SHORT ESSAY ON THE NOTION OF *GENERAL INTEREST* IN ARTICLE 982 OF THE *CIVIL CODE OF QUEBEC* OR *JE PUISE MAIS N'ÉPUISE*

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There is a beautiful stained glass widow located in the library of the National Assembly of Quebec showing a young person drawing water from a stream, that has a most appropriate title referring in a very subtle way to the fact that all the knowledge and information contained in the library is easily accessible and can be drawn upon, without impairing its existence: "*Je puise mais n'épuise*," a literal translation of which could be "I do not deplete the source I draw upon."

The concept expressed in this image is appropriate to the many aspects of the current discourse with respect to water resources. It also serves to better understand the legislator's intention in qualifying the import of Article 982 *C.C.Q.* with the notion of *general interest*.

INTRODUCTION

I propose to share a few reflections concerning a very interesting provision of the *Civil code of Quebec*, Article 982 *C.C.Q.*, which reads as follows:

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> Unless it is contrary to the general interest, a person having a right to use a spring, lake, sheet of water, underground stream or any running water may, to prevent the water from being polluted or used up, require the destruction or modification of any works by which the water is being polluted or dried up.

À moins que cela ne soit contraire à l'intérêt général, celui qui a droit à l'usage d'une source, d'un lac, d'une nappe d'eau ou d'une rivière souterraine, ou d'une eau courante, peut, de façon à éviter la pollution ou l'épuisement de l'eau, exiger la destruction ou la modification de tout ouvrage qui pollue ou épuise l'eau.
Even though there are minor discrepancies between the English and French, the reader should be reminded that under Quebec law the two versions of the *Civil code* have absolutely equal standing.[1]

The original *Civil code of Lower Canada* was adopted in 1866, one year before Confederation, to reflect generally what was considered to be the private law in Quebec at the time. The basic structure of the *Code,* together with a very significant number of its provisions, was based on the Napoleonic Code adopted in France in 1804. Over time, very few amendments were made to the *Code* of 1866 and, in 1955, a political decision was made to proceed with a complete revision of the old *Code*.

The process of revision was a long and difficult one, and it ultimately came to fruition with the adoption on December 18, 1991 of a new *Code*, now known as the *Civil code of Quebec*. It came into force on January 1, 1994.

Article 982 *C.C.Q.* is an altogether new provision, in that there was no corresponding or even similar stipulation in the *Civil code of Lower-*

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1. *Doré v. Verdun*, [1997] 2 S.C.R. 862, at par. 23 and 24 : "…appellant is relying on an interpretation principle applicable to bilingual statutes, namely that they should be interpreted by finding the meaning shared by both versions, that is "the more narrow of the two" meanings (P.-A. Côté, The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 276)…This argument was rejected by Baudouin J.A. in the judgment under appeal, partly on the basis that the English version of the Civil Code is [Translation] "merely a translation of the original French version" (p. 1327). With respect, although what he stated is unfortunately true, it cannot be used to reject the argument made by the appellant. Section 7 of the Charter of the French language, R.S.Q., c. C-11, provides that the French and English versions of Quebec statutes "are equally authoritative". This is in accordance with s. 133 of the Constitution Act, 1867 which requires that the statutes of the legislature of Quebec be enacted in both official languages and that both versions be equally authoritative and have the same status (see: Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721).

Canada of 1866. The concepts expressed in Article 982 are completely new to the *Civil code of Quebec* and have therefore been the subject of few judicial pronouncements. In fact, Article 982 *C.C.Q.* could be said to reflect developing concerns for the Quebec legislator of the 1980's.

As part of the reform process, a *Commentary* was prepared by the Minister of Justice, to set forth the origins of each article and a short explanation of the article itself.

