SUPREME COURT OF CANADA

CITATION: St. Lawrence Cement Inc. *v.* Barrette, 2008 SCC 64 **DATE:** 20081120
DOCKET: 31782

BETWEEN:

St. Lawrence Cement Inc.
Appellant / Respondent on cross-appeal
and
Huguette Barrette and Claude Cochrane in their capacity of representing the designated group
Respondents / Appellants on cross-appeal
- and -
Friends of the Earth, Quebec Environmental Law Centre and Quebec Business Council on the Environment
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Bastarache,* LeBel, Deschamps, Fish, Abella and Charron JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 119) LeBel and Deschamps JJ. (McLachlin C.J. and Fish, Abella and Charron JJ. concurring)

* Bastarache J. took no part in the judgment.

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st. lawrence cement *v.* barrette

St. Lawrence Cement Inc. *Appellant/Respondent on cross-appeal*

v.

Huguette Barrette and Claude Cochrane, in their capacity as representatives of the designated group *Respondents/Appellants on cross-appeal*

and

Friends of the Earth, Quebec Environmental Law Centre and Quebec Business Council on the Environment *Interveners*

Indexed as: St. Lawrence Cement Inc. *v.* **Barrette**

Neutral citation: 2008 SCC 64.

File No.: 31782.

2008: March 27; 2008: November 20.

Present: McLachlin C.J. and Bastarache,* LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for quebec

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* Bastarache J. took no part in the judgment.

Property Neighbourhood disturbances No-fault liability Operation of cement plant Whether in Quebec civil law there scheme of no-fault civil liability in respect of neighbourhood disturbances under art. 976 C.C.Q. that applies where annoyances suffered are excessive Whether special statute governing plant's activities confers immunity on plant for neighbourhood disturbances.

Prescription Interruption Judicial demand Neighbourhood disturbances resulting from operation of cement plant causing damage that spread out over time Whether lawsuit interrupted prescription for damage suffered after lawsuit filed Whether that damage arose from "same source" Civil Code of Québec, S.Q. 1991, c. 64, art. 2896.

Damages Assessment Use of average amounts Class action Neighbourhood disturbances resulting from operation of cement plant Members of group divided into four residential zones to ensure that there some basic injury common to residents of each zone Recovery subject to individual claims procedure, but amount to be awarded to each member assessed using average determined for each zone Whether it appropriate to use average amounts in assessing damages of members of group covered by class action.

A special statute passed by the Quebec legislature in 1952 authorized SLC to build a cement plant in a municipality. After the plant began operating in 1955, neighbourhood problems arose between SLC and neighbours who were displeased with the consequences of the plant's activities. The Ministère de l'Environnement stepped in several times in response to citizens' complaints about problems with dust,

odours and noise, and the plant itself produced several environmental incident reports. Alleging various faults in the operation of SLC's plant and also contending that the neighbourhood disturbances caused by the plant were abnormal or excessive, B and C filed a motion for authorization to institute a class action on behalf of the other residents living in areas near the plant. The motion was granted, and the action was filed on August 1, 1994. SLC stopped operating the plant in 1997.

The trial court allowed the class action on the basis that a scheme of no-fault liability in respect of neighbourhood disturbances exists under art. 976 of the *Civil Code of Québec* ("*C.C.Q.*"). Because, in its view, the evidence showed that there was a common injury, but that it varied in intensity from one zone to another and from year to year, the court awarded damages that varied from zone to zone. It also held that group members would have to file individual claims for the damages being awarded, since it was difficult to determine the exact number of members in each zone. The Court of Appeal allowed SLC's appeal in part with regard to certain aspects of the assessment of damages, but found the company civilly liable on the basis of proven fault under the general rules of civil liability in light of its failure to comply with certain applicable regulatory provisions. The court rejected the theory of no-fault liability in respect of neighbourhood disturbances.

SLC appealed with regard to the Court of Appeal's conclusion that it was liable on the basis of fault, and to the method adopted for determining the quantum of damages, to prescription and to the immunity to which it claims to be entitled under the special statute applicable to its plant. B and C cross-appealed, seeking recognition of a no-fault liability scheme applicable to neighbourhood annoyances that are

excessive, and seeking to restore the trial court's conclusions on the quantum of damages.

Held: The principal appeal should be dismissed and the cross-appeal allowed.

Even though it appears to be absolute, the right of ownership has limits. Article 976 *C.C.Q.* exemplifies this in prohibiting owners of land from forcing their neighbours to suffer abnormal or excessive annoyances. Two regimes of civil liability in respect of neighbourhood disturbances should be recognized in Quebec law: one, under the ordinary rules of civil liability, is based on the wrongful conduct of the person who allegedly caused the disturbances, while the second is a regime of no-fault liability based on the extent of the annoyances suffered by the victim for the purposes of art. 976 *C.C.Q.* [20][86]

Where fault-based liability is concerned, civil fault may relate either to the abusive exercise of a right of ownership (art. 7 *C.C.Q.*) or to a violation of standards of conduct that are often set out in legislative provisions relating to the use of property. However, conduct is not the deciding criterion when it comes to abnormal annoyances under art. 976 *C.C.Q.* An owner who causes abnormal annoyances without either intent to injure or excessive and unreasonable conduct does not abuse his or her rights, because he or she cannot be accused of wrongful conduct. A finding that abnormal annoyances were caused will therefore not be enough to establish fault in the exercise of a right. On the other hand, an owner who commits a fault may be held liable for damage even if the damage does not reach the level of abnormal annoyances. Article 976 *C.C.Q.* does not guarantee immunity from the consequences

of civil fault. As for the violation of a legislative standard, it will constitute civil fault only if it also constitutes a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 *C.C.Q.* [22] [30-31] [33-34]

In addition to the general rules applicable to fault-based civil liability, it is necessary to recognize a scheme of no-fault civil liability in respect of neighbourhood disturbances under art. 976 *C.C.Q.* that is based on the annoyances suffered by the victim being excessive rather than on the conduct of the person who allegedly caused them. The inclusion of art. 976 in the book on property confirms that the legislature intended to separate neighbourhood relations from the general rules on obligations. This provision thus relates more to the right of ownership than to the general rules of civil liability. Next, the actual words of art. 976 do not require evidence of wrongful conduct to establish the liability of an owner who has caused excessive neighbourhood annoyances. Moreover, the commentaries of the Civil Code Revision Office and the Minister of Justice support a conclusion that the legislature's intention was not to limit actions relating to neighbourhood disturbances to cases involving the wrongful exercise of a right. Finally, art. 976 is related to other provisions that focus on the result of an act, not on an owner's conduct. A scheme of civil liability based on the existence of abnormal neighbourhood disturbances that does not require proven or presumed fault is also consistent with the approaches taken in Canadian common law and in French civil law. What is more, such a scheme is consistent with general policy considerations, such as the objective of environmental protection and the application of the polluter-pay principle. [3] [20] [37] [72-75] [80]

The theory of real liability adopted by the Court of Appeal must be rejected. According to this theory, the obligation not to injure one's neighbours must be treated as a charge on every immovable in favour of neighbouring lands. As soon as the limit of normal annoyances is exceeded, the neighbouring owner can set up his or her right against the owner who is at fault by bringing an immovable real action to put an end to the disturbance. As for claims for compensation of a personal nature, they are governed by the traditional rules of civil liability. There are several problems with this approach: rather than a personal action, only an immovable real action would be possible; a remedy under art. 976 *C.C.Q.* would not be available to lessees or occupants, since they would not be able to claim to have a real right; and it would as a result be difficult, if not impossible, to institute class actions in situations where art. 976 *C.C.Q.* applies. [81-84]

In the instant case, the trial judge concluded that SLC had not committed a civil fault in relation to its statutory obligations. She found that SLC had fulfilled its obligation to use the best known means to eliminate dust and smoke and had taken reasonable precautions to ensure that its equipment was in good working order at all times and was functioning optimally. Her interpretation of the facts is reasonable, and her analysis of the law is correct. B and C have not shown that the judge made an error in this regard that justified reversing her decision. [92-94]

Regarding no-fault liability in respect of neighbourhood disturbances under art. 976 *C.C.Q.*, the trial judge said she was convinced that, even though SLC had operated its plant in compliance with the applicable standards, B and C and the members of the group they are representing had suffered abnormal annoyances that were beyond the limit of tolerance neighbours owe each other according to the nature

or location of their land. In view of her findings of fact, the trial judge was justified in finding SLC liable under art. 976 *C.C.Q.* Moreover, she did not misinterpret the word "neighbour" when she concluded that all members living in the neighbourhoods adjacent to the plant were neighbours of the plant for the purposes of art. 976 *C.C.Q.* on the basis that they lived close enough to it. Although the plaintiff must prove a certain geographic proximity between the annoyance and its source, the word must be construed liberally. [94-96]

The 1952 special statute respecting SLC did not grant SLC immunity from actions in damages relating to its industrial activities. Although that statute authorized the operation of the plant while requiring that the best means available be used, it in no way exempted SLC from the application of the ordinary law. When the legislature excludes the application of the ordinary law, it generally does so expressly. There is no provision in the special statute precise enough to justify a conclusion that the law of civil liability has been excluded for all consequences of the plant's activities. [97-98]

Damage relating to events subsequent to the judgment authorizing the class action is not subject to prescription. The application for authorization to institute a class action suspended prescription until the judgment granting the motion was no longer susceptible of appeal (art. 2908 *C.C.Q.*), and the filing of the action then interrupted prescription (art. 2892 *C.C.Q.*). According to art. 2896 *C.C.Q.*, such an interruption continues until judgment and has effect in respect of any right arising from the "same source". These words must be interpreted liberally. Here, the source of the continuing damage suffered by B and C, namely the acts that generated their right of action, remains the same: activities of SLC that caused excessive

neighbourhood annoyances. Since those activities continued until 1997, it would make no sense, in addition to being impractical, to ask B and C to repeat their motion every three years for each annoyance suffered. [99-103] [106]

Finally, given the trial judge's discretion and the difficulty of assessing environmental problems and annoyances, the trial judge's use of average amounts in determining the quantum of damages was reasonable and appropriate in the circumstances. SLC has not shown that its liability increased as a result, and there is no indication that the amount awarded was based on a wholly erroneous estimate of the injury. The trial court's conclusions on the assessment of damages must therefore be restored. [116]

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appeal granted, [2007] 1 S.C.R. viii, appeal discontinued, [2008] 2 S.C.R. v; *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 2003 SCC 58; *St-Pierre v. Daigle*, [2007] Q.J. No. 1275 (QL), 2007 QCCS 705; *Coalition pour la protection de l'environnement du parc linéaire « Petit Train du Nord » v. Laurentides (Municipalité régionale de Comté des)*, [2005] R.J.Q. 116, motions for appeal and cross-appeal denied, [2005] Q.J. No. 9042 (QL), 2005 QCCA 664; *Dicaire v. Chambly (Ville de)*, [2000] Q.J. No. 884 (QL); *Bouchard v. Corp. Stone Consolidated*, [1997] Q.J. No. 4574 (QL); *Arseneault v. Société immobilière du Québec*, [1997] Q.J. No. 4570 (QL); *Carey Canadian Mines Ltd. v. Plante*, [1975] C.A. 893; *Théâtre du Bois de Coulonge inc. v. Société nationale des Québécois et des Québécoises de la Capitale inc.*, [1993] R.R.A. 41; *Ouimette v. Canada (Procureur général)*, [2002] R.J.Q. 1228; *Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Hammersmith and City Railway Co. v. Brand* (1869), L.R. 4 H.L. 171; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *Canadian Pacific Railway Co. v. Roy*, [1902] A.C. 220; *Laforest v. Ciments du St-Laurent*, [1974] C.S. 289; *ABB Inc. v. Domtar Inc.*, [2005] R.J.Q. 2267, 2005 QCCA 733; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68; *Thompson v. Masson*, [2000] R.J.D.T. 1548; *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1990] R.J.Q. 359; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

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APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (Forget, Pelletier and Morissette JJ.A.), [2006] R.J.Q. 2633, [2006] Q.J. No. 13603 (QL), 2006 QCCA 1437, 2006 CarswellQue 9389, allowing in part an appeal and dismissing an incidental appeal from a decision by Dutil J., [2003] R.J.Q. 1883, [2003] Q.J. No. 5273 (QL), 2003 CarswellQue 994. Appeal dismissed and cross-appeal allowed.

