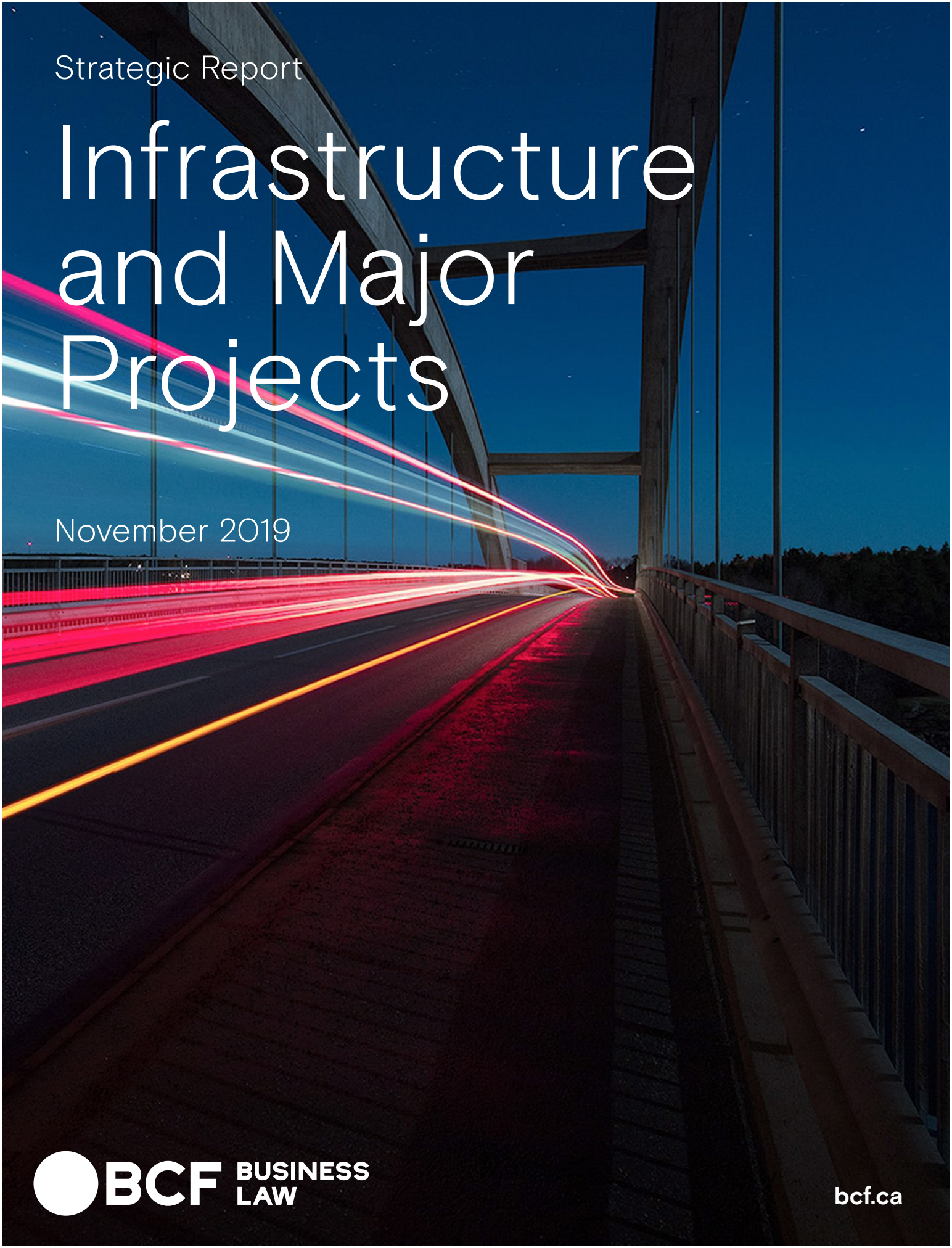

Strategic Report

Infrastructure and Major Projects

November 2019

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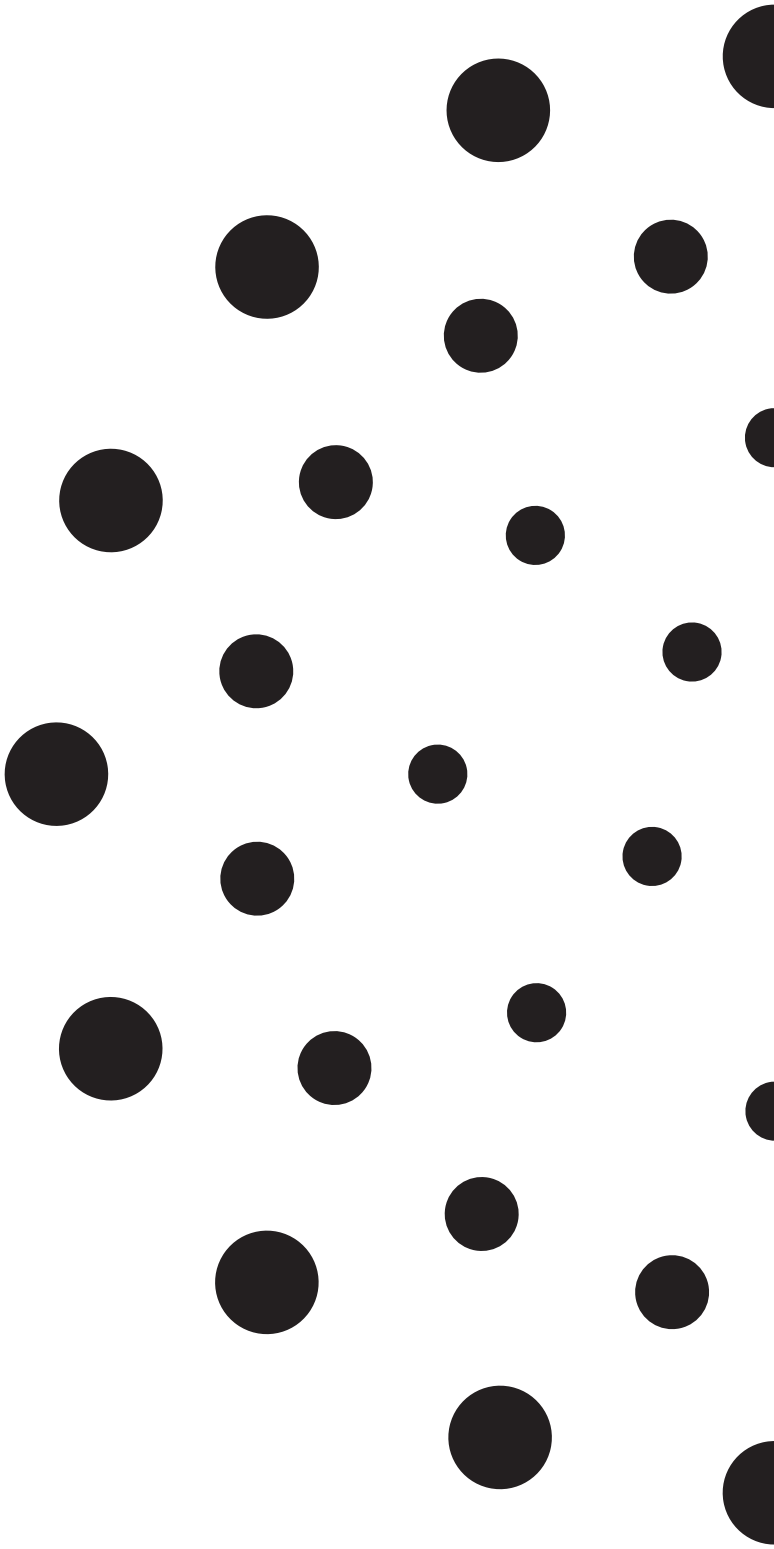

BCF BUSINESS LAW

Foreword

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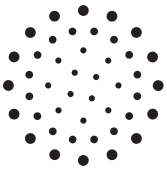
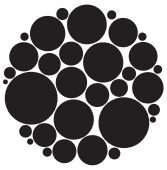
As with our general economy, the real estate industry is thriving and evolving at high speed, and investments in public infrastructure are not to be outdone. Earlier this year, the Government of Quebec announced a 15% increase in investments under the Quebec Infrastructure Plan, bringing total investments to over $115 billion by 2029. All this excitement also raises significant issues in order to capitalize on all these investments and improve our urban centres and the infrastructure essential to their prosperity.

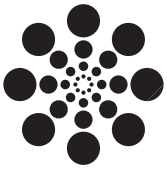
Although we do not claim to cover everything, we offer you, through our articles, an overview of key issues such as ensuring a more fluid construction process between public services and contractors, finding original financing methods, preventing corruption and clarifying the intricacies of environmental procedures and municipal taxation.

Enjoy your reading!

Table of Contents







Duties on the Transfer of Immovables in the Context of Major Projects

—

By: Pierre Delisle, Consulting Partner and Lawyer, and Isabelle Landry, Partner and Lawyer

1

Duties on the Transfer of Immovables in the Context of Major Projects

The province and its cities are currently undertaking a number of large-scale projects: several billion dollars of public and private investments are planned over the next decade in Quebec. Faced with this reality, transfer duties (more commonly referred to as the «welcome tax») are becoming a considerable source of income for municipalities that see major real estate projects emerging in their region[1].

Under the *Act respecting duties on transfers of immovables* [2] (hereinafter **"A.D.T.I."**), a local municipality must collect a duty on the transfer of any immovable situated within its municipal area . The local municipality has no discretion in regard to the "A.D.T.I. and must collect a transfer duty upon transfer of an immovable located within its municipal area[3].

The revenue from the collection of transfer duties of immovables in 2016 was $572.3 million.

How Are the Duties on the Transfer of Immovables Imposed?

The taxable amount of the transfer duties is the higher of the following amounts:

- the amount of consideration provided for the transfer of the property (less GST and QST);
- the amount of consideration stipulated for the transfer of the property (normally the sale price indicated in the deed);
- the amount of the property's market value at the time of its transfer (value on the property assessment roll, multiplied by the comparative factor for the current year)[4].

In addition, pursuant to the A.D.T.I., where an immovable constitutes, at the time of its transfer, a unit of assessment entered on the property assessment roll of a municipality or part of such a unit the value of which is separately entered on the roll, its market value shall be the product obtained by multiplying the value entered on the roll for the unit or part corresponding to the transferred immovable[5].

