500-17-091497-159

COUILLARD CONSTRUCTION LIMITÉE

v.

LE PROCUREUR GÉNÉRAL DU QUÉBEC

Summary of the Judgment

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

2. The highway's layout, determined by the *Ministère des Transports du Québec* ("**MTQ**"), required the excavation of a significant quantity of rock (375,000 m^3) in proximity of several residences and small businesses drawing their drinking water from artesian wells located alongside the future highway.

> "[261] [Our translation] The Court shares Couillard's attorneys' opinion that their client could not have modified the highway's layout determined by the MTQ, nor even suggest doing so. Rather, Couillard was required to respect the design elaborated by teams of specialized professionals over the four years preceding the publication of the tender documents."

3. Aware of the inherent risks in choosing this layout, in 2009 the MTQ analysed well water from the wells in question with a view to establishing benchmarks for various organic and chemical substances in case of contamination. This namely contemplated monitoring levels of nitrates and nitrites.

4. Indeed, in 2009, the MTQ knew – in fact, all those working in this field knew – that such a large quantity of rock could only be excavated using explosives, all of which are composed of varying degrees of ammonium nitrate.

5. Conversely, the impact of perchlorates in certain explosives was a little-known and emerging phenomenon in Quebec and Canada. Certain American States had only barely begun documenting this phenomenon and it was not until 2014, which is to say after Couillard's work, that the MTQ requested an amendment for the 2015 edition of its General Specifications[1] (the "**CCDG**") to prohibit the use of explosives

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[1] *Cahier de Charges Devis Généraux*.

containing perchlorates, and to require technical data sheets from contractors indicating the proposed explosive's chemical composition.

6. In 2010, the MTQ implemented a water monitoring program further to its 2009 analyses. The MTQ divulged neither the 2009 well water analyses, nor its 2010 monitoring program to bidders at the time of the call for tenders which was published on November 15, 2011, the deadline for bid submissions expiring the following December 21 (5 weeks).

7. Furthermore, while still in 2010, as the Federal Government was indirectly involved in this project which was carried out in part on the Federal Capital's territory, Transport Canada issued a third report which, from the outset, contemplated that corrective measures would be needed in the event that the water from the project-adjacent wells were contaminated.

8. 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:

> "[266] [Our translation] Respectfully, due to the total absence of probative evidence establishing even one incident throughout the entirety of the dynamiting work, or establishing Couillard's or Dyfotech's failure to respect the plans and specifications, the Court has great difficulty seeing how it could hold Couillard or Dyfotech liable for the increased levels of nitrites and nitrates in certain wells' water during the completion of the work and the measures taken to reduce and even eliminate these substances. The presence of nitrites and nitrates had already been noted prior to the project and the MTQ had already contemplated remedial efforts for such a situation with water treatment equipment."

9. The MTQ required that Couillard carry out additional work directly related to managing this situation, work which the MTQ's head site supervisor announced would be payable through internally controlled claims mechanisms.

10. Despite Couillard's exemplary collaboration, the MTQ made an about-face, deciding that the work related to the appearance of nitrites, nitrates and perchlorates in the water was the sole responsibility of Couillard and its sub-contractor, Dyfotech inc. ("**Dyfotech**"), thereafter refusing to pay Couillard for said work, representing $1,046,864.50, and further imposing four (4) contractual holdbacks totalling $854,667.47.

11. Couillard sued the MTQ for both of these amounts. The MTQ denied owing anything to Couillard and brought a counterclaim seeking payment of $1,063,207.99.

12. The Court ordered the MTQ to pay to Couillard the entirety (100%) of both amounts claimed, and dismissed the MTQ's counterclaim in its entirety for the following reasons.

