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Neighbourhood annoyances: the Court of Appeal rules against the principle of no fault liability[1]

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On October 31, 2006, the Court of Appeal rendered two key decisions on the issue of neighbourhood annoyances in Quebec. It is greatly to their credit that these two judgments represent a return to more reasonable legal bases on this issue. The decisions are *Ciment du Saint-Laurent inc. / St. Lawrence Cement Inc. v. Barrette and Cochrane*[2] (hereinafter "St. Lawrence Cement") and *Comité d'environnement de Ville-Émard (C.E.V.E.) and Michaud v. Domfer Poudres métalliques ltée / Domfer Metal Powders Limited*[3] (hereinafter "Domfer").

The two Court of Appeal decisions followed trial court judgments rendered in connection with class actions brought, in one case, by residents living in the vicinity of the Domfer plant in Lasalle[4] and, in the other case, by residents living in the vicinity of the St. Lawrence Cement plant in Beauport[5].

The first key principle emerging from these two judgments undoubtedly is the Court of Appeal's rejection of no fault liability

In recent years, residents suffering annoyances resulting from the activities of a business located in their neighbourhood, such as odour, dust or noise problems, had instituted class actions based, among other grounds, on article 976 of the Civil Code of Québec (C.C.Q.), which stipulates that neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other[6]. So, individuals residing near an industrial firm (or another source of nuisance) maintained that the annoyances they suffered constituted abnormal annoyances, for which they were entitled to compensation. The courts were then inclined to decide that the mere proof of abnormality of the annoyances suffered by the plaintiffs justified their claim.

The Court of Appeal recently concluded otherwise: in the two above-mentioned judgments, it ruled that there is no liability without fault and thus that the mere proof of the abnormality of the annoyances is insufficient. Unless the Supreme Court decides to hear St. Lawrence Cement's appeal and comes to a different conclusion, individuals who want to bring a class action for trouble and inconvenience attributable to the activities of a firm located in their neighbourhood can no longer invoke article 976 C.C.Q. in support of their personal claim, the Court of Appeal having ruled that it must only apply to claims based on ownership of land. According to the Court, this article [Translation] "does not give rise to any personal obligation and is not aimed at compensating victims of abnormal inconvenience".

Residents will rather have to exercise their recourse on the basis of article 1457 C.C.Q., which requires proof of a fault, an injury and a causal relationship between the fault and the injury. Consequently, the burden of proof will be more onerous for individuals who wish to go to court against a firm in their neighbourhood.

Thus, should a firm that holds all the required authorizations, and which complies with all of the conditions of its authorizations and acts in accordance with the legislation applicable to its activities be sheltered from all recourses? We do not believe so. Legal doctrine and case law teach us that the simple fact that a

1 This article is up to date as of January 8, 2007 and, for the most part, has been drafted for the March 2007 issue of *Urbanité* magazine, the management of which has consented to this publication. The author wishes to thank her colleagues Daniel Bouchard, Jean-Pierre Casavant, Odette Jobin-Laberge and Guy Lemay for their helpful comments.

2 EYB 2006-110980 (C.A.), the Honourable Justices Forget, Pelletier and Morissette. A motion for leave to appeal to the Supreme Court of Canada was filed on December 29, 2006 under number 31782.

3 EYB 2006-110660 (C.A.), the Honourable Justices Forget, Pelletier and Morissette. As of January 8, 2007, no motion for leave to appeal to the Supreme Court of Canada had been filed.

4 REJB 2002-35189 (S.C.).

5 REJB 2003-41541 (S.C.).

6 976 C.C.Q. "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".

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company [Translation] "has complied with legislative standards does not automatically exclude the possibility that it is nevertheless be held liable under the general law provisions"[7].

Therefore, the general obligation to act as a good citizen, that is, to act correctly toward others, continues to apply. Within the context of recourses instituted under Article 1457, the courts will have to determine, for each particular situation, the standard of behaviour that is acceptable or tolerable in society. Such standard may vary according to social changes and the evolution of moral standards.

Let us look at the second principle emerging from the two Court of Appeal decisions.

The second key principle emerging from these Court of Appeal judgments is that of the necessity for every firm to maintain its antipollution equipment in optimal operating condition at all times during production hours

To best understand the scope of this principle, it is useful to review the facts of the two cases.

In St. Lawrence Cement, the class action for neighbourhood annoyances resulted from dust, odour and noise emissions attributable to the activities at a cement plant, while in Domfer the action resulted from annoyances caused by dust, odour and noise produced by activities that consisted of purifying and reducing metal filings into scrap metal and processing metal filings into iron powder.

In Domfer, the action had been dismissed on the merits without any statement by the trial judge of his analysis of the evidence[8] while in St. Lawrence Cement the action had been granted[9] and the assessment of the damages had been made by distinguishing four zones, from the nearest to the farthest.

The Court of Appeal upheld the judgment in St. Lawrence Cement while setting aside the principle of no fault liability and reducing the total indemnity awarded at trial to the members of the red, blue and yellow zones by 5% on the ground that no causal fault had been established regarding the noise. The Court also reduced the indemnity for trouble and inconvenience by 15% to account for the portion of normal inconvenience that the residents should suffer and that was unrelated to the suboptimal operation of St. Lawrence Cement's equipment.

In Domfer, the Court of Appeal proceeded with an exhaustive analysis of the evidence due to the trial judge's failure to engage in this exercise, and finally ruled that Domfer was liable and awarded damages on the basis of near, intermediate and far zones[10].