François Fontaine, *Andres C. Garin* and *Gregory Bordan*, for the appellant/respondent on cross-appeal.

Jacques Larochelle, for the respondents/appellants on cross-appeal.

Michel Bélanger and *William Amos*, for the interveners Friends of the Earth and Quebec Environmental Law Centre.

Guy Du Pont, *Marc-André Boutin* and *Brandon Wiener*, for the intervener Quebec Business Council on the Environment.

English version of the judgment of the Court delivered by

LEBEL AND DESCHAMPS JJ. —

I. Introduction

A. *Nature of the Case*

[1] 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. This case is proof of that.

[2] In this case, Huguette Barrette and Claude Cochrane ("the representatives"), residents of the city of Beauport (now a borough of the city of

Québec), instituted a class action against St. Lawrence Cement Inc. ("SLC") for neighbourhood disturbances related to the operation of a cement plant in that city. The Superior Court allowed the class action on the basis that a scheme of no-fault liability in respect of neighbourhood disturbances exists under art. 976 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"). The Court of Appeal allowed SLC's appeal in part with regard to certain aspects of the assessment of damages, but found the company civilly liable on the basis of proven fault under the general rules of civil liability.

[3] In an appeal from the Court of Appeal's decision, this Court must now determine whether in Quebec civil law there is a scheme of no-fault civil liability in respect of neighbourhood disturbances under art. 976 *C.C.Q.* that applies where the annoyances suffered are excessive. We answer this question in the affirmative and, on that basis and for the reasons that follow, dismiss SLC's appeal. However, the cross-appeal is allowed and the damages awarded by the Superior Court are restored.

B. *Origin of the Case*

(1) Establishment of the Cement Plant

[4] This case originated when SLC implemented a plan to establish a large cement plant in Villeneuve (which was later amalgamated with the city of Beauport and then with the city of Québec). SLC was incorporated in 1951 under the *Quebec Companies Act*, R.S.Q. 1941, c. 276, and began building its plant in 1952. Although many lots were still vacant in the area where SLC established its plant, some houses had been built on land adjacent to its property. Moreover, a special statute passed by

the Quebec legislature authorized the company to establish its plant in the "municipality of the village of Villeneuve" and conferred additional corporate powers on it (*An Act respecting Atlas Realties Co. — La Compagnie d'Immeubles Atlas*, S.Q. 1951-52, c. 131 ("*SLC Special Act*")).

(2) Development of Neighbourhood Problems for the Plant

[5] The plant began operating around 1955. Neighbourhood problems quickly arose between SLC and neighbours who were displeased with the consequences of the plant's activities. The evidence shows that environmental incidents occurred as early as 1956 ([2003] R.J.Q. 1883 (Sup. Ct.), at para. 10). In 1974, the Superior Court ordered SLC to compensate a citizen for negligence in firing its cement kilns. The Ministère de l'Environnement then stepped in several times in the 1980s in response to citizens' complaints about problems with dust, odours and noise. In the spring of 1990, SLC agreed to wash houses that had been dirtied during the winter by debris and dust from the plant. It also offered, in 1991 and 1992, to pay to have some residents' cars washed.

[6] The Ministère de l'Environnement received many complaints about environmental incidents (dust from the plant, foul odours) between June 8, 1991 and February 1, 1996. And the plant produced several environmental incident reports between February 6, 1992 and May 16, 1996 (Sup. Ct., at paras. 243-45; [2006] R.J.Q. 2633, 2006 QCCA 1437, at paras. 27-28).

[7] The evidence also shows that SLC invested several million dollars for environmental protection purposes. In particular, it spent more than $8 million

between 1991 and 1995, mostly on the installation of new dust collectors for the kilns (Sup. Ct., at para. 257). SLC stopped operating the plant in 1997, but the disputes with its neighbours continued in the courts.

(3) The Class Action

[8] On June 4, 1993, the representatives filed a motion in the Quebec Superior Court for authorization to institute a class action. The motion was granted on March 31, 1994, and the action was filed on August 1, 1994. The representatives alleged various faults in the operation of SLC's plant but also contended that the neighbourhood disturbances caused by the plant were abnormal or excessive. The proposed group was made up of Beauport residents living in areas near the plant. SLC denied any liability and contested the action both at the authorization stage and on the merits.

C. *Judicial History*

(1) Superior Court

(a) *Judgment Granting Authorization*

[9] The application for authorization to institute a class action came before Thibault J., who held that the four conditions set out in art. 1003 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), had been met. First, regarding the requirement that identical, similar or related questions of law or fact be raised, Thibault J. accepted that the claims for damages were based on the same sources of injury and that the

evidence on the plant's liability would be common. She then found that the evidence showed a strong appearance of right and thus that the facts alleged seemed to justify the conclusions sought. Next, the large number of people in the group made the application of art. 59 or 67 *C.C.P.* difficult and impracticable. Finally, Thibault J. concluded that the representatives were in a position to represent the group's members adequately. She therefore granted the motion for authorization to institute a class action and ascribed the status of representative to Huguette Barrette and Claude Cochrane.

(b) *Judgment on the Merits*, [2003] R.J.Q. 1883

[10] A few years later, Dutil J. heard the action on the merits. She affirmed the judgment authorizing the institution of a class action. She also found that events subsequent to the filing of the motion for authorization, up to 1997, were relevant to the proceedings.

[11] Dutil J. held that SLC was liable on the basis that the annoyances suffered by the representatives and the members of the group were excessive. Despite SLC's efforts to comply with the relevant standards in operating its plant, its emissions of dust, odours and noise had caused abnormal annoyances for its neighbours and it was therefore civilly liable under art. 976 *C.C.Q.* However, Dutil J. did not find that SLC had committed a fault.

[12] Dutil J. found that the scheme of liability under art. 976 *C.C.Q.* was available to all SLC's neighbours, both lessees and owners. In her opinion, all the group's members lived close enough to SLC to be considered "neighbours" for the

purposes of that scheme. Even those who had moved near SLC's plant after it opened were entitled to damages. Dutil J. also held that the statutory authorization given to SLC to operate a cement plant did not give it immunity for damage suffered by its neighbours, and she rejected a prescription argument made in relation to some of the damage.

[13] According to Dutil J., the evidence showed that there was a common injury, but that it varied in intensity from one zone to another and from year to year. As a result, she awarded damages that varied from zone to zone. Because it was difficult to determine the exact number of members in each zone, Dutil J. held that group members would have to file individual claims for the damages being awarded (paras. 417 and 423).

(2) Court of Appeal, [2006] R.J.Q. 2633, 2006 QCCA 1437

[14] SLC appealed to the Quebec Court of Appeal. The reasons for judgment were written by Pelletier J.A., and Forget and Morissette JJ.A. concurred in them. Pelletier J.A. rejected the theory of no-fault liability in respect of neighbourhood disturbances and instead found SLC liable on the basis of proven fault. The Court of Appeal also intervened to reduce the amount of compensation awarded by Dutil J.

[15] The Court of Appeal interpreted the Quebec case law on neighbourhood obligations from the standpoint of real liability (responsabilité *propter rem*) (para. 99). In its opinion, this means that neighbourhood relations impose reciprocal passive charges on the holders of real rights in land, which permits a balance to be struck in the use of neighbouring properties and thus grounds a real rather than a personal

action. As a result, only owners can enjoy the protection of art. 976 *C.C.Q.* Moreover, a class action cannot be based on that provision, because a class action is a procedural vehicle designed solely for exercising rights belonging to persons.

[16] According to the Court of Appeal, a neighbour who seeks to have an owner found personally liable bears the burden of proving fault, a causal connection and injury under the traditional rules of civil liability. Examining SLC's liability from this standpoint, the court found that Dutil J. had erred in assessing the extent of SLC's obligations under the regulatory provisions applicable to its facility. The Court of Appeal found that SLC had an obligation to properly maintain its equipment and to ensure that its equipment functioned optimally during production hours. The court therefore found that SLC had to be able to cease operating, either entirely or partially, as soon as a breakdown occurred, and for as long as was necessary to make repairs. In the Court of Appeal's opinion, the evidence showed that SLC had failed to meet this requirement numerous times during the period covered by the claim. SLC had therefore committed a fault and was, as a result, civilly liable.

[17] The Court of Appeal agreed with Dutil J. that the filing of the action by the representatives had suspended and interrupted prescription and that events subsequent to the filing of the action were relevant. It also held that the method of compensation chosen by Dutil J. was acceptable, and it stressed the importance of the Superior Court's discretion in choosing the appropriate recovery method. However, the Court of Appeal found that basing the compensation on average amounts was not appropriate where the damage suffered by owners owing to additional painting work was concerned. It accepted SLC's argument that [TRANSLATION] "the trial judge wrongly awarded an 'average' compensation amount to every owner in each zone for additional

painting expenses that were not incurred by all of them" (para. 241). The Court of Appeal therefore struck out the amount the Superior Court had awarded to the owners under this head. It also intervened to reduce the compensation awarded to the group members by a percentage amount. Its analysis of civil liability led it to limit the compensation amounts to injuries resulting from the fact that SLC's equipment was not functioning optimally. It therefore reduced the awarded amounts to exclude annoyances not resulting from SLC's fault.

[18] SLC appealed to this Court with regard to the Court of Appeal's conclusion that it was liable on the basis of fault and, in the alternative, with regard to the existence of a causal connection between its fault and the damages claimed. It also appealed with regard to the method adopted for determining the quantum of damages, to prescription and to the immunity to which it claims to be entitled under the special statute applicable to its Beauport plant. The representatives cross-appealed, seeking recognition of a no-fault liability scheme applicable to neighbourhood annoyances that are excessive, and of the possibility of instituting a class action under that scheme. They also sought to restore the Superior Court's conclusions on the quantum of damages.

II. Analysis

A. *Issues*

[19] In this appeal, the Court must consider the following issues:

(1) Is civil liability in respect of neighbourhood disturbances in Quebec law necessarily based on fault? Is it possible that a no-fault liability scheme exists? What would the nature of such a scheme be, and how would it apply to the facts of this case?

(2) Does the special statute passed by the Quebec legislature to govern SLC's activities confer immunity on SLC for neighbourhood disturbances?

(3) Did the representatives' lawsuit interrupt prescription for damage suffered after it was filed?