The amount of the transfer duty corresponds to the sum of the following amounts (section 2):

- the amount corresponding to 0.5% of the first $50,900 of the basis of imposition;

- the amount corresponding to 1% on that part of the basis of imposition between $50,900 and $254,400;
- the amount corresponding to 1.5% on that part of the basis of imposition exceeding $254,400.

Let us provide an example and assume that the basis of imposition is $600,000. The transfer duty would then be $7,473, which is the sum of the following amounts:

- $254 ($50,900 x 0.5 %);
- $2,035 ($203,500 x 1 %);
- $5,184 ($345,600 x 1.5 %).

The A.D.T.I. now allows any municipality to set a rate higher than 1.5% for any portion of the tax base exceeding $500,000. To set such a rate, the municipality must adopt a by-law . However, the rate thus fixed must not exceed 3%, except for the City of Montréal (see the rates in effect for 2019)[7].

Each of the amounts used to establish the aforementioned parts of the bases of imposition must be subject to an annual indexation, calculated according to a statistical method developed in the new section 2.1 of the A.D.T.I. The percentage increase shall be published no later than 31 July of the year preceding that for which it has been fixed, in order to allow interested parties (notaries, brokers and other real estate professionals) to incorporate them into their practices. For the fiscal year 2019, the rate of increase used to determine the amount used to establish these tax brackets is 1.035%[8].

For transfers of immovables that are not recorded in the land register, the obligation to pay a transfer duty requires a notice of disclosure of certain information.

What Are the Exemptions Regarding Transfer Duty Payments When Transferring an Immovable?

We will not go into great detail with regards to the various exemption systems prescribed in the A.D.T.I.; these cover public bodies (section 17), agricultural operations (section 18), money lending businesses (section 19), transfers to corporations that are under more than 90% control (section 19), transactions under $5,000 and various exceptions as described in section 20.

On 20 December 2017, via Information Bulletin 201-14, the Department of Finance announced its intention to introduce a new exemption whereby a partnership (limited partnership, general partnership and undeclared partnership) would be a party to a transfer of property in circumstances similar to those provided for in paragraphs (a), (b) and (d) of the first paragraph of section 19 that apply to a legal person.

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These amendments governed any transfer of property made after 20 December 2017. Bill 13, introduced on 26 February 2019 by the Minister of Finance and passed on 19 June 2019, is intended to follow up on this announcement with retroactive effect from 20 December 2017.

The announced exemption applies in the following situations[9]:

- the transferor is a natural person and the transferee is a partnership, provided that the transferor's share of the corporation's income or loss is, immediately after the transfer, at least 90% (s. 19 a.1 of the amended A.D.T.I.);
- the transferor is a partnership and the transferee is a natural person, provided that the transferee's share of the partnership's income or loss is, during the 24-month period preceding the transfer, at least 90% (s.19 b.2 of the amended A.D.T.I.);
- the transferor and a transferee are both partnerships or a partnership and a corporation under conditions similar to those that apply to two closely related corporations with respect to the 90% test for the partnership's income or loss.

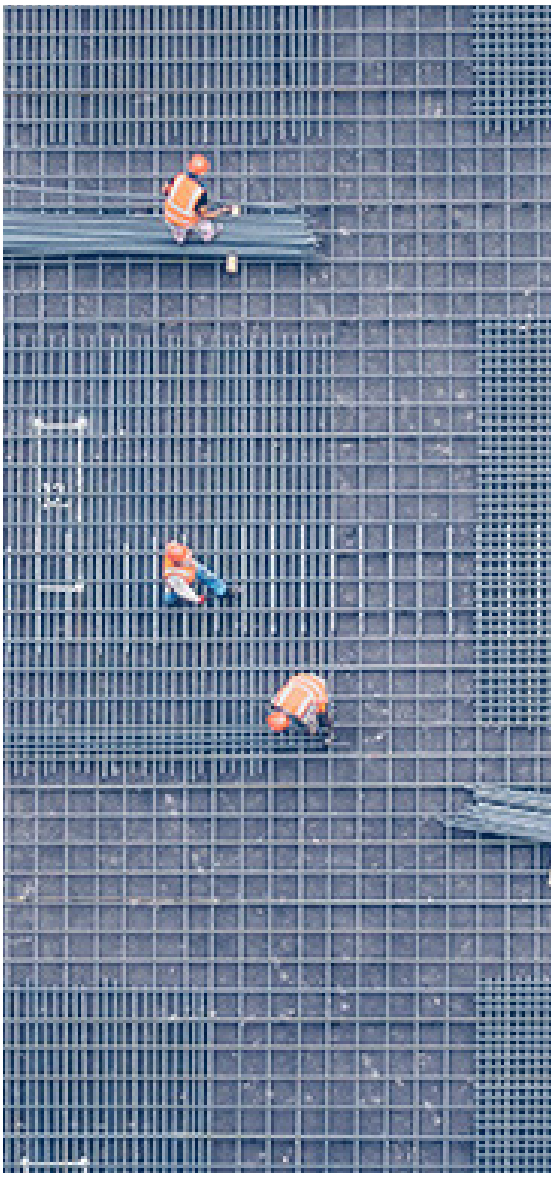
Of course, a disclosure mechanism will apply under specific rules to this new exemption and sections 4.1, 4.2, 4.2.1, 4.2.1, 4.2.1.1, 4.2.2.2 and 10.2 of the A.D.T.I. are either amended or added to ensure consistency with the provisions in force for legal persons and which are now applicable to partnerships.

Environmental Impacts of Major Construction Projects: 5 Takeaways to Conduct Your Major Projects with Due Diligence

By: Simon Pelletier, Partner and Lawyer, and Maxime-O. Brassard-Samson, Lawyer

2

Environmental Impacts of Major Construction Projects: 5 Takeaways to Conduct Your Major Projects with Due Diligence



Due diligence is one of the most frequent defences used to contest an environmental criminal infraction[1]. We provide concrete recommendations to help companies in the field of major works act with due diligence when conducting their business.

More than 150 years ago, the federal government started establishing a regulatory framework for environmental activities of persons subject to legislation[2]. Subsequently, the undeniable importance that the population attaches to environmental protection justified the increase in laws[3], which included a penal regime aimed not only at punishing offenders, but especially at preventing acts of pollution.

The Defence of Environmental Due Diligence

The issue of due diligence in the context of a criminal offence cannot be addressed without discussing *the Sault Ste-Marie decision*[4]. In fact, in this decision, the Supreme Court of Canada confirmed the existence of three categories of criminal offences to which different standards of evidence apply: offences in which *mens rea* must be established, offences of strict liability and offences of absolute liability.

According to the highest court in the country, the standard that must be applied to public welfare offences is strict liability, wherein evidence of guilty intent does not have to be proven, but for which the due diligence defence is valid in law. Thus, while the prosecutor is required to demonstrate the material elements of the alleged offence beyond a reasonable doubt, the accused is able to exonerate himself by proving on a balance of probabilities that he has demonstrated due diligence[5].

As the quality of the environment is a matter of public interest, it is now widely recognised that violations of environmental laws are generally pubic welfare offences and therefore that the due diligence defence in the strict liability standard is[6] accepted.

The criteria for the due diligence defence

The due diligence defence implies that “the accused took all reasonable precautions to avoid the event in question”[7]. The notion of “all reasonable precautions” has been widely discussed and the case law of recent years shows that this standard has proven very difficult for polluters[8]. Due diligence is assessed according to an objective standard by assessing the defendant’s conduct in relation to that of a reasonable person in a similar context[9]. It is therefore a flexible standard that can be adapted according to the field of activity, the defendant’s expertise and the risk potential of the activity being carried out[10].

To this end, the Supreme Court in *Wholesale Travel Group* pointed out that the burden of due diligence is heavier for a defendant who operates in a regulated field of activity where a licence is required, because by doing so, he accepts his public responsibilities to act with caution[11]. Although due diligence does not require perfection from the defendant[12], the burden is great enough that case law has in most cases not been established in his favour in recent years, particularly when it comes to a company specialised in its field. Nevertheless, a recent judgment draws our attention to the demonstration of due diligence by companies involved in major works.

The decision Frontenac Drilling (1995) Inc.

In the decision Director of Criminal and Penal Prosecutions v. Forage Frontenac (1995) Inc.[13], the defendant, a business specialised in drilling and blasting, is charged with violating section 20 of the Environment Quality Act[14] after a blasting operation sent rock fragments onto the properties of the residents of St-Joseph-de-Corelaine, located approximately 1 km from the quarry where works were being carried out.

Upon initiating its analysis of due diligence, the Court points out that even if perfection is not required of the accused, the high level of complexity and danger of a blasting operation justifies the use of strict precautions[15]. The judge recalled that in a pollution accident case, the accused's due diligence is assessed by evaluating the precautions put in place to avoid the accident according to the degree of predictability of the accident[16]. Since the evidence shows that the Director of Operations of Forage Frontenac was vested with the company's decision-making power[17], his personal actions are those which must analysed by the court[18]. The judge, faced with the contradictory expert opinions of the parties, analysed the evidence as a whole and ruled in favour of the defendant, chiefly on the grounds that with the information that she had at her disposal, she had done everything possible to reasonably predict the risk of an accident while acting in accordance with the accepted practices and in compliance with the regulations.

This judgment clearly bears witness to the fact that the accused, in order to prove its diligence, must demonstrate that it has been extremely meticulous in conducting its activities by presenting solid evidence to the effect that all reasonable precautions have been put in place to avoid committing the offence.

5 Takeaways for Major Works Undertaken

In light of our analysis of the case law on the subject of due diligence defence in environmental law, as well as the various aspects considered by the Court in *Forage Frontenac*[19], the following observations can guide companies working in the field of major works in order to ensure that they present evidence of due diligence that satisfies their burden. Thus, a diligent company must:

1. Ensure its activities are in regulatory compliance by establishing mechanisms and monitoring methods for the internal regulatory framework to which all employees are subject in environmental matters. Ensure regular updates to this regulatory framework, which is also of primary importance.

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2. Identify all activities that pose a risk to the environment and then institute mandatory procedures for employees, as well as a procedure for confirming steps through written reports or third-party validation. The company will also have to ensure that this information is always sent to its managers.

3. Implement a continuous training system for its employees to ensure that they are aware of and comply with the laws, the company's mandatory internal procedural instructions and the best practices in their field of activity.