With respect to Article 982 *C.C.Q.*, the *Commentary* of the Minister of Justice is to the following effect:

> [Translation by the writer] This article is new. It follows the philosophy set forth in Article 981[2] restricting the absolute right over water, particularly by requiring that the right to demand the destruction or the modification of any work can only be exercised if it is not contrary to the general interest.
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> Water must be considered as a thing subject to common use and rules must be enacted to preserve the quality of this water and also the right of use of other owners.
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> The *Environment Quality Act* (Q-2) and the *Mining Act* (M-13.1), together with the regulations adopted thereunder, contain a number of provisions that already limit the rights of an owner in this respect.[3]

I find this statement by the Minister to be quite ambiguous in that the legislator's priorities seem divided. This *Commentary* seems to assert that a user of water can seek redress under this provision only if the *general interest* is not adversely affected in the process. If the polluter is found to be otherwise acting in the *general interest*, then the user, whose water "is being used up or polluted", has no recourse under this article. That appears to be the logical implication of the first paragraph. Yet the second paragraph refers to water as "a thing subject to common use" and therefore entitled to preservation and protection, an objective that may or may not be in accord with a narrow view of what constitutes the *general interest*. Furthermore, the oblique reference to public law statutes (the *Environment Quality Act*[4] and the *Mining Act*;[5] and there are others, such as the

2. Article 981 *C.C.Q.* : "A riparian owner may, for his needs, make use of a lake, the headwaters of a watercourse or any watercourse bordering or crossing his land. *As the water leaves his land, he shall direct it, not substantially changed in quality or quantity, into its regular course. No riparian owner may by his use of the water prevent other riparian owners from exercising the same right.*"

3. Footnote Needed—get from text.

4. R.S.Q. c. Q-2.

5. R.S.Q. c. M-13.1.

Watercourses Act[6] and *An Act to affirm the collective nature of water resources and provide for increased water resource protection*,[7] for example) points to statutory legislation that does in fact contain provisions dealing with the use and protection of water. Yet it is unclear what the intent of the legislator could be in cases of conflict between the different sources of legislation (private and public).

The *Commentaries of the Minister* do not, in general, have a determining effect on the interpretation and application of particular provisions of the *Civil code* by the courts. But they are one of the preferred sources to which a jurist can resort in the process of determining the scope and meaning of a particular article.[8]

In this case, the *Commentary* would probably be given serious attention by our judges in their attempt to discern the actual intent of the legislator.

I. ARTICLE 982 *C.C.Q.*

Let us return to the actual wording of the Article. There are a number of significant elements in this provision and, as is generally the case in matters involving a Civil Code, there are no statutory definitions to draw upon when the time comes to determine the scope and actual import of a particular article.

I will generally restrict my comments to attempting to define what meaning could be given to the notion of "general interest" as used in this article, bearing in mind that there are other aspects of this provision that are worthy of consideration[9] such as the determination of *who* can avail himself/herself of this provision (*a person*), the nature of the right (interest) linking this person to a specific source water (*a right to use*), the forms in which *water* can be found for the purposes of this article, the degree of *pollution or overuse* that a court would consider sufficiently serious and the

6. R.S.Q. c. R-13.

7. S.Q. 2009, c. 21.

8. *See Doré v. Verdun*, *supra* note 1, par 14: "Of course, the interpretation of the Civil Code must be based first and foremost on the wording of its provisions. That said, however, and as noted by Baudouin J.A. in the judgment under appeal, there is no reason to systematically disregard the Minister's commentaries, since they can sometimes be helpful in determining the legislature's intention, especially where the wording of the article is open to differing interpretations (at p. 1327). However, the commentaries are not an absolute authority. They are not binding on the courts, and their weight can vary, inter alia in light of other factors that may assist in interpreting the Civil Code's provisions."

9. Article 982 *C.C.Q.*: Unless it is contrary to the general interest, a person having a right to use a spring, lake, sheet of water, underground stream or any running water may, to prevent the water from being polluted or used up, require the destruction or modification of any works by which the water is being polluted or dried up.

rules with respect to the *destruction or modification* of offending *works*. These considerations will be left for another day!