In both cases, the firms were held liable because the evidence revealed that they had committed a fault by failing to maintain their equipment for reducing atmospheric emissions in optimum working order at all times. This failure was an offence against section 12 of the *Regulation respecting the application of the Environment Quality Act*[11].

According to Justice Pelletier's remarks, expressed in the St. Lawrence Cement decision on behalf of all three judges, the firm [Translation] "had to be more than especially vigilant. All in all, it had to be capable of shutting down all or part of its operations upon the appearance of a failure, for the period of time necessary for the repairs"[12].

In the Domfer decision, Justice Forget emphasized the plant's production imperatives, which the firm favoured to the detriment of its neighbours who suffered harm. He expressed the following view on behalf of all three judges:

> "I do not wish to draw a totally negative picture of Domfer. It is certain that it made some efforts and cooperated to some extent with the residents and the government authorities. Nonetheless, the preponderance of evidence shows that Domfer often stalled before acquiring the equipment necessary to protect the environment, being more concerned about production requirements than the harm suffered by its neighbours. Even when the equipment was in place, Domfer exhibited negligence in its servicing and inspection. All this constitutes a fault on Domfer's part."[13] [Translation]

7 J.L. Baudouin and P. Deslauriers, La responsabilité civile, 6th edition, Les Éditions Yvon Blais, Cowansville, 2003, page 126, number 167.

8 The motion for authorization to institute the class action had been previously granted on June 5, 1998 by Madam Justice Diane Marcellin, REJB 1998-08598 (S.C.).

9 The motion for authorization to institute the class action had been previously granted on March 31, 1994 by Madam Justice France Thibault, 200-06-000004-930 (S.C.).

10 The Court awarded $1,000 per year from April 1994 to April 2000 per resident of the near and intermediate zones for discomfort caused by dust, noise and odours. It also awarded $750 per adult who resided in the near zone and $600 for those who lived in the intermediate zone. Finally, it awarded an indemnity of $500 per year to each of the members who owned a house or a dwelling from April 1994 to April 2000, reduced in proportion to the actual length of residence in the subject period.

11 R.R.Q., c. Q.-2, r. 1.001.

Conclusion

These two Court of Appeal judgments exclude the possibility of invoking article 976 C.C.Q. as a basis of a class action for neighbourhood annoyances. Unless the Supreme Court decides to hear St. Lawrence Cement's appeal and comes to a different conclusion, any class action founded on neighbourhood annoyances related to environmental pollution, whether by noise, odours or other emanations of any kind, will henceforth have to be brought on the basis of article 1457 C.C.Q. and proof of the fault, the injury and the causal relationship will have to be established.

Moreover, from now on every firm will have to ensure the optimum performance of its equipment, and even improve it, if it wants to escape the prospect of a class action based on neighbourhood annoyances of an environmental nature.

These two cases illustrate the extent of the consequences that laxity in municipal developmental policies may bring.

Many issues deserve further discussion on the subject, such as that of whether a municipality exposes itself to judicial proceedings when approving a residential development project on the outskirts of an industrial zone or vice-versa. One may also wonder about the possibility of ensuring collective management of nuisance sources, as it is done in the case of watershed management or the possibility that any request to institute a buffer zone be considered as a disguised expropriation if the enabling power does not expressly authorize it.

Another interesting issue to explore would be that according to which the setting up of a buffer zone may be considered as a "municipal infrastructure", which would allow a municipality to require the owner, as a condition for the issuance of a construction or subdivision permit, to assume the costs of setting of such buffer zone under Section 145.21 of the *Act respecting land use planning and development.*

Of course, the costs associated with such a requirement as well as intermunicipal competition would discourage municipalities from adopting such a measure. However, the way to resolve this politico-economic problem would be to convert the discretionary power to set up buffer zones, as recognized under the *Act respecting land use planning and development* into an obligation imposed by law.

The combination of this obligation with the *Civil Protection Act*[14] and the *Fire Safety Act*[15], which require enterprises to set out the risks resulting from their activities, should favour and consolidate the creation of these buffer zones. But what would buffer zones be like? A strip of vacant land with a vegetation visual screen or a screen acting as an acoustic insulant? Would that strip of land be of the same width everywhere within Quebec, regardless of the type of zone (urban, rural or resort) or the type of nuisance involved?

All these questions are equally pertinent since certain sources of nuisance may impact the neighbouring population over a greater radius due to the very nature of the activities that are carried out or the prevailing winds. A buffer zone, even rigorously set up, is not always enough to offset abnormal neighbourhood nuisances. For example, the 200-meter bank which separates the residential zone from the Domfer plant never turned out to be a model of effectiveness.

In this respect, municipal zoning by-laws could impose performance criteria at the time a new activity is implemented and thus force operators to take the necessary steps to minimize the impact of their industrial activity, for instance, for a certain number of kilometres around their location, Such criteria could take into consideration prevailing winds and the distance travelled by noise, odours or airborne contaminants while fixing goals to reach in order to eradicate the sources of nuisance.

As a by-law must fix clear standards allowing citizens to know the scope of their obligations, this writer is well aware of the difficulties posed by the drafting of such a by-law. One may draw inspiration from the distance standards of certain provincial regulations, which vary according to the host environment, watercourses, school or health institutions, green spaces, etc.

For the reader's benefit, we have tried to raise various questions which, it goes without saying, would warrant more reflection, from both the legal and politico-economic point of views.

12 Paragraph 202.

13 Paragraph 140.

14 R.S.Q., c. S-2.3.

15 R.S.Q., c. S-3.4.

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