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Real estate developer granted injunction in dispute over flooding caused by new highway interchange

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In June 2015, the Superior Court of Québec sided with a real estate developer who applied for an order requiring the Quebec Ministry of Transport (MOT) to fix a highway interchange whose construction in 2007 caused the developer's land to be flooded [1]. This article summarizes the court's principal findings. The ruling has been appealed by the Quebec Ministry of Sustainable development, Environment and the Fight against climate change (MSDEF).

THE FACTS

Héritage Terrebonne owns a huge tract of land north of Highway 640, not far from the place where it intersects Highway 40. The area has seen quite a bit of development since the 1960's, which increases its appeal from a real estate perspective. However, new infrastructure has also had the effect of changing surface water runoff patterns in the area, with the result that part of Héritage Terrebonne's property which was formerly "dry" has turned into a wetland. After construction of the interchange in 2007, almost all of the property was covered with water.

THE LAW

The *Civil Code of Québec* creates a water runoff easement and related obligations, as follows:

> 979. Lower land is subject to receiving water flowing onto it naturally from higher land.
>
> The owner of lower land has no right to erect works to prevent the natural flow. The owner of higher land has no right to aggravate the condition of lower land, and is not presumed to do so if he carries out work to facilitate the natural runoff or, where his land is devoted to agriculture, he carries out drainage work.

In addition, for the purpose of protecting wetlands, section 22 of the *Environment Quality Act* (Quebec) (EQA) provides that:

> […] no one may erect or alter any structure, carry out any works or projects, undertake to operate any industry, carry on any activity or use any industrial process or increase the production of any goods or services in a constant or intermittent watercourse, a lake, pond, marsh, swamp or bog, unless he first obtains a certificate of authorization from the Minister.

The identification of a site as being a wetland is a problem for real estate developers, notably

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because the law gives the MSDEF the ability to require (non-compensable) compensation measures, such as the creation or restoration of a wetland near the one affected by the project, from anyone who applies for an authorization in order to carry out a project that will affect or destroy a wetland[2].

THE DISPUTE

The dispute between the parties rested on questions of fact and questions of law: what is the natural state of Héritage Terrebonne's land? What is the relevant time period? Héritage Terrebonne advanced the following answer: the natural state of the land is the state it was in before human intervention, that is to say, before development began in the 1960's. For MOT and MSDEF, the answer is that there was already a wetland on the site before the interchange was built, or else why would MET have applied to MSDEF for an authorization under EQA section 22 to build the interchange?

The trial judge began by ruling that the EQA takes precedence over the Civil Code, meaning that if the Héritage Terrebonne property turns out to be a wetland for legal purposes, the discussion stops there, without the developer having the right to claim compen¬sation for indirect expropriation. The Court then went to great lengths comparing the expert reports filed by the parties, in the end deciding to go with the findings advanced by Héritage, which the judge found more thorough and objective. Consequently, she refused to read "wooded bog" into the concept of "bog" (not defined in the EQA) on the grounds that this extension of the meaning of the word "is not supported by a majority of experts" [our translation]. She added that yes, there was a wetland covering several hectares on the site where the interchange was built, but the flooding of more than one hundred hectares caused by the interchange itself had not yet had the effect of turning the flooded land into a wetland, this being a gradual process (changes in the vegetation, etc.).

Having dealt with the question of the existence and size of an EQA protected wetland on the Héritage property, the Court quickly settled the temporal question in connection with the easement for surface water runoff: at law, the "natural state" of the land is the state it was in right before the construction of the work giving rise to the litigation. Furthermore, the prescription period is ten years. Therefore, Héritage could not complain about earlier development, but it was well founded in asking for changes to the interchange, which the Court ordered, giving the MOT six months to secure the required authorizations and make any necessary adjustments to the interchange in order to allow for surface water to run off naturally.

COMMENTS

If there is a lesson to take away from this case, it is the importance of acting with diligence and hiring good experts when one notices that a neighbor has done something that risks turning one's property into a wetland protected under the EQA.

As regards expert reports, in the Héritage Terrebonne case, the trial judge's appreciation of the written and oral evidence played a key role. The judge took pains to explain in detail what made the written reports and testimony of the plaintiff's experts more convincing than those of the defense, be it because plaintiff's experts showed up in court and were avail¬able to answer questions, or because the reports prepared for the defendants seemed aimed at justifying the defendants' actions. The Court ordered the MOT to pay plaintiff's costs, including preparation of expert reports and the cost of preparing and delivering expert testimony.

It will be interesting to see what arguments the MSDEF will advance on appeal, keeping in mind that the Court of Appeal will show deference as regards the trial judge's findings of fact.

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[1] *3563308 Canada inc.* v. *Quebec (Attorney General) (Ministry of Transport)*, 2015 QCCS 2477 (CanLII).
[2] *An Act Respecting Compensation Measures for the Carrying out of Projects Affecting Wetlands or Bodies of Water,* CQLR c M-11.4.

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