(4) Was it appropriate for the courts below to use average amounts in assessing the damage suffered by the members of the group covered by the class action?

B. *General Framework for the Discussion on Civil Liability in Respect of Neighbourhood Disturbances*

[20] The main issues that arise in this appeal relate to the legal nature of the regime of civil liability in respect of neighbourhood disturbances in Quebec law. In reviewing the disagreements among judges and commentators over the content of this regime, it becomes clear that the basic issue is whether the Court should recognize or reject a liability scheme based on the extent of the annoyances suffered by the victim rather than on the conduct of the person who allegedly caused them. A no-fault liability regime would be in addition to the ordinary rules of civil liability. Before this

form of liability is examined, it must be determined how civil liability based on fault can apply in the context of neighbourhood disturbances.

C. *Fault-Based Liability*

[21] Article 1457 *C.C.Q.* sets out the general rules of fault-based liability as follows:

> **1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

The first rule imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances (Ministère de la Justice, *Commentaires du ministre de la Justice: Le Code civil du Québec — Un mouvement de société* (1993), vol. I, at p. 886). Civil fault [TRANSLATION] "is the difference between the agent's conduct and the abstract, objective conduct of a person who is reasonable, prudent and diligent" (J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, at p. 171; see also J. Pineau and M. Ouellette, *Théorie de la responsabilité civile* (2nd ed. 1980), at p. 7). The standard of civil fault thus corresponds to an obligation to act reasonably, prudently and diligently and can be characterized as an obligation of means (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G Jobin in collaboration with N. Vézina, at p. 38;

P.-A. Crépeau, *L'intensité de l'obligation juridique ou Des obligations de diligence, de résultat et de garantie* (1989), at p. 55). The basis for civil liability remains the same whether the impugned conduct is intentional or unintentional (Baudouin and Deslauriers, at p. 165). The purpose of civil liability is [TRANSLATION] "not to blame or punish but only to compensate for loss" (Baudouin and Deslauriers, at p. 9; see also Pineau and Ouellette, at p. 60). Intent to injure is therefore not necessary to trigger liability (Baudouin and Deslauriers, at p. 9).

[22] In the context of neighbourhood disturbances, civil fault may relate either to the abusive exercise of a right of ownership or to a violation of standards of conduct that are often set out in statutory or regulatory provisions relating to the use of property. We will consider these two types of civil fault.

(1) Abuse of Rights and Fault

[23] Although the doctrine of abuse of rights has long been the subject of debate or dispute, there is no question that it has been accepted in Quebec civil law, in which it now has an important place, as this Court recognized in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122. The doctrine has now been codified in art. 7 *C.C.Q.*:

> **7.** No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.
>
> (See *Commentaires du ministre de la Justice*, vol. I, at p. 8)

[24] Article 7 *C.C.Q.* thus gives effect to the principle of the relativity of rights, which applies to rights as absolute in theory as the right of ownership. According to

this principle, one person's right necessarily limits that of another person, and to uphold all such rights concurrently will reduce the absoluteness of each (A. Nadeau and R. Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), at pp. 227-28). This is true of all rights that are protected in civil law. Such rights remain limited by their coexistence and by the fact that they conflict with one another. As Albert Mayrand writes, "[a]ll rights have limitations; when a person under the pretense of exercising an actual right goes beyond the sphere of that right, it is said that he has committed an abuse of right" (A. Mayrand, "Abuse of Rights in France and Quebec" (1974), 34 *La. L. Rev.* 993, at p. 993; see also J. Ghestin and G. Goubeaux, *Traité de droit civil*, vol. 1, *Introduction générale* (3rd ed. 1990), at p. 678).

[25] Article 7 *C.C.Q.* places two limits on rights: a right may be exercised neither with the intent of causing injury nor in an excessive and unreasonable manner. These limits constitute a codification of the prior case law and establish the point beyond which the exercise of a right becomes abusive (M. Ouellette, "Book One: Persons", in *Reform of the Civil Code* (1993), vol. 1-A, at p. 5; for examples of judgments on neighbourhood disturbances, see *Brodeur v. Choinière*, [1945] C.S. 334; *Air-Rimouski Ltée v. Gagnon*, [1952] C.S. 149; *Lessard v. Dupont Beaudoin*, [1997] R.D.I. 45 (Sup. Ct.)). An abuse of rights relates to the exercise of a right whose legitimacy is not at issue (*Commentaires du ministre de la Justice*, vol. I, at p. 8; Ghestin and Goubeaux, at pp. 678-79).

[26] This leads to the following question: does the concept of abuse of rights under art. 7 *C.C.Q.* correspond to a scheme of civil liability separate from that of arts. 1457 and 1458 *C.C.Q.*? Civil law commentators in Quebec generally answer that abuse of rights constitutes civil fault in the exercise of a right (Baudouin and

Deslauriers, at pp. 192-93; P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at pp. 425-26; Ouellette, at p. 5; D.-C. Lamontagne, "Special Rules on the Ownership of Immovables and Servitudes", in *Reform of the Civil Code* (1993), vol. 1-A, at p. 6; Pineau and Ouellette, at p. 73; Mayrand, at p. 997; Nadeau and Nadeau, at pp. 228-29). French civil law commentators seem to take a similar view (P. Malaurie, L. Aynès and P. Stoffel-Munck, *Les obligations* (2nd ed. 2005), at p. 56; J. Flour, J.-L. Aubert and É. Savaux, *Les obligations*, vol. 2, *Le fait juridique* (10th ed. 2003), at p. 118; B. Starck, H. Roland and L. Boyer, *Obligations*, vol. 1, *Responsabilité délictuelle* (5th ed. 1996), at pp. 176-77; Ghestin and Goubeaux, at p. 694; G. Marty and P. Raynaud, *Les obligations*, vol. 1, *Les sources* (2nd ed. 1988), at p. 542; H. and L. Mazeaud and A. Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6th ed. 1965), t. 1, at p. 640).

[27] However, Ghestin and Goubeaux rightly point out that there is something peculiar about extending the concept of fault to abuse of rights:

> [TRANSLATION] Of course, most decisions penalizing abuse of rights refer to article 1382 of the [French] Civil Code. This does not necessarily mean that abuse constitutes fault in the exercise of a right. If . . . it is accepted that the term "abuse of rights" refers to a specific limit on a right, it is clear that a person who so "abuses" his or her right actually acts wrongfully and becomes liable. Article 1382 of the Civil Code does indeed provide a basis for a penalty for the abusive act. However, the presumption that the act is lawful must *first* be rebutted by proving abuse, which makes it possible to show fault.
>
> There is certainly some truth to the theory of fault in the exercise of rights, but this is not really how the question is resolved. Control is exercised through the mechanism of civil liability. However, to say that abuse results from fault "is to answer the question with a question and to see a cause in what is merely a consequence". Thus, "to get to the question of liability, the question of abuse of rights must be resolved first." This is why the identification of an autonomous criterion for abuse of rights remains of the utmost importance. [Emphasis in original; footnotes omitted; pp. 693-94.]

[28] French authors Flour, Aubert and Savaux also comment on the need to consider the context when analysing the application of the concept of fault to abuse of rights:

> [TRANSLATION] [F]ault in the exercise of a right cannot be judged by the same standards as fault in other circumstances. Usually, the mere fact of not foreseeing the possibility of avoidable damage and not doing something to prevent it is wrongful. A right necessarily gives its holder a degree of impunity, however. . . .
>
> This leads to the conclusion that, in most cases, the fact that a person who causes damage has a right does not constitute an automatic justification. However, this circumstance will likely result in a relaxation of the usual conditions of liability. . . . [p. 118]
>
> (See also Lafond, at p. 426.)

[29] Where a right exists, therefore, the usual application of the concept of fault is qualified. The holder of a right has a sphere of autonomy in exercising that right. In such a context, it thus becomes crucial, when analysing civil liability, to consider the nature of the right in issue and the circumstances in which it is exercised, since, as Ghestin and Goubeaux note, an *abuse* of rights must be found in order to show fault. Once an abuse is found, the holder of the right loses the protection of the sphere of autonomy that flows from the right. Violation of a standard of conduct is therefore inextricably linked to the concept of abuse of rights.

(2) Abuse of Rights, Abnormal Annoyances and Article 976 *C.C.Q.*

[30] However, conduct is not the deciding criterion when it comes to abnormal annoyances under art. 976 *C.C.Q.*:

> **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.

An owner who causes abnormal annoyances without either intent to injure or excessive and unreasonable conduct [TRANSLATION] "does not abuse his or her rights, because he or she cannot be accused of wrongful conduct" (Lafond, at p. 404). The word "abuse" implies blame and [TRANSLATION] "is ill-suited to an attitude that may in itself be beyond reproach" (Ghestin and Goubeaux, at p. 686).

[31] A finding that abnormal annoyances were caused will therefore not be enough to establish fault in the exercise of a right. On the other hand, an owner who commits a fault may be held liable for damage even if the damage does not reach the level of abnormal annoyances. Article 976 *C.C.Q.* does not guarantee immunity from the consequences of civil fault. According to Professors G. Viney and P. Jourdain, such an immunity, if accepted, [TRANSLATION] "would make the existence of a neighbourhood disturbance the only possible ground for liability, one that would apply even in cases of proven fault, and would encourage polluters not to comply with regulations in the hope that any nuisances they caused would be found tolerable" (*Traité de droit civil – Les conditions de la responsabilité* (2nd ed. 1998), at p. 1086). Even though art. 976 *C.C.Q.* incorporates a duty to tolerate normal neighbourhood annoyances, this does not mean that it authorizes wrongful conduct.

(3) Fault and Violation of the Law

[32] Standards provided for in statutes and regulations also place limits on rights and on the exercise thereof. Many examples of this can be found in the *Civil Code of*

Québec, in zoning rules and in environmental standards. As a result, the question of the relationship between violations of the law and civil liability needs to be examined.

[33] As we noted above, the general rules of civil liability set out in art. 1457 *C.C.Q.* are based on fault (Baudouin and Deslauriers, at p. 149). [TRANSLATION] "This is a universal concept, since it applies every time a victim alleges that a person who caused injury is liable under the general rules" of art. 1457 *C.C.Q.* (P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile?" (1984), 44 *R. du B.* 222, at p. 223). To answer this question, the standards provided for in statutes and regulations, often called "legislative standards", must be analysed in light of the basic concept of civil fault.

[34] In Quebec civil law, the violation of a legislative standard does not in itself constitute civil fault (*Morin v. Blais*, [1977] 1 S.C.R. 570; *Compagnie d'assurance Continental du Canada v. 136500 Canada inc.*, [1998] R.R.A. 707 (C.A.), at p. 712; Jobin, at p. 226). For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 *C.C.Q.* (*Union commerciale Compagnie d'assurance v. Giguère*, [1996] R.R.A. 286 (C.A.), at p. 293). The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.

[35] The French position is different. In French law, the violation of a legislative standard in itself constitutes civil fault (Jobin, at p. 229). This means that it is not necessary [TRANSLATION] "to find negligence, imprudence, carelessness or something deficient in the conduct of the person who caused the injury" (Viney and Jourdain, at p. 328). Thus, where a legislative standard is violated, the general rules of civil liability transform the standard into an obligation of result, since the victim can [TRANSLATION] "establish fault by proving a simple material fact without having to show that the conduct of the person who caused the injury was also morally or socially blameworthy" (Viney and Jourdain, at p. 342).

[36] In Quebec, art. 1457 *C.C.Q.* imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances. As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct — the content of which may be reflected in the relevant legislative standards — having regard to the law, usage and circumstances.

D. *No-Fault Liability*

(1) Preliminary Comments

[37] In addition to the general rules applicable to fault-based civil liability, it is necessary to consider the possibility of liability in situations where neighbours suffer abnormal annoyances but the owner who causes the damage has not committed a fault.

[38] There is no consensus regarding the theory of no-fault liability in the context of neighbourhood annoyances. As we will see, however, the existence of this form of liability is not precluded by the wording or legislative history of art. 976 *C.C.Q.* or by developments in the case law and commentaries from before and after the enactment of the *Civil Code of Québec*. On the contrary, these sources provide support for it. In addition, reviews of both comparative law and general policy considerations favour the acceptance of no-fault liability.

(2) Case Law and Commentaries Predating the Enactment of Article 976 *C.C.Q.*

[39] Although the *Civil Code of Lower Canada* ("*C.C.L.C.*") contained no provisions governing neighbourhood relations, there were several decisions in which courts explicitly recognized, if not the theory of no-fault liability in the context of neighbourhood relations, at least the principle that an owner must compensate neighbours to whom he or she has caused excessive annoyances.

[40] It should be mentioned, however, that prior to the enactment of the new Code, neighbours involved in legal proceedings, and the courts hearing such cases, generally relied on art. 1053 *C.C.L.C.* Nonetheless, in some cases courts allowed actions on the basis of evidence of excessive annoyances without requiring that the existence of a fault be established. Moreover, absence of fault was not always a defence. After analysing numerous Quebec judgments from the first half of the 20th century in which the defendants were found civilly liable owing to excessive annoyances (nuisance), Robert I. Cohen observed:

> To most civilian legal minds, art. 1053 means "fault" and "fault" connotes an illicit act or at least an actor who has not acted "en bon père de famille", who has not, in other words, taken all reasonable care to avoid the damage. . . .
>
> Although a few isolated Quebec cases support the above view . . . the jurisprudence almost uniformly supports the proposition that the proprietor is subject to liability as regards the damage caused once he is shown to be the author of the nuisance.
>
> In general, the Quebec courts have not boldly articulated this principle and have been content, upon finding the existence of a nuisance of unreasonable dimensions, to close their inquiry there without deciding whether reasonable care was, or could have been, taken to avoid the damage, thus coming to the same thing in the end. . . . The problem, not surprisingly, arises where there is unequivocal evidence to the effect that all reasonable care *has* been taken to avoid the damage. On the several occasions when the Quebec courts have been faced with the situation where the greatest care had evidently been taken to avoid the nuisance, they have held that it was no defence to the action.
>
> ("Nuisance: A Proprietary Delict" (1968), 14 *McGill L.J.* 124, at pp. 136-38 (emphasis in original))

[41] Three decisions of the Supreme Court of Canada and the Quebec Court of Appeal are often relied on in support of the argument that prior to the 1994 codification, the concept of no-fault liability triggered by a finding of excessive annoyances was accepted in Quebec civil law. Those judgments need to be examined more closely.

[42] The first is *Drysdale v. Dugas* (1896), 26 S.C.R. 20. In it, Dugas, the owner of a house located in a residential area near a stable operated by Drysdale, complained of disagreeable odours, noise made by the horses at night and fetid liquids penetrating the basement of his house. Dugas claimed damages and asked that the stable cease operating. This Court affirmed the decisions of the lower courts, which had awarded him damages for the annoyances he had suffered. Although Strong C.J. began by finding that the law applicable to the case was the law set out in art. 1053 *C.C.L.C.*,

he added that, in Quebec law as in English common law, enjoyment of the right of ownership was subject to respect for the rights of neighbouring owners. The Chief Justice also stressed the similarity between English and French law on the subject of nuisance. He then stated the proposition, based on an analysis of English case law, that "occupiers of lands and houses have a right of action to recover damages for any interference with the comfort and convenience of their occupation" (p. 23). Finding that there was no question that Dugas had suffered annoyances and that the disagreeable odours from the stable constituted a nuisance, Strong C.J. concluded that Drysdale was liable to Dugas and that Dugas was entitled to damages. The fact that Drysdale had shown care and caution in operating his stable — and thus that there was no fault — did not exempt him from liability (pp. 25-26).

[43] In concurring reasons with which Strong C.J. agreed (p. 23), Taschereau J. situated his analysis in the framework established by French authorities. Noting that in the case before the Court, the odours, [TRANSLATION] "by their continuity and intensity, exceed the limits of the normal inconveniences that cannot be dissociated from the neighbourhood", Taschereau J. wrote that the commentators and the courts [TRANSLATION] "agree that, in such a case, an action in damages lies against the person who committed the injurious act" (p. 27). As a result, Drysdale could operate his stable only if he compensated his neighbours for the damage he caused them. Taschereau J. therefore attached more importance to the damage suffered by the plaintiff than to the defendant's acts. Thus, Strong C.J. and Taschereau J. agreed on the existence of a scheme of no-fault liability even though their reasons were based on different analytical frameworks.

[44] The second decision is *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 243. In that case, Brown, a neighbour of a pulp and paper mill, sued the mill's operator over noxious odours and fumes that resulted from the use of sulphate-based manufacturing processes. The reasons for judgment in the case, which began as a demand for an injunction, show that the judges agreed only in part. Thus, in allowing Brown's demand, Duff J. favoured the theory of liability based on fault pursuant to art. 1053 *C.C.L.C.* (p. 251). Anglin J., writing for himself and Davies C.J., referred to the concept of nuisance and confirmed that the annoyances suffered by the plaintiff were in excess of anything that could be justified in the context of neighbourhood relations and were therefore actionable (pp. 254-55). Finally, Brodeur J. relied both on abuse of the right of ownership and on excessive annoyances caused by the odours (p. 260).

[45] Despite these differences in the reasons of the members of the Court, some Quebec commentators viewed the case as amounting to a recognition of no-fault liability in respect of neighbourhood disturbances. For example, Louis Baudouin wrote in 1953 that in *Drysdale* and *Canada Paper*, the Court had sought to identify an excessive injury [TRANSLATION] "whose cause lay <u>not in malicious intent</u> in exercising a legitimate right, <u>but rather in objective limits on the right of ownership</u>" (*Le droit civil de la Province de Québec: Modèle vivant de Droit comparé* (1953), at p. 1285 (emphasis added)). This concept of objective limits on the right of ownership relates not to the owner's *conduct*, but to the consequences of the owner's use of his or her property. Likewise, Pratte J.A. of the Quebec Court of Appeal pointed out in an oft-quoted passage that in those two cases, this Court had accepted a principle of inherent limits on the right of ownership:

> [TRANSLATION] The right of owners to use their things as they see fit entails an obligation not to exercise that right in a manner that prevents

> neighbours from enjoying their own property. Of course, because we live in society, each person must suffer the unavoidable annoyances resulting from this situation, but the sum of those annoyances must not be greater than is necessary to reconcile conflicting rights.
>
> (*St-Louis v. Goulet*, [1954] B.R. 185, at p. 191 (emphasis added))

[46] Despite the vagueness of the legal concepts referred to by the judges of this Court in *Canada Paper*, the judges expressed an intention to protect neighbours from excessive annoyances that arise in neighbourhood relations. Moreover, it is difficult to explain the Court's decision in terms of the concept of civil fault based on the diligent person standard.

[47] Finally, in *Katz v. Reitz*, [1973] C.A. 230, the Quebec Court of Appeal explicitly endorsed the theory of no-fault liability in respect of neighbourhood disturbances. Reitz owned a lot and a house when Katz purchased neighbouring lots separated from Reitz's property by a lane. In order to build an apartment building, a company hired by Katz dug a deep hole on Katz's lot that caused Reitz's house to collapse (pp. 231-34).

[48] The Court of Appeal found that Katz had not committed a fault. He had hired a third party with the necessary experience and skill to perform the work (pp. 235-36). However, Katz's right to exercise his right of ownership remained limited by Reitz's right to enjoy his property:

> [TRANSLATION] However absolute it may be, the exercise of the right of ownership includes an obligation not to injure one's neighbours and to compensate them for damage which the exercise of this right may cause them. This obligation exists even in the absence of fault, and in that case results from the neighbours' right to enjoy their property undisturbed and to be compensated for losses which they suffer against their will from work

> done by another for the other's advantage and profit.[Emphasis added; p. 237.]

[49] These three decisions thus showed at least partial acceptance, even prior to the new codification, of no-fault liability in respect of neighbourhood disturbances. However, following a subsequent judgment of this Court, *Lapierre v. Quebec (Attorney General),* [1985] 1 S.C.R. 241, there was some question whether this view was still valid.

[50] In *Lapierre*, a child had contracted encephalitis after being vaccinated for measles pursuant to a provincial routine vaccination policy. The Superior Court found the government civilly liable on a no-fault basis. The Court of Appeal set aside that judgment and dismissed the action. This Court affirmed the Court of Appeal's judgment and refused to find the government liable. Chouinard J., writing for the Court, criticized, *inter alia*, the theory of risk, pursuant to which fault is not necessary. According to that theory, any act that causes damage, whether due to fault or not, attracts liability (p. 265, referring to Mazeaud and Tunc, at p. 431, No. 339). In Chouinard J.'s view, the theory of risk was not accepted in Quebec law. Chouinard J. also briefly considered the argument that *Katz* had opened the door to "recognizing the theory of risk" (p. 265). He rejected that view and preferred to interpret *Katz* as a decision based on fault and abuse of rights (p. 266).

[51] In light of that decision, some judges have denied any possibility of no-fault liability in respect of neighbourhood disturbances in Quebec law. For example, that was the basis for the Court of Appeal's decision in *Christopoulos v. Restaurant Mazurka Inc.*, [1998] R.R.A. 334, to exempt from liability two owners who had not

been at fault when the collapse of their building caused a wall between it and a neighbouring building to collapse.

[52] In view of Chouinard J.'s comments on the non-acceptance of the theory of risk in Quebec law, the real scope of *Lapierre* requires some clarification. The case concerned not neighbourhood disturbances, but a provincial routine vaccination policy, which, according to the plaintiff in that case, had caused a problem of delictual liability. As Professor Lafond points out, Chouinard J. did not rule out the possibility of no-fault liability in respect of the exercise of rights of ownership, particularly in the context of neighbourhood disturbances. In fact, the Court did not deal with the issue in *Lapierre*:

> [TRANSLATION] [I]n *Lapierre*, the . . . Court did not conclusively rule out the possibility of strict liability in connection with the right of ownership . . . . It seems clear to us that [the Court], in deciding a traditional civil liability case, did not want to hold that no-fault liability is *widely* available in Quebec law.
>
> (Lafond, at p. 449 (emphasis in original))

The relevance of that decision to neighbourhood disturbances becomes even more questionable in the context of the *Civil Code of Québec*, as the wording of the new Code's relevant provision, and the inspiration for it, differ from those of the former Code in this regard. At this point, a review of the legal situation created when the new Code came into force in 1994 is relevant.

(3) Coming into Force of the *Civil Code of Québec*: Article 976 *C.C.Q.* and No-Fault Liability

[53] We will begin by examining the legislature's intention in codifying art. 976 *C.C.Q.* and will then discuss the cases and commentaries in which the nature of liability in respect of neighbourhood disturbances under the *Civil Code of Québec* has been considered.

(a) *Legislature's Intention*

[54] The legislative history of art. 976 *C.C.Q.* begins with the work of the Civil Code Revision Office. In its 1975 *Report on Obligations* to the Office, the Committee on the Law of Obligations suggested that a specific provision on neighbourhood relations be included in the book on obligations. The proposed provision read as follows:

> 95. No person may cause any damage to another beyond the normal inconveniences resulting from proximity.

The jurists who made this recommendation explained that the source of this obligation in Quebec law was either the remedy for abuse of rights or the remedies based on nuisance. They took care to distinguish the obligation described in this art. 95 from the one provided for in art. 1053 *C.C.L.C.* and explained that the obligation not to inconvenience one's neighbour applied even in the absence of fault:

> The legal obligation of good-neighbourliness, set forth in Article 1057 C.C., is here further defined as an obligation not only of diligence, but of refrainment from causing any "gênes intolérables", regardless of whatever measures have been taken to eliminate such inconveniences.

> This obligation has long been acknowledged by Quebec law, which has referred to it as either an abuse of right or, as in Common law, a "nuisance". It has recently been correctly defined as a specific legal obligation, distinct from both the obligation set forth in Article 1053 C.C. and the concept of fault implied by that article.
>
> Thus, this article compels all persons, and not only landowners, not to inconvenience their neighbours. This obligation holds even if there is no fault and regardless of any administrative authorization.
>
> (Civil Code Revision Office, Committee on the Law of Obligations, *Report on Obligations* (1975), at p. 149)

[55] In its 1977 *Report on the Québec Civil Code*, the Office in turn proposed including a provision on neighbourhood disturbances in the book on obligations. The recommendation in this report was worded in substantially the same way as the one made two years earlier:

> **96** No person may cause to another damage which exceeds the normal inconveniences resulting from proximity.
>
> (Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. I, *Draft Civil Code*, at p. 346)

This proposal was supported by a commentary identical to the above-quoted commentary by the Committee on the Law of Obligations (Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. II, t. 2, *Commentaries*, at pp. 619-20).

[56] However, the legislature did not adopt the two proposals reproduced above, which would have imposed a positive obligation on owners not to cause excessive inconveniences to neighbours. Instead, article 976 *C.C.Q.* was included in the book entitled "Property". It provides for a passive obligation of tolerance, as neighbours are told to suffer normal neighbourhood annoyances. Once again, this article reads as follows:

> **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.

[57] This provision is silent on the question of liability resulting from neighbourhood annoyances.

[58] The Minister's commentaries concerning the chapter on the ownership of immovables referred to [TRANSLATION] "the general principle of tolerance to be observed in neighbourhood relations" (*Commentaires du ministre de la Justice*, vol. I, at p. 569). The Minister noted that [TRANSLATION] "the new Code restates most of the traditional rules but modernizes them by taking greater account of environmental legislation, the value of water and the quality of life" (*Commentaires du ministre de la Justice*, vol. I, at p. 570). According to the Minister, art. 976 *C.C.Q.* is based on judge-made law. Initially developing that case law on the basis of the concept of abuse of rights, the courts had gradually created specific legal rules for neighbourhood disturbances:

> [TRANSLATION] This article is new. It refers to the principle that tolerance must be shown in neighbourhood relations and codifies that principle in a general provision that heads up and underlies the entire chapter. It thus codifies the academic commentaries and case law on neighbourhood disturbances, which were originally founded primarily on abuse of the right of ownership before a specific framework was established for neighbourhood disturbances. [p. 573]

Thus, the Minister's view was that the courts, in decisions on neighbourhood relations, had adopted a rule that owners must compensate neighbours to whom they cause excessive annoyances. Even though art. 976 *C.C.Q.* is worded as a duty of tolerance,

therefore, it codifies a line of authority according to which owners are not to be exempted from liability for damage associated with excessive annoyances they have caused for their neighbours. Moreover, consistently with *Drysdale*, *Canada Paper* and *Katz*, the article does not state that fault must be proved to obtain compensation for abnormal neighbourhood annoyances.

[59] Since the enactment of the *Civil Code of Québec*, there have been cases in which the Quebec Court of Appeal has decided in favour of a scheme of no-fault liability based on art. 976 *C.C.Q.* In other decisions, however, the same court has disagreed with relying on this provision as a source of civil liability.

(b) *Case Law of the Court of Appeal on Article 976 C.C.Q.*

[60] Some hesitation about the basis of civil liability in respect of neighbourhood disturbances and, more specifically, about accepting no-fault liability can be seen in the decisions of the Court of Appeal since the new Civil Code came into force.

[61] As we mentioned above, the Court of Appeal rejected no-fault liability in *Christopoulo*s. In that case, the Court of Appeal expressed the view that the theory of no-fault liability had been rejected in *Lapierre* in the context of the *C.C.L.C.* (p. 350). It added that art. 976 *C.C.Q.* had not changed the state of the law. The court cited Professor Claude Masse, who asserted that the addition of art. 976 *C.C.Q.* had not established a scheme of no-fault liability in respect of neighbourhood disturbances (p. 350). We mentioned above our reservations about the application of *Lapierre* to cases concerning neighbourhood disturbances. We cannot accept *Christopoulos* insofar as it is based on *Lapierre*. It should also be noted that the applicable law in

Christopoulos was that of the *C.C.L.C.* and that the Court of Appeal referred only briefly to art. 976 *C.C.Q.*

[62] However, the Court of Appeal adopted the same position more recently in *Comité d'environnement de Ville-Émard (C.E.V.E.) v. Domfer Metal Powders Ltd.*, [2006] Q.J. No. 13631 (QL), leave to appeal granted, [2007] 1 S.C.R. viii; appeal discontinued on August 31, 2007, [2008] 2 S.C.R. v. In that case, Forget J.A., relying on the Court of Appeal's reasons in the judgment under appeal in the case at bar, stated that he would be reviewing the facts in light of the [TRANSLATION] "classic theory of civil liability based on fault" (para. 125). He thus rejected the theory of no-fault civil liability in respect of neighbourhood disturbances. The judgment in *Domfer* was rendered the same day as the Court of Appeal's judgment in the instant case. We will explain below why the theory of real liability that the Court of Appeal adopted in these two cases should be rejected.

[63] The Court of Appeal has also accepted the possibility of no-fault liability for neighbourhood disturbances in two cases. In the first, *Sirois v. Lévesque-Gagné*, [1996] Q.J. No. 2669 (QL), two lots overlooked Ms. Lévesque-Gagné's property. A hill with an irregular slope rose above the line separating the three lots. The foot of the hill crossed over that line. Ms. Lévesque-Gagné, who wanted to level her lot, began excavation work that eliminated the slope on it but caused erosion on the neighbouring lots.

[64] Mailhot J.A., writing for a unanimous Court of Appeal, quoted *Katz* with approval and held that Ms. Lévesque-Gagné's right to modify her own property [TRANSLATION] "is of course limited by the equally indisputable right of [her

neighbours] to the peaceful enjoyment of their property" (para. 40). Mailhot J.A. found that the facts in *Katz* differed from those of the appeal before her, because [TRANSLATION] "Ms. Lévesque-Gagné knew that the excavation work she was undertaking could cause the partial ruin and slumping of parts of the neighbouring properties" (para. 41). Nevertheless, in her view, the principle stated in *Katz* still applied. Mailhot J.A. accordingly concluded that [TRANSLATION] "an owner of land, although enjoying the freedom of an owner, may not alter the property in such a way as to cause, as here, a significant foreseeable loss on or deterioration of neighbouring properties" (para. 43).

[65] The question of liability for damage resulting from neighbourhood disturbances came before the Court of Appeal again in *Gourdeau v. Letellier de St-Just*, [2002] R.J.Q. 1195. In that case, the owner of an immovable had built two concrete walls that were supported by the wall of the building next door. Over time, the presence of the concrete walls caused his neighbour annoyances and use problems that gave rise to an action to demolish them that was based on abuse of rights. In discussing the legal problems caused by the construction of the walls, Thibault J.A., writing for the majority of the Court of Appeal, accepted a theory of liability based on the extent of the annoyances suffered rather than on proof of fault (para. 44).

[66] In support of that conclusion, Thibault J.A. relied, *inter alia*, on the wording of art. 976 *C.C.Q.*, which [TRANSLATION] "does not suggest that it applies only where fault is demonstrated" (para. 39). She added that the source of art. 976 *C.C.Q.* [TRANSLATION] "seems to lie in a balance between the use of one property and the use of neighbouring properties", and she referred to the principles laid down in *Katz* (paras. 40-41). Turning to the case before her, Thibault J.A. found that the owners —

whose predecessor in title had built the walls — were liable because the work, although lawful, had caused abnormal annoyances for the neighbours:

> [TRANSLATION] In the absence of a servitude of view in favour of the appellants' immovable, the respondent's predecessor in title had the right, and a very legitimate one at that, to protect his privacy. But the chosen method far exceeded what was normal and acceptable. In light of the objective being pursued, the height of the walls was disproportionate and excessive, and the configuration of the walls was totally unacceptable. In exercising the right to privacy, it was necessary to respect the neighbours' right to have access to their property and to enjoy, not a right of view, but the benefits of air and light.
>
> It is precisely in such situations that the rules of good neighbourliness must apply. Competing rights come into conflict, but no one has to suffer abnormal annoyances resulting from a neighbour's excessive acts. [paras. 47-48]

[67] Thus, in *Gourdeau*, the Court of Appeal explicitly accepted an interpretation of art. 976 *C.C.Q.* based on the extent of the annoyances suffered rather than on an assessment of the owner's conduct.

(c) *Quebec Commentators and No-Fault Liability in Respect of Neighbourhood Disturbances*

[68] Most Quebec commentators seem to favour the theory of no-fault liability in respect of neighbourhood disturbances. For example, Professor Lafond agrees that an action relating to neighbourhood disturbances lies even where there is no proof of fault, malice or excessive conduct by an owner of land. In his view, proof of abnormal or intolerable annoyances suffered by a neighbour will be enough to justify such an action (Lafond, at p. 404; *contra*, C. Masse, "Civil Liability", in *Reform of the Civil Code* (1993), vol. 2-B, at pp. 13-14). According to A. Popovici, the determining factor is the *result* of the owner's act (that is, the abnormal disturbance or excessive

annoyance) rather than the owner's *conduct* ("La poule et l'homme: sur l'article 976 *C.c.Q.*" (1997), 99 *R. du N.* 214, at p. 221).

[69] Baudouin and Deslauriers point out that art. 976 *C.C.Q.* does not explicitly refer either to intent to injure or to excessive and unreasonable exercise of the right of ownership. In their opinion, art. 976 *C.C.Q.* confirms the line of cases in which liability was recognized as being based on the existence of abnormal neighbourhood annoyances rather than on proof of fault (p. 202).

[70] However, noting that there is disagreement on this point, Baudouin and Deslauriers associate liability in this area with fault-based liability. Where an excessive annoyance (and thus an injury) exists, fault can be *presumed*. According to these authors, since art. 1457 *C.C.Q.* makes [TRANSLATION] "breaking the law a civil fault" and art. 976 *C.C.Q.* sets out [TRANSLATION] "an objective legislative standard in this regard" (at p. 202), an owner will necessarily be liable for abnormal annoyances:

> [TRANSLATION] The controversy over whether fault is necessary may thus be more apparent than real; fault exists once excess does, and the recognition of an injury gives rise to a presumption of fault. [p. 203]

[71] With respect, we are not convinced that relying on the concept of presumed fault is helpful. The assessment of fault is based on the way a reasonable, prudent and diligent person would behave in objectively similar circumstances. By presuming fault on an owner's part solely because his or her neighbour has suffered excessive annoyances, the analysis confuses an examination of *conduct* (whether the owner acted as a reasonable, prudent and diligent owner) with an examination of the *result*

(whether the neighbour suffered excessive annoyances). Finally, it is contradictory to conclude that for an owner to cause abnormal annoyances for a neighbour amounts to fault after finding that the owner did not, in actual fact, commit any fault (Lafond, at p. 406, and Popovici, at p. 221). A finding of abnormal annoyances is therefore not enough to establish that a fault has been committed.

(d) *Summary of the Legislative History, of the Case Law, and of Commentaries on Article 976 C.C.Q.*

[72] Although the drafts prepared by the Civil Code Revision Office proposed that an article on neighbourhood relations be included in the book on obligations, the legislature ultimately decided to put art. 976 *C.C.Q.* in the book on property. The decision to do so is important to the interpretation and application of this provision. In this regard, this Court recently noted that "[t]he organization of rules is an essential feature of codification" (*Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34, at para. 14; see also para. 15). It might be thought that the inclusion of the provision on neighbourhood relations in the book on property confirms that the legislature intended to separate neighbourhood relations from the general rules on obligations and those on civil liability. On this point, we agree with Thibault J.A., who explained in *Gourdeau* why, owing to the location of art. 976 *C.C.Q.* in the Code, this provision relates more to the right of ownership than to the general rules of civil liability:

> [TRANSLATION] . . . article 976 C.C.Q. is found under Title Two, *Ownership* (arts. 947 to 1008), and is the general provision of Chapter III, *Special rules on the ownership of immovables* (arts. 976 to 1008), in which the legislature has grouped together various limits or restrictions on the right of ownership. This is the chapter that contains the old servitudes "arising from the position of the property or established by law". The word " servitude" of course refers to a charge imposed on one property for the

> benefit of another. This suggests that the legislature intended to dissociate these limits from the rules of civil liability and attach them instead to a rule creating a real right that, in itself, is unrelated to the concept of fault. The source of the right established in this article seems to lie in the balance between the use of one property and the use of neighbouring properties, and the right therefore resembles a legal servitude that results from the human environment of a given property. [para. 40]

[73] Next, it must be remembered that the actual words of art. 976 *C.C.Q.* do not require evidence of wrongful conduct to establish the liability of an owner who has caused excessive neighbourhood annoyances (see, *inter alia*, *Gourdeau*, at para. 39; Baudouin and Deslauriers, at p. 202). Moreover, the commentaries of the Civil Code Revision Office and the Minister of Justice support a conclusion that the legislature's intention was not to limit actions relating to neighbourhood disturbances to cases involving the wrongful exercise of a right.

[74] In addition, art. 976 *C.C.Q.* is related to other provisions that appear to be based on the same principles regarding the exercise of rights of ownership. For example, arts. 988 and 991 *C.C.Q.* — which govern the rights and obligations of neighbours — support the argument that an owner can be found liable even though he or she has committed no fault (Lafond, at p. 455). These provisions focus on the result of an act, not on an owner's conduct.

[75] In short, although they do not rule out the possibility of actions based on the usual principles of civil liability, the legislative history, the case law and academic commentaries favour the recognition of a scheme of civil liability based on the existence of abnormal neighbourhood disturbances that does not require proven or presumed fault. Such a scheme is also consistent with the approaches taken in Canadian common law and in French civil law, and with general policy considerations.

(4) Comparative Review of Canadian Common Law and French Civil Law

[76] At this stage in our analysis of liability in respect of neighbourhood disturbances, we believe it will be helpful to consider how certain other legal systems approach the same kinds of problems. We will therefore briefly review the solutions adopted in Canadian common law and French civil law.

[77] At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L. N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

[78] In France, the Court of Cassation accepts as a principle of law that [TRANSLATION] "no one may cause an abnormal neighbourhood disturbance to another" (J. Carbonnier, *Droit civil* (2004), vol. II, at p. 1785; P. Malinvaud, *Droit des obligations* (8th ed. 2003), at p. 404; Viney and Jourdain, at pp. 1069-70). This

principle is not based on art. 1382 of the Civil Code (Malinvaud, at p. 404; Viney and Jourdain, at p. 1069). Liability for damage resulting from abnormal neighbourhood disturbances is thus independent of fault, and a finding of excessive injury or abnormal disturbance is all that is needed to trigger it (Viney and Jourdain, at pp. 1069 and 1079). However, trivial annoyances caused by relations between neighbours will not trigger liability (Starck, Roland and Boyer, at p. 169).

[79] Thus, in both these legal systems, a scheme of no-fault liability in respect of neighbourhood disturbances is accepted in one form or another. Their schemes seem analogous to the one that can be inferred from art. 976 *C.C.Q.*

(5) General Policy Considerations

[80] Finally, it must be mentioned that the acceptance of no-fault liability furthers environmental protection objectives. The Minister stressed the importance of the environment and the quality of life in his commentaries on the chapter concerning the ownership of immovables (*Commentaires du Ministre de la Justice*, vol. I, at p. 570). No-fault liability also reinforces the application of the polluter-pay principle, which this Court discussed in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 2003 SCC 58:

> To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities. [para. 24]

(6) Rejection of Real Liability

[81] At this point, we must explain why it is necessary to reject the theory of real liability adopted by the Court of Appeal. According to this theory, which was not discussed or contemplated in the documented preparatory work for the Civil Code, the obligation not to injure one's neighbours must be treated as a charge on every immovable in favour of neighbouring lands, and the rights and obligations associated with good neighbourliness are dependent on land ownership:

> [TRANSLATION] Since only a person who has a right of ownership has an obligation of good neighbourliness, the obligation becomes a charge for that person, that is, a real obligation, since it imposes certain limits on the exercise of his or her right.
>
> (L. Laflamme, "Les rapports de voisinage expliqués par l'obligation *propter rem*", in S. Normand, ed., *Mélanges offerts au professeur François Frenette: Études portant sur le droit patrimonial* (2006), 229, at pp. 233-34.)

According to the theory of real liability, the obligation not to impose abnormal annoyances on a neighbour is inherent in the right of ownership. As soon as the limit of "normal" annoyances is exceeded, the neighbouring owner can set up his or her right against the owner who is at fault by bringing an immovable real action to put an end to the disturbance. As for claims for compensation of a personal nature, the Court of Appeal suggested that they should be governed by the traditional rules of civil liability, which require proof of wrongful conduct by the neighbouring owner (para. 175).

[82] The approach adopted by the Court of Appeal raises several problems. The fact remains that, in principle, as Professor Lafond points out, behind any real

obligation is a [TRANSLATION] "person who is the debtor of the charge" and must compensate a neighbour who suffers excessive annoyances (Lafond, at p. 455; see also Popovici, at p. 225). Thus, the remedy under art. 976 *C.C.Q.* remains first and foremost a claim that a person (and not land) has against another person, as the Court of Appeal held in *Gourdeau* in allowing the action for demolition brought by the appellants, who were the owners of the neighbouring property. Furthermore, the Court of Appeal's approach would significantly restrict and limit the scope of art. 976 *C.C.Q.* Under this approach, only an immovable real action would be possible even though a person, and not land, actually suffers the annoyances and claims compensation.

[83] The Court of Appeal's approach would also mean that a remedy under art. 976 *C.C.Q.* would not be available to lessees or occupants, since they would not be able to claim to have a real right. Yet the courts have already found that lessees, too, may benefit from this scheme even though they do not have such a right. One author points out that no court has yet held an action under art. 976 *C.C.Q.* to be inadmissible [TRANSLATION] "on the basis that it was brought by someone other than the holder of a right of ownership" (Laflamme, at p. 232). Indeed, it seems incongruous to tie the right to enjoy a neighbourhood without excessive disturbances solely to status as an owner even though the damage is suffered by the plaintiff, not the plaintiff's property. On that basis, the Superior Court has held that the term "neighbour" refers not only to the holder of a real right in land, but also to any person who exercises a right to enjoy or use land (*St-Pierre v. Daigle*, [2007] Q.J. No. 1275 (QL), 2007 QCCS 705, at para. 19; *Coalition pour la protection de l'environnement du parc linéaire "Petit Train du Nord" v. Laurentides (Municipalité Régionale de*

Comté des), [2005] R.J.Q. 116, at para. 100, main appeal and incidental appeal dismissed on motions, [2005] Q.J. No. 9042 (QL), 2005 QCCA 664).

[84] Moreover, the narrow approach adopted by the Court of Appeal would make it difficult, if not impossible, to institute class actions in situations where art. 976 *C.C.Q.* applies. In addition to limiting this provision to purely real rights, the Court of Appeal used this characterization to conclude that class actions are precluded because, in its opinion, the class action procedure is reserved exclusively for the exercise of rights belonging to persons (C.A., at para. 178; see also the criticisms by Lafond, at pp. 454-55). This position contradicts a number of judgments in which the courts have authorized class actions where the plaintiff members held real rights and were claiming damages (K. Delaney-Beausoleil, "Livre IX: Le recours collectif", in D. Ferland and B. Émery, eds., *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, 875, at p. 906; see *Dicaire v. Chambly (Ville de)*, [2000] Q.J. No. 884 (QL) (C.A.); *Bouchard v. Corp. Stone Consolidated*, [1997] Q.J. No. 4574 (QL) (Sup. Ct.); and *Arseneault v. Société immobilière du Québec*, [1997] Q.J. No. 4570 (QL) (Sup. Ct.).

[85] We will not comment further on the theory of real liability, which appears to us to unduly limit the scope of art. 976 *C.C.Q.* and the possibility of instituting a class action.

(7) Conclusion

[86] Even though it appears to be absolute, the right of ownership has limits. Article 976 *C.C.Q.* establishes one such limit in prohibiting owners of land from

forcing their neighbours to suffer abnormal or excessive annoyances. This limit relates to the *result* of the owner's act rather than to the owner's *conduct*. It can therefore be said that in Quebec civil law, there is, in respect of neighbourhood disturbances, a no-fault liability regime based on art. 976 *C.C.Q.* which does not require recourse to the concept of abuse of rights or to the general rules of civil liability. With this form of liability, a fair balance is struck between the rights of owners or occupants of neighbouring lands.

E. *Application of the Principles of Civil Liability to the Facts of This Case*

(1) Review of the Superior Court's Findings

[87] The question of the effect of environmental standards or standards for operating the cement plant and their impact on SLC's civil liability arose in the Superior Court. There were several environmental standards that applied to SLC, and all of them limited its right of ownership. First of all, SLC had to comply with the *Regulation respecting the quality of the atmosphere*, R.R.Q. 1981, c. Q-2, r. 20, which establishes opacity standards to be met by a business when discharging contaminants into the atmosphere (ss. 10 and 11), and standards for the emission of particulate matters into the atmosphere by a cement plant (s. 42). As well, the *Regulation respecting the application of the Environment Quality Act*, R.R.Q. 1981, c. Q-2, r. 1.001 ("*RAEQA*"), provides that "[a]ny equipment used or installed for the purpose of reducing the emission . . . of contaminants into the environment shall at all times be in good working order and shall function optimally during production hours" (s. 12). SLC was also subject to standards for blasting in quarries (*Regulation*

respecting pits and quarries, R.R.Q. 1981, c. Q-2, r. 2, s. 34). Finally, the *SLC Special Act* required it to "use the best known means to eliminate dust and smoke":

> **5.** The corporation shall favour local labour first and regional labour afterwards, save as regards administrative employees, technicians and experts, and shall pay reasonable wages, procure suitable working conditions, maintain hygienic and sanitary conditions conducive to public health and safety and use the best known means to eliminate dust and smoke.

[88] SLC's cement mills were equipped with bag filters. According to the evidence, if a filter of this type is in good condition, the air coming out of it will remain relatively clean, with no cloud of smoke (Sup. Ct., at para. 241). The evidence also showed that the electrostatic precipitators used with SLC's equipment were efficient but fragile and that to function properly, they required regular maintenance (para. 242).

[89] The tests conducted on the chimneys of the kilns and clinker coolers (the two main sources of particulate matter emissions) showed that, at the time of the tests, the standards for emissions of particulate matters into the atmosphere were being complied with. Although this did not prove that these standards were always met at other times, Dutil J. noted that there was no evidence on this point (para. 238).

[90] Dutil J. nonetheless acknowledged that the evidence showed that many incidents had occurred as of June 4, 1991. She referred to the environmental incident reports completed at the plant between February 6, 1992 and May 16, 1996 and to documents from the Ministère de l'Environnement prepared between June 8, 1991 and February 1, 1996, which contained notes taken by government officials during telephone calls or meetings with SLC representatives or concerning complaints

received from citizens (paras. 244-45). The judge also noted that clouds of dust coming from hatches or windows on the east side of the plant (where the cement mills were located) were visible on videotapes recorded by a resident between 1992 and 1997, and SLC did not deny this (para. 240). The videotapes also showed dust at the base of the chimney for the kilns, which were equipped with electrostatic precipitators (para. 242).

[91] Although Dutil J. observed that there had been frequent deposits of dust and flakes (para. 246), she stated that the evidence did not make it possible to attribute them to a failure to maintain the plant's equipment (para. 255). Dutil J. noted that SLC had hired an environmental manager, invested several million dollars on projects relating to environmental protection, used the best dust control systems available for wet process kilns (paras. 256-58) and hired a maintenance team that was responsible for keeping the equipment in good working order (para. 263). She therefore refused to find fault on SLC's part on the basis of a presumption of fact:

> [TRANSLATION] In the Court's opinion, the plaintiffs have not shown that the defendant committed faults by failing to comply with section 12 of the *Regulation respecting the application of the Environment Quality Act*, which concerns the maintenance of its equipment. To find the defendant liable on the basis of presumptions of fact, the presumptions must be serious, precise and concordant. [para. 252]

[92] Dutil J. added that SLC had fulfilled its obligation under s. 5 of the *SLC Special Act* to use the best known means to eliminate dust and smoke (para. 264).

(2) Absence of Fault, Including Fault Related to the Violation of Statutory Obligations

[93] In this context, the Superior Court had to consider whether SLC had committed a civil fault in relation to its statutory obligations. In analysing s. 12 *RAEQA* from the standpoint of a failure by SLC to maintain its equipment, Dutil J. was attempting, without expressly saying so, to determine whether SLC had taken reasonable precautions to ensure that its equipment was in good working order at all times and was functioning optimally, and whether its conduct in this regard may have constituted wrongdoing that would justify a finding of civil fault.

[94] As we mentioned above, Dutil J. appears to have concluded that the respondents had failed to prove fault and that she could not draw presumptions of fact about the appellant's liability from the evidence. Her interpretation of the facts is reasonable, and her analysis of the law is correct. The respondents have not shown that the Superior Court judge made an error in this regard that justified the Court of Appeal intervening to reverse her decision. Section 12 *RAEQA* does inform the interpretation of the applicable standard of conduct, but without a finding that this standard has not been met, we must confine ourselves to no-fault liability in respect of neighbourhood disturbances.

(3) Finding of No-Fault Liability Under Article 976 *C.C.Q.*

[95] After hearing the evidence, Dutil J. said she was convinced that, even though SLC had operated its plant in compliance with the applicable standards, the representatives and members of the group had suffered abnormal annoyances that were beyond the limit of tolerance neighbours owe each other according to the nature or

location of their land (para. 304). First, clinker dust or cement dust had caused the most serious annoyances in all the zones she had identified, namely the red, blue, yellow and purple zones. Because of the dust deposits, many residents had to wash their cars, windows and garden furniture frequently and could not enjoy their property. This led to considerable annoyances associated with maintenance and painting and with the use of outdoor spaces (paras. 305 *et seq.*). As well, sulphur, smoke and cement odours caused abnormal annoyances in all zones except the purple zone (paras. 323 *et seq.*). Finally, the noise from the cement plant's operation caused annoyances that were beyond the limit of tolerance in the red zone and, to a lesser extent, in the blue zone (paras. 328 *et seq.*). In view of Dutil J.'s findings of fact, it seems clear to us that the group members suffered abnormal annoyances that varied in their intensity but were beyond the limit of tolerance neighbours owe each other. The trial judge was therefore justified in finding SLC liable under art. 976 *C.C.Q.*

[96] We note in closing that Dutil J. did not misinterpret the word "neighbour" as used in art. 976 *C.C.Q.* when she concluded that all members living in the neighbourhoods adjacent to the plant were neighbours of the plant for the purposes of that provision on the basis that they lived close enough to it (paras. 354-59). Article 976 *C.C.Q.* does not define the scope of the concept of "neighbour". Obviously, the plaintiff must prove a certain geographic proximity between the annoyance and its source. However, the word must be construed liberally. The leading case on this point, which dates back to 1975, is *Carey Canadian Mines Ltd. v. Plante*, [1975] C.A. 893. In that case, the plaintiff claimed damages from Carey Canadian Mines after a river crossing his land became polluted; the evidence showed that the pollution came from an asbestos deposit two miles away. The Quebec Court of Appeal confirmed that the obligation extended to the entire neighbourhood and that

the properties concerned did not have to be adjacent (p. 899) (see also *Théâtre du Bois de Coulonge inc. v. Société nationale des Québécois et des Québécoises de la Capitale inc.*, [1993] R.R.A. 41 (Sup. Ct.), at pp. 42-43; *Ouimette v. Canada (Procureur général)*, [2002] R.J.Q. 1228 (C.A.), at p. 1244). The conditions for finding SLC liable under art. 976 *C.C.Q.* were therefore met. However, SLC has raised other defences to avoid or limit its civil liability that must now be considered.

F. *SLC Special Act and the Immunity Argument*

[97] First, SLC argues that as a result of the *SLC Special Act* passed by the Quebec legislature in 1952 to govern its activities, it has immunity from actions in damages relating to its industrial activities. In its view, this immunity results from the rule that a person or a corporation may not be held liable in nuisance if the activity in question is authorized by statute and it is proved that the nuisance is the inevitable result or consequence of exercising that authority. According to SLC, although this rule derives from English law (*Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353 (H.L.); *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.); *Hammersmith and City Railway Co. v. Brand* (1869), L.R. 4 H.L. 171), it is recognized in Canadian common law (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181) and is also applicable in Quebec law (*Canadian Pacific Railway Co. v. Roy*, [1902] A.C. 220 (P.C.); *Ouimette*; *Laforest v. Ciments du St-Laurent*, [1974] C.S. 289).

[98] The statute relied on by SLC provides no basis for this defence. Although the *SLC Special Act* authorized the operation of the plant while requiring that the best means available be used, it in no way exempted SLC from the application of the

ordinary law. When the legislature excludes the application of the ordinary law, it generally does so expressly. For example, the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001, provides that "[n]o worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury" (s. 438). Likewise, with regard to bodily injury, the *Automobile Insurance Act*, R.S.Q., c. A-25, provides that "[c]ompensation under this title stands in lieu of all rights and remedies by reason of bodily injury and no action in that respect shall be admitted before any court of justice" (s. 83.57). There is no provision in the *SLC Special Act* precise enough to justify a conclusion that the law of civil liability has been excluded for all consequences of the plant's activities.

G. *Prescription and Future Damage*

[99] SLC also makes an argument based on prescription. According to this argument, prescription was not interrupted for damage relating to events subsequent to the judgment authorizing the class action, and the action is thus prescribed as regards such events. It must therefore be determined whether events subsequent to the filing of the application for authorization to institute a class action are relevant to this case, and whether the representatives can be compensated for damage suffered after that date.

[100] Article 2908 *C.C.Q.* restates the principle set out in art. 2233a *C.C.L.C.* that an application for leave to bring a class action suspends prescription until the judgment granting the motion is no longer susceptible of appeal:

> **2908.** A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion.
>
> The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside . . . .
>
> In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.
>
> (See *Commentaires du ministre de la Justice*, vol. II, at p. 1825)

[101] In the instant case, the action was authorized on March 31, 1994 by Thibault J. Prescription was therefore *suspended* between the date of the application, June 4, 1993, and the date when Thibault J.'s judgment was no longer susceptible of appeal, namely 30 days after March 31, 1994 (art. 494 *C.C.P.*). Prescription then ran again until the action was filed on August 1, 1994. The *Civil Code of Québec* provides that the filing of a judicial demand *interrupts* prescription:

> **2892.** The filing of a judicial demand before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than sixty days following the expiry of the prescriptive period. . . .

[102] Article 2896 *C.C.Q.* adds that the interruption continues until judgment and has effect in respect of any right arising from the *same source*:

> **2896.** An interruption resulting from a judicial demand continues until the judgment acquires the authority of a final judgment (*res judicata*) or, as the case may be, until a transaction is agreed between the parties.
>
> The interruption has effect with regard to all the parties in respect of any right arising from the same source.

The question is therefore whether the damage suffered by the representatives after the filing of the judicial demand in August 1994 arose from the "same source". The analysis on this point will make it possible to decide whether the representatives can be compensated not only for neighbourhood disturbances that occurred between June 4, 1991 and the date of filing of the demand, June 4, 1993, but also for damage suffered up to the time SLC ceased operations in 1997.

[103] In this case, the courts below correctly adopted a liberal interpretation of the words "same source". Dutil J. held that the *C.C.Q.* does not limit the general scope of the word "source" in art. 2896 *C.C.Q.* (para. 223) and concluded that it is possible to claim compensation for damage that has the same cause but is spread out over time. Moreover, in her judgment authorizing the class action, Thibault J. did not limit the members' claims to the period starting on June 4, 1991 and ending with the filing of the motion for authorization on June 4, 1993. The Court of Appeal confirmed the validity of Dutil J.'s liberal interpretation of the expression "same source" (paras. 224-25).

[104] The Court of Appeal had also concluded in *ABB Inc. v. Domtar Inc.*, [2005] R.J.Q. 2267, 2005 QCCA 733, that the word "source" must be interpreted broadly rather than narrowly. The following passage shows that that court's decisions have been consistent. The provision's purpose is to maintain, not to extinguish, rights associated with proceedings that are under way:

> [TRANSLATION] In *Québec (Procureur général) v. Armand Sicotte & Fils Ltée* [[1987] R.R.A. 290, at p. 294], this court stated:
>
> > Article 2224 C.C.L.C. provides that the filing of a judicial demand creates a civil interruption that is effective for every party to the action

> for any right and recourse arising from the same source as the demand. . . .
>
> Later, in *D'Anjou v. Thériault* [C.A., Montréal, 200-09-002267-984, 2001-05-01], this court held that:
>
> > [44] This conclusion is made all the more necessary by the need to bear in mind the legislature's purpose in making successive amendments to art. 2224 C.C.L.C. In my opinion, that purpose was a liberal one, namely to ensure that rights closely connected with legal proceedings already under way would be maintained rather than extinguished. Naturally, this objective required a flexible interpretation of the criterion of identity of sources, which this Court adopted, *inter alia*, in *Banque de Nouvelle-Écosse v. Exarhos*. . . . [Emphasis omitted; paras. 96-97.]

[105] Baudouin and Deslauriers also discuss the concept of "continuing damage" and its consequences for prescription. This type of damage involves an injury that recurs or persists over time. In such a case, it makes sense to allow the victim to bring a single action to put a permanent end to the damage rather than requiring him or her to bring a series of actions.

> [TRANSLATION] **1-1422** — *Continuing damage* — This is a single injury that persists rather than occurring just once, generally because the fault of the person who causes it is also spread over time. One example is a polluter whose conduct causes the victim an injury that is renewed every day. . . . Since there are several wrongful acts as well as simultaneous recurring damage that is related to those acts, it makes sense to accept, as the courts do, that prescription starts running each day. . . . The plaintiff thus has the option of either suing once and for all and seeking an end to the injury or compensation for future damage, or periodically renewing his or her judicial demands. [pp. 1200-1201]

Although Baudouin and Deslauriers are referring to a more typical situation involving extracontractual liability (where fault has been proved), their analysis relates mainly to the question of damage. It therefore applies even in the present context where the defendant's liability is based on the extent of the annoyances suffered by the victims rather than on fault.

[106] Here, the "source" of the continuing damage suffered by the representatives, namely the acts that generated their right of action, remains the same: activities of SLC that caused excessive neighbourhood annoyances. Since those activities continued until 1997, it would make no sense (in addition to being impractical, as Dutil J. pointed out at para. 230) to ask the group's representatives to repeat their motion every three years for each annoyance suffered. In conclusion, we agree with the courts below that all events subsequent to the filing of the action were relevant, and in our opinion, they did not err in law or in fact in this regard.

H. *Appropriateness of Using Average Amounts in Assessing Damages*

[107] SLC criticizes the method chosen by the courts below respecting compensation: determining an "average" for each of the residential zones that had been established rather than making an order requiring each resident to prove his or her injury. The representatives contest the intervention of the Court of Appeal, which reduced the compensation awarded by Dutil J. They ask that the Superior Court's conclusions on the quantum of damages be restored.

[108] A distinction must be drawn between *evidence* of similar injury and the *assessment* of that injury. On the question of evidence, this Court stated in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, that "in the context of an action in civil liability brought in the form of a class action, the elements of fault, prejudice and causal connection must be established in respect of the members of the group, by the normal evidentiary rules" (para. 33). L'Heureux-Dubé J., writing for the Court, noted that the rules of proof by

presumptions apply to class actions (para. 39) and that presumptions of fact can be used to prove that a similar injury has been suffered:

> In my opinion, Nichols J.A. correctly described the process followed by the trial judge (at p. 2784):
>
> > [TRANSLATION] When the trial judge spoke of a "presumption of similarity", he did not use a presumption of law but rather looked at it as an objective toward which his analysis of the evidence was leading. He never drew the conclusion that all the patients had suffered the same prejudice because the representative of the group had herself suffered discomfort. *Rather, he sought to find an element of damage common to everyone, and only after reviewing the evidence as a whole did he find enough evidence to be able to infer that there were serious, precise and concordant presumptions that all the patients had at least suffered discomfort.*
> >
> > If we consider that no member of the group was capable here of expressing himself or herself to describe the subjective prejudice he or she felt, the necessary conclusion is that, in the circumstances, proof by presumptions was the most appropriate method of proof for establishing the existence of such prejudice.
>
> I agree with Nichols J.A. on this point and I would add that the trial judge did not rely solely on presumptions of fact, but also took into account the evidence as a whole, including that of witnesses and expert witnesses, in reaching his conclusions. [Emphasis in original; paras. 41-42.]

Therefore, the court can draw from the evidence a presumption of fact that the members of the group have suffered a similar injury (J.-C. Royer, *La preuve civile* (3rd ed. 2003), at p. 649). It may also divide the group into subgroups, each of them made up of members who have suffered a similar injury.

[109] At the hearing in the instant case, 62 witnesses residing in the four zones described the annoyances they had suffered (Sup. Ct., at paras. 23-24). Relying on their testimony, Dutil J. found that the evidence showed a form of injury that was common to all members of the group, but that varied in intensity (para. 398). Dust emissions, odours and noise from the plant had affected the residents of some zones

less than others. For this reason, Dutil J. divided the group members into four zones to ensure that there was some basic injury common to the residents of each zone. She thus ensured that there was a common injury in each zone.

[110] It is true that in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, this Court expressed the opinion that the class action was not the preferable means of resolving the claims of the class members. However, in that case, the Divisional Court had noted that "[e]ven if one considers only the 150 persons who made complaints — those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (para. 32). In the instant case, the representatives provided detailed evidence of the injury they had suffered. Dutil J. considered all that evidence and was able to infer from it that the members in each zone had suffered similar injuries. Her analysis contains no error warranting this Court's intervention.

[111] However, one aspect of Dutil J.'s decision is unusual: she ordered that recovery be subject to an individual claims procedure but assessed the amount to be awarded to each member using an average determined for each zone. The procedure chosen for recovery should not be confused with the assessment of injury. From a procedural standpoint, the trial judge must decide whether "the claims of the members [will] be recovered collectively or be the object of individual claims" (art. 1028 *C.C.P.*). Regardless of whether recovery is collective or individual, each member will, in theory, be compensated for "the amount of the loss he has sustained and the profit of which he has been deprived" (art. 1611 *C.C.Q.*). This is because a class action is only a "procedure which enables one member to sue without a mandate on behalf of all the members" (art. 999(*d*) *C.C.P.*; see *Dell Computer*, at paras. 105-8). The nature

of the action itself remains unchanged. Thus, even in the context of an order for collective recovery, the injury the trial judge must assess is, at first glance, individual rather than common.

[112] The provisions of the *Code of Civil Procedure* on individual claims do not suggest that the trial judge may not decide the amount to be awarded in respect of an individual injury (see arts. 1037 to 1040 *C.C.P.*). Moreover, a judge who opts for collective recovery does so "if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; [the judge] then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established" (art. 1031 *C.C.P.*). This suggests that the total amount is based on an assessment of the sum of the members's individual injuries. Finally, the trial judge has considerable discretion in making this assessment in the context of a class action (arts. 1039 and 1045 *C.C.P.*; see also *Thompson v. Masson*, [2000] R.J.D.T.1548 (C.A.), at paras. 38-40).

[113] Professor Lafond makes the following comment about the trial judge's discretion:

> [TRANSLATION] In a class action, the judge has a different role, as his or her participation continues until the final judgment is executed. The collective or individual processing of claims and the distribution of compensation constitute an essential step in the class action and largely determine the effectiveness of the procedure. The legislature has assigned responsibility for this to the judge, who turns into a genuine administrator for purposes of the execution of his or her decision.
>
> (*Le recours collectif, le rôle du juge et sa conception de la justice* (2006), at p. 189)

Thus, a trial judge who, as in the case at bar, decides to proceed by way of individual claims is not precluded from determining the amount to be awarded in respect of an individual injury. This approach also simplifies the individual claims procedure, since it will then be possible to limit what must be proved at that stage.

[114] The question that remains is whether it was appropriate for Dutil J. to use average amounts to determine the compensation in this case. It must be recognized that the annoyances suffered by victims of environmental injury are difficult to assess. In *Domfer*, 4,000 residents of Ville-Émard suffered damage and annoyances caused mainly by dust, noise and odours from Domfer's plants. Forget J.A. rightly noted that it was difficult to put a dollar amount on the problems and annoyances the residents had suffered (para. 162). In that case, too, the Court of Appeal used average amounts and based the plaintiffs' compensation on the zones in which they resided, although its reasoning was grounded in fault-based liability (para. 164). Thus, the Court of Appeal's approach was analogous to the one taken by Dutil J. in the instant case.

[115] An average amount was also used to determine compensation for moral injury in *St-Ferdinand*. In that case, the trial judge had expressed the opinion that [TRANSLATION] "[w]here all members of the group have suffered the same kind of prejudice, the prejudice can be assessed on the basis of an average without increasing the debtor's liability" ([1990] R.J.Q. 359, at p. 397). L'Heureux-Dubé J., writing for this Court, noted that "because of the nature of the prejudice, the quantum of moral damages cannot be determined exactly" (para. 85).

[116] Given the trial judge's discretion and the difficulty of assessing environmental problems and annoyances, we consider Dutil J.'s use of average

amounts to have been reasonable and appropriate in the circumstances. Moreover, SLC has not shown that its liability increased as a result. There is no indication that the amount awarded by Dutil J. was based on a wholly erroneous estimate of the injury (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 235). We will therefore allow the cross-appeal and restore the Superior Court's conclusions on the assessment of damages (with the exception of para. 419, corrected by the Court of Appeal with the respondents' agreement), which the Court of Appeal varied because of its findings concerning the bases for SLC's liability.

[117] Moreover, it is our view that the amount awarded by Dutil J. to the owners for additional painting expenses should also be restored. In light of the evidence before the court, we are not convinced that that assessment was inconsistent with the latitude the trial judge is recognized to have. Dutil J. gave a precise description of the additional painting expenses incurred by Claude Cochrane, one of the representatives, who lived in the red zone (paras. 57-60). She subsequently noted that another witness from the red zone had painted every year until he moved in 1994 (para. 78); that house exteriors had had to be repainted regularly in the yellow zone (para. 94); that lessees in the purple zone had not referred to painting in their testimony (para. 101); that two owners from the purple zone had said they had to paint wooden window frames every two years (para. 102); and that many witnesses had confirmed that after the plant closed, they no longer had to paint every year or two (para. 313). Dutil J. also distinguished environmental problems and annoyances from injury in the form of painting expenses (paras. 312-13).

[118] The test to be applied by an appellate court before intervening with respect to the quantum of damages is "very strict and gives preference to the evaluation done

by the trier of fact" (*St-Ferdinand* (S.C.C.), at para. 84). It is our opinion that SLC has not proved that Dutil J. applied a wrong principle of law or that the amount she awarded to the owners was based on a wholly erroneous estimate of the injury. That amount should therefore be restored.

III. Disposition

[119] For these reasons, we would dismiss the principal appeal and allow the cross-appeal, with costs throughout.

Appeal dismissed and cross-appeal allowed, with costs.

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