IN FACT AND IN LAW

Resource and
Environment Law

June 2000

Acquired Rights or Authorizations Required With Respect to the Tapping of Spring Water or Mineral Water

By Hélène Lauzon

The outcome of the public hearings on water management held by the BAPE may very well give rise to major legislative amendments regarding the tapping of underground water. In its report, the BAPE recommended that all projects for the tapping of 75 m^3 or more per day be subject to the environmental impact assessment and review procedure. Moreover, it also recommended that the legal status of underground water be clarified.

Consequently, it would be wise for all business operators to review their activities in the near future in order to determine whether they benefit from acquired rights and, if not, to obtain the necessary authorizations before the introduction of new legislative provisions.

This bulletin will help you answer certain questions so that you may ensure that your affairs are in order with respect to the various authorities in question. We will begin by examining your rights regarding boring or drilling activities, then your rights relating to the tapping of spring water or mineral water, and finally your rights regarding the operation of a spring water or mineral water bottling plant, all in light of the Civil Code of Québec, *the* Environmental Quality Act *(hereinafter referred to as the "EQA"), the* Act Respecting the Preservation of Agricultural Land and Agricultural Activities *(hereinafter referred to as the "APALAA") and your municipality's planning by-laws.*

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

The Scheme Applicable Pursuant to the *Civil Code of Québec*

Pursuant to the *Civil Code of Québec* (hereinafter referred to as the "C.C.Q."), there is a controversy as to whether underground water constitutes public or private property. In fact, in its report, the BAPE recommended that the legal status of underground water be clarified. We will consider the principal obligations imposed by the *Civil Code of Québec* upon the owner of a spring.

Article 913 C.C.Q. stipulates that water constitutes common property which may not be appropriated. However, water which is collected and placed in receptacles, but which is not intended for public utility, may be appropriated.

Summary

For its part, article 951 C.C.Q. states the principle that ownership of the soil carries with it ownership of what is above and what is below the surface. Therefore, the owner may make such constructions, works or plantations above or below the surface as he sees fit. However, he is bound to respect the rights of the State in mines, sheets of water and underground streams.

Moreover, article 980 C.C.Q. stipulates that an owner who has a spring on his land may use it and dispose of it.[1] The second paragraph of article 980 provides that the owner may, for his needs, use water from the lakes and ponds that are entirely on his land, taking care to preserve their quality.

Article 981 C.C.Q. states the principle that when water leaves the owner's land, he must direct the water into its regular course "*not substantially changed in quality or quantity*." Thus, the legislature has added a restriction regarding the quantity and quality of water which leaves the land of an owner who wishes to use the water. The water in question in this case is surface water.

Finally, article 982 C.C.Q. confers upon all persons the right to use a spring, lake, sheet of water, underground stream or any running water, with the corollary right to require the destruction or modification of any works by which the water is being polluted or dried up, unless to do so would be contrary to the general interest.

Therefore, the legislature has specifically imposed upon the owner of land the obligation to respect public rights to sheets of water and underground streams, as well as the obligation to preserve the quality and quantity of water in virtue of articles 980 and 981. If the owner fails to abide by these rules, article 982 specifically grants a recourse to those who use the water resource.

The Scheme Applicable Pursuant to the *Environmental Quality Act*

Boring or Drilling Activities

As a starting point, it should be noted that pursuant to section 45.4 of the EQA no person may, except with a permit from the Minister, make borings or drillings for the purpose of locating and tapping deep underground water sources. This permit is issued annually and expires on April 1st of each year (section 45.5 of the EQA). The permit application must be submitted in accordance with the rules set forth in the *Regulation Respecting Underground Waters*.

Consequently, it is crucial that you obtain this type of permit before beginning such boring or drilling activities. If you hire a subcontractor to carry out the work, you have the obligation to ensure that the subcontractor has the necessary permit and that the permit is still valid.

The Tapping of Spring Water or Mineral Water

You should determine whether you benefit from acquired rights regarding the carrying on of such activities or whether you need to obtain authorizations.

Acquired Rights

Pursuant to section 32 of the EQA, no one may establish a "water supply intake" before having submitted the plans and specifications and having obtained the authorization of the Minister of the Environment.