4. Establish a regular review (audit) process to ensure that the company's activities are in compliance and that employees are following orders. An internal sanctions regime could also be put in place to encourage employees to comply with the guidelines.

5. Finally, in the event that the risk materialises despite the precautions taken, the company must establish an emergency programme to minimise the impact on the environment and document the situation in the best way possible and in a manner consistent with the accident.

Case law also teaches us that evidence of due diligence usually involves demonstrating the many preventive actions taken by the accused, and that this evidence is unlikely to be sufficiently convincing if it is supported only by unsubstantiated testimony or writing. Thus, it is in the company's interest to document its operations to ensure that compliance with procedures is confirmed or, at a minimum, to ensure that several people are involved in validating the steps to be taken.

Financing the Réseau express métropolitain: What About Transportation Dues?

By: Pierre Delisle, Consulting Partner and Lawyer, and Isabelle Landry, Partner and Lawyer

3

Financing the Réseau express métropolitain: What About Transportation Dues?

Given the importance and originality of the suggested means of financing the Réseau express métropolitain (REM), this one warrants a more detailed review.[1] We can easily imagine that such methods will be used for other major public projects in Quebec, including the restructuring of the public transportation network using a tramway system in Quebec City.

The financing of the REM is a complex matter, because in addition to significant contributions from higher levels of government (more than $2.5 billion from the Government of Quebec and $1.28 billion from the Canada Infrastructure Bank out of a total budget of $6.924 billion), municipal contributions will amount to more than $824.9 million, user contributions will be $887 million and the fuel tax attributed to this network will exceed $132.4 million[2]

A legislative and historical reminder is required at this point:

May 2016:

- Adoption of an *Act, aimed primarily at amending the organisation and governance of the public transportation system in the Montreal metropolitan region*[3]
- Creation of the Autorité régionale de transport métropolitain (hereinafter referred to as «ARTM») and the Réseau de transport métropolitain (hereinafter referred to as «RTM», or EXO)

September 2017:

- Adoption of the *Act respecting the Réseau électrique métropolitain*[4], allowing the implementation of the Réseau électrique métropolitain (hereinafter referred to as the «REM», now called the Réseau express métropolitain) by the Caisse de dépôt et placement du Québec (hereinafter the «CDPQ») or a subsidiary and
- Outcome of the agreements with the ARTM and local municipalities
- Implementation of a system for the payment of dues for public transportation purposes;

March 2018: publication of 3 ministerial decrees

- M.D. 2018.03 which creates zones within the ARTM area conducive to the coordination of urbanisation and public transportation services;
- M:D. 2018.04 which authorises transportation dues for the REM;

- M.D. 2018.05 which publishes the agreement stipulating the ARTM's financial contribution to the implementation of the REM; the agreement is between the ARTM and REM Inc, a subsidiary of CDPQ Infra);

May 2018:

- the RTM becomes EXO. The RTM is responsible for operating the train, metro and bus networks within the Greater Montreal Area.

$600 Million in Transportation Dues

REM financing outlined in the 2017 constituent act.[5] After an agreement between the CDPQ and the ARTM, the following amounts will be added to the aforementioned revenue:

- $512 million in lieu of property appreciation;
- $600 million from the collection of transportation dues over a 50-year period;
- A sum of $1.283 million as a down payment from the State in relation to financing the REM project.

The financing of some REM costs through transportation dues is outlined in Ministerial Order AM-2018-04, which became the *By-law respecting transportation dues regarding the Réseau express métropolitain*[6].

Essentially, some works are subject to payment of transportation dues, which will be collected by local municipalities in those zones lending themselves to the coordination of urbanisation and the implementation of public transportation services.

The new regulations cover:

- The requirement to obtain a permit for work subject to transportation dues (section 2)[7];
- The rate and calculation of the dues (section 3): the amount required, and indexed annually, is $107.64 per square metre built[8];
- Work subject to payment of dues (section 4): the construction, reconstruction, increase in surface area of a building, its redevelopment; the work must cover an area exceeding 186 square metres and buildings forming part of agricultural operations are excluded;
- The relevant buildings in cases of redevelopment with even just a partial change of use are those that involve a change to one or other of the following categories:
    - o Housing;
    - o Retail, restaurant, etc.;
    - o Business offices and professional services;
    - o Institutional;
    - o Industries, wholesale trade, para-industrial services and automobile services;

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o The research and development industry and data centres.

- The value of the relevant works (section 5): work over $769,080, indexed annually;
- The determination of the floor area (section 6);
- The dues are payable by the owner, the emphyteuta, the beneficial owner or the person with the right of superficies, as well as the occupant of a building mentioned in section 97.12 of the ARTM Act, and a syndicate of co-owners (section 7);
- The conditions of payment (sections 8 to 10);
- The rules for establishing suitable zones (section 11): some within 1 kilometre of a station, others within 500 metres;[9]
- Exemptions (section 12): agricultural operations and other cases provided for in Section 97.12 of the ARTM Act;
- Collection by local municipalities and remittance to the Authority (section 8 and 13 to 18);
- Criminal provisions (section 19).

Transportation dues which will finance the REM are payable from 1 May 2018. However, the rates will be applied gradually as the CDPQ train network is currently under construction. This rate was set at 50% of the total amount of the dues until 31 December 2018, and will be 65% for 2019 and 80% for 2020.

How to Deal With Changes During the Course of a Major Construction Project

By: Mario Welsh, Managing Partner
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and Lawyer, and
Maxime L. Blanchard, Lawyer

4

How to Deal With Changes During the Course of a Major Construction Project

It is of paramount importance that all contractors become familiar with and understand the contractual clauses establishing the applicable process for changes to the contract.

One of the foundations of a successful construction project is ensuring the different parties have thoroughly comprehended the contract. This is all the more true for contracts awarded through a call for tenders.

In fact, diligently reviewing the available documentation will not only ensure that the bidder sets a fair price, but that it is also aware of the extent of its obligations, thus generally avoiding any unpleasant surprises during the fulfilment of the contract.

Impact in the Event of Changes to the Contract

Despite the contractor's diligence or the client's good faith, there are very few worksites that are not subject to some changes during the performance of the work. The nature or reason for these changes is numerous. This may be the result of unexpected working conditions, changes to the work to be performed, or unforeseen additional work, etc. As a general rule, as it relates to public contracts, these changes are governed by clauses that are specific to the contract between the two parties.

It is of paramount importance that all contractors become familiar with and understand the contractual clauses establishing the applicable process for changes to the contract.

In *2414-9098 Québec inc. v. Pasagard Development Corporation*, the Court of Appeal recalled that "it is settled case law and doctrine that where the contract provides for a procedure to amend the contract and the works to be performed, this must be respected by the contractor; if not, his claim for compensation for the additional works undertaken will be rejected."[1] In this case, the procedure, which is very common, included provisions stipulating the need for an agreement with regards to both the scope and cost of the additional work, prior to its execution. As such, for the work that was performed in non-compliance with this procedure, and in the absence of a waiver by the client, the contractor's claim was therefore rejected.

Although it is imperative to respect the contractual procedure establishing the measures to be taken following any amendments, it is not always possible to avoid disputes in all cases. However, we can retain some principles from the case law that could save contractors quite a bit of hassle.

Clarifying ambiguities

First and foremost, we should recall that when a contract is unclear and has been imposed by a party, it must be interpreted according to the intentions of the person who drafted it. This applies to the contract and the entirety of the contractual documents (including the specifications). It is preferable to clarify at any time, whether at the submission or execution stage, any interpretive ambiguities or difficulties that may arise. In fact, at the trial stage, the Tribunal will have to distinguish between an ambiguity resulting in confusion and a difficulty that may be resolved through the interpretation of the clauses in relation to one another.[2]

Prioritising agreements

Thereafter, as we have seen above, prior to the fulfilment of the works which would warrant additional charges, it would also be very useful to agree on the scope of such works and the cost, especially in relation to the contractual procedure which should be followed. It should be noted that the client's silence does not necessarily mean that the approval process for additional work has been waived. It is therefore important to not only oppose the matter in writing, but also to solicit a response, since the intention to oppose it must be unequivocal.[3]

Determine the urgency and need for change

It is also preferable to seek confirmation from professionals with regard to the urgency for any changes, as the costs associated with a management decision in the absence of such urgency, for example costs related to lost productivity, are not necessarily considered extra charges.[4]

In short, it is important to deal with your case meticulously at all times in order to establish tangible proof of the damages being claimed.

The Pilot Project Procedure

A thorough review of the documents will also help determine whether the project on which the contractor will be bidding is subject to the **Pilot project to facilitate payment to enterprises that are parties to public construction work contracts and related public subcontracts.** This innovative project, which came into force in 2018, aims, as its name suggests, to facilitate payments to both contractors and subcontractors in the context of public construction works.

The procedure provided for in this project will make it possible, among other things, to resolve disputes that may arise regarding an assessment as to the value of a contractual amendment.[5]

Thus, if, in the context of a construction project submitted to the pilot project, a dispute arises regarding the assessment of the value of an amendment to the contract, it may be submitted to an expert intervener who will compile the various viewpoints of the parties. The latter will then have the mandate to resolve the dispute within 30 days of receiving the required documentation.[6]

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The expert intervener's decision shall be binding and payment shall be made within 10 days of receipt of the notice.

What is innovative about the legislator's approach is that the payment made within this dispute settlement process is deemed to be made under protest, therefore without prejudice and subject to the payer's right to reimbursement of all or part of the amount paid. An appeal which relates to the same elements as those in the dispute settlement process may also be brought before an arbitrator or the Court.

Thus, if the contractor remains dissatisfied with the ensuing results, it is generally possible for them to file a claim for additional work, which must, of course, be accompanied by supporting evidence. The client will also have the opportunity to file a claim with the Court or an arbitrator for reimbursement of the amount they consider to have overpaid.

In doing so, this procedure will allow work to continue on the construction site while avoiding the accumulation of significant costs associated with any additional work, all without waiving the rights of any of the parties.

No construction site is immune to changes while works are in progress. Thus, an accurate review of the contract between the contractor and the client, as well as thorough knowledge of the contract amendment process, will undoubtedly allow a meticulous contractor to successfully complete requests for claims for additional work. Let it be added that the same applies to the management of the end of a contract.

Given the issues that may arise in the contractual amendments process and the associated value assessment, the solution proposed by the pilot project may help to ensure the much sought-after improvement in the progress of construction projects. Only time will tell whether this legal innovation will be successful enough to become the norm in public construction contracts.