II. GENERAL CONTEXT

Article 982 is located in Book 4 - Property, Title 2 – Ownership, Chapter III – Special rules on the ownership of immovables, Section III – Water.

The introductory article to Chapter III is Article 976, which is at once a "stand alone" provision and one that is also designed to have a direct influence on the interpretation of the whole of Chapter III of which Article 982 forms a part:

> Article 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.[10]

We will not consider here the full meaning and implications of this very laconic provision, other than to say that it is one of the basic legal provisions relating to a very complex and interesting area, the relationship between neighbours.

One of the key concepts flowing from Article 976 is the notion of *tolerance*. In considering the tests or criteria that will determine the application of the recourse set forth in Article 982, the level of *tolerance* that neighbours owe each other would have to be taken into account.[11]

Moreover, to the extent that there may have been doubts lingering in the minds of members of the legal community as to the necessity or not of basing any recourse under Article 976 on the notion of *fault*, this question was resolved by the judges of the Supreme Court Canada in the fall of 2008[12] in a unanimous decision that clearly and unequivocally confirmed

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10. Footnote needed—get from text.

11. Québec, Ministère de la justice, *Commentaires du ministre de la justice : Le Code civil du Québec – Un mouvement de société*, vol.1, Québec, Publications du Québec, 1993, p.569-573 : [Translation by the writer] "With respect to the Chapter dealing with the *Special rules on the ownership of immovables*, the *Code* sets forth, as a first principle, the notion that neighbours must accept the normal "neighbourhood annoyances" that can arise from time to time…The legislator has traditionally regulated the relations between neighbouring owners in order to maintain peace between them. Even though both enjoy the most complete rights on their respective properties, each must respect the equal rights of the others...This Article [976 *C.C.Q.*] is new. It establishes and codifies the principle of tolerance in the relationships between neighbours, this principle being contained in a general provision applicable to the whole chapter and underlying its provisions."

12. St. Lawrence Cement Inc. v. Barrette, [2008] 3 S.C.R. 392

that fault was not a necessary ingredient in determining liability under Article 976. Similarly, *fault* should not be a required ingredient under Article 982.[13]

III. THE "GENERAL INTEREST".

A. Importance

Clearly, the question we must address is the meaning of the expression *general interest* since this concept determines whether or not this provision of law will be applicable in a given situation or not.

> Unless it is contrary to the general interest, . . .
> À moins que cela ne soit contraire à l'intérêt général, ...[14]

This expression is not defined in the *Civil code* itself and there are no statutory definitions otherwise available.[15]

In a short article published in 1992 (after the adoption of the new *Civil code* but before its coming into force),[16] Charlotte Lemieux, professor at the Law Faculty of the University of Sherbrooke, proposed a critical analysis of Article 982 and, with respect to the notion of *general interest*, made the following observation:

> [Translation by the writer] "The 'general interest' that will allow one to set aside the recourse available under Article 982 *C.C.Q.* remains to be defined, yet as it is a nebulous, elastic, variable and mobile concept, subject to social, economic and cultural

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13. The language of Article 982 makes no direct or indirect reference to *fault*, in any event.

14. Article 982 *C.C.Q.*

15. It is interesting to note that Article 913 makes a reference to "*lois d'intérêt general*," translated as "*general laws*."

16. (1992), 23 R.D.U.S. 191. At that time, Professor Lemieux was very critical of the legislator for having introduced such a limitation on the right of ownership and also for having delegated to the courts the discretionary power to protect the environment, this task being in any event beyond the scope of the Civil Code as the expression of the *common law* of Quebec. At p. * :

> [Translation by the writer]
> But should it be intended that Article 982 C.C.Q. protect the right to use water and the holders of such right, or that its purpose be to protect water itself, these two possibilities are equally open to criticism, since in the first case the "right to use water" is placed in a position which is hierarchically superior to the right of ownership itself, which cannot be justified, and in the second case, a measure foreign to the very nature of civil law is introduced in a codification which is not expected to seek to govern the relationships between citizens and the environment.

