# Duty to advise on contamination risks: Couillard Construction Limitée v. Procureur général du Québec (MTQ)

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In *Couillard Construction Limitée v. Le Procureur Général du Québec* (MTQ), 2022 QCCS 2069, the Superior Court of Québec granted a general contractor payment in full for excavation work that led to water contamination, after it was determined that the Ministère des Transports du Québec (MTQ) had failed to divulge study results that identified contamination risks yet refused to pay the contractor.

## Background

This matter arose further to the project for the northward extension of Highway A-5 in Outaouais, carried out between 2012 and 2014 by Couillard Construction Ltée (Couillard), represented by BLG.

The highway's layout, determined by the Ministère des Transports du Québec, required the excavation of a significant quantity of rock (375,000 $m^3$) in proximity of several residences and small businesses drawing drinking water from artesian wells located alongside the future highway. At the design phase, the MTQ and its teams of professionals conducted various analyses with a view to determining the project's potential impacts. These endeavours specifically identified the artesian wells in question as being at risk of contamination due to their proximity to project blasting zones, and further resulted in the implementation of a water contaminant monitoring program. In the tender process through which the MTQ retained Couillard to act as the general contractor, the MTQ surprisingly did not divulge any information whatsoever pertaining to these water contamination risks or the monitoring program.

As suspected by the MTQ, and although all parties admitted that Couillard carried out the work in compliance with the plans and specifications, the significant rock excavation in proximity of the wells resulted in increased levels of nitrites and nitrates in certain wells' drinking water, as well as the unexpected appearance of perchlorates. The MTQ thereafter required that Couillard carry out additional work directly related to managing this situation, work which the MTQ's head site supervisor initially announced would be payable through internally controlled claims mechanisms.

Despite Couillard's exemplary collaboration, the MTQ ultimately made an about-face, deciding that the appearance of nitrites, nitrates and perchlorates in the water resulted from project blasting and therefore was the sole responsibility of Couillard and its dynamiting sub-contractor, Dyfotech inc. (Dyfotech). Accordingly, the MTQ refused to pay Couillard for said work, representing $1,046,864.50, and further imposed four (4) contractual holdbacks totalling $854,667.47. Couillard sued the MTQ claiming both of these amounts, in response to which the MTQ denied owing anything and brought a counterclaim seeking payment of $1,063,207.99 for additional decontamination and remedial efforts.

# Decision and key takeaways

The Court ultimately granted Couillard's claim in its entirety and dismissed the MTQ's counterclaim for the following reasons:

- The MTQ's non-disclosure of the information it possessed identifying water contamination risks constituted a clear breach of its obligation of information and duty to advise. Internal e-mail exchanges within the MTQ throughout the work also led the judge to conclude that the MTQ breached its obligation of information during the execution phase of the project.
- During the execution of this work, neither the MTQ nor its site supervision professionals identified any instances of non-compliance with respect to the explosives or their detonation. Furthermore, at the time of the project, the MTQ did not prohibit the use of explosives containing perchlorates. It is of note that the Court set aside all arguments exposed by the MTQ's expert witnesses, namely as their opinions were purely theoretical and unsupported by factual evidence.
- The MTQ's living interpretation of the contract confirmed Couillard's position, namely in light of the MTQ's initial confirmation that Couillard would be paid the work aiming to remedy the situation when the first signs of contamination appeared in 2012.

Also read BLG's summary of the decision.

# Contact us

If you have any questions about this article or wish to discuss other legal concerns related to construction matters, we invite you to contact the authors and contacts below or any lawyer from our Construction Group.

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