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Superior Court Refuses to Cancel Order Allowing Expansion of Canadian Malartic Mine

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In *Dave Lemire v Canadian Malartic Mine GP and La Procureure générale du Québec*, 2017 QCCS 1438, the Québec Superior Court (Court) dismissed an application for judicial review brought by Dave Lemire, a resident of the city of Malartic. Mr. Lemire asked for the cancellation of a government order authorizing the proposed expansion of an open-pit mine operated by Canadian Malartic GP (CMGP) on the following grounds: the Government used its discretionary power for improper purposes; its decision to adopt the order had already been made before the proper procedure was completed; the procedure for adopting the order was non-transparent and unintelligible; and the content of the order was unreasonable. At the heart of the dispute are the sound environment conditions under the order and, to a lesser extent, the ore extraction rate.

Procedure for Authorizing the Project

The *Environment Quality Act* (EQA) sets out rules for authorizing certain activities that are likely to emit contaminants into the environment. Noise can be considered an environmental contaminant within the meaning of the EQA. The proposed expansion of the mine is subject to an authorization from each the Minister and the Government, with the latter issued by order. EQA sections 31.1 and following provide for the steps to be taken before such an order is adopted.

Background

In 2013, Osisko Mining Corporation, which owned the mine at the time, sent the Department of Sustainable Development, Environment and Parks (MEQ) a notice concerning the expansion of the mine in Malartic, thereby beginning the authorizing process under the EQA.

In 2015, CMGP filed the environmental impact assessment required to obtain the order. The assessment was made public in 2016 and the MEQ asked the *Bureau d'audiences publiques sur l'environnement* (BAPE) to hold public hearings and to file a report on its findings. The BAPE filed its report in October 2016. On April 11, 2017, the MEQ filed an environmental analysis report concluding that the project was acceptable subject to certain conditions. On April 12, 2017, the Government of Québec adopted the order.

Decision

The Court began by stating that nothing in the plaintiff's evidence or arguments mentioned the ore extraction rate, so it held from the outset that there was no basis for it to intervene in that regard.

With respect to the noise, the Court noted that there is no binding provincial standard regulating sound environment. Instruction Note 98-01, "*Traitement des plaintes sur le bruit et exigence aux entreprises qui le génèrent*"[1] [Treatment of noise complaints and requirements for the companies causing it] is not legally binding. Although it was issued by the Minister in charge of enforcing the EQA and is applied across Québec, it is merely a directive, not a regulation.

The plaintiff also argued that the Government used its discretionary power for improper purposes. The Court dismissed this argument and held that, although the sound environment constitutes an important aspect in analyzing a project, the Government may take other considerations into account. Those factors include the social acceptability of a project and its social and economic impact.

As for the argument that the decision to grant the order had already been made, the Court held that although several discussions unquestionably took place between the representatives of the MEQ and CMGP before the order was adopted, on the balance of probabilities, nothing suggests that the Government decided in advance to authorize the project before the procedure leading to the adoption of the order prescribed by the EQA was completed.

The plaintiff also asserted that the procedure for adopting the order was unintelligible and non-transparent. After analyzing the evidence, the Court held that the plaintiff had failed to show any lack of transparency or any unintelligibility whatsoever. On the contrary, the Court held that the procedure was clearly documented and easily understandable.

As for whether the order was unreasonable, the Court stated that the choice of whether or not to impose Instruction Note 98-01 is at the heart of the debate. It held that the Government's decision not to incorporate the entire Instruction Note 98-01 in the order was properly based on information available to the Government when it made its decision.

To conclude, the Court reiterated that it was not up to the courts to substitute their opinion for that of the decision-maker – the Government in this case.

Only a preponderance of evidence that the Government's broad discretionary authority was exercised illegally might have led the Court to allow the plaintiff's application for judicial review.

Davies acted as co-counsel for CMGP in this case.

[1] RSQ (c Q-2), sections 20 and 22. Read 98-01 (in French only).

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