COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027429-182
(500-17-095472-166)

MINUTES OF THE HEARING

DATE: May 18, 2818

THE HONOURABLE MARK SCHRAGER, J.A.

APPLICANT	COUNSEL
3077004 CANADA INC.	Mtre ROBERT DAIGNEAULT *(Daignealt avocats inc.)*
RESPONDENT	COUNSEL
ATTORNEY GENERAL OF QUEBEC	Mtre NATHALIE FISET *(Ministère de la Justice, DGAJLAJ)*
IMPLEADED PARTY	COUNSEL
CITY OF VAUDREUIL-DORION	Mtre JEAN-FRANÇOIS GIRARD *(Dufresne Hébert Comeau Inc.)*
ADMINISTRATIVE TRIBUNAL OF QUEBEC	*Absent*

DESCRIPTION: **Application for leave to appeal from a judgment rendered on February 23 2018, revised on March 16 2018, by Jean-Yves Lalonde of the Superior Court, District of Montreal**

Clerk: Elisabeth Lepage	Courtroom: RC-18

HEARING

9:30	Commencement of the hearing.
	The parties have been advised that their presence was not required today.
	BY THE JUDGE:
	Conclusion of the hearing.

(s)

Clerk

BY THE JUDGE

JUDGMENT

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[1] I am seized with an "Application for Leave to Appeal from a Judgment that Terminates a Proceeding" under article 30, para. 2, subsection 5 *C.C.P.*

[2] Applicant seeks leave to appeal the judgment rendered on February 23, 2018 and revised on March 16, 2018 by Superior Court, District of Montreal (the Honourable Jean-Yves Lalonde), dismissing the Applicant's proceeding in judicial review of a decision of the Tribunal Administratif du Québec of August 10, 2016.

[3] Applicant wishes to construct a residential development on its property in the City of Vaudreuil-Dorion. The site includes a body of water, which was a stone quarry in the 1960's. Applicant commenced pumping water with a view to draining and eventually filling the depression. A dike was constructed to block the pumped water from draining back into the old quarry.

[4] The Minister of Sustainable Development, Environment, Fauna and Parks, as it then was, (hereinafter the "Minister") considers this body of water to be a lake and as such, the works described above require a certificate under s. 22 of the *Environmental Quality Act*.[1] Applicant did not have such a certificate and indeed refused to obtain one despite being made aware of the necessity by various civil servants employed by the Minister; it continued the pumping work despite being called upon by the responsible authorities to stop. Consequently, the Minister issued an order pursuant to s. 115.2 of the *Act* enjoining Applicant to stop the work.

[5] The contestation of this order by Applicant gave rise to the decision of the TAQ under judicial review before the Superior Court.

[6] The Superior Court decided that the review of the TAQ's decision was to be made on the basis of reasonableness given its exclusive jurisdiction under s. 15 of the *Act* respecting administrative justice[2] and that the issues for determination were mixed questions of fact and law. In such regard, the judge explained that the TAQ was called upon to decide whether the *Act* (and specifically s. 22) applied to the body of water and more specifically: 1) whether it was a lake within the meaning of the *Act*; 2) whether the outlet canal constructed by Applicant was a "cours d'eau" within the meaning of the *Act*; and 3) whether the exemption under s. 1(3) of the *Regulations* applied.

[7] The judge's review of the TAQ's 65-page decision caused him to conclude that regarding the first and second issues the outcome was reasonable and in his view also correct. The TAQ analyzed the proof including the expert opinions in a transparent and intelligible manner so that the judge concluded:

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1 *Environmental Quality Act*, CQLR, Q-2, hereinafter the "*Act*".
2 *Act respecting administrative justice*, CQLR, c. J-3.

> [81] Le TAQ a eu l'opportunité et le bénéfice d'entendre la preuve, d'étudier les rapports des experts, de soupeser la valeur probante du témoignage des experts et des arguments de part et d'autre. Il n'appartient pas au Tribunal de révision judiciaire de réévaluer tout cela, surtout en absence des transcriptions de la preuve ou l'identification d'un dérapage particularisé dans l'évaluation de cette preuve. Pour l'heure, l'exercice en est un d'examen de la légalité du processus et, de toute évidence, le TAQ a procédé à un exercice cohérent et pondéré. Chacune des questions en litige était au cœur de sa compétence et de sa spécialisation.
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> [82] L'interprétation retenue par le TAQ du terme «lac» s'harmonise parfaitement avec l'esprit et la finalité de la LQE, de même qu'elle s'avère respectueuse de l'intention du législateur.
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> [83] Le Tribunal est d'avis que le Ministre a eu raison de considérer cette ancienne carrière comme étant désormais un écosystème riche arborant une grande diversité d'habitats et offrant refuge à de nombreuses espèces fauniques et floristiques (par. 171). La LQE s'applique à cet état de fait.
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> [84] Force est de conclure que le TAQ a rendu une décision raisonnable en définissant le terme «lac» et en concluant que le plan d'eau litigieux est un lac au sens de la LQE.

