IN FACT AND IN LAW

Environmental and
Resource Law

**July 2000**

# Water Use: Are You Ready for the Future?

By Hélène Lauzon

For many Québec industries, water constitutes an essential resource for various processes. Some industries tap their water from a watercourse, but many others obtain their supply directly from a well situated on their property.

For many years, the issue of underground water use was relevant only to bottlers, but the report of the Bureau d'audiences publiques sur l'environnement (BAPE) relating to water management, which was published in May 2000, suggests several legislative amendments which might also have consequences on industries whose industrial processes require the tapping of underground water.

In its report, the BAPE recommended that all new 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 allowing them to tap underground water within the scope of an industrial process or, failing same, seek 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 and then examine your rights relating to the tapping of underground water, 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 the land use planning by-laws of the municipality in which your firm operates.

## 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.

The *Civil Code of Québec* sets forth a series of rules, described below.

According to article 913 C.C.Q., 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.

Pursuant to article 951 C.C.Q., 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], and the second paragraph of article 980 C.C.Q. 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.

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

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.*" This restriction relates only to surface water which the owner wants to use.

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.

In summary, then, the legislature has specifically imposed upon the owner of land not only the obligation to respect public rights to sheets of water and underground streams, but also the obligation to preserve the quality of the water. However, the said owner may make such constructions or works on his property as he sees fit. If the owner fails to abide by these rules, article 982 C.C.Q. specifically grants a recourse to others who use the water resource. For example, your neighbours might have a recourse if your industry were to deplete or contaminate their groundwater.

## 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 boring or drilling activities. If you hire a sub-contractor to carry out the work, you have the obligation to ensure that the subcontractor has the required permit and that the permit is valid.

### The Tapping of Underground Water for Use in an Industrial Process

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 (Before December 21, 1972)*

Pursuant to section 32 of the EQA, no one may establish a "water supply intake" before having submitted the plans and specifications as well as having obtained the authorization of the Minister of the Environment. Some may think that the expression "water supply intake" relates only to water intended for human consumption and, therefore, excludes underground water tapped for use as process water. This is not at all the case. Firstly, French dictionaries define the word "*alimentation*" in various ways, including the activity of obtaining supplies. Secondly, the English version uses the expression "water supply" which encompasses all types of supply, regardless of the ultimate use. Thus, industries that tap underground water for use within their processes are subject to section 32.

This provision came into force on December 21, 1972. Therefore, any firm whose underground water 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, the well's piping or increased its production.

However, if a firm increased its production or changed its processes and such increase or change was likely to result in a change in the quality of the environment (e.g. a depletion or lowering of groundwater levels), the firm would have had to obtain an authorization pursuant to section 22 of the EQA.

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

Firms which began their operations after December 21, 1972 should, therefore, have obtained an authorization pursuant to section 32 in order to "establish" a water supply intake.

Given that section 32 requires an authorization in order to "establish" a water supply intake, one might therefore 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, one might wonder whether an authorization is required pursuant to section 32 in order to build the well and another 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 underground water is likely to change the water table, one might think that an authorization pursuant to section 22 is also necessary. 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

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obtain a certificate of authorization pursuant to section 22. The department of the environment currently considers that no certificate of authorization pursuant to section 22 is required in order to establish a water supply intake or to operate it. Therefore, the word "establish" as used in section 32 of the EQA encompasses not only the construction of the well but also its operation.[2] Therefore, one cannot operate a water supply intake unless one has obtained an authorization pursuant to section 32 of the EQA.

## The Scheme Applicable Pursuant to the *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*, some land has been designated as agricultural land by Orders in Council. These Orders in Council were adopted between November 9, 1978 and the end of 1979.[3] Consequently, in a designated agricultural zone, unless one benefits from acquired rights, it is forbidden to use a lot for purposes other than agriculture[4] without first obtaining the authorization of the Commission de protection du territoire agricole du Québec (hereinafter referred to as the "CPTAQ").

The majority of industries carry on their activities in industrial zones and will not be subject to these provisions. However, underground water tapping activities are sometimes carried out from a lot situated in an agricultural zone. Thus, we will now examine the applicable provisions.

### *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 underground water tapping activities are being carried out 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 APALAA 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).

Thus, when the underground water tapping activities are being carried out on a separate lot which is zoned as agricultural, it is important to restrict the said activities within this half-hectare or whole-hectare area, as the case may be.[5]

### *Authorization from the CPTAQ*

If the lot on which the water tapping 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 must obtain an authorization from the CPTAQ in order to continue its tapping of underground water for industrial process use.

## 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 with the RCM's development plan.

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

Consequently, industrial activities will be permitted in an industrial zone. Underground water tapping activities are usually ancillary to main operations and are also carried out in an industrial zone. However, there are cases in which the supply is located at a distance, on land which has been zoned as agricultural pursuant to the zoning by-law. In such a case:

- either such activities benefit from acquired rights;
- 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.

[2] 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.

[3] 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.

[4] Section 26 – effects of the legislation.

[5] It would be wise to ensure that the lot in question has not been subdivided contrary to the APALAA.

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 an underground water tapping project is required with respect to an application for authorization pursuant to section 32 of the EQA.

**Please do not hesitate to contact us should you require any information regarding the matters discussed in this bulletin.**

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