This provision came into force on December 21, 1972. Therefore, any firm whose spring water or mineral tapping activities began before December 21, 1972 will benefit from acquired rights and will not be required to obtain an authorization pursuant to section 32, provided it has not made any changes to its well or to the piping of the well.

[1] The legislature omitted the words "as he pleases" which were contained in article 502 of the *Civil Code of Lower Canada*.

If a firm were to increase its production or change its procedures and such increase or change were likely to result in a change in the quality of the environment (e.g. a depletion or lowering of groundwater levels), it would have to obtain an authorization pursuant to section 22.

- The Maximum Authorized Rate of Flow in the Case of Acquired Rights

The department of the environment uses the technical maximum capacity of a well as the basis for setting the authorized rate of flow. If hydrogeological surveys have been carried out, the department will base itself on the results of these surveys in order to set the maximum authorized rate of flow.

Exercised Rights

If a firm began its operations after December 21, 1972 or if it lost the benefit of its acquired rights after this date, in theory it would have had to obtain an authorization pursuant to section 32 or section 22 of the EQA, depending upon the type of change made. However, the department of the environment has shown some tolerance towards firms who were carrying on spring water or mineral water tapping activities before 1994. In such cases, the department recognizes the existence of "*exercised rights*", without, however, expressly admitting that these rights are acquired rights, given that, since 1972, section 32 of the EQA has imposed the obligation for an authorization. Therefore, this is a "tolerance" which the department of the environment applies.

This tolerance may protect you from having the department of the environment institute proceedings against you, but it will not protect you entirely against third party recourses. In fact, those who oppose the tapping of spring water or mineral water could, one day, raise this issue and contest the department's practice which consists in "tolerating" such situations. These opponents could try to force the department to apply section 32 of the EQA and require water bottlers to obtain specific authorizations; they could also institute injunctive proceedings pursuant to section 19.1 of the EQA.

- The Maximum Authorized Rate of Flow in the Case of Exercised Rights

In situations in which the department of the environment recognizes exercised rights, how does it set the maximum authorized rate of flow, given that no hydrogeological reports will have been submitted to it? Pursuant to section 22 of the *Regulation Respecting Bottled Water*, manufacturers and importers of bottled water must, before undertaking marketing activities, send various information to the Minister, such as pumping tests within the scope of a hydrogeological survey, in order to allow the Minister to verify the accuracy of the statements made on a label. Thus, the maximum rate of flow is set by using the pumping tests required by the Minister pursuant to this section. There are specific situations in which the department obtains other information subsequent to the pumping tests, such as information disclosed pursuant to the *Act to Provide for the Protection of Groundwater*.[2]

However, as a general rule, when a firm benefits from an "acknowledgement of exercised rights" and it wishes to increase its maximum authorized flow, it must file an application for authorization and submit a hydrogeological report.

[2] S.Q. 1998, c. 25.

The department requires that these reports deal with water quality and with the quantity of water tapped and that they show natural protection as well as the absence of conflicts in use.

Situations in Which an Authorization Pursuant to Section 32 of the EQA is Required

Although the EQA came into force on December 21, 1972, as we have seen, the department applies a policy of tolerance with respect to firms who were already carrying on operations prior to 1994. For firms who began their operations after 1994, the department applies section 32 and requires that they obtain an authorization pursuant to section 32 of the EQA by submitting a hydrogeological report.[3]

Pursuant to section 32.3 *in fine* of the EQA, an applicant must also submit, in support of his application, a certificate of the clerk or secretary-treasurer of the municipality in whose territory the activities will be carried on, attesting that the municipality does not object to the project in question.

- The Maximum Authorized Rate of Flow When an Authorization Pursuant to Section 32 of the EQA is Granted

The authorization granted pursuant to section 32 of the EQA can set the maximum authorized rate of flow on the basis of the hydrogeological surveys which have been submitted. However, an authorization will not always set forth the maximum authorized rate of flow. In such cases, it is appropriate to refer to the documents submitted in support of the authorization application, which documents form an integral part of the authorization. Most of the time, these documents set forth the acceptable rate of flow. When the documents submitted in support of the application do not deal with the rate of flow, the department will refer to the pumping tests required pursuant to section 22 of the *Regulation Respecting Bottled Water* in order to determine the maximum authorized rate of flow. It should be noted that any subsequent increase in the rate of flow is subject to the filing of an application for an amendment of the authorization, which application must be submitted with a hydrogeological report.

Authorization Pursuant to Section 22 of the EQA

Given that section 32 requires an authorization in order to "establish" a water supply intake, one might wonder whether an authorization is also required pursuant to section 22 of the EQA which deals in particular with the carrying on of the activity. In other words, is one required to obtain an authorization pursuant to section 32 in order to establish the well and an authorization pursuant to section 22 in order to operate the well? Section 22 of the EQA requires a firm to obtain a certificate of authorization before commencing an activity which is likely to result in a contamination of the environment or a change in the quality of the environment. Given that the tapping of spring water or mineral water is likely to change the water table, one might think that an authorization pursuant to section 22 is also required. However, the *Regulation Respecting the Application of the Environmental Quality Act* expressly stipulates that a firm that has obtained an authorization pursuant to section 32 of the EQA is exempt from the obligation to obtain a certificate of authorization pursuant to section 22. Therefore, the word "establish" as used in section 32 of the EQA encompasses not only the construction of the well but also its operation.[4]

Having examined the situation applicable to spring water and mineral water tapping activities, let us turn to the scheme applicable to the operation of a spring water or mineral water bottling plant.

[3] The *Guide d'application relatif à l'examen de projets de prise individuelle d'eau commerciale*, 2nd ed., March 1995, as amended on December 23, 1996 and October 15, 1998, sets forth the procedure to be followed.

[4] However, it should be noted that the authorizations granted pursuant to section 32 of the EQA are non-transferable when there is a sale of assets, contrary to the certificates of authorization issued pursuant to section 22 of the EQA. In such a case, the purchaser must obtain a new authorization pursuant to section 32 of the EQA.

Hélène Lauzon has been a member of the Bar of Québec and specializes in Resource and Environmental Law

The Operation of a Spring Water or Mineral Water Bottling Plant

It is also worthwhile to consider whether the operation of a water bottling plant is protected by acquired rights or whether a certificate of authorization is required.

Acquired Rights

Section 22 of the EQA requires every person who wishes to carry on activities likely to contaminate the environment to first obtain a certificate of authorization.

This provision came into force on December 21, 1972. Therefore, a spring water or mineral water bottling plant which began its operations before December 21, 1972 will benefit from acquired rights and will not be required to obtain a certificate of authorization, provided it has not increased its production or changed its procedures in a manner which would impact upon the environment or change the quality of the environment.

Authorization Required Pursuant to Section 22 of the EQA

If a spring water or mineral water bottling plant began its operations after December 21, 1972 or if it lost the benefit of its acquired rights because it subsequently increased its production or changed its procedures, it will be required to obtain a certificate of authorization if its operations result in a discharge of contaminants into the environment or a change in the quality of the environment.

However, if the operation of the plant:

- is not likely to result in the discharge of contaminants:
  - into the atmosphere (e.g.: the operation of a distiller);
  - into a watercourse (e.g. the discharge of wastewater);
  - into the soil (e.g. the discharge of wastewater into a septic tank and then into the soil by means of a leaching field)

and

- is not likely to change the quality of the environment (e.g.: a lowering of groundwater levels, the creation of water pressure or water quantity problems in neighbouring areas, or a depletion of groundwater levels)

then

no certificate of authorization will be required.

It should be noted that an application for a certificate of authorization pursuant to section 22 of the EQA must be submitted with a certificate of the clerk or secretary-treasurer of the municipality in whose territory the activities will be carried on, attesting that the municipality does not object to the project in question.

We will now examine the scheme applicable pursuant to the Québec *Act Respecting the Preservation of Agricultural Land and Agricultural Activities*.

The Scheme Applicable Pursuant to the Québec *Act Respecting the Preservation of Agricultural Land and Agricultural Activities*

The APALAA has been in force since November 9, 1978. As a result of this *Act*, several areas have been designated as agricultural land by means of orders in council. These orders in council were adopted between November 9, 1978 and the end of 1979.[5] Consequently, in a designated agricultural zone, unless one benefits from acquired rights, it is

[5] Therefore, as regards a given area of land, it is advisable to consult the orders in council in order to determine when the land was designated as agricultural land.

[6] Section 26 – effects of the legislation.

forbidden to use a lot for purposes other than agriculture[6] without first obtaining the authorization of the Commission de protection du territoire agricole du Québec (hereinafter referred to as the "CPTAQ").

Acquired Rights

If, at the time the APALAA came into force, the lot on which you carry on your operations was used for residential, commercial or industrial purposes, it will benefit from acquired rights (section 101). In fact, even if a lot was used for residential purposes, it would be possible to carry on commercial or industrial activities, given that it was used for a purpose other than agriculture. Thus, if the spring water or mineral water tapping activities or the bottling activities were being carried on on a lot which was used for residential, commercial or industrial purposes prior to the coming into force of the applicable order in council, the firm would not have been required to obtain an authorization from the CPTAQ in order to continue its operations.

The acquired rights exist only with respect to the area of the lot which was used for purposes other than agriculture; this area may be increased to a half-hectare if, at the time the *Act* came into force, the lot was being used for residential purposes. It may be increased to one hectare if, at the time the *Act* came into force, the lot was being used for commercial, industrial or institutional purposes (section 103).

Consequently, it is important to restrict the spring water or mineral water tapping activities and/or the operation of a water bottling plant within this half-hectare or whole-hectare area, as the case may be.[7]

Authorization from the CPTAQ

If the lot on which the activities are being carried on was not used for residential, commercial or industrial purposes before the date of coming into force of the applicable order in council, the firm should have obtained an authorization from the CPTAQ in order to continue its operations.[8]

We will now turn to the scheme applicable pursuant to municipal planning by-laws.

The Scheme Applicable Pursuant to Municipal Planning By-Laws

Pursuant to *An Act Respecting Land Use Planning and Development*, each regional county municipality (hereinafter referred to as an "RCM") must adopt a development plan setting forth the general aims for the territory. Each municipality must then adopt a planning programme which includes a zoning by-law, a building by-law and a subdivision by-law. Each of these by-laws must fit in with the MRC's development plan.

The zoning by-law establishes the various zones (agricultural, commercial, industrial, residential, etc.) by prescribing the permitted uses for each zone.

When spring water or mineral water tapping activities or bottling activities are carried on in an industrial zone, they are usually carried on in accordance with the zoning by-law.

However, when these activities are carried on in an agricultural zone:

- either they benefit from acquired rights;

[7] It would be wise to ensure that the lot in question has not been subdivided contrary to the *Act*.

[8] It should be noted that the acquisition of agricultural land by a non-resident firm is also subject to the obligation to obtain an authorization from the CPTAQ.

- or a request for an amendment to the zoning by-law must be submitted to the municipality in order to allow such activities within the agricultural zone.

Thus, it is only if the activities in question began before the coming into force of your municipality's zoning by-law that they will benefit from acquired rights and be permitted to continue, failing which, you will have to file an application for an amendment to the zoning by-law.

For example, if the spring water or mineral water tapping activities began before the coming into force of the zoning by-law, but the operation of a water bottling plant began after such date, the firm will have to file an application for an amendment to the zoning by-law so as to permit the new activity which is not protected by acquired rights.

The recognition of acquired rights or compliance with the zoning by-law is that much more important given that a certificate from the municipality attesting that it does not object to a water tapping project or bottling plant project is required with respect to an application for authorization pursuant to section 32 or section 22 of the EQA.

Hélène Lauzon

You can contact any of the following members of the Resource and Environmental Law group in relation to this bulletin.

at our Montréal office
Yvan Biron
Hélène Lauzon
Louis A. Leclerc
Tania Smith
Michel Yergeau

at our Québec City office
Daniel Bouchard

Montréal
Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City
Suite 500
925 chemin Saint-Louis
Québec, Quebec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Associated Firm
Blake, Cassels &
Graydon LLP
Toronto
Calgary
Vancouver
London (England)
Beijing

Web Site
www.laverydebilly.com

LAVERY, DE BILLY
BARRISTERS AND SOLICITORS