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PROJECTS AFFECTING WETLANDS: COMING INTO FORCE OF MEASURES ON COMPENSATION

BY OUR ENVIRONMENTAL LAW GROUP

June 2012 — On May 22, 2012, Bill 71 – *An Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water*¹ (the “Act”) was passed. The Act came into force on May 23, 2012, almost a month after it was first tabled at the National Assembly. It grants the ministre du Développement durable, de l’Environnement et des Parcs [Minister of Sustainable Development, Environment and Parks] (the “Minister”) authority to require from an applicant, pursuant to Sections 22 or 32 of the *Environment Quality Act* (“EQA”), measures to compensate for the effects of any project affecting wetlands or bodies of water.

It should be recalled that on March 12, 2012, the Superior Court of Québec rendered a judgment² quashing Directive No. 06-01, which had been followed until that time by the Minister’s representatives to manage and require compensation measures with respect to the impacts resulting from projects on wetlands in the context of applications for a certificate of authorization under Section 22 of the EQA. This section provides that a certificate of authorization shall be obtained from the Minister prior to any work or activities in a watercourse, lake, pond, marsh, swamp or bog, but it does not provide for any duty to compensate for the impact on such areas. In its judgment, the Superior Court had considered *inter alia* that the requirement for compensation measures provided by Directive No. 06-01 represented a breach of property rights without any legal grounding, as it was not entrenched in legislation. On April 11, 2012, the Attorney General filed an appeal of this judgment.

The Act represents a very brief response to the judgment of March 12, 2012.

The Act defines the term “wetland” as a “pond, marsh, swamp or bog” without however defining these terms. The expression “body of water”, on the other hand, is defined as “a lake or a constant or intermittent watercourse”.

The Act henceforth authorizes the Minister to “require from an applicant [for a certificate of authorization] compensation measures designed, in particular, to restore, create, protect or ecologically enhance a wetland, a body of water or a piece of land near a wetland or a body of water”. Such compensation measures will be part of the conditions for authorization but shall not give rise to an indemnity. The authority to require such measures is retroactive to April 24, 2012.

However, the section providing for this new authority shall cease to have effect on April 24, 2015, unless the section should be repealed prior to that date by an act providing for rules on preservation and sustainable management of wetlands and bodies of water.

Compensation measures required prior to the cancellation by the Superior Court of Directive No. 06-01 are expressly validated by the Act: such measures shall not give rise to an indemnity.

Consequently, despite the judgment of the Superior Court, the Minister is henceforth authorized by law to require compensation measures for the carrying out of projects affecting wetlands – although the terms for applying such compensation measures still remain undetermined in the legislation.

¹ S.Q. 2012, c-14.

² *Atocas de l'Érable inc. c. Québec (Procureur général) (Ministère du Développement durable, de l'Environnement et des Parcs)*, 2012 QCCS 912; last March, we published a *nota bene* on that decision.

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