Major Public Infrastructure Projects: Where Is Culture in All This?

By: Patrice Picard, Partner and Lawyer

5

Major Public Infrastructure Projects: Where Is Culture in All This?

What do we do after a long day of work upon meeting up with family and friends? I would say that we entertain ourselves.

Since 2007, the Government of Quebec has adopted a comprehensive outlook in terms of maintaining and restoring its existing infrastructures, as well as new constructions. In 2018, it launched the Quebec Infrastructure Plan 2018-2028 (QIP), which provides for investments of more than $100 billions over 10 years across 14 major business sectors, in addition to significant investments in infrastructures by the Government of Canada, municipalities and other public bodies and the private sector.

The citizens of the greater Montreal region, of which I am part, already understand that, for all the business sectors affected by the QIP, about 50% of the investments are dedicated to relating to road network, transportation and health and social services sectors. One only needs to think of the construction site of Turcot interchange, the new CHUM and the Glen Site of the MUHC in Montreal.

Of course, we should be delighted with these investments in critical and essential sectors, especially as some of these were urgent and needed to be prioritised. The QIP is intended to be as complete and coherent investment plan as possible to protect our growth and quality of life in a sustainable manner. It also provides for major investments in infrastructures across all other key sectors to ensure the population of Quebec have access not only to education, but also to early childhood centres as well as sports and community activities, among others.

Over time, the maintenance, renovations, transformations and new constructions currently underway will allow us to circulate more fluidly and have better access to hospitals, schools and universities. But what else is missing from this list to help a society thrive?

What do we do after a long day of work upon meeting up with family and friends? I would say that we entertain ourselves.

Our cultural infrastructures support our ongoing need to enrich and enhance our daily lives. These cultural infrastructures enable us to access art in all its forms, through museums, libraries, theatres and public spaces where cultural events and festivals in which we take part are held.

The Redevelopment of Montreal's Quartier Des Spectacles

The QIP provides for investments in cultural infrastructures in the amount of $1.578 billion, or 1.6% of the total investments forecast in the QIP, representing a 26% increase since the QIP was updated in 2018. The construction and development of Le Diamant theatre in Quebec City, which opened last August, is a recent example of a major cultural project delivered pursuant to the QIP.

Another recent example of a cultural infrastructure project, carried out at the Government of Quebec's initiative and its public and private sector partners under the former Quebec plan, is the redevelopment of part of the Îlot Balmoral, located in the heart of the Quartier des Spectacles in Montreal. Begun in 2008, these investments have made it possible, over time, to transform two obsolete buildings owned by the Société Québécoise des Infrastructures:

- The inauguration in 2009 of the Maison du Festival de Jazz (now renamed La Maison du Festival Rio Tinto), to host various festivals and cultural events; and,
- The more recent inauguration, in September 2017, of the Wilder Espace Danse Building, which has given the dance community a foothold in Montreal's Quartier des Spectacles and enabled this art form to be showcased on the Place des Festivals. This brought together four leading dance organisations in Montreal under one roof - Les Grands Ballets Canadiens, L'Agora de la danse, Tangente and the École de danse contemporaine de Montréal - while also hosting the offices of the Quebec Ministry of Culture and Communications, and the Conseil des arts et des lettres du Québec.

These two buildings can now enjoy the new Place des Festivals, which was redeveloped as part of the investments made in 2009. These are some examples of real cases for which several objectives have been met in order to enrich the cultural aspects that the Quartier des Spectacles has to offer, to turn obsolete government buildings into high-quality buildings while preserving their heritage, and to house cultural organisations and government officials working in the cultural sphere in Quebec.

The Added Value of Competent Legal Counsel in a Cultural Infrastructure Project

These infrastructure plans are the result of the government's vision and contain various policies and guidelines to ensure their proper management and success. Beyond the similar issues prevalent in real estate development projects in urban areas, it is essential for all legal advisors to understand this vision, these policies and directives and the internal operations of the various corporations and departments involved in the Government of Quebec, as I was required to do when accompanying the Société Québécoise des Infrastructures in the context of this redevelopment.

Comprehend the policies and guidelines in place

In particular, for infrastructure projects that qualify as major projects (when the estimated total cost exceeds a certain amount), the current policies and guidelines include all the steps that must be followed over several years. From the presentation of a preliminary project sheet to the Council

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of Ministers at the end of the project, all phases are planned to ensure rigorous management and supervision, such as that of the Wilder Espace Danse Building. The legal advisor must be familiar with these policies and guidelines, and will be called upon to assist those involved at each stage of the study, planning and implementation of the project in accordance with the outlined needs and established requirements.

Understand the overview and broad objectives

When several phases are planned, the legal advisor must also have an overview of the area to be redeveloped, and more specifically an overview of the proposed development of the site. This overall vision will allow timely and thoughtful decisions to be made for the first phase and thus allow the subsequent phases to be carried out effectively. This is particularly important in high-density urban areas such as the Quartier des Spectacles, where the areas and public domain required reconfiguration. For example, when the first building was transferred in 2008 with a view to becoming La Maison du Festival du Jazz, certain decisions were made regarding access to public services and their supply in response to the implementation of the new Place des Festivals and the Wilder Espace Danse Building. The same approach was also taken during the reconfiguration of the new Place des Festivals by transferring some land and acquiring other land in order to redefine the public domain (streets, sidewalks) and meeting the needs of the final phase of the renovation and expansion of the Wilder Espace Danse Building. When confronted with project policies and directives, the legal advisor is also called upon to ensure that the financial conditions for carrying out the project are met and that cultural organisations will remain in the new building over the long term. For these purposes, the legal advisor must, among other things, be fully versed in banking law and municipal taxation.

Dealing with the various participants in the project

Another important aspect of cultural infrastructure projects is the presence of a number of private partners, including not-for-profit corporations working in various fields of the cultural sector. Unlike projects in other business sectors, such as the road network system or transportation, where private partners are usually technically advanced commercial companies, which are used to complex contractual relationships, cultural companies quickly feel overwhelmed if they cannot rely on good collaboration between project stakeholders and on efforts to popularise both the process and the complex contracts that will be executed.

Being a coordinator

The primary qualities required by a legal advisor who is called upon to assist the government in complex cultural projects are as follows: to be a good coordinator and to understand the dynamics and positions of the various public and private partners involved in a complex and multifactorial legal context.

Like all of you, I consider myself fortunate to have access to these cultural infrastructures, which are a real legacy for Montreal and for Quebec as a whole. Every day I am proud to see the richness of our culture and of those involved, not to mention that of our population and the many tourists who visit. As a citizen of Montreal, I would say, patience, patience, patience and patience, because I am sure that all these projects will eventually transform Québec into one of the most pleasant places in the world.

Obtaining Environmental Permits: Where to Start?

—

By: Jean Piette, Counsel

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Obtaining Environmental Permits: Where to Start?

Depending on the nature or location of an infrastructure or construction project, it is highly likely an environmental permit may be required in order to carry out the project. Overview of the various authorisations and permits which are required depending on the nature of the project undertaken.

An Environmental Authorisation Under the *Environment Quality Act*

The *Environment Quality Act* requires that an environmental authorisation be obtained in accordance with the nature of the project or the location in which a project will be undertaken. The requirement for an environmental authorisation is set out in section 22 of the *Environment Quality Act*. In particular, an environmental authorisation – formerly known as a "certificate of authorisation" – must be obtained in the following cases:

- the construction and operation of an industrial plant
- the installation of a water withdrawal facility;
- the establishment, modification or extension of any waste-water management or treatment facility;
- any work, construction or other intervention in wetlands and bodies of water;
- certain activities relating to the management of hazardous materials;
- the installation and operation of equipment to prevent the release of contaminants into the atmosphere;
- the implementation or operation of a waste disposal facility;
- establishment and operation of a residual materials reclamation facility;
- any construction on land that has been previously used as a waste disposal site and is no longer in use;
- any other activity determined by government regulation;
- any project involving an activity that may result in contaminants being released or a change in the quality of the environment, including, but not limited to, the construction and operation of an industrial facility, the use of an industrial process and any increase in goods or services.

What procedures should be followed?

The *Environment Quality Act* and its regulations provide guidance on how to apply for authorisation from the Ministry of Sustainable Development, Environment and Fight Against Climate Change. The Act provides for a mechanism to protect confidential industrial or trade secrets that may be included within an application for an environmental authorisation. When such application is filed with the Ministry, a copy must also be sent to the municipality in which the project will be undertaken.

The Act sets out the criteria that the Minister must consider when analysing the impact of the project for which an environmental authorisation has been requested. In the case of a project that affects a wetland or body of water, the applicant may be required to pay monetary compensation that will be used to protect or create other wetlands or bodies of water to offset those that will be destroyed by the project.

The Act authorises the Minister to prescribe conditions, restrictions or prohibitions on, among other things, measures to mitigate the environmental impact, an environmental monitoring programme, the communication of environmental monitoring or surveillance reports, measures to respect the characteristics and support the capacity of the host environment, the period during which an activity must be carried out, management of residual materials, site restoration measures, measures to reduce greenhouse gas emissions, measures to adapt to climate changes and even the formation of a monitoring committee. In some cases, these measures may be different from those prescribed by government regulations.

Among the formalities to be followed, any person applying for an environmental authorisation must file a declaration of integrity stating that the applicant, its directors, officers and even, in some cases, shareholders, have not been convicted of an environmental offence or even a criminal offence in connection with activities authorised under the *Environment Quality Act.*

Several regulations implementing section 22 and the following sections are currently being prepared. Consultations with participants have just taken place via «co-creation tables» where interested participants were asked to put forward their ideas and suggestions and to contribute towards drafting the regulations for the implementation of section 22 of the *Environment Quality Act.*

Which projects are subject to a “declaration” and which are exempt?

The *Environment Quality Act* provides that the government may, by regulation, identify projects considered to have “low environmental impacts” that will be subject to a “declaration” instead of an application for an environmental authorisation. Consultations are ongoing to establish which project categories will be subject to a “declaration”.

Similarly, the government may, by regulation, exempt certain activities from the requirement to obtain an environmental authorisation. Again, consultations are ongoing with interested participants to establish which project categories will be considered to have a “negligible impact”, which will exempt them from any requirement to obtain an environmental authorisation or to file a “declaration”.

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What happens if a project is carried out without authorisation?

When an environmental authorisation is obtained pursuant to section 22 of the *Environment Quality Act*, the holder of the authorisation must comply with its terms and conditions, under penalty of a fine, an administrative sanction, a suspension or a revocation.

If an individual carries out a project without obtaining an environmental authorisation or filing a declaration, depending on the situation, the natural person is liable to an administrative monetary penalty of $1,000 and a minimum fine of $5,000 and, in the case of a legal person, to an administrative monetary sanction of $5,000 and a minimum fine of $15,000. Fines can reach a maximum of $3 million when the offence is committed by a legal person. Directors or managers of a legal entity, partnership or an unincorporated association are also at risk of prosecution when a legal entity, partnership or unincorporated association commits an offence under the Act or its regulations.

An Environmental Authorisation Under the *Fisheries Act*

If a project of any nature is to be carried out in a location where it is likely to result in the "deterioration, destruction or disruption to fish habitat", it must obtain a ministerial authorisation under section 35(2)(b) of the *Fisheries Act*. This section applies to all projects carried out in a body of water, where there is a risk of damage to fish habitat.

Fisheries and Oceans Canada is preparing guides and guidelines to facilitate the application and interpretation of the new version of section 35(1) of the *Fisheries Act* adopted by Bill C-68 and regulations that will clarify the application of this Act, which broadly covers all activities conducted in a body of water that have the potential to harm, destroy or disrupt fish habitat.

In this regard, it is worth highlighting the *Fish and fish habitat protection policy statement*, which was published in August 2019 to help litigants understand the meaning and scope of the new provisions of the *Fisheries Act*, including section 35. This policy statement is based on the principles of "Avoid, Mitigate, Compensate", a philosophy similar to that used by the Government of Quebec for authorising work in a wetlands or body of water.

A Permit Under the Migratory Birds Act

In some cases, a project may be carried out on a shoreline or in a body of water, in an area that is a sanctuary for migratory birds.

The *Migratory Birds Convention Act, 1994* is a federal law that protects migratory birds from being affected by human activities. *The Migratory Bird Sanctuary Regulations* provide for a procedure to issue permits for any activity that is harmful to migratory birds, their eggs, nests or habitats. There are currently 27 migratory bird sanctuaries in Quebec that are protected by law.

Remember to Plan for Land Rehabilitation or for Management of Contaminated Soil in Your Projects

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By: Anne-Frédérique Bourret,
Partner and Lawyer

7

Remember to Plan for Land Rehabilitation or for Management of Contaminated Soil in Your Projects

The completion of infrastructure or development projects can trigger various requirements related to land rehabilitation and the management of contaminated soil. Early planning is essential in order to limit the risk of unpleasant surprises during the project and to ensure its success.[1]

The legal regime applicable to land contamination and rehabilitation is essentially found in the *Environment Quality Act* (**"EQA"**) and its regulations, including the *Land Protection and Rehabilitation Regulation* (**"LPRR"**).

This regime provides for certain specific requirements with regard to the characterization and rehabilitation of land that supports or has supported "designated" activities. In particular, the LPRR identifies the categories of "designated" industrial or commercial activities and sets the applicable regulatory limit values, which are devised according to the applicable zoning for the land.

Statutory Characterization and Rehabilitation Requirements

The cases giving rise to statutory requirements for land characterization and rehabilitation are as follows:

Cessation of a "designated" activity

When a "designated" activity is terminated on a permanent basis, a mandatory characterization study must be carried out within six months of the cessation. Additional time may be granted in some cases. If this study reveals the presence of contaminants above the applicable regulatory limit values, a rehabilitation plan must be drawn up, approved by the Minister and implemented. In addition, a notice of contamination must be registered in the land register. Once the site has been rehabilitated, a decontamination notice can then be registered.

Thus, in the context of a revitalisation or development project that involves, for example, the closure of a plant whose activities are listed under the LPRR, these requirements will apply and will be incumbent on the company ceasing these activities, regardless of its status as lessee or owner of the land in question. In this type of case, the fulfilment of the studies and rehabilitation work may be the subject of contractual negotiations with the company that wishes to acquire the land or proceed with its revitalisation; however, under the EQA, it is the company ceasing its activities that will nevertheless remain liable.

Change of use

The implementation of a development or infrastructure project involving a change of use of land upon which "designated" activities have been carried out in the past also requires a characterization study to be carried out for anyone who intends to change the use of this land (even if they are not the owner). If it reveals that the applicable regulatory standards have not been met, a notice of contamination must be registered in the land register and a rehabilitation plan must be prepared, approved by the Minister and implemented.

Requirements arising from a change in use apply as soon as there is an "intention" to change the use of the land. With regard to the concept of "change of use", the EQA specifies that carrying out an activity on the land that differs to that previously carried out constitutes such a change. In short, this concept is relatively vague but is further clarified in the guidance developed by the Ministère de l'Environnement et de la Lutte contre les changements climatiques.

It should be noted that it is now possible to proceed using a declaration of compliance rather than the Minister-approved rehabilitation plan, in which rehabilitation of the land is carried out solely through soil excavation, must be completed within a maximum of one year and the quantity of soil to be excavated must not exceed 10,000 m^3. A rehabilitation project that meets the applicable criteria could, therefore, avoid the cumbersome and administrative delays inherent in the Minister-approved rehabilitation plan.

What About the Other Requirements?

Voluntary land rehabilitation

The rehabilitation of land to the applicable generic criteria does not normally require any approval from the Minister, subject to certain specific cases.

For example, a ministerial authorisation under section 22 of the EQA may be required for the use of rehabilitation technology that is likely to result in the release of contaminants into the atmosphere or water (*in situ* treatment).

In addition, someone who plans to rehabilitate a property which will leave contaminants in the soil in excess of the applicable limits - namely via rehabilitation following a toxicological and ecotoxicological risk assessment - must submit a rehabilitation plan to the Minister that sets out the measures to be implemented, in particular with regard to protecting the quality of the environment, as well as human health and safety. Following the Minister's approval of the plan, a notice of land use restrictions must be registered in the land register, making the rehabilitation plan enforceable against third parties and obliging any subsequent purchaser to adhere to the charges and obligations provided for therein.

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Notice to the neighbouring owner

The EQA also requires the property's custodian to immediately notify the owner of a neighbouring property in writing when the following three conditions are met:

- The contamination exceeds the applicable regulatory limits;
- Soil contamination results from a "designated" activity undertaken on the land; and
- The custodian is informed 1) of the presence of contaminants at the property boundaries or 2) of the existence of a serious risk of migration outside of the limits of the land that could compromise water usage

If only the first two conditions are met and the custodian is informed of a serious risk of off-site contamination, only the Minister must be notified.

Management of contaminated excavated soils

Finally, even in the absence of any statutory requirements to characterise or rehabilitate the land, development or infrastructure projects generally require characterization studies to be carried out, whether this be for financing or managing excavated materials.

With regard to excavated contaminated soil, it should be noted that it must be disposed of at an authorised site. In order to prevent illegal dumping of contaminated soil, the Government of Quebec published, in the spring, a draft regulation aimed at tracking the movement of contaminated soil via GPS. The use of this type of traceability system is already part of the conditions set out in the call for tenders of certain public bodies. The Regulation respecting the traceability of contaminated excavated soil will be the subject of a separate article as soon as the final version is published by the Government of Quebec.

The above applicable requirements following the cessation of an activity or a change of use can be easily identified during the planning stages of a project through appropriate research and checks. In addition, the assessment of the volumes of contaminated soil to be excavated as part of a project is often a key element in the risk-sharing between the developer and the general contractor.

The identification of environmental risks related to land contamination in advance of any infrastructure or development project makes it possible to take into account the time necessary to meet these requirements in the project schedule and, where applicable, to determine who will bear the costs and risks related to the decontamination of the land or the management of excavated soils.

Taking the Powers of Cities Into Account When Developing Your Projects

By: Isabelle Landry,
Partner and Lawyer

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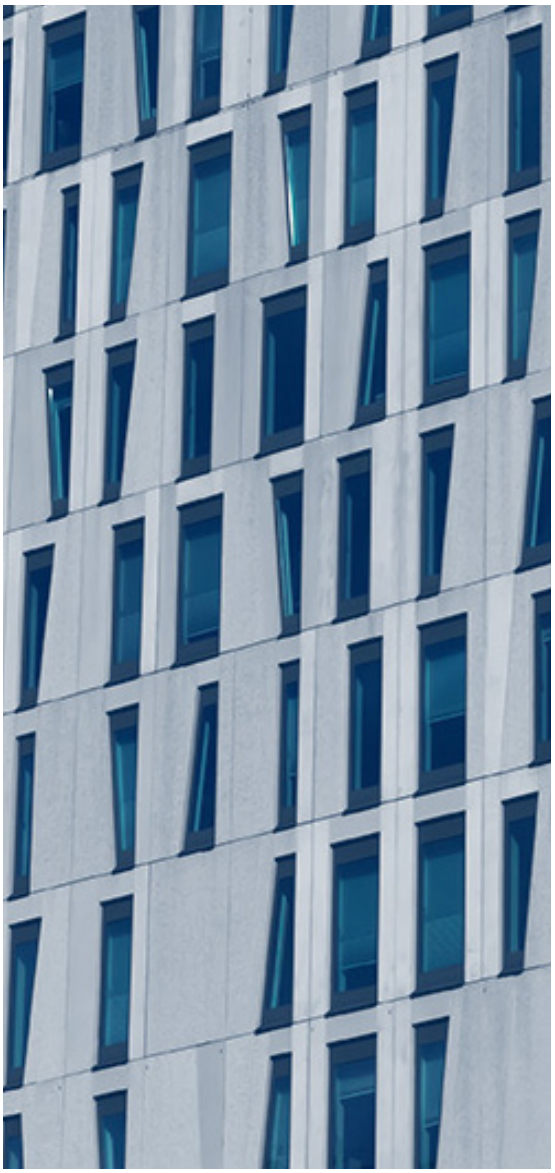
Taking the Powers of Cities Into Account When Developing Your Projects



In recent years, certain municipal powers have been granted, reinforced or expanded. Many of them have a real impact on infrastructure and major projects currently in under way, as well as the manner in which redevelopment projects in our cities will be carried out in the very short term.