A. Breach of Obligation of Information and Duty to Advise

13. The non-disclosure of the 3 reports issued in 2009 and 2010 constituted a clear breach of the MTQ's obligation of information and duty to advise:

> "[173] [Our translation] However, considering the manifestly relevant content of the three preliminary reports, the Court is shocked that none of them were disclosed or transmitted to the future bidders in the tender process though which Couillard was granted the contract. The MTQ did not even mention their existence, nor did it include any warnings or recommendations beyond specifying waterproofing for adjacent ditches without further explanation.
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> (…)
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> [230] One aspect the Court finds particularly striking is the MTQ's surprising reticence to disclose to the general contractor Couillard and to its sub-contractor Dyfotech in due time, all of the useful information it already had in its possession, well before the call for tenders, indicating the high risk of contaminating the groundwater feeding several wells in proximity of significant rock excavation work, precisely where the problems arose.
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> (…)
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> [234] Coulllard's attorney rightly maintained that in acting as it did, the MTQ breached its obligation of information or duty to advise with respect the general contractor, as well as Dyfotech.
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> (…)
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> [246] With respect for any opinion to the contrary, the evidence allows the Court to conclude in this matter that the MTQ clearly breached its obligation of information, both in the tender process and throughout the execution of the work.
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> [247] Once the problem was discovered, the MTQ attempted to take every means possible to attribute blame to Couillard – and consequently to Dyfotech – for the contamination of the artesian wells located in proximity of the dynamiting work downstream. Worse, the MTQ knew that the groundwater feeding many of these wells passed precisely through the area where it had required significant rock excavation with explosives that created risks of water contamination. Once this information was in hand, the identification of specific potential contaminants was not necessarily crucial, as the primary objective was to minimise the intrusion of contaminants in the groundwater, whatever they may have been.

> [248] It is worth repeating that the MTQ, and in particular its expert Roy, vainly insinuated that Dyfotech committed errors, or even was negligent in carrying out certain tasks and that these errors or negligent acts were the source of the contamination. Expert witness Soucy's entire testimony, which had little credibility, relied upon these hypotheses which were contrary to the documentation issued by CIMA+'s site supervision personnel – incidentally, from which no representative testified at trial – such documentation containing no such indications, aspect which engineer and MTQ project manager Sabourin admitted."

14. 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:

> "[225] [Our translation] The Court understands that this e-mail is representative of the attitude adopted by the MTQ, aiming to keep Couillard and Dyfotech in the dark with respect to important discussions and exchanges relating to the determination of the cause of the contamination and the determination of appropriate rehabilitation measures."

B. Couillard and Dyfotech respected the plans and specifications as well as industry standards

15. At the time of the project, the MTQ did not prohibit the use of explosives containing perchlorates.

> "[261] [Our translation] The Court shares Couillard's attorneys' opinion that their client could not have modified the highway's layout determined by the MTQ, nor even suggest doing so. Rather, Couillard was required to respect the design elaborated by teams of specialized professionals over the four years preceding the publication of the tender documents."
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> (…)
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> [288] In this context, the Court shares Couillard's attorney's view that it is difficultly imaginable that his client, a general contractor, having respected the plans and specifications throughout the execution of the work, could be held liable for this situation which was the responsibility of the Project's design professionals."

16. In fact, the MTQ had approved the general plan for drilling and blasting which Dyfotech and Couillard remitted prior to commencing the rock excavation work, which specified the type of explosives Dyfotech would use.

17. During the execution of this work, neither the MTQ nor Cima+ identified any instances of non-compliance with respect to the explosives and/or their detonation. Indeed, no non-compliance notices were issued throughout the Project with respect to Dyfotech's work.

18. The evidence adduced did not support the MTQ's theory, according to which Dyfotech failed to respect industry standards by disregarding explosive manufacturer instructions, which would have caused incomplete detonations, leaving explosive residue containing perchlorates in the rocky soil, which ultimately would have infiltrated the groundwater.

19. No compelling and credible evidence supported the MTQ's expert's position to the effect that the initiators in the explosive columns were insufficient, thereby leading to incomplete detonations. In fact, this hypothesