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ABUSE OF RIGHTS IN FRANCE AND QUEBEC*

Albert Mayrand**

The expression "abuse of right" is open to criticism. According to Planiol, it is a barren "logomachy".¹ A right is always in conformity with the law; the exercise of a right cannot be against the law. What we call an abuse of right is essentially an excess of right.² All rights have limitations;³ 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. His right ceased where the abuse began. A person's right to stretch his arm, stops at his neighbor's nose. If he goes an inch further, it could be said that he has committed an abuse of right. It might be simpler to call this a tort or a negligent act. In a recent judgment of the Quebec Superior Court, the distinction between the exercise of the right of picketing during a legal strike and illegal acts committed by the pickets was expressed this way:

(translation)

[V]iolence, intimidation, trespass and riot cannot be considered as "abuses of the right" of picketing. The latter is a right; the former are violations of the law on the occasion of the exercise of the right.⁴

* This article is based on a presentation and round-table discussion at a seminar of Louisiana Appellate Judges held on Feb. 1-2, 1974 under the auspices of the Institute of Civil Law Studies of Louisiana State University. A list of the abbreviations used appears in the Appendix.

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1. 2 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* no. 871 (9th ed. 1923).

2. Scholtens, *Abuse of Rights*, 75 S. AFR. L.J. 39, 49 (1958).

3. Exceptionally some rights are held to be absolute. A classical example is the right of the parents to refuse their consent to the marriage of their minor child. However, a father who had withdrawn his consent to the marriage of his minor son was condemned to pay damages to his son's fiancée, because the withdrawal of his consent was inspired by a spirit of vengeance. Civ., May 21, 1924, D. 1924.1.97. Louis Josserand notes: "*Le groupe de ces prérogatives souveraines et asociales se rétrécit de plus en plus.*" *Id.* at 98. The Civil Code Revision Office of the Province of Quebec proposes the following rule: Art. 28—*Report on Family Law*: "If the opposition [to marriage] is dismissed, the opposant may be condemned to pay damages, according to the circumstances."

4. Canadian Gypsum Co. Ltd. v. Confédération des Syndicats, [1973] Que. S.C. 932, 936: "[L]a violence, l'intimidation, l'empiètement et l'émeute ne peuvent être considérés comme des abus du droit de piquetage. L'un est un droit; les autres des contraventions à la loi dont l'exercice du droit n'est que l'occasion." The Court of Appeal has reversed this judgment (Jan. 31, 1974): "To the extent that there is a right

The above criticism is not without merit; the expression "abuse of right" is perhaps an abuse of language. However, it is a very convenient phrase and is commonly used in civil law countries. Scholars are still going to employ the term, but the main problem is to know exactly what is meant by it. There are indeed circumstances when a person, being technically within the limits of his right, does not exercise it in conformity with its nature or with the purpose contemplated by the law or by the contracting party when that right was created.⁵

The theory of the abuse of rights existed and was applied centuries before it was given a name and formally recognized. As early as 1577, a wool comber indulged in singing continuously while working, for the sole purpose of annoying a neighboring attorney. It was held that his songs were more harming than charming and that he had made an abusive use of his right to sing. He was condemned to pay damages.⁶

Until the beginning of this century, the theory of abuse of rights occupied a modest place in the field of law. Its real starting point was property law. Moreover it was restricted to cases where the owner had exercised his right maliciously. Those two frontiers or limitations (property law and malice) were soon removed. From property law, the abuse of rights theory spread to other fields including administrative law and even the law of contract. Malice, which was at first a *sine qua non* condition of the abuse of rights, gave way to simple fault which has a much wider scope. Some persons even consider that, in certain cases, fault is no longer a prerequisite.

The evolution and the spread of the theory of abuse of right has followed a similar pattern in France and in the Province of Quebec. Until recently, Quebec courts did not accept the application of the theory in the law of contracts. Recent decisions are doing away with this last limitation and it can be said that there is now much similarity between French and Quebec jurisprudence.

I. THE ABUSE OF RIGHTS IN EXTRA-CONTRACTUAL MATTERS

(a) *The Abuse of Right in Property Law*

The right of ownership was the natural cradle of the theory of abuse of rights. Why is this so? The right of ownership has always been considered as absolute. It has been defined by the Quebec Civil Code in the following terms:

to picket, this right must, like any other right, be exercised so as not to interfere with the rights of others."

5. Crabb, *The French Concept of Abuse of Rights*, 6 INTER-AMERICAN L.R. 1, 9 (1964).

6. 2 MAZEAUD ET TUNC, *TRATÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ* no. 556 (5th ed. 1957).

Ownership is the right of enjoying and of disposing of things *in the most absolute manner*, provided that no use be made of them which is prohibited by law or by regulation.⁷

A similar provision is found in the Louisiana Civil Code:

Perfect ownership gives the right to use, to enjoy and to dispose of one's property *in the most unlimited manner*, provided it is not used in any way prohibited by laws or ordinances . . .⁸

Article 667 of the Louisiana Civil Code limits what is described as an almost unlimited right in article 491 of the same Code:

Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.⁹

This article solves for Louisiana the problem of abuse of the right of a proprietor to make a work on his estate, by fixing clear limits to that right. In a way, it is narrower than a general rule on the abuse of rights, because it provides a solution for a particular case; in another way, it is wider than a case of abuse of right, because it comprises cases where a damage is caused without any fault. Neither the French nor the Quebec Civil Code has a similar article; the owner of an estate in those two countries, has a right which is described as "absolute." This qualification is an echo of the Roman Law which recognized three prerogatives of the owner: *jus utendi, jus fruendi, jus abutendi*. In connection with this last prerogative, the right to abuse, it should be noted that *abutere* is stronger than "to dispose." How was this right to abuse turned into an abuse of right? The Latin expression *jus abutendi* meant that an owner had the right to damage or destroy his own property; it did not mean that he had the right to use his property to damage his neighbor. However, being the undisputed master of his property, it was natural for the owner who has a grudge against his neighbor to exercise his right of ownership in a manner causing damage to him. Were the courts to remain indifferent and allow an owner to cause damage by malice without awarding compensation to his victim?

According to the common law of England a right is a right no matter what is in one's mind when one exercises it. This absolutist view of rights was well expressed in the case of *The Mayor of Bradford v. Pickles*:

7. (Emphasis added.) QUE. CIV. CODE art. 406. See also FR. CIV. CODE art. 544.

8. (Emphasis added.) LA. CIV. CODE art. 491.

9. LA. CIV. CODE art. 667.

No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.¹⁰

In support of this rule, it has been argued that it is too difficult to discover the true intent of a person exercising his right, because it involves an investigation of a psychological nature;¹¹ the heart of man is impenetrable!

The difficulty in the matter of proving malice does not appear to be a very good reason; whenever proof of malice can be made, the law should take it into consideration. This is done everyday in criminal law in those cases where the *mens rea* is an element of the crime. It is also done in private law where the rights of a contracting party, of an occupier or a possessor, vary according to his good or bad faith. If a person does something on his property which is not useful to himself but injures another, the presumption is that he acted with the intention to injure,¹² because he is supposed to know and accept the normal consequences of his acts. It is comforting to read the following statement in a comment on abuse of rights in Louisiana:

The principle that an act which is lawful in itself cannot be made actionable because of the motive which induces it, is a legal platitude honored more by exception than by application.¹³

Examples of the abusive exercise of a right of property are quite common in both French and Quebec jurisprudence. One such example in France is the case of a fake or dummy chimney constructed on the top of a roof; it served no practical or aesthetic purpose but was erected for the sole purpose of interfering with the neighbor's view and shutting out air and light from an important window of his home. Although the defendant's property was not a servient estate charged with a servitude, the court found that he had exercised his right of ownership in an abusive manner and ordered the demolition of the fake chimney.¹⁴

Another example is the case of the dirigible balloons in France: Plaintiff was experimenting with airships; his neighbor erected in his

10. [1895] A.C. 587 (H.L.). The defendant abstracted the water percolating under his soil in order to prevent its reaching the plaintiff's reservoir and compel him to buy his land. See also *Sorrell v. Smith* [1925] A.C. 700 (H.L.); *Allen v. Flood* [1898] A.C. 1 (H.L.); LA. CIV. CODE art. 661; QUE CIV. CODE art. 503; FR. CIV. CODE art. 644.

11. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 26 (1933).

12. Scholtens, *Abuse of Rights*, 75 S. AFR. L.J. 39, 43 (1958).

13. Comment, 7 TUL. L. REV. 426 (1932).

14. Colmar, May 2, 1855, D. 1856.2.9.

field high wooden scaffolds equipped with iron spikes in order to render the experiments dangerous and force the plaintiff to buy his land.¹⁵ In Quebec, the same high spirit of opposition inspired the ex-director of an air transportation company who, having not been re-elected, erected high posts on the land adjoining the airport, for the purpose of rendering its operation hazardous.¹⁶ There is also the Quebec case of *Brodeur v. Choiniere*,¹⁷ in which the owner erected a fence eight and a half feet high along his neighbor's property, for the purpose of depriving him of air and light, while pretending falsely that his purpose was to prevent his hens from invading the land of his neighbor. This case offers a good example where the malicious intent is deduced from all the circumstances of the case and where the predominating motive reveals an *animus nocendi*.

When the exercise of a right is a mere pretext to cause damage deliberately to somebody, it is difficult to argue that no liability is incurred. Thus, when a person engages an orchestra to play loudly every time his neighbor organizes a hunting party, not for the love of music but for the sole purpose of scaring the game, he really commits a tort or a delict camouflaged under the right to play and enjoy music.¹⁸

The courts in France and Quebec thought that it was impossible to refuse a remedy to the victim of a malicious act, and it is through this wide open door that the abuse of rights theory entered the civil law. But judges have to give reasons for their judgments, and those reasons must be based on legal rules. The reason given to justify the application of the abuse of rights theory could be summed up in the following proposition: He who exercises his right maliciously commits a fault and incurs delictual liability according to article 1053 of the Quebec Civil Code:

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.¹⁹

Once the theory of abuse of rights found itself comfortably

15. *Coquerel v. Clément-Bayard*, Req., Aug. 3, 1915, S. 1920.1.300, D.P. 1917.1.79; Trib. Compiègne, Feb. 19, 1913, D.P. 1913.2.177.

16. *Air Rimouski Ltée v. Gagnon*, [1952] Que. S.C. 149. See also *Blais v. Giroux*, [1958] Que. S.C. 569; *Laperrière v. Lemieux*, [1958] R.L. 228. In both cases, a high and ugly fence had been erected for the sole purpose of depriving the neighbor of light and depreciating his property.

17. [1945] Que. S.C. 334.

18. *Amiens*, Feb. 7, 1912, D. 1913.2.177.

19. QUE. CIV. CODE art. 1053. See articles 2315 (1) and 2316 of the Louisiana Civil Code which correspond to articles 1382 and 1383 of the French Civil Code. "Every act

settled on article 1053 of the Quebec Civil Code or article 1382 of the French Civil Code, it could not rest with the malicious intent limitation. The fault contemplated in that article does not require malice. Any fault, voluntary or involuntary, gross or slight,²⁰ malicious or not malicious, renders its author liable for damages caused.²¹

The substitution of the criterion of fault for the criterion of malice (*animus nocendi*) is well illustrated in the jurisprudence relating to the abuse of the right to repudiate a promise of marriage. Although it is sometimes disputed,²² the general opinion in Quebec law is that a reciprocal promise of marriage does not create the obligation to execute that promise.²³ However, the right to make a promise of marriage or to repudiate a promise of marriage must not be exercised "*à la légère*", inconsiderately. A breach of a promise of marriage may be reasonable, in which case no damage is due. It may also be prompted by malice or by simple fault, in which case it is an abuse of the right to repudiate the promise.²⁴

Every one has the right to express his opinion on events or on persons. However this free speech and free expression must not be exercised maliciously or even imprudently. It has often been held in our courts that good faith is not in itself a good defense for libel or slander.²⁵

The right to sue in court is considered as a sacred right; the right to litigate or to use legal process is ancillary to individual freedom; legal remedies must be available to every one *ex debito justitiae*²⁶ and no one can validly waive this right. When a litigant loses his lawsuit, judges say that he did not have a good case; the party who loses his case loses also the time he has spent in Court and in his lawyer's office, he loses the costs²⁷ and he sometimes suffers damage to his

whatever of man that causes damage to another obliges him by whose fault it happened to repair it. . . ." LA. CIV. CODE art. 2315. "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." *Id.* art. 2316.

20. See the signification of these terms in Louisiana Civil Code article 3556 (13).

21. 1 MAZEAUD ET TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ no. 576 (5th ed. 1957).

22. Mayrand, *Rupture de fiançailles*, [1963] R. DU B. 1.

23. A. ET R. NADEAU, TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE no. 197 (1971).

24. *Id.* no. 198; Riom, March 26, 1941, S. 1941.2.45; Req., June 23, 1938, Gaz. Pal. 1938.2.586.

25. A. ET R. NADEAU, TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE no. 238 (1971), (except in the case of an absolute or a qualified privilege); Bédard v. Paquette, [1965] Que. B.R. 483.

26. The Queen v. Osborn, [1971] S.C.R. 184, 190 (Ontario).

27. QUE CODE CIV. P. art. 477.

prestige; but even if he caused a great inconvenience to the person he sued, he is only condemned to pay the taxable costs. This is the fair price one has to pay for the exercise of the right to contend in court for justice. The other costs and inconvenience suffered by the successful defendant are a *damnum sine injuria*, a damage which is not the result of a violation of the law. If the plaintiff would be liable in damages every time his action is dismissed, this would prevent free access to the courts.

It is not an abuse *per se* to go to court even if one is not absolutely sure of his right and cannot foresee the outcome of the case.²⁸ However, it becomes an abuse when the litigant, knowing very well that he has no case, institutes legal procedures with the sole purpose of harming the other party. A vexatious procedure may be entered in order to destroy a person financially, politically or professionally. Everyone has the right to prosecute, but no one has the right to persecute. Malice for some time was considered as the condition *sine qua non* of the action in damages for false accusations or abusive institution of legal proceedings. At first, it was thought in Quebec that English law ought to be applied in this matter because the right to use legal process is a part of public law.²⁹ But the jurisprudence is now settled: ancient French law applies in Quebec to the abuse of the right to sue in court. Malice is not an essential element of the action. When a litigant has taken action which he should have known to be unfounded, he commits a fault and he is liable for damages caused to the defendant or to the accused.³⁰

French courts have decided that the right to appeal from a judgment is also subject to being abused.³¹ In Quebec, the legislator has endorsed the theory of abuse of right in the case of frivolous "appeals." Article 524 of the Quebec Code of Civil Procedure allows the Court of Appeal to condemn an appellant to damages when it dismisses an appeal "that it considers dilatory or abusive." French courts have also decided that a creditor may make an abuse of his right to execute a judgment.³²

According to the Quebec Civil Code, the right of the creditor of

28. *Ville St-Laurent v. Marien*, [1962] S.C.R. 580.

29. *Héту v. Dixville Butter and Cheese Assoc.*, 16 Que. B.R. 333 (1907), 40 S.C.R. 128 (1908); *Pinsonneault v. Sébastien*, 3 S.C. 446 (M.L.R. 1887); *Grothé v. Saunders*, 3 Q.B. 208 (M.L.R., 1886); *Copeland v. Leclerc*, 2 Q.B. 365 (M.L.R., 1886).

30. *Fabyan v. Tremblay*, 26 Que. B.R. 416 (1917); *Prime v. Keiller*, [1943] R.L. 65, A. ET R. NADEAU, *TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE* no. 222 (1971); See *however* *United Steel Workers v. Gaspé Copper Mines*, [1970] S.C.R. 362, 389 (no responsibility failing evidence of bad faith or gross error equivalent to fraud).

31. Req. Nov. 18, 1946, *Gaz. Pal.*, 1947.1.40; Req., June 8, 1931, S. 1931.1.332.

32. Req., Mar. 20, 1929, S. 1930.1.45.

an alimentary pension to register his judgment as a judicial mortgage on the immovables belonging to his debtor, is also exercised abusively if the judgment is registered on several properties without necessity, in cases where the alimentary pension is abundantly secured by a single one of them. The debtor may then obtain a judgment limiting the judicial mortgage and granting a release except for one or two immovables.³³

In France, Josserand suggested that the theory of abuse of rights ought to be applied when a right is exercised in a way that is inconsistent with its natural purpose or its social aim or objective.³⁴ This new criterion for the abuse of right has not been adopted by everyone.³⁵ It is often difficult to identify the social purpose of a right, and the usual criterion of fault is more easily understood. Moreover, one may consider that the exercise of a right in a way that is contrary to its social purpose is precisely a fault, because a *bonus paterfamilias* would not exercise his right in such a way.

The application of the theory of abuse of rights to cases where the person exercising his right was at fault, without having any malicious intent, seemed to be the last stage of the extension of the theory. It may appear very awkward to hold a person liable for damages when that person is merely exercising his right in good faith and in a prudent manner. Yet the theory of the abuse of rights sometimes seems to reach that extreme. This last extension of the theory of abuse of rights chose as a starting point the use of a right of property or ownership. Indeed, the right of ownership is in a way the breeding ground of the theory of abuse of rights.

The following is an example taken from French jurisprudence. A company was given permission by public authorities to set up and operate a refinery. In the process of refining oil, it emitted fumes which polluted the air and caused a nuisance to the neighborhood, although the company used good and modern equipment.³⁶ Although it committed no fault, the company was condemned to pay damages to its neighbors because the normal exercise of its right to operate a refinery exceeded the standard of ordinary and reasonable limits of

33. QUE. CIV. CODE, art. 2036. The article, however, provides for the payment of the costs by the petitioner.

34. L. JOSSERAND, *DE L'ABUS DES DROITS* (2d ed. 1939); 2 *COURS DE DROIT POSITIF* no. 438 (3d ed. 1938).

35. ETHIOPIAN CIV. CODE, art. 2034: "*Sous réserve des articles précédents, la manière dont un droit est utilisé ne peut être critiquée en faisant valoir qu'elle est contraire à la destination économique ou sociale de ce droit.*" Translation: "Under reserve of the preceding articles, the manner in which a right is exercised cannot be objected to for the reason that it is contrary to the economic or social function of this right."

36. Req., Dec. 5, 1904, D. 1905.1.77; Req., Apr. 19, 1905, D. 1905.1.256.

annoyance that neighbors are expected to endure with forbearance. Of course, a court will take into consideration the district in which the property is located. The industrial section of a city cannot be as peaceful and quiet as the suburban residential district; sometimes it is also relevant that the neighbor, who complains about the inconvenience, already had his residence there when the manufacturer established himself in vicinity.³⁷

The abuse of right without fault had been recognized twelve years earlier by the Supreme Court of Canada in the Quebec case of *Drysdale v. Dugas*.³⁸ The defendant Drysdale had been authorized to erect and operate a large livery stable on St. Denis Street in Montreal. The plaintiff Dugas who owned an adjoining home suffered from offensive smells emanating from the stable and from noise caused by the horses. One dissenting judge of the Supreme Court would have allowed the appeal and dismissed the action because the maintenance of the stable was legal and the proof had been made that it would be "impossible that any such stable could be more perfect in its construction and in its arrangements and in the manner of its being conducted."³⁹ It is interesting to note that Chief Justice Strong cited only English authorities, as was then (1895) customary for the common law trained judges, whereas Justice Taschereau (of Quebec) cited only French authorities. At any rate, the majority of the judges decided that although the defendant had "acted with extreme care and caution" and had been operating the livery stable according to the municipal by-laws, he was responsible for the serious annoyance and inconveniences caused to the plaintiff.

Another example of responsibility for abuse of right without fault is the recent case of *Katz v. Reitz*.⁴⁰ During the construction of a large apartment house, the private residence of a neighbor collapsed. When the builders of the apartment house were making the excavations they erected a wall made with wooden beams to support the land of the neighbor. They acted as any prudent and competent contractor would have acted. However, an underground pool of water located in the land of the neighbor percolated through the wooden beams into the excavation carrying with it part of the soil. Quoting the maxim "*sic utere tuo ut alienum non laedas*," the court observed that the builder of the apartment house was obliged to compensate the neigh-

37. Known as the theory of pre-occupation or of priority of activity. *Contra*, Cass., Feb. 18, 1908, D. 1907.1.385, 1907.1.77.

38. 26 S.C.R. 20 (1895), *affirming* 6 Que. B.R. 278 (1895), 5 Que. S.C. 418 (1894).

39. *Id.* at 26 S.C.R. 28 (Gwynne, J.).

40. [1973] C.A. 230. For other cases of abuse of right without fault, see Huard, *Le droit de la famille et le droit des biens*, 6 R.J.T. 375 (1971).

bor "even in the absence of fault."

We are here at the meeting point of two theories: the theory of abuse of rights and the theory of risks (*théorie des risques*). The latter, which is more disputed than the former, may be summed up in the proposition that he who benefits from an economic activity must assume the risk inherent in such an activity and pay the damages caused even without his fault; hence, the duty of the employer to compensate the workman who is hurt at work even through his own fault.

(b) *The Abuse of Right in Administrative Law*

The abuse of rights theory has also been recognized in administrative law.⁴¹ Jossierand, the brilliant author of *De l'abus des droits*,⁴² has made the following remarks:

When a public administrator commits a distortion (or misuse, "*détournement*") of power, it is also at the same time an abuse of right for which he is liable, with only this difference that the abuse concerns a right related to the public function and not to a private function. This difference might have a bearing on the procedure to be followed, but not on the nature of the recourse.⁴³

The exercise of the right to render administrative decisions is not governed by all the rules that must be observed for the rendering of a judicial decision. For instance, the rules of evidence are not followed as strictly as in a court of justice,⁴⁴ as long as the case is handled in all fairness and according to the rules of natural justice. However, as a rule, the decision of an administrative tribunal ought to include supporting reasons unless there is an express provision of law to the contrary.⁴⁵ Since the courts have a general power of supervision over

41. L. DUBOIS, *LA THÉORIE DE L'ABUS DE DROIT ET LA JURISPRUDENCE ADMINISTRATIVE* (vol. 45 of the Bibliothèque de droit public Librairie Générale de Droit et de Jurisprudence, Paris 1962).

42. (Paris 1962).

43. *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ* no. 194 (2d ed. 1939): "*Lorsqu'un administrateur commet un détournement de pouvoir, c'est encore, et du même coup, un abus de droit dont il se rend coupable, avec cette seule particularité, que l'abus intéresse un droit attaché à la fonction publique et non point à la fonction privée. La procédure à suivre pourra bien s'en trouver influencée, mais non l'essence même du recours.*"

44. For instance, the right of an interested party to cross-examine a witness may be refused. See *Re Elliott and Governors of the University of Alberta*, 37 D.L.R. 3d 197 (1973).

45. *Compare* Conseil d'Etat, Jan. 26, 1973, D. 1973.606. A judgment of a court must, as a rule, contain the reasons upon which it is founded. C.C.P. arts. 471, 519.

political and corporate bodies,⁴⁶ the reason of the decision should be expressed, because otherwise it would be difficult for the supervising court to determine whether it is the result of an abuse of power.

The power to render decisions given to public boards or public administrators must be exercised reasonably. Quebec courts and Canadian courts generally have annulled or reversed decisions rendered against a person who was not given the opportunity of being heard. The rule "*audi alteram partem*" is a part of Quebec law;⁴⁷ the rendering of a decision without giving the party concerned a chance to be heard is an abuse of administrative power, unless the law, in specific cases, allows the *ex-parte* procedure.⁴⁸

The right to render administrative decisions is exercised abusively when it is rendered for an improper or an irrelevant motive. In the case of *Jaillard v. City of Montreal*, a permit to operate a roller skating rink was refused only because the parish priest was opposed to it.⁴⁹ This was quite an irrelevant motive. In the case of *Roncarelli v. Duplessis*, the president of the Quebec Liquor Board had refused the renewal of a liquor permit to a well known restaurateur, only because this was the express wish of the prime minister of Quebec; the prime minister had recommended the refusal of the permit for the sole reason that the restaurateur was furnishing bail for many Jehovah's Witnesses who were being prosecuted. It was held that the refusal of the permit for such an irrelevant motive and the recommendation of the prime minister—which was considered as an order—constituted "a gross abuse of a legal power." The Court found that "it is not proper to exercise the power of cancellation (of a liquor permit) for reasons which are unrelated to the carrying into effect of the intent and purpose of the (Alcoholic Liquor) Act."⁵⁰

46. FR. CODE CIV. P. art. 33.

47. *Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*, 2 S.C.R. 140 (1953), reversing [1951] Que B.R. 752. A teachers' union called a strike in violation of the Public Services Employees Dispute Act, which at that time refused the teachers the right to strike. The Labour Relations Board, without notice to the union and without hearing it, cancelled its certificate of representation. Although the law did not in terms require a notice, it was held that the Board was bound by the maxim "*Audi alteram partem*." The decision of the Board was annulled and the writ of prohibition was granted.

48. *Commission des Rel. de Travail du Quebec v. Ingersoll Rand Co.*, [1968] S.C.R. 695; *Quebec Labour Board v. J. Pascal Hardware Co.*, [1965] Que. B.R. 791.

49. 72 Que. S.C. 112 (1934), *mandamus granted*. See also *Ville St-Laurent v. Marien*, [1962] S.C.R. 580 where the city had maliciously refused to issue a permit of construction.

50. [1959] S.C.R. 121, at 141, 156. *Compare* *Re John Gregory Ltd. and Town of Oakville*, 37 D.L.R. 3d 641 (1973) (bad faith of the municipal authority which refused a construction permit); *Re Parisien and Mason*, 37 D.L.R. 3d 450 (1973) (refusal of the renewal of a collection agent licence based on an insufficient reason).

More recently, it was held that even though a city has the right to adopt zoning by-laws, it is not entitled to use its discretionary power to prevent an already established commercial firm from carrying on its business.⁵¹

The expression "abuse of right" is not used in administrative law which in Quebec is derived from English law. What is described as an excess of jurisdiction, gross irregularity or "an abuse of authority,"⁵² is sometimes a genuine abuse of the right to make decisions. But the words are relatively unimportant. The fundamental rule remains true: any right, whether private or public, must be exercised in good faith and not in a way to defeat the purpose for which it was granted, or in a way to cause a prejudice which could be avoided.

II. THE ABUSE OF RIGHTS IN CONTRACTS

(a) *Reasons to Oppose the Application of the Theory of Abuse of Rights to Contracts*

Is the abuse of rights theory applicable in contractual matters? At first sight, the principle of freedom of contract (and the autonomy of the will) is opposed to the extension of the theory of the abuse of rights in the field of contracts. According to the French Civil Code, article 1134, the contract is the law of the parties. Article 1901 of the Louisiana Civil Code puts it this way:

Agreements legally entered into have the effect of laws on those who have formed them.

Then article 1945 of the same Code goes on:

Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. . . .

This rule holds even when the agreement is inequitable for one of the contracting parties. Under such a rule, the clever and experienced business man is the undisputed master. He is allowed to stipulate abusive clauses and take full advantage of them against the naive party. *Pacta sunt servanda* even if the result is inequitable. The debtor owes an absolute duty to the creditor, who has an absolute right to the execution of the contract.⁵³

The only general limitation on the principle of contractual lib-

51. *Ivanhoe Corp. v. La Ville de Val d'Or*, [1973] S.C. 904.

52. QUE. CODE CIV. P. art. 846: "*[u]n abus de pouvoir.*"

53. This appears clearly from what an English judge said in the case of *Chapman v. Honig*, 3 Weekly L.R. 19, 32 (1963): "[A] person who has a right under a contract or other instrument is entitled to exercise it and can effectively exercise it for a good reason or a bad reason or no reason at all."

erty appears in article 13 of the Quebec Civil Code (which corresponds to article 6 of the French Civil Code and article 11 of the Louisiana Civil Code):

No one can, by private agreement, validly contravene the laws of public order and good morals.

Louisiana Civil Code, Article 11:

Individuals can not by their conventions derogate from the force of laws made for the preservation of public order and good morals

. . .

But the legislator does not deem an abusive clause of a leonine contract to be contrary to public order or good morals.⁵⁴ This results clearly from article 1012 of the Quebec Civil Code:

Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only.

The French Civil Code (art. 1313) and the Louisiana Civil Code are quite similar on this point although they make exceptions for the sale of immovables and exchange.⁵⁵ A person of age must assume the consequences of his lack of wisdom and experience, even of his stupidity. This rule has some resemblance with the law of the jungle, where the fittest and the strongest survive. The court seems to be without authority to intervene in favor of the weakest. The Louisiana Civil Code warns them at article 1945 (par. 2):

Courts are bound to give legal effect to all such contracts according to the true intent of all the parties.

The contractual right, seen in that perspective, looks at first sight to be an impregnable fortress barring the way to the theory of the abuse of rights. How could this fortress be breached? When there is a will, there is a way; techniques have been found. The simplest one consists in declaring the contract null because it is contrary to good morals or public order. A good supply of *contra mores* or *contra public order* dynamite will be used to explode either the whole con-

54. *Commercial Acceptance v. Partridge*, [1956] R.L. 193 (clause by which the vendor of a car could repossess the unpaid car and sue the buyer for the balance due before reselling the car).

55. LA. CIV. CODE art. 1861: "The law, however, will not release a person of full age, and who is under no incapacity, against the effect of his voluntary contract . . . , Art. 1863: "Persons of full age are relieved for lesion in no other contracts than those above expressed, except as hereinafter provided regarding the contract of exchange." FR. CIV. CODE art. 1313: "*Les majeurs ne sont restitués pour cause de lésion que dans les cas et sous les conditions spécialement exprimées dans le présent Code.*"

tract or only the part of the contract which makes it unjust. The more sophisticated technique consists in circumventing the contract, using the little winding path of interpretation to go around it. When those techniques fail, resort can be had to the theory of abuse of rights.

(b) *Techniques Used to Apply the Theory to Contractual Matters*

It is appropriate to make an examination of the techniques applied in France and in Quebec. In all likelihood, similar techniques may have been applied in Louisiana.

Morality and public order are such indefinite and extensive concepts that whenever a contract is shockingly unjust one feels justified to say that it is contrary to good morals or to public order. Here are two examples taken from Quebec jurisprudence. The first is the clause by which a debtor promises to pay any expenses and fees his creditor might have to incur for the collection of the debt by an attorney. The second is the restrictive covenant by which a person undertakes not to exercise his profession or commerce in competition with his former employer or the purchaser of his establishment.

The validity of the following agreement has been questioned, sometimes with success, before the Quebec courts:

If the amount due is not paid and must be placed for collection in the hands of solicitors, the debtor agrees to pay to the creditor all expenses incurred therefor including attorney's fees (or: to pay an additional sum of 15% on the amount of the said collection as and for solicitors' charges).

Many arguments, not all convincing, have been invoked against the validity of this clause. Here are some of them:

1. This clause constitutes a stipulation for the benefit of a third party,⁵⁶ the beneficiary is the attorney for the creditor, and the creditor is not entitled to claim fees which belong to his attorney (Quebec Code of Civil Procedure, art. 59: "A person cannot use the name of another to plead . . .").⁵⁷

2. The object of the obligation (eventual attorney's fees) is not sufficiently determined or determinable. The disputed clause would be contrary to article 1060 of the Quebec Civil Code (art. 1886 of the Louisiana Civil Code or art. 1129 of the French Civil Code):

56. QUE. CIV. CODE art. 1029; FR. CIV. CODE art. 1121; LA. CIV. CODE art. 1890.

57. *Modern Refrigeration Co. v. Bastien*, [1953] S.C. 347; J.-L. BAUDOIN, *LES OBLIGATIONS* 301 (Les Presses de l'Univ. de Montréal, 1970): "[E]lle constitue une stipulation pour autrui en faveur de l'avocat, d'honoraires que la stipulant réclame lui-même et dont il acquiert le bénéfice contrairement à la Loi du Barreau."

An obligation must have for its object something determinate at least as to its kind. The quantity of the thing may be uncertain, provided it be capable of being ascertained.⁵⁸

3. The clause is contrary to public order, the law establishes a tariff of legal fees that can be claimed against the debtor condemned by judgment:

Quebec Code of Civil Procedure art. 480:

The party entitled to costs prepares a bill thereof in accordance with the tariffs in force . . .

If the debtor is obliged to pay additional costs not provided for in the tariff, he is charged a double toll, which is contrary to the intent of the legislator.⁵⁹

4. The clause is contrary to article 1077 of the Quebec Civil Code⁶⁰ which reads as follows:

Dans les obligations pour le paiement d'une somme d'argent, les dommages-intérêts résultant du retard ne consistent que dans l'intérêt au taux légalement convenu entre les parties, ou en l'absence de telle convention, au taux fixé par la loi . . .

The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or in the absence of such agreement, at the rate fixed by the law . . .

Article 1935 of the Louisiana Civil Code would be more favorable to such an interpretation:

The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, *and whatever loss he may have suffered, he can recover no more.*⁶¹

58. *Posluns v. Berke*, [1968] S.C. 255; *La Caisse Populaire de l'Université Laval v. Morais*, [1970] P.R. 408, 411; *Cities Service Oil Co. Ltd. v. Huot*, [1965] S.C. 113.

59. *Leduc v. Gourdine*, 10 L.N. 161 (1887); *Rompré Frère Drive Yourself Ltée v. Roy*, [1961] S.C. 29; *Traders Finance Corp. v. Dame Leclerc*, [1961] P.R. 205; *Posluns v. Berke*, [1968] S.C. 255; A. Langlais, *Tout pacte de payer les frais non taxables oblige-t-il le défendeur?*, 1958 R. DU B. 245, 264.

60. *Traders Finance Corp. v. Perron*, [1967] S.C. 418; T.-L. Bergeron, *Des ventes dites conditionnelles*, 22 R. DU B. 150, 157 (1962); Y. Caron, *Domages-intérêts et clauses pénales*, 74 R. DU N. 328, 330 (1972). *Contra*, Bernard Grenier, *Domages-intérêts conventionnels avant pour objet les frais extrajudiciaires*, 12 CAHIERS DE DROIT 477 (1973). See also, *contra*, *Les Immeubles Fournier Inc. v. Construction St. Hilaire Ltée* decided by Supreme Court of Canada, April 29, 1974.

61. (Emphasis added.)

Here is a second example of an agreement in which one of the parties takes an abusive advantage over the other and which the courts are inclined to annul as contrary to public order. The principle of contractual liberty allows for a restrictive covenant by which an employee agrees not to work after the termination of his employment for a competitor of his employer, or a restrictive covenant by which a vendor undertakes not to compete with the purchaser of his business. The validity of such covenants is not questioned when they are reasonable, having regard to the legitimate interests of the parties and of the public. However the abuse of restrictive covenants has led tribunals to consider them against public order when they go beyond what is reasonably adequate to protect these interests. They are not enforceable when they are excessive either as to duration, or place or scope.⁶² It is indeed against public order to deprive a man of the means to earn his living and to contribute his work and services to society.

When it is impossible to use the weapon of morality and public order to defeat the abusive contract, one may sometimes avoid any inequity by resorting to the interpretation of the leonine contract. The force of interpretation is such that it may tame a lion and transform it into a domestic pet.

A section of the Quebec Civil Code, under the title of Obligations, relates to "The interpretation of contracts."⁶³ The Louisiana Civil Code⁶⁴ and the French Civil Code⁶⁵ have a similar section. Article 1019 of the Quebec Civil Code⁶⁶ reads as follows:

In case of doubt, the contract is interpreted against him who has stipulated and in favor of him who has contracted the obligation.

Due to the probably inadvertent omission of a phrase in the 1825 English translation the Louisiana Civil Code states the opposite rule.⁶⁷ In Quebec and French civil law, persons are presumed to be free of obligations and the same rule applies to property: it is interpreted restrictively.⁶⁸

62. *Pitre v. L'Association Athlétique d'Amateurs*, 20 K.B. 41 (1911); *Cameron v. Canadian Factors*, [1971] S.C.R. 148.

63. QUE. CIV. CODE arts. 1013-21.

64. "Of the Interpretation of Agreements," LA. CIV. CODE arts. 1945-62.

65. "De l'interprétation des conventions," FR. CIV. CODE arts. 1156-64.

66. This article corresponds to FR. CIV. CODE art. 1162.

67. LA. CIV. CODE art. 1957: "In a doubtful case, the agreement is interpreted against him who *has contracted the obligation."

*[Should include "has stipulated and in favor of him who. . . ." See 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 1957 (J. Dainow ed.). Ed.]

68. *Limoges v. Bouchard*, [1973] C.A. 791. See also LA. CIV. CODE art. 753:

Another provision of the Quebec Civil Code, in article 1024, states that:

The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature.

The Louisiana Civil Code also refers to equity as a complement of the express terms of the contract.⁶⁹ There is also a good description of what is meant by equity in article 1965:

The *equity* intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another . . .

This article offers a very convenient support to the theory of the abuse of rights; the French and the Quebec Civil Codes have no corresponding article.

Unfortunately, it is not always possible to complete the terms of a contract by implied terms founded on equity. Article 1963 of the Louisiana Civil Code states the rule:

When the intent of the parties is evident and lawful, neither equity nor usage can be resorted to, in order to enlarge or restrain that intent . . .⁷⁰

The natural light that shows the intent of the parties emanates from the words of the contract. Interpretation is an artificial light which cannot be used when there is no darkness, no obscurity, no ambiguity. Therefore, when the wording of a contract is crystal clear, the resulting rights cannot be disputed or diminished. If they are harsh, they will cause harshness without remedy and the ensuing injustice will be clothed in the authority and majesty of Latin maxims such as "*Dura lex, sed lex*"—"Pacta sunt servanda"—"*Nullus*

"Servitudes which tend to affect the free use of property, in case of doubt as to their extent or the manner of using them, are always interpreted in favor of the owner of the property to be affected."

69. LA. CIV. CODE art. 1964: "Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources." *Id.* art. 1903: "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect."

70. *See also Id.* art. 1945(3): "[T]he intent is to be determined by the words of the contract, when these are clear and explicit and lead to no absurd consequences."

videtur dolo facere qui suo jure utitur."⁷¹ Now, it is up to the theory of abuse of rights to tear down these pompous garments and expose the naked injustice. But how can it do so legally? If interpretation cannot render the contract equitable at the time of its execution, fairness and reasonableness should prevail at the time of its performance. Both the French Civil Code and the Louisiana Civil Code state the rule: "Agreements . . . must be performed in good faith."⁷² If a contract may be performed in different manners, one must presume that the intention of the parties was that it should be performed the way which is less harmful to the debtor.⁷³ This is specially true when the more damaging way of performing the contract does not appear clearly by its terms. If a party acts maliciously in the performance of a contract, he violates a rule of law and he therefore commits a fault. Article 1383 of the French Civil Code and 1053 of the Quebec Civil Code (corresponding to article 2315 of the Louisiana Civil Code) will hold him responsible for the damages resulting from his fault. It is interesting to observe that the theory of the abuse of rights has been introduced in the Swiss Civil Code by adding only a few words to what is in article 1901 of the Louisiana Civil Code. Article 2 of the Swiss Civil Code reads as follows:

Every one is bound to *exercise his rights* and perform his obligations according to the principles of good faith. The law does not protect the manifest abuse of a right.⁷⁴

It is generally held that the fault which consists in exercising a contractual right in bad faith is delictual (extracontractual). However, it should be possible in many cases to consider it as a contractual fault. If one considers that the obligation to perform the contract in good faith is a condition implicitly agreed by the parties, the abuse

71. DIGESTE, bk. 50, tit. 17, fr. 55.

72. LA. CIV. CODE art. 1901 (3). FR. CIV. CODE art. 1134(3): "*Les conventions . . . doivent être exécutées de bonne foi.*" The Quebec codifiers did not consider it necessary to state this principle explicitly. A contract must be completed by the rule of equity and it is a rule of equity that it should be performed in good faith.

73. 7 LAROMBIÈRE, THÉORIE ET PRATIQUE DES OBLIGATIONS no. 11 (1885): "*A plus forte raison, en serait-il tenu (du dommage causé) si, entre diverses manières d'exercer son droit, il avait méchamment et dans le dessein de nuire, choisi celle qui devait ou pouvait être la plus dommageable.*" Translation by H.C. Leake in *Abuse of Rights in Louisiana*, 7 TUL. L.R. 426, 432 (1932): "A fortiori, one would be held liable for it (the damage caused) if among the various ways of exercising his right, he had maliciously, and for the purpose of causing injury, chosen the one which must or might cause the greatest harm."

74. SWISS CIV. CODE art. 2: "*Chacun est tenu d'exercer ses droits et obligations selon les règles de la bonne foi. L'abus manifeste d'un droit n'est pas protégé par la loi.*"

of a contractual right is in itself a violation of the contract.

In France, the theory of the abuse of rights has been applied to contracts but the abuse of a contractual right or of any other right is generally considered as a delictual or a quasi-delictual fault.⁷⁵ In Quebec, until very recently, the courts were reluctant to allow the application of the theory to contractual matters. They held that the employer who has reserved the right to put an end to the contract of employment unilaterally or the lessor who has stipulated that he could put an end to the lease after twenty-four hours notice, could exercise his right rigorously without incurring any liability.⁷⁶

Recently, several judgments of the Superior Courts have expressed a different opinion. The right to terminate a contract should be exercised in good faith in such a way and at such a time that it will not cause unnecessary prejudice.⁷⁷

A good example of the slow introduction of the theory of the abuse of rights in contractual matters is afforded in the case of leases. Until January 1, 1974, article 1638 of the Quebec Civil Code provided that "The lessee has a right to sublet, or to assign his lease, unless there is a stipulation to the contrary." But it added: "If there is such a stipulation [prohibiting a sublease] . . . it is to be strictly observed." Article 2725 of the Louisiana Civil Code is to the same effect.⁷⁸ The insistence of the two Codes for a strict observation and a strict construction of the prohibiting clause seemed to be a warning to keep the theory of the abuse of rights out of this area. As a matter of fact, the Quebec courts have considered that the contractual right of the lessor to oppose any sublease is an absolute right; he who exercises this right does not have to give his reason or justify his decision.⁷⁹ However some judgments made a distinction between an

75. 2 H., L. ET J. MAZEAUD, *LEÇONS DE DROIT CIVIL* no. 461 (2d. ed. 1962); 1 MAZEAUD ET TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ* no. 559 (6th ed. 1965); Cass., July 18, 1961, J.C.P. II. 1961.12317.

76. *Banque Provinciale du Canada v. Martel*, [1959] B.R. 278, 299; *Trottier v. McColl Frontenac Oil Co. Ltd.*, [1953] B.R. 497; *Quaker Oats Co. of Canada Ltd. v. Côte*, [1949] B.R. 389.

77. *Modernfold Ltée v. New Castle Products Ltd.*, [1973] S.C. 220; *Fiorito v. The Contingency Ins. Co.*, [1971] S.C. 1; *Aluminum Co. v. Syndicat National*, [1966] B.R. 641, 651 (obiter dictum). See D. Angus, *Abuse of Rights in Contractual Matters in the P. of Q.*, 8 MCGILL L.J. 150 (1962).

78. "The lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted. The interdiction may be for the whole, or for a part; and this clause is always construed strictly."

79. *Kates Ltd. v. Gross Interests Corp.*, [1970] C.A. 1143; *Librairie Concorde v. Ariss*, [1961] B.R. 425, 426, (Mr. Justice Bissonnette expressly refuses to apply the theory of the abuse of rights); *Boyer v. Quintin*, [1948] B.R. 400, 402; *Mount-Royal Hotel v. Martin*, 41 B.R. 27, 32 (1926); *Rosconi v. Péladeau*, 48 S.C. 356 (1915).

absolute interdiction to sublet and an interdiction to sublet without the consent of the lessor, in which case it is a conditional interdiction.⁸⁰ The purpose of this clause would be to prevent the tenant from subletting the apartment to undesirable people who could damage the property. But it would not entitle the lessor to refuse permission to sublet for no reason at all or for the purpose of causing inconvenience to his tenant.⁸¹

The Civil Code Revision Office of Quebec has opted for this last formula. In conformity with its recommendation the Civil Code of Quebec has been modified. Article 1619 now reads as follows:

The lessee cannot sublet all or part of the thing or assign his lease without the consent of the lessor, who cannot refuse it without reasonable cause . . .⁸²

Then article 1652 states:

Every stipulation inconsistent with articles . . . 1619 (and others) . . . when they apply to the lease of a dwelling . . . is without effect.

This text and many others that have been adopted during the last few years show that the legislators⁸³ join with the courts to inject into the law the idea that no creditor should exercise his right in a way to cause an undue prejudice to his debtor. The theory of the abuse of

80. *Larocque v. Freeman's Ltd.*, 50 S.C. 231 (1916); *Charbonneau v. Houle*, 1 S.C. 41 (1892).

81. *Geiger v. Dame Cohen et vir*, [1962] S.C. 222 (*obiter dictum*) (the reasons for refusing were deemed reasonable); *Drozdinski v. Zemal*, [1954] S.C. 163; *Veitch v. Eliasoph*, 30 R.L. (n.s.) 138 (1924). See *Yves Mayrand, Clauses de sous-location*, 5 R.J.T. 151 (1970). Compare *Trib. civ. Poitiers*, Dec. 1, 1931, D.P. 1932.257; *Req.*, Nov. 16, 1927, D.P. 1928.161; *Pimms Ltd. v. Tallow Chandlers*, 2 All E.R. 145 (1964). For the abuse of an interdiction to install electric wires in connection with a burglar alarm system, see *Dame Leclerc v. Medalsy*, [1968] B.R. 869. In *Grinco Amusements Ltd. v. Intercity Food Services*, [1971] S.C. 276, the refusal of the lessor to allow the tenant to erect a sign outside the rented premises was justified in the circumstances of the case.

82. An Act Respecting the Lease of Things, Bill 2 (assented to Dec. 22, 1973) (entry into force Jan. 1, 1974).

83. QUE. CIV. CODE art. 1622 (Jan. 1, 1974): "The lessee must permit the lessor to ascertain the condition of the thing. The lessor must exercise this right in a reasonable manner." See also Patent Act, R.S.C. 1970, ch. P-4, art. 67: "Abuse of rights under patents (1) The attorney General or any person interested may at anytime after the expiration of three years from the date of the grant of patent apply to the Commissioner alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act. *What amounts to Abuse* (2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances: . . ."

rights is penetrating our law through the combined action of the legislators and of the tribunals. It promotes the idea of reasonableness without which justice would disagree with the law: *summum jus, summa injuria*.

CONCLUSION

In a system of civil law, it is only natural to express formally in a Code a rule which is constantly applied by the courts. In some countries like Russia,⁸⁴ Switzerland,⁸⁵ Germany,⁸⁶ and others,⁸⁷ the theory of the abuse of rights has been given legislative recognition. France⁸⁸ and Quebec⁸⁹ have contemplated similar legislation.

84. U.S.S.R. CIV. CODE art. 1: "Civil rights are protected by the law, except in those cases in which they are exercised in a manner contrary to their social and economic purpose" (translation supplied).

85. SWISS CIV. CODE art. 2: "*Chacun est tenu d'exercer ses droits et obligations selon les règles de la bonne foi. L'abus manifeste d'un droit n'est pas protégé par la loi.*" Translation: "Every one is bound to exercise his rights and perform his obligations according to the principles of good faith. The law does not protect the manifest abuse of a right."

86. B.G.B. Art. 226: "The exercise of a right is illicit if its sole purpose is to harm some other person." (translation supplied).

87. ETHIOPIAN CIV. CODE art. 2032: "(1) *Une personne commet une faute lorsqu'elle agit en vue de nuire à autrui, sans rechercher pour elle-même un profit personnel.* (2) *Elle commet de même une faute si, en connaissance de cause, elle cause à autrui un dommage considérable, en recherchant un profit personnel qui est sans rapport avec ce dommage.*" Translation: "(1) A person commits a fault when he acts with the purpose of harming some other person, without pursuing a personal benefit. (2) He also commits a fault if, knowingly, he causes a serious damage, when seeking after a personal benefit which is out of proportion with the damage."

88. COMMISSION DE RÉFORME DU CODE CIVIL FRANÇAIS, REPORT FOR THE YEAR 1950-51, at 26; Art. 31: "*Tout acte ou tout fait qui excède manifestement par l'intention de son auteur, par son objet ou par les circonstances dans lesquelles il est intervenu, l'exercice normal d'un droit, n'est pas protégé par la loi et engage éventuellement la responsabilité de son auteur. La présente disposition ne s'applique pas aux droits qui, en raison de leur nature ou en vertu de la loi peuvent être exercés de façon discrétionnaire.*" Translation: "Any act or any fact which manifestly exceeds by the intention of its author, by its object or by the circumstances in which it took place, the normal exercise of a right, is not protected by the law and eventually involves the responsibility of its author. The above rule does not apply to the rights which, on account of their nature or by virtue of the law can be exercised unconditionally." See also *Projet du Code des obligations et des contrats*, COMMISSION FRANÇAISE D'ÉTUDES DE L'UNION LEGISLATIVE ENTRE LES NATIONS ALLIÉES ET AMIES (Paris 1929); Art. 74: "*Toute faute qui cause un dommage à autrui oblige celui qui l'a commise à le réparer. Doit également réparation celui qui a causé un dommage à autrui en excédant, dans l'exercice de son droit, les limites fixées par la bonne foi ou par le but en vue duquel ce droit lui a été conféré.*" Translation: "Any fault which causes damage to another obliges its author to repair it. Any person shall make compensation if he causes harm to another by exercising a right in excess of the limits fixed by good faith or by the object for which the right was conferred on him."

89. Draft submitted to the Civil Code Revision Office of Quebec: Art. A: "*Chacun*

Whereas the civil law has a "penchant" for general principles,⁹⁰ the common law is wary of generalizations. The abuse of rights theory also arouses the usual dislike of lawyers and judges to admit rules which are not explicitly formulated in the law. Some consider that what is to be feared most is not the abuse of rights, but the abuse of the theory of abuse of rights. A certain suspicion tainted with some hostility appears in the following remarks of Mr. H.C. Gutteridge:

The theory of abuse . . . may get out of hand and results in serious inroads on individual rights, thus becoming an instrument of dangerous potency in the hands of the demagogue and the revolutionary. It resembles a drug which at first appears to be innocuous, but may be followed by very disagreeable after effects. Like all indefinite expressions of an ethical principle it is capable of being put to an infinite variety of uses, and it may be employed to invade almost any sphere of human activity for the purpose of subordinating the individual to the demands of the State.⁹¹

This "drug" has been used for almost a century in many civil law countries and the "disagreeable after effects" have not yet been felt. It has been used for worthy causes, and did not bring either revolution or the disruption of the system of law. In Quebec, the theory of the abuse of rights has been gaining ground constantly and its application is getting more frequent; yet, there seems to be no known instance where its application has resulted in an injustice or has been met with disapproval.

Of course, the rejection of the theory of the abuse of rights by common law countries does not mean that all abuses of rights are tolerated in those jurisdictions. Common law countries prefer to

est tenu d'exercer ses droits et d'exécuter ses obligations selon les exigences de la bonne foi." Translation: "Every one is bound to exercise his rights and perform his obligations according to the requirements of good faith." Art. B: "*Nul ne peut exercer un droit en vue de nuire à autrui ou de manière à causer un préjudice hors de proportion avec le profit qu'il recherche.*" Translation: "No one can exercise a right for the purpose of harming some other person or in a manner to cause a prejudice disproportionate to the benefit pursued." Art. C: "*Nul ne peut exercer dans son intérêt propre les pouvoirs qui lui sont conférés dans l'intérêt d'autrui. Celui qui est chargé d'administrer la chose d'autrui est tenu d'agir en toute loyauté dans le seul intérêt du bénéficiaire.*" Translation: "No one can exercise in his own interest the powers which have been conferred upon him in the interest of some other person." "The person who is charged with the administration of the affair of another is bound to act in all fairness for the sole interest of the beneficiary."

90. Thus, the theory of unjust enrichment has evolved from fragmentary applications to a broad fundamental principle.

91. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 43-44 (1933).

adopt precise and fragmentary rules for particular abuses. Malicious prosecution and abuse of legal process, nuisance, libel and slander, are met with somewhat individual remedies, each one being governed by its own rules. The situation of the common law has been thus described by Professor John H. Crabb:

Abuse of rights does have some blood relations living among us, but they do not bear the family name, and hence the kinship may not be generally realized. Local branches of the family are apt to go by the name of nuisance or malicious prosecution, among a few others.⁹²

Is there a place for the theory of abuse of rights in Louisiana Law? The writer will not be bold enough to venture any prediction or even express a wish. But he hopes that it will not be inappropriate to make the following observation. Already the Louisiana Civil Code expressly condemns particular abuses of rights.⁹³ If and when the Louisiana courts find it useful in the interest of justice to recognize the theory of the abuse of rights, they will find in their own Code all the corresponding articles which were used in Quebec and in France to provide a legal basis for this theory.⁹⁴

92. Crabb, *The French Concept of Abuse of Rights*, 6 INTER-AMERICAN L.R. 1 (1964).

93. For instance article 621 (corresponding to article 480 of the Quebec Civil Code) provides that the usufruct may cease by the abuse the usufructuary makes of his enjoyment. See also LA. CIV. CODE art. 667.

94. Art. 2315 (1): "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Art. 1901 (3): "Agreements . . . must be performed in good faith."

APPENDIX

	ABBREVIATIONS
A.C.	Appeal Cases (English Reports)
All E.R.	All England Reports
B.G.B.	Bürgerliches Gesetzbuch (German Civil Code of 1900)
C.A.	Court of Appeal
Cass.	Cour de Cassation
Civ.	Chambre civile
D.	Dalloz
D.L.R. 3d	Dominion Law Reports
D.P.	Dalloz périodique
Fr. Civ. Code	French Civil Code
Gaz. Pal.	Gazette du Palais
H.L.	House of Lords
La. Civ. Code	Louisiana Civil Code
L.N.	Legal News
M.L.R.	Montreal Law Reports
P.R.	Practice Reports (Quebec)
Q.B.	Queen's Bench
Que. B.R.	Quebec Banc du Roi
	Quebec Banc de la Reine
Que. Civ. Code	Quebec Civil Code
Que. S.C.	Quebec Superior Court
R. du B.	Revue du Barreau
R. du N.	Revue du Notariat
Req.	Chambre de Requête
R.J.T.	Revue Juridique Thémis
R.L.	La Revue Légale
R.L.n.s.	Revue Légale, nouvelle série
R.S.C.	Revised Statutes of Canada
S.	Sirey
S. Afr. L.J.	South African Law Journal
S.C.R.	Supreme Court Reports (Canada Law Reports)
Tul. L. Rev.	Tulane Law Review.