> considerations, its definition will be problematic."

Certainly, at first glance and as Professor Lemieux points out, Article 982 constitutes the clear expression of a restriction on the absolute nature of the right of ownership with respect to water. The Minister, in his *Commentary,* refers to the fact that Article 982 is an extension of the principle laid out in Article 981, which clearly provides that a riparian owner only enjoys a very limited right of use with regards to any water bordering or crossing his or her land: "As the water leaves his land, he shall direct it, not substantially changed in quality or quantity, into its regular course. . . . No riparian owner may by his use of the water prevent other riparian owners from exercising the same rights."

A riparian owner cannot appropriate the water temporarily located on his/her land in a way that would modify the quality or quantity of the water as it flows downstream and in any event cannot act in a way that would prevent other riparian owners from exercising the same rights. The rule is clear and seems imminently fair and equitable!

But Article 982 seems to have two somewhat contradictory effects:

> [F]irst, with respect to the person "having a right to use water", the right given under Article 982 can never be absolute since it is necessarily limited by any imperatives relating to *general interest* (which would have to include a reference to the notion of "tolerance" mentioned previously). "Unless it is contrary to the *general interest* . . . ": if it is, the right to seek the remedy provided in Article 982 is set aside altogether[.][17]

And second, with respect to the works "by which the water is being polluted or dried up", such works could be required to be destroyed or modified unless their existence and continued maintenance is shown to be in the *general interest*.

So then what is this *general interest*?

Clearly, the concept is fundamentally important to the understanding of Article 982. By its terms, the import of this article extends beyond the immediate relationship between neighbours, which is generally based on the concepts of proximity and reciprocity. *General interest* here refers to a level of concern that reaches beyond the immediate interests of contiguous neighbours. Different considerations are involved here, including community interests, economic interests, employment, fiscal considerations, but also environmental concerns, including the preservation

17. Footnote needed—see text.

of water as a resource to be protected and shared, the protection of special habitats, etc. In each particular case, *general interest* will have to be defined and established by a judge hearing the case.

B. Definitions

How can we define *general interest*?

Strangely enough, it is not easy to find a useful definition of this expression.

In the Private Law Dictionary published by the Quebec Research Centre of Private & Comparative Law at the McGill Law Faculty, there is an entry under GENERAL INTEREST which reads as follows:

> That which is to the advantage of all.[18]

Gérard Cornu, in his *Vocabulaire juridique*, published under the auspices of the *Association Henri Capitant*, proposes the following definition:

> Ce qui est pour le bien public; à l'avantage de tous
>
> [Translation by the writer]
> That which is in the public good, to the advantage of all.[19]

It is conceivable that a judge sitting in a complex case involving an action under Article 982, would not find these definitions very helpful.

C. Two approaches to the determination of "general interest"

Cursory research on this question has indicated that, as so often happens, the expression is used as though its meaning were obvious and generally known, with no further inquiry as to its scope. It is also often stated to be synonymous with the expression *common good*.

In a recent article written by French author François Rangeon and published in Québec under the title *L'intérêt général et les notions voisines*,[20] two approaches to the possible definition of *general interest* are

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18. *Private Law Dictionary and Bilingual Lexicon – Obligations*, Quebec Research Centre of Private & Comparative Law, Les Éditions Yvon Blais Inc., Cowansville 2003.

19. Gérard Cornu, *Vocabulaire juridique*, 7th ed., Presses Universitaires de France, Paris 2005.

20. François Rangeon, *L'intérêt général et les notions voisines,* in *La santé et le bien commun*, published under the direction of Bartha Maria Knoppers and Yann Joly, Les Éditions Thémis, Montreal 2008, at p. 19.

proposed. The first reflects a more traditional viewpoint and defines *general interest* by reference to existing legislation. According to this view, the legislator represents the democratic embodiment of the people's wishes and is therefore the true expression of *general interest* through the legislative process. The second approach reflects an expression of the changing times in which we live. It refers to a more dynamic and fragmented process whereby the active members of a given modern society, after extensive interaction, achieve some form of consensus that becomes the then-prevailing expression of what constitutes *general interest* at that time.

