operating the plant in 1997.

1 *St. Lawrence Cement Inc. v. Barrette*, 2008, SCC 64.

2 *Supra*, footnote 1, para 1.

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SLC'S Liability

The general rules of civil liability provide for compensation to be granted when the person seeking it proves a fault, damage and a causal connection between the fault and the damage.

Did SLC commit a fault in operating its cement plant?

The Supreme Court held that it did not. Indeed, the Court was satisfied that SLC ensured that its equipment was in good working order at all times and was functioning optimally. SLC also used the best available methods to eliminate dust and smoke. SLC complied with the applicable standards and had not breached any law. There was therefore no basis for holding SLC liable in this regard.

The Supreme Court then turned to the rules applicable to neighbourhood annoyances to determine whether damages should be awarded to residents inconvenienced by the dust, odour and noise, notwithstanding the absence of fault.

The Supreme Court cited article 976 C.C.Q., which states:

> **"976. Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom."**

The Supreme Court acknowledged that, under this article, neighbours must tolerate certain annoyances. However, this does not mean that they should have to tolerate abnormal or excessive annoyances. Thus, it is not the *behaviour* of the neighbour that should be examined but rather the results of his actions.

Although SLC operated its cement plant in compliance with the standards, the Supreme Court held that the residents had suffered abnormal annoyances. More specifically, because of the dust deposits the residents had to wash their cars, windows and garden furniture frequently and could not enjoy their property. As well, the sulphur, smoke and cement created odours that caused abnormal annoyances. Lastly, the operation of the plant caused a noise level that exceeded the limit of tolerance. Although the level of intensity of the annoyances suffered by the residents varied, the Court considered them sufficiently abnormal to order SLC to compensate the residents.

Thus, notwithstanding behaviour that did not involve fault, the operation of the cement plant caused its neighbours to suffer annoyances that were beyond the limit of tolerance and, therefore, resulted in SLC's liability.

The Supreme Court also justified this approach based on general policy considerations. Indeed, it was of the view that no-fault liability promotes environmental protection and is consistent with the polluter pays principle.

Prescription and the granting of future damages

Although the general principle is that damages can be claimed for the three-year period preceding the filing of a legal action, the Supreme Court agreed to compensate the residents not only for the past damages, but also for the damages suffered from the time the Motion for Authorization was filed in June 1993 until the plant was closed in 1997.

The Supreme Court adopted the traditional approach and acknowledged that prescription was interrupted. Therefore, the residents could claim damages for the annoyances suffered after the Motion for Authorization was filed because these annoyances came directly from the same source, that is, the operation of the cement plant.

The Supreme Court confirmed that, due to the abnormal or excessive annoyances suffered by the neighbours of the SLC cement plant, SLC had to compensate them.

Assessment of damages

The amount of damages granted to the neighbours of the cement plant was established in a manner specific to class action cases. Sixty-two residents of the areas surrounding the cement plant testified at trial regarding the various annoyances they had suffered. It was proven that there was a form of harm that was common to all the residents but that it varied in intensity depending on the areas in which the witnesses lived. The Supreme Court confirmed that the trial judge could infer from this evidence that the residents of each area had suffered harm similar to that of the residents who had testified.

With respect to the assessment of damages, the Supreme Court agreed with the use of the average method to determine the amount to be paid; this method had been used before in two class actions.[3] As it is difficult to assess environmental annoyances and the documentary evidence showed a common and similar harm for all residents in the same area, it was appropriate to determine the amount of compensation by presumption. For example, residents in the area that suffered the most annoyances will receive $2,500 per year for the period between June 1991 and June 1996 and $1,500 for the period from June 1996 to June 1997. An additional annual indemnity was granted to the owners for painting work. SLC was unable to convince the judge that this unduly increased its liability.

Lastly, the Supreme Court confirmed the Superior Court's holding that collective recovery is not appropriate given the difficulty of establishing with sufficient accuracy the number of residents in each area and thus the total amount of the claims of the residents. Thus, the neighbouring residents must present their claims individually.

Conclusion

The Supreme Court's decision was expected and will have a major impact. Indeed, this decision imposes a burden that will be almost impossible for businesses to meet. Not only must they comply with the laws and regulations, but now they must also assess the annoyances they could cause to their neighbours and, if such annoyances can be considered abnormal or excessive, they will likely have to pay the price. Businesses will have to be especially prudent, considerate and imaginative to maintain a harmonious rapport with their neighbours.

Consequently, we expect to see an increase in the number of class actions involving neighbourhood disturbances and annoyances against businesses and municipalities, which will also have to be careful in managing the development of their territory.

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[3] *Quebec (Public Curator)* v. *Syndicat national des employés de l'hôpital Saint-Ferdinand,* [1996] 3 S.C.R. 211; *Comité d'environnement de Ville-Émard (C.E.V.E.)* v. *Domfer Metal Powders Ltd.* [2006] R.R.A. 854, application for leave to appeal granted; appeal discontinued, 31841.

You can contact the members of the Class Actions and Environmental, Energy and Natural Resources groups with any questions concerning this newsletter.

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