



Original : Français

Québec, May 2, 2012

Ms. Danielle Doyer
Chair, Committee on Transportation
and the Environment
Hôtel du Parlement
2^e étage, Bureau 2.53
1045, rue des Parlementaires
Québec (Québec) G1A 1A4

Subject: *Bill 71, An Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water*

Dear Ms. Doyer:

The Québec Ombudsman reviews all bills tabled in the National Assembly and, when it deems necessary, intervenes under section 27.3 of its constituting act, which empowers it to call the attention of the government to legislative, regulatory or administrative reforms it deems to be in the public interest.

I therefore read Bill 71, *An Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water*, introduced by the Minister of Sustainable Development, Environment and Parks on April 24 last.

The bill *expressly* empowers the Minister to require from a natural person or legal person who applies for authorization under section 22 or 32 of the *Environment Quality Act* compensation measures designed, in particular, to restore, protect or enhance a wetland, a body of water or a piece of land. In addition, a compensation measure required pursuant to a certificate of authorization issued for that kind of project before March 12, 2012 is deemed valid in a retroactive manner.

I would begin by saying that I agree with the need for a framework of rules for projects affecting wetlands. However, I note that this bill was tabled in response to a provision of a Superior Court judgment rendered on March 12,¹ in which the Court ruled that this type of compensation measure, hitherto provided for in an administrative directive, was invalid and illegal. Furthermore, the Court stated that "this discretion was exercised for improper, arbitrary and unreasonable motives and justifies our intervention, especially given that such compensation is illegal because it breaches the right of ownership."² [*Translation*]. The Attorney General of Québec has filed for appeal of this judgment.

The bill's retroactive effect

The bill's retroactive effect and the particular context surrounding its passage have prompted me to make certain comments. I would like to point out that in the last 18 months, three laws have been passed to retroactively remedy situations in which the government was deemed to be at fault by a tribunal:

- Bill 131, *An Act to amend the Act respecting the Régie du logement and various Acts concerning municipal affairs* (December 2010);
- Bill 2, *An Act respecting the construction of a section of Highway 73 from Beauceville to Saint-Georges* (June 2011);
- Bill 21, *An Act to amend the Act respecting the marketing of agricultural, food and fish products* (November 2011).

As I have already said, Parliament is sovereign and can pass such a bill, but I repeat nonetheless that any provision that is retroactive in scope must always be the exception. Laws with a retroactive effect must never become standard practice enabling the government to sidestep the consequences of a judgment that is not in its favour. I consider that such legislative action demeans the power of the courts. In engaging in such action, the legislator bypasses the judicial process even though the above-mentioned judgment clearly shows that the company in question had every right to turn to the courts.

¹ *Atocas de l'Érable inc. v. Québec (Procureur général)*, 2012 QCCS 912.

² *Idem*, paragraph 149.

It also seems to me that the facts behind the introduction of the bill have been passed over. We are not talking about a measure that was a long time in the planning, but rather a hastily introduced legislative amendment designed to make up for an illegal and arbitrarily applied administrative practice.

But, more importantly, we must not forget that it all began when a company applied to the Ministère du Développement durable, de l'Environnement et des Parcs (Department) for a certificate of authorization in January 2008. After more than three years of administrative vacillation during which the company tried to meet the Department's many and ever-changing requirements, it was forced to go to court to obtain the requested certificate of authorization.

So, I have serious qualms about the grounds for the urgency cited for fast-tracking the bill. The delays and inconveniences suffered by the company contrast with the speed with which the government acted to cancel the effects of this judgment that was not in its favour. Clearly, there was no such rush when the Department was processing the company's application.

When citizens devote time and resources to have their rights recognized by the court and they win their case, retroactive changes to standards are unfair to them and undermine public confidence in the judicial process. This can only serve to discourage citizens from going to court to have their rights respected when the government is involved. Given today's context in which the government is trying to improve citizens' access to justice, I see a bill that is retroactive in scope as unjustified and contradictory.

Arbitrary standards

I repeat that it is crucial that citizens know the rules governing their dealings with the government. For example, in the case of an application for a certificate of authorization, citizens need to know the normative framework that applies. They must have a clear understanding of what to expect and the requirements that they will have to meet.

It seems obvious to me that the duty to protect wetlands requires some leeway in terms of the powers conferred on the Minister. However, I deplore the fact that the bill does nothing to correct the irregularities noted by the Superior Court with respect to the standards governing applications for certificates of authorization for projects affecting wetlands. The compensation measures established by the Department were deemed illegal and arbitrary. Even though the purpose of the bill is to rectify the illegality of the administrative directive, it remains arbitrary. I also have questions about the fact that the bill fails to address the Court's finding that said measures "alter or limit a fundamental right (peaceful enjoyment of property) provided for in section 6 of the *Charter of Human Rights and Freedoms*."³ [Translation]

³ *Idem*, paragraph 143.

The Québec Ombudsman's mission is to ensure that the rights of all citizens are respected and to see to it that citizens are treated justly, equitably and in keeping with democratic values. I am therefore of the opinion that section 3, which gives the bill its retroactive scope, should be removed, and that the judicial process underway should follow its course. That way, the government would avoid giving the impression that it can ignore court decisions that are not in its favour whenever and however it pleases.

Furthermore, if the bill becomes law, the Department should see to it that appropriate means for ensuring the protection and sound management of wetlands are clearly defined. It should also, as part of this process, ensure that the solutions chosen enable citizens' applications to be processed equitably and in a uniform manner.

Yours sincerely,

[French version signed]

Raymonde Saint-Germain
Ombudsperson

c.c.: Pierre Arcand, Minister of Sustainable Development, Environment and Parks
Jean-Marc Fournier, Minister of Justice and Government House Leader
Stéphane Bédard, Official Opposition House Leader
Diane Jean, Deputy Minister of Sustainable Development, Environment and Parks
Denis Marsolais, Deputy Minister of Justice
Louisette Cameron, Secretary, Committee on Transportation and the Environment
Cédric Drouin, Secretary, Committee on Institutions