[8] Similarly regarding the outlet canal, the judge concluded:

> [97] S'en remettant à une décision récente du TAQ, les décideurs administratifs en arrivent à la conclusion que l'exutoire du lac de la carrière, soit le tronçon rectiligne d'environ 30 mètres, bien que d'origine anthropique, s'avère un cours d'eau au sens de la LQE.
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> [98] Le Tribunal n'y voit aucune démarche irrationnelle. La portion sinueuse (208 mètres) du lit d'écoulement est clairement d'origine naturelle. Il n'est pas déraisonnable de considérer que la portion rectiligne, d'origine anthropique, fait dorénavant partie du cours d'eau au sens de la LQE.
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> [99] Le TAQ a raison de considérer qu'il s'agit désormais d'un ensemble permettant un lien hydrique entre le lac de la carrière et le lac des Deux-Montagnes. Le résultat choisi s'appuie raisonnablement sur la preuve et ne laisse paraître aucune erreur d'appréciation.
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> [100] Le Tribunal est d'avis que la qualification retenue par le TAQ fait non seulement partie des issues possibles acceptables en regard du droit et de la preuve, mais qu'elle est correcte. L'exutoire du lac est un cours d'eau au sens de la LQE.
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> [Renvoi omis]

[9] On the third question, the judge agreed with the TAQ's conclusion that the exemption did not apply albeit for different reasons than the TAQ. As such, he concluded that the permit issued by the City to backfill the lake did not preclude the application of s. 22 of the *Act*.

[10] Lastly, although the point is raised at the beginning of the judgment of the Superior Court, the judge found that the Applicant commenced work in bad faith and continued despite being notified of the Minister's position that a s. 22 certificate was required. In the view of the judge, this constituted bad faith so that the TAQ exercised its jurisdiction under s. 96 of the *Act* and the Applicant did not come to court with "clean hands". Since judicial review is a discretionary remedy, the judge found that the behaviour constituted a "fin de non-recevoir" to judicial relief.

[11] Leave under art. 30 *C.C.P.* requires that the decision of the lower court involves some issue meritorious of leave such as a new point of law or conflicting judicial decisions.

[12] Applicant does not convince the undersigned that leave should be granted. The judge's remarks concerning the "fin de non-recevoir" can be considered *obiter dicta* given his conclusion that the TAQ's decision was reasonable.

[13] The standard of review is not correctness as the Applicant argues. There is no issue present of the nature referred to by the Supreme Court as attracting a review on the basis of correctness.[3] The TAQ exercised its jurisdiction under s. 96 of the *Act* and analyzed the evidence adduced in the light of a statute within its mandate to apply.

[14] Applicant refers to *Québec (Procureur général) v. Forces Motrices Batiscan Inc.*,[4] decided by this Court, prior to *Dunsmuir*. That case dealt with the jurisdiction of the Minister to revoke a permit previously issued under the *Act*. Even if such a question could be subject to review on the basis of correctness, there is no such issue present here. The meaning of "lake" in the *Act* was considered in detail by the TAQ. The term is used but not defined in the *Act*. The meaning of the term and consideration of the evidence were properly reviewed by the Superior Court judge on a reasonableness basis. The resolution of the issue as decided by the judge does not give rise to any point of principle that merits an inquiry by the Court of Appeal.

[15] Finally, and again, the interpretation of s. 1(3) of the *Regulations* does not give rise to a point of principle. The case law referred to by the Applicant (*Filion c. Vallée-du-Richelieu (Municipalité régionale de comté de la)*,[5] and *6169970 Canada inc. c. Québec (Procureur général)*,[6] does not further Applicant's case for leave. The latter case dealt with a question of statutory interpretation of the section of the *Regulations*. *Filion* deals with the application of s. 22 to the altering of the course of a waterway. Lalonde, J.S.C., notes that the permit obtained from the City in this case contains the comment that a certificate under s. 22 of the *Act* would be required prior to backfilling the lake. Whether the City had the power to authorize the filling of the lake is not in issue here. On the facts of this case, the City explicitly stated on the permit that the certificate was required – i.e. the City was not authorizing that work by issuing the permit.

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3 See for example *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, 2011 SCC 59, paras. 35-36.

4 *Québec (Procureur général) v. Forces Motrices Batiscan Inc.*, 2003 CanLII 41711 (QC CA).

5 *Filion v. Vallée-du-Richelieu (Municipalité régionale de comté de la)*, 2006 QCCA 385.

6 *6169970 Canada inc. v. Québec (Procureur général)*, 2013 QCCA 696.

[16] Both the TAQ and the Superior Court examined in a judicious manner the position of the Applicant to conclude in the applicability of s. 22 of the *Act* to Applicant's situation. In my view, there is nothing raised in Applicant's motion that would qualify this matter for leave to appeal.

FOR THE FOREGOING REASONS, THE UNDERSIGNED:

[17] **DISMISSES** the application for leave to appeal from a judgment that terminates the proceeding, with legal costs.

MARK SCHRAGER, J.A.