These changes stem in particular from the adoption of Bill 122 entitled *An Act mainly to recognize that municipalities are local governments and to increase their autonomy and powers* on 15 June 2017, as well as Bill 155, entitled *An Act to amend various legislative provisions concerning municipal affairs and the Société d'habitation du Québec on 19 April 2018.*[1]

In this article, we will briefly discuss:

- Changes in relation to contributions for the purposes of parks and playgrounds and the preservation of natural area,
- The possibility of making the procurement of a permit for the construction of residential units subject to compliance with certain rules relating to affordable, social or family housing, and
- The City of Montreal's pre-emptive right.

Contributions for the Purposes of Parks and Playgrounds and the Preservation of Natural Area

This well-known contribution has existed since 1993, but was modified in 2017. Firstly, a new condition for which park fees may be charged has been added to the *Act respecting land use planning and development*, namely where a building permit is requested for works to allow new activities to be carried out on the building.

As was the case previously, this condition must be added to local municipal by-laws in order to be applicable. Local by-laws can of course vary from one municipality to another. More specifically, this means that work that would allow a change as to the use (for example, from industrial to residential for the reallocation of a former factory) could result in the payment of a contribution for the purposes of parks, even in the absence of a subdivision.

The calculation of what can be requested in terms of a contribution for parks (the famous 10%) has also been expanded. When a municipality provides for this in its by-law, here is what it can request:

- Maximum of 10% for a cash-only contribution;
- Maximum of 10% in cash when the contribution is made both in land and cash. This means that in total, the contribution in terms of land and money can be greater than 10%;

- Land with an area greater than 10% when the subdivision or construction is carried out in a central area of the municipality and constitutes all or part of a green space;
- In other cases, a land-only contribution will be a maximum of 10%;

Affordable, Social or Family Housing

In 2017, a new section was added to the *Act respecting land use planning and development* to allow municipalities to effectively require a number of affordable, social or family housing units when applying for a building permit for residential units; a practise that was previously done on a voluntary basis.

To impose this type of housing in a residential construction project, a municipality must adopt a by-law ensuring that an agreement containing certain conditions is signed before the permit is issued. These conditions must be provided for in the municipal by-law, in accordance with the urban planning guidelines. The agreement with the developer will either provide for the construction of certain affordable, social or family housing units, or the transfer of a building or payment of an amount to the city. The building or amount provided will be used to implement an affordable, social or family housing programme. The municipal by-law must indicate the calculation rules for determining the percentage of affordable, social or family housing, or the calculation for payment by way of a building or money. The agreement also governs the size and number of rooms required in the affordable, social or family housing units, their location in the housing complex or elsewhere in the municipal territory, as well as their design and construction. The agreement may also establish rules to ensure the affordability of housing for a term which it will determine.

Our understanding of the distinction between these three types of housing is that affordable housing is cheaper, social housing is subsidised and family housing is larger. The by-law adopted by each municipality may, however, define these types of housing using more specific criteria. It is obviously possible for a housing unit to meet several of these criteria concurrently.

The draft by-law of the City of Montreal

The City of Montreal adopted a draft *By-law to improve the supply of social, affordable and family housing*[2] on June 12, 2019. Its final adoption is scheduled for early 2020 and it will come into force on January 1st, 2021. Consultations are currently in progress.[3] We will not discuss the content of this by-law in detail here, as changes may be adopted to the draft by-law following the consultations. The City of Montréal has drawn up the following table, which summarises the contributions currently contemplated under this by-law:

Number of units in the project	Social Housing		Affordable Housing		Family Housing		
	Downtown	Other territories	Downtown	Other territories	Downtown	Central neighbourhoods and periphery	Outskirts
5(450m²) to 49 units	Financial contribution	Financial contribution	NA	NA	NA	NA	NA
50 units or more	20% or Financial contribution	20% onsite or 22% offsite or Financial contribution	10% to 15% including 5% family units or Financial contribution	15% to 20% including 5% family units or Financial contribution	5% without price control	10% without price control	NA

4

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The City of Montreal's Pre-Emptive Right.

Bill 121, which was adopted in September 2017, amended *the Charter of Ville de Montréal* to add a section to Schedule C providing for a pre-emptive right for the City. Under this new power, the City could adopt a by-law determining the properties which would be subject to a pre-emptive right; this occurred in October and November 2018 via the adoption of two by-laws, namely the *By-law determining the park territories in which the city's pre-emptive right may be exercised and in which immovables may be acquired for the purposes of regional parks* and the *By-law determining the urban planning sectors in which the city's pre-emptive right may be exercised and the purposes for which buildings can be acquired*.

For properties that meet the criteria established by these by-laws, the City of Montreal must enter a notice of intention in the land register, which will remain in effect for 10 years. Owners not selling their property are not required to do anything. However, owners who intend to sell their property and accept an offer must inform the City by sending a notice of intention to alienate their property[5]; failure to do so may result in the City cancelling the sale. Such notice of intention is not required when the proposed sale is between related persons. The City will then have 60 days to decide if it intends to purchase the building under the same conditions as those set out in the offer. If the City does not exercise this right, the sale may take place and the City's pre-emptive right will terminate.

An owner who wishes to sell their property should, therefore, consult the land register and these by-laws in order to establish whether their building is subject to this pre-emptive right.

No other city in the province of Quebec has this right.

These relatively recent rules will certainly have an impact on the way major projects, or even the redevelopment projects within our cities will be carried out in the very short term. Developers must be aware of these rules, not only to be able to ensure compliance when planning a development project, but also to ensure the profitability of the project. It goes without saying that these rules will have an impact on developers' wallets and may as well affect the time required to negotiate the various agreements with municipalities.

The Autorité des Marchés Publics: What You Need to Know Regarding Major Projects and Request for Proposals

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By: Frédéric Côté,
Partner and Lawyer, and
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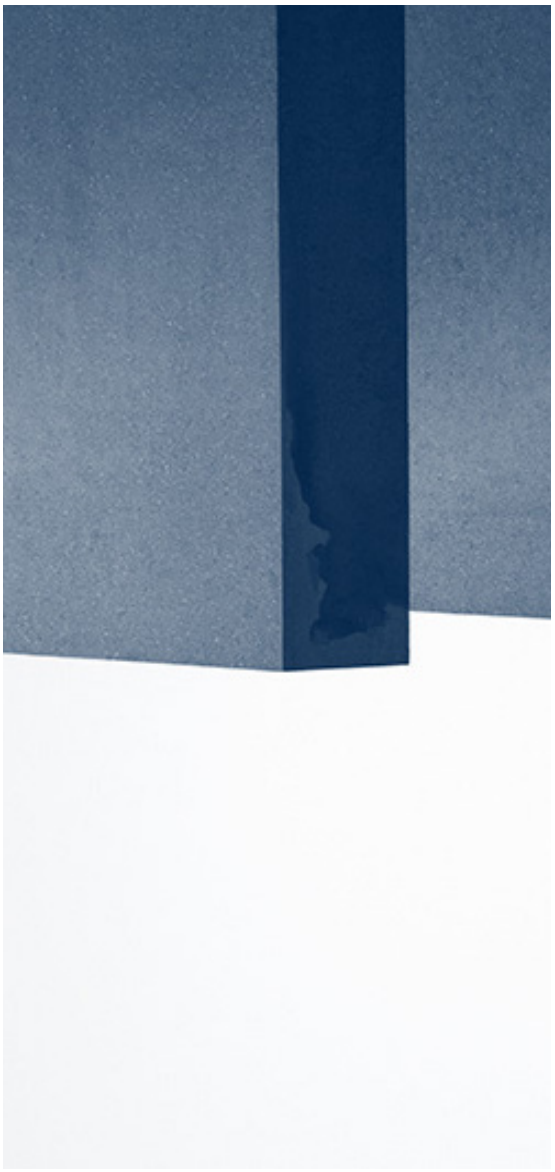
9

The Autorité des Marchés Publics: What You Need to Know Regarding Major Projects and Request for Proposals



Since January 25, 2019, the AMP has been entrusted with a series of functions which were previously performed by the Autorité des marchés financiers ("AMF"), relating to eligibility for public contracts and prior authorisation to obtain a public contract or subcontract.

It should be pointed out that the Autorité des marchés publics ("AMP") was established on the 1st of December 2017 through the *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*. It is a neutral and independent body under provincial jurisdiction whose mission is to monitor public procurement and enforce legislation and regulations governing public contracts.

Before considering the innovative nature of the powers vested in the AMP, it is worth reviewing the prior authorisation required to obtain a public contract or a public subcontract, which has been mandatory for some major public projects since 2013.

Prior Authorisation Required to Obtain a Public Contract or Subcontract: The Continuation Of AMF's Activities

The transfer of powers pertaining to prior authorisation to obtain a contract or public subcontract from the AMF to the AMP has not changed the rules.

In order to obtain the prior authorisation required to obtain a public contract or subcontract, a business must demonstrate that it meets the high standards of **integrity** that the public is entitled to expect from a party to a public contract or subcontract. The AMP may, in order to determine whether a given company meets the integrity test, examine the integrity of the company itself, as well as that of its directors, officers, shareholders and other persons or bodies who have, directly or indirectly, legal or *de facto* control of the company. The AMP, upon receiving a request for authorisation, forwards the information obtained from the company requesting the authorisation to the Commissioner associated to the Unité permanente anticorruption, so that the former can carry out the verifications deemed necessary.

Prior authorisation to obtain a public contract or a public subcontract is required for businesses engaged in a call for tenders or award process for contracts with, among others, ministries, Crown Corporations and municipalities in Quebec, and involving an expenditure equal to or greater than the thresholds determined by the government.

More than ever, the prior authorisation of the AMP must therefore be considered as a valuable asset for any business.

In general, the thresholds are set at

- $5 million for any construction work contracts or public-private partnership contracts or subcontract;
- $1 million for any service contracts or subcontracts entered into pursuant to a call for tenders or awarded by mutual agreement.

In Montreal, the expenditure threshold that makes obtaining certain contracts subject to prior authorisation by the AMP is much lower. Hence, the threshold is set at $100,000 for any of the following contracts:

- contracts for construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers;
- contracts for the procurement of bituminous compounds;
- service contracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers.

In addition, the threshold for Montreal is set at $25,000 for subcontracts directly or indirectly related to the contracts covered by the $100,000 threshold mentioned above.

In addition, it should be noted that the above-mentioned rules are of general application and that other types of contracts may be subject to the requirement to obtain prior authorisation from the AMP.

Prior Authorisation of the AMP: The Development of a Certificate of Integrity

The authorisation process to obtain a public contract or subcontract has been deployed to protect the interests of public at stake in the award and management of certain public contracts. However, recently it has been noted that private sector stakeholders, such as financial institutions and private owners, have begun requiring their customers, contractors or service providers, as the case may be, to obtain authorisation from the AMP or to show that they pass an «integrity» test similar to the one administered by the AMP for prior authorisation.

AMP authorisation has therefore become a filtering tool over the years allowing not only the public sector but also the private sector to exclude certain contracting parties whose integrity could be called into question.

More than ever, the prior authorisation of the AMP must therefore be considered as a valuable asset for any business.

Powers of the AMP Pertaining to a Public Request for Proposals or the Performance of a Public Contract

The AMP's functions, in addition to authorisations to contract with a public body, include reviewing the processes for awarding or allocating public contracts, reviewing the performance of a public contract and reviewing the contractual management of a public body that is specifically designated by the AMP or the government.

With regard to the award, allocation and performance of public contracts, the AMP has audit and investigative powers by which it can validate compliance with the eligibility requirements of bidders, the uniformity regarding the processing of bids, the equal treatment of participants in public tenders, the principles of fair competition, and even the commercial efficiency of a competitive bidding process. In other words, this scope of what can thus be validated by the AMP constitutes the "applicable normative framework". The AMP may also investigate the commission of certain criminal offences related to the exercise of its powers (obstruction of an audit, provision of false information, etc.).

In the course of an audit or investigation, the AMP may require the public body responsible for a call for tenders or the performance of a contract to provide any information or document it considers relevant. It may also enter any establishment of the public body and consult any document, use any computer equipment and question public servants, who also have an obligation to cooperate.

Following an audit or investigation, the AMP may order the public body to:

- amend its request for tender documents;
- cancel a request for tender;
- refrain from invoking an exception that would allow it to enter into an over-the-counter contract (without a request for tender);
- use the services of an independent auditor;
- forward for approval the composition of a selection committee;
- require an independent third party be added to a selection committee; or
- suspend or terminate a public contract (for a designated organisation only).

It should be noted, however, that when the public body concerned is a municipal body, the AMP can only issue a recommendation. Given the political consequences associated with a publicised failure to follow an AMP recommendation, the weight of such a recommendation and the opportunity to seek its issuance from the AMP should not be underestimated.

How to Request the AMP's Intervention in the Context of a Public Request for Proposals

A person who considers themselves aggrieved by a public call for tenders, bidders in the process of a call for tenders or any other interested persons may request that the AMP intervene with a public body and exercise the above-mentioned powers. Two procedures are available to achieve this: complaint and provision of information.

1. **Complaint:** During the public contract award or allocation process, any interested person may issue a complaint. The complaint must first be forwarded to the public body and it will then be referred to the AMP if the public body makes an unfavourable decision regarding the complaint or does not follow up on it. It should be noted that tight deadlines apply and that the AMP will reject complaints from a complainant who is pursuing a parallel judicial remedy.

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2. Disclosure of information: At any time, any interested person may also provide information to the AMP concerning any deviation from the above-mentioned "applicable normative framework". This is a broader and less formal mechanism than the complaint process. To this end, the AMP does not have the same response and follow-up obligations as those in the context of a complaint. However, as discussed more fully below, information disclosures can lead to tangible and effective results. It should be noted that measures to protect whistle-blowers are planned in order to facilitate the use of this procedure.

To date, the AMP has already issued three tender cancellation orders and a recommendation to adopt a needs assessment procedure following a complaint, in one case, and three information disclosures in the other cases. It is clear from these decisions that the AMP requires serious and tangible demonstration on the part of public bodies who adopt tendering criteria that could result in limiting the number of bidders. Failing this, it will exercise its powers. Filing a complaint and providing information may, therefore, be strategic alternatives to instituting legal proceedings by a bidder during a call for tenders or by any other person wishing to denounce a situation concerning a public contract.

Will Your Construction Project Be Subject to an Environmental Assessment?

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By: Jean Piette, Counsel

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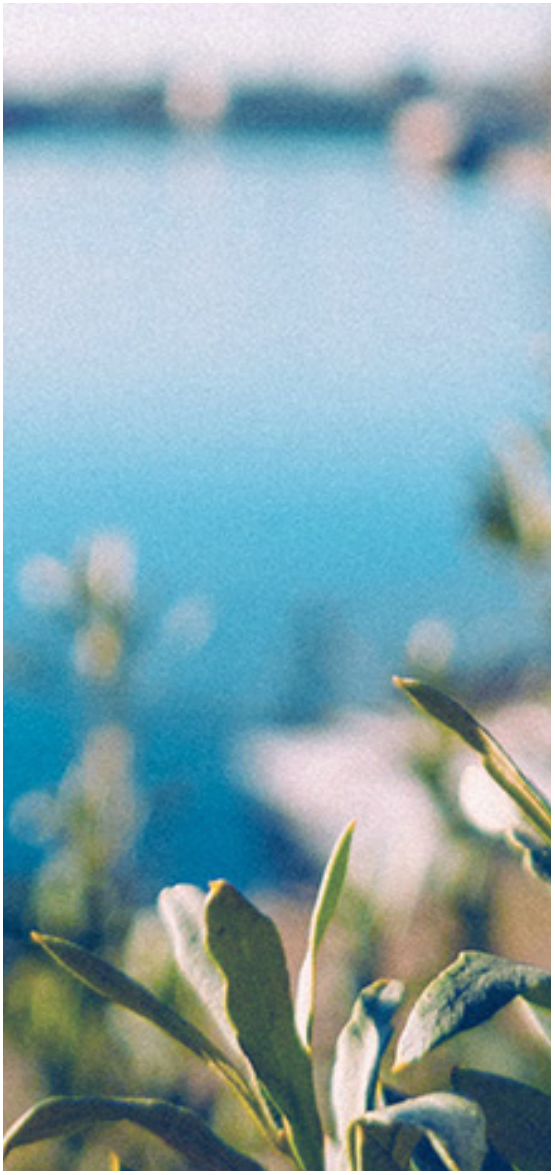
Will Your Construction Project Be Subject to an Environmental Assessment?



If the project relates to infrastructure or industrial construction of a certain magnitude, be aware that an environmental assessment may be required.

Quebec Environmental Assessment

There is an environmental assessment procedure in Quebec that is likely to apply to any major infrastructure or industrial construction project. In fact, since 1978, there are four different environmental assessment procedures in Quebec depending on the territory in which a project will be carried out. Three of these procedures apply in the northern regions of Quebec and are based on agreements between the governments of Quebec and Canada and, depending on the circumstances, the Cree Nation, the Inuit Nation and the Naskapi Nation. In southern Quebec, the environmental assessment procedure has been amended in 2017, when Bill 102 was passed by the National Assembly of Quebec.

What are the projects covered by this regime?

The applicable procedure in southern Quebec applies to projects that fall within one of 38 categories and that are subject to an environmental assessment by regulation. These projects include:

- some public works,
- certain works that are likely to affect the body of water,
- certain types of industrial establishment or industrial activities, and
- certain establishments likely to emit significant quantities of greenhouse gases.

In addition, the government has, under section 31.1.1 of the *Environment Quality Act*, the "exceptional" power to subject a project to an environmental assessment if it does not fall within the 38 project categories provided for in the regulations. The government has this power in the following cases:

- If it believes that the environmental stakes are high and that public concern warrants the assessment;
- The project involves new technology or a new type of activity with significant predicted impact;
- If it believes that the project involves major climate change issues.

Brief description of the procedure

The initiator of a project who is subject to an environmental assessment under Quebec law must first file a Project Notice describing the intended project. The Minister then sends the initiator a directive indicating the nature, scope and extent of the impact assessment to be carried out. Within 30 days following the publication of a notice in the press, any person, group or municipality may submit comments to the Minister regarding any issues that should be addressed by the project's impact assessment. The Minister shall inform the project initiator of any relevant issues which justify their inclusion in the impact study.

The impact assessment will be the subject of an agreement by the Minister regarding its acceptability. Once this step has been completed, the project initiator will trigger a 30-day public information period during which any person, group or municipality may request a public consultation or mediation or a "targeted consultation". The Minister shall inform the project initiator of the way in which the public consultation will take place.

If there is a public hearing, it is held under the auspices of the Bureau d'audience publique sur l'environnement (BAPE). Quebec law requires that a public hearing be held within four months, a targeted consultation within three months and a mediation within two months.

After taking into account the results of the public consultation, the government may, by decree, authorise a project, with or without modification or with conditions, restrictions or exclusions, or refuse to issue a permit. The government authorisation may include norms, conditions, restrictions or exclusions, which may differ from those prescribed by regulations made under the Act. In emergency situations or to prevent an impending disaster, the government may authorise the execution of remedial or preventive work by exempting them from the environmental assessment procedure.

Federal Impact Assessment

The Canadian federal government also has an impact assessment procedure that applies to a number of projects under federal constitutional jurisdiction and other industrial projects that are considered significant.

As is the case at a provincial level, there are four different federal environmental assessment procedures; however, unlike Quebec, in some cases they can apply simultaneously. Three of these procedures apply in the same northern regions of Quebec as certain Quebec procedures, as they also stem from agreements reached between the Governments of Quebec and Canada and, depending on the situation, the Cree Nation, the Inuit Nation and the Naskapi Nation. A new general federal impact assessment procedure came into force on 28 August, which is the date that Bill C-69 - which replaces the *2012 Canadian Environmental Assessment Act* - also came into force. The new federal legislation is called the *Impact Assessment Act.*

What projects are covered by this procedure?

The impact assessment procedure applicable at a federal level applies to projects that fall within one of the 61 project categories that are automatically subject to an impact assessment by regulation. These projects include work in the federal public domain, certain projects that clearly fall

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within federal constitutional jurisdiction, and certain types of industry that are of particular federal interest. In addition, the Minister has the authority, under section 9 of the *Impact Assessment Act*, to subject a project to an impact assessment where it does not fall within the 61 project categories provided for in the regulations. The Minister may exercise this power on request or by his own initiative, in the following cases:

- If it deems that carrying out the activity may result in effects that are considered negative, either directly or indirectly, within an area of federal jurisdiction;
- If it deems that public concern warrants the assessment.

Brief description of the procedure

The initiator of a project subject to an impact assessment under federal law must first file an initial project description that contains the information prescribed by regulation with the Impact Assessment Agency of Canada (IAAC). Filing this initial project description is part of the "Preparatory Step". The project description is published on the IAAC website. Members of the public, Aboriginal groups and federal institutions are invited to comment and raise questions about the project. The IAAC will decide whether an impact assessment of the project is required. It makes its decision based on criteria set out in the Act. The IAAC is the body that will generally carry out the impact assessment, in collaboration with the project initiator who must prepare or compile the assessments or information required by IAAC.

The Minister may, if it is considered to be in the public interest, refer a project to a review panel to hear the views of citizens and other participants, especially Aboriginal peoples, in relation to the proposed project. Unless additional time is granted, the panel is normally required to complete its review of the project within 600 days.

The Act provides that the Minister may enter into an agreement with another government to conduct a joint review with a jurisdiction of that government and may even allow the impact assessment procedure of another government to be substituted for that of the *Impact Assessment Act*.

At the end of the impact assessment, the Minister will decide whether any adverse effects in an area of federal jurisdiction or any negative effects - direct or otherwise - that have been identified in the impact assessment report are in the "public interest", according to the criteria set out in the Act, as well as the extent to which these effects are significant. If this is the case, the Minister will issue a decision statement that allows the project in question to proceed, subject to any conditions the Minister considers necessary, acting in the public interest. The Minister also has the authority to refer to the Governor in Council, i.e. the federal cabinet, the decision on whether the adverse effects are in the public interest.

About BCF

With more than 500 employees and 300 professionals, BCF Business Law is the go-to firm for business leaders, growing companies, and well-established global enterprises that have chosen Quebec and Canada as a stepping stone to growth and success. Our entrepreneurship not only distinguishes us from the competition but has earned us the recognition of one of *Canada's Best Managed Companies* for the 12th year in a row.

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Notes

Duties on the Transfer of Immovables in the Context of Major Projects

[1] From the book *La fiscalité locale: municipale, scolaire et régionale*, second edition, WoltersKluwer, Montreal 2019, by Pierre Delisle.

[2] *Act respecting duties on transfers of immovables*, CQLR, c. D-15.1 (hereinafter referred to as «A.D.T.I.»).

[3] A.D.T.I., s. 2, para. 1 For statistics on transfer duties, see MAMH [Ministry of Municipal Affairs and Housing], *Financing and taxation of municipal organisations in Quebec*, 18 July 2019.

[4] A.D.T.I, s. 2, 2nd para.

[5] Act respecting municipal taxation, s. 1.1.

[6] A.D.T.I., s. 2, 2nd para

[7] For that part of the basis of imposition that does not exceed $50,000: 0.5%; from $50,000 to $254,400%: 1.0%; from $254,400 to $508,700: 1.5%; from $508,700 to $1,017,400 2.0%; and exceeding $1,017,400: 2.5%.

[8] 2018, 150 G.O. 1, 389

[9] Bill 13, 2019, section 39 passed on 19 June 2019; SQ 2019, chapter 14.

Environmental Impacts of Major Construction Projects: 5 Takeaways to Conduct Your Major Projects with Due Diligence

[1] Paule Halley, *Le droit pénal de l'environnement: l'interdiction de polluer* (Montreal: Éditions Yvon Blais, 2001), 160.

[2] *The Fisheries Act*, S.C. 1868, approved by the Parliament of Canada in 1868.

[3] For example, the *Environment Quality Act*, C.Q.L.R. c. Q-2 or the *Canadian Environmental Protection Act*, 1999 (S.C., c. 33), to name a few.

[4] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 1978 CanLII 11 (SCC).

[5] P. Halley, supra note 3 at 163-164.

[6] *R.*v. *Sault Ste. Marie*, supra note 4; *Quebec (Attorney General)v. Gazon Savard Saguenay Inc.*, 2009 QCCQ 534, para. 263-264; *Municipalité régionale de comté de Bellechasse v. Director of Criminal and Penal Prosecutions,* 2017 QCCS 5239 (CanLII), para. 30.

[7] *R.*v. *Sault Ste. Marie*, supra note 4; *R. v. Wholesale Travel Group Inc.* 1991 CanLII 39 (SCC), [1991] 3 S.C.R. 154, para. 213.

[8] P. Halley, supra at 171.

[9] *R.*v. *Wholesale Travel Group Inc.*, supra note 7;*Lévis (City)* v. T*étreault; Lévis (City)* v. *2629-4470 Québec Inc.*, [2006] 1 SCR 420, 2006 SCC 12 (CanLII), para. 15; *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers,* [2013] 3 S.C.R. 756, para. 56.

[10] *R.* v. *Wholesale Travel Group Inc:* "[the] question is not whether the accused has exercised some care, but whether the degree of care exercised was sufficient to meet the standard imposed"; *Quebec (Attorney General)* v. *3766063 Canada Inc. (Multitech)*, 2007 QCCQ 8661, para. 51 to 53; *P.G.Q.* v. *Jobert Inc.*, 705-36-000031-953, Joliette District, 19 January 1996, Hon. Lise Côté, J.C.S. (S.C. on appeal); *Director of Criminal and Penal Prosecutions* v. *Centre de traitement BSL Inc.* 2009 QCCQ 4872, para. 40-43; *Director of Criminal and Penal Prosecutions* v. *City of Louiseville,* 2013 QCCQ 675, para. 319-324; *Regional County Municipality of Bellechasse* v. *Director of Criminal and Penal Prosecutions,* para. 41 51; *Director of Criminal and Penal Prosecutions* v. *Forage Frontenac (1995) Inc.* 2019 QCCQ 11, para. 84-86.

[11] *R.* v. *Wholesale Travel Group Inc.*, supra note 7; see also *Communauté métropolitaine de Montréal* v. *Sanimax Lom Inc.* 2018 QCCM 204 (CanLII), para. 159 to 162; *Québec (Attorney General) v. 3766063 Canada Inc. (Multitech)*, supra note 10 at para. 124. Moreover, case law recognises that the burden of due diligence is particularly strong in the environmental field. See for example: *SM Construction Inc.* v. *Director of Criminal and Penal Prosecutions,* 2016 QCCS 4350 (CanLII), para. 101-102; see also *R.* v. *Légaré auto ltée,* [1982] AZ 82011036 (C.A.), p. 1 and 7; *Québec (Attorney General)* v. *3766063 Canada Inc.* (Multitech), supra 10, para. 53.

[12] *R.* v. *Sintra Inc.*, [1986] Q.J. no. 1083 (S.C.); *CSST* v. *Imprimerie Ste-Julie Inc.*, 2008 QCCQ 8606 (CanLII).

[13] *Director of Criminal and Penal Prosecutions* v. *Forage Frontenac (1995) Inc.* 2019 QCCQ 11.

[14] *Environment Quality Act*, supra note 2.

[15] Id. note 13, para. 79.

[16] Id. note 13, para. 81-83; P. Halley, 158.

[17] Id. note 13, para. 82.

[18] When the alleged error is committed by a simple employee, the judges instead analyse the procedures put in place by the company to prevent its employees from committing offence.

[19] *Environment Quality Act*, supra note 15.

Financing the Réseau express métropolitain: What About Transportation Dues?

[1] From the book *La fiscalité locale: municipale, scolaire et régionale,* second edition, WoltersKluwer, Montreal 2019, by Pierre Delisle.

[2] *"Réseau express métropolitain: the complete figures"*, Gérald Fillion,

Radio-Canada, 8 February 2018; *"Financing the completed Réseau express métropolitain"*, Radio-Canada, 22 August 2018.

[3] S.Q. 2016, c. 8

[4] S.Q. 2017, c. 17

[5] *Act regarding the Réseau électrique métropolitain,* S.Q. 2017, c. 17; CQLR, chapter R-25.02, sections 38 and 77.

[6] *By-law respecting transportation dues regarding the Réseau express métropolitain,* CQLR, chapter A-33.3, r. 2. See the implementation guide prepared by the ARTM, which is available on its website, ed01_20180507, dated 7 May 2018. Also see the summary prepared by the APCHQ and mentioned in Note 1 of this chapter.

[7] See Appendix E of the by-law for the work permit system.

[8] The rate of the dues is calculated in accordance with section 97.2 of the ARTM Act and is published in Schedule C of the by-law.

[9] See Schedules A and B of the by-law.

How to Deal With Changes During the Course of a Major Construction Project

[1] 2414-9098 Québec inc. v. Pasagard Development Corporation, 2017 QCCA 1515, para. 22;

[2] Bâtiments Kalad'Art inc. v. 175934 Canada Inc. 2002 CanLII 7705 (QCCS), para. 82;

[3] Société de cogénération de St-Félicien, société en commandite v. Industries Falmec inc., 2005 QCCA 441, para. 58; Birdair inc. v. Danny's Construction Company Inc. 2013 QCCA 580, para. 194.

[4] Aluminerie Alouette inc. v. Construction du St-Laurent Ltée, 2003 CanLII 10112 (QCCA), para. 123.

[5] Art. 20 pilot project.

[6] Art. 28 pilot project.

[7] Art. 38 pilot project.

[8] Art. 42 pilot project.

Remember to Plan for Land Rehabilitation or for Management of Contaminated Soil in Your Projects

[1] This article is intended to provide an overview of the principal requirements in this domain and does not take into account exceptions that may be applicable in specific cases.

Taking the Powers of Cities Into Account When Developing Your Projects

[1] This does not take into account Bill 121, adopted on 21 September 2017, entitled *An Act to increase the autonomy and powers of Ville de Montréal, the metropolis of Québec*, and Bill 109, entitled *An Act to grant Ville de Québec national capital status and increase its autonomy and powers*, which was adopted on 8 December 2016

[2] Also known as the *By-law for a diverse metropolis* and better known as the 20-20-20 rule because of the calculation rules contained therein

[3] http://ocpm.qc.ca/fr/metropole-mixte

[5] Available at : http://ville.montreal.qc.ca/pls/portal/docs/page/habitation_fr/media/documents/by-law_for_a_diverse_metropolis-summary.pdf

[6] Form available at http://ville.montreal.qc.ca/pls/portal/docs/PAGE/PRT_VDM_FR/MEDIA/DOCUMENTS/FORMULAIRE_AVIS_INTENTION_ALIENER_IMMEUBLE.PDF

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