> [Translation by the writer]
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> General interest and common good have distinct semantic histories. The notion of common good has a theological basis—it was conceptualized in the 13th century by Saint Thomas Aquinas—and it incorporates a forcefully moral dimension, through which it is akin to ideas of justice and virtue. General interest originated in the 18th century, and its history is intimately linked to the emergence of the modern State. General interest can thus be seen as the secularization, rationalization and appropriation by the state of the concept of common good. Its dominant thrust is at once legal and political.
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> General interest has first of all become very complex, both in terms of its conceptual content and in terms of the facets by which it manifests itself. General interest now incorporates contradictory principles (individual freedom and solidarity, enshrined personal rights and their regulation within society). It is no longer granted acceptance as an *a priori* factor that public officials impose upon the society they represent, but is born instead of a long process of consultation by which specific interests are weighed, rather than opposed. The result is a collaboration between public powers, market forces and societal values. Any socio-historical construct allying general interest with State interest or public policy appears to have imploded. What may have once been a State monopoly on the notion of general interest has been subjected to an array of diverse pressures, such as globalization, crises of confidence with regards to State power and its political brokers, a rise in democratically defined aspirations, as well as territorial re-mappings within States. Ultimately, a principle according to which the State should define general interest will have become obsolete, or at the very least, deeply controversial.[21]

21. Footnote needed—see text.—Likely just an *Id.*

This second view is, it would seem, closer to what is happening now in our societies. It is one that our judges will increasingly be called upon to take into account in determining what, in a given situation, constitutes the *general interest*. This viewpoint also allows a judge to consider the elements relating to the principle of *tolerance*[22] mentioned previously. A reference to a standard prescribed by legislation or regulation does not allow for the flexibility that should be permitted to properly qualify and recognize the rights and obligations of parties involved in litigation based on the terms of Article 982. From this point of view, *general interest* becomes a broader and more sensitive tool better suited to deal with the complex issues that will arise within the purview of the social objectives envisaged by the legislator under the terms of Article 982.

This question is certainly open for further discussion.

D. Cases relating to "general interest" under Article 982.

The first case to be mentioned is Assoc. des résidents du Lac Mercier Inc. v. Québec (ministre de l'Environnement).[23]

This case involves a suit instituted by residents seeking to obtain the demolition of a converted railway right of way because of its alleged polluting effect on a nearby lake. The right of way has been developed into a linear park for use by different types of recreational vehicles.

Without attempting to define *general interest* for the purposes of Article 982, the judge simply states:

> [Translation by the writer]
> [The evidence before the Court would seem to indicate that] the tourist, recreational and economic benefits that result from the use of the old abandoned railway right of way for leisure purposes are significant. The *general interest* is undeniable. Under these circumstances, the Court has no hesitation to conclude that the *general interest* that the linear park serves greatly overrides any consideration of the ill-defined environmental damages that could be caused thereby to Lac Mercier.[24]

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22. Which includes the determination of what constitutes a damage or injury that is beyond the "tolerable" threshold.

23. [1996] J.Q. no 2691, [1996] R.J.Q. 2370, J.E. 96-1756, [1996] R.D.I. 597, REJB 1996-29270, No 500-05-014323-933, C.S. (Crête, J.)

24. Footnote Needed—see text.

The only other case that deals with the question of applying the notion of *general interest* in an action under Article 982 is the case of *Roy v. Tring Jonction*.[25] Roy, a dairy farmer, had access to a stream that bordered his farm and used the water from this stream to water his dairy cows. Upstream from Roy's farm, the town of *Tring Jonction* had built a sewage treatment plant partly with funds from the Quebec Government and had been given the necessary conformity certification by the Ministry of the Environment. However, effluent from this plant was highly contaminated, it polluted the stream, and as a result Mr. Roy's cows became very ill and one of them died.

He took an action against the Town who impleaded the Provincial authority. In his conclusions, he invoked the terms of Article 982 in order to obtain the demolition (no less) of the sewage treatment plant in addition to his claim for the damages sustained by his dairy farm.

Although the judge (François Pelletier) was sympathetic to the plight of this poor dairy farmer and did grant part of the indemnification claimed, with respect to the notions of *general interest* he took the traditional position that the *Environment Quality Act*,[26] and the certificate issued thereunder, overrode any right Roy might have had under private law (in this case, Article 982 *C.C.Q.*):

> [Translation by the writer]
> The certificate of compliance issued by the Ministry of the Environment enshrines the right of the municipality to pollute, to a certain extent and in the *general interest*, the streams that receive the overflow from its sewage system. In such a situation, the authorization granted by the terms of the certificate has precedence over the right given to the owner by the terms of Article 982 to require the destruction [of the plant].[27]

I would like to suggest that the recent decision of the Supreme Court of Canada in *St-Lawrence Cement Inc.*[28] would make it more appropriate to adopt a broader interpretation of what constitutes *general interest*. In that case, the finding of the trial judge, entirely relied upon and confirmed by the justices of the Supreme Court of Canada, was that even though the defendant cement company was generally in compliance with applicable environmental legislation, this fact in itself did not absolve the defendant

25. AZ-01021419, J.E. 2001-769, [2001] R.R.A. 806 (rés.)
26. R.S.Q. c. Q-2
27. Footnote needed—see text.
28. *Supra* note 9.

from liability for damages sustained by neighbours and resulting from the operation of the cement plant. One could certainly argue that in this case the *general interest* was not determined by reference to statutory enactments proceeding from the legislator, but rather by the application of "common law" rules relating to the relation between neighbours who are entitled to be indemnified, as a matter of *general interest*,[29] taking into account questions of tolerance and injury that go beyond what would constitute "normal neighbourhood annoyances."[30]

E. Recent legislation

Maybe as a further indication that times are actually changing and that the notion of *general interest* is evolving, the adoption earlier this year[31] of *An Act to affirm the collective nature of water resources and provide for increased water resource protection*[32] does provide an interesting source for the interpretation of *general interest* in the context of the preservation of water quality.

Section 3. of this statute reads as follows:

> 3. *The protection, restoration, improvement and management of water resources are of general interest and further sustainable development*. The Minister of Sustainable Development, Environment and Parks may take action to promote public access to the St. Lawrence River and other bodies of water or watercourses, particularly to allow any person to travel on them in accordance with the conditions set out in article 920 of the

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29. *Supra* note 9, par. [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.*"

30. Article 976 *C.C.Q.*, *supra*.

31. In the year 2009.

32. S.Q. 2009, chapter 21, assented to 12 June 2009.

Civil Code.[33] [Emphasis by the writer]

The general statement in the first sentence of that Section constitutes, in my estimation, a very clear reference to what may be comprised in the notion of *general interest* in this context. Transposing this interpretation to the introductory sentence of Article 982, we can see that the legislator now clearly considers that the objectives of preventing pollution or depletion should normally be considered as forming an integral part of that concept so that in order to override the application of the remedies provided in Article 982, the burden imposed upon the polluter or the person depleting the resource will be considerably heavier.

CONCLUSION

General interest clearly remains a dynamic concept, one that will continue to evolve as social, economic and scientific needs and objectives evolve. With the current debate surrounding the impacts attributable to global warming, and as social values and needs change, our courts, who will remain the final arbiters in the specific situations brought before them, will play an equally dynamic and significant role. Clearly, an enlightened judiciary is what is called for here.

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33. Footnoted Needed.—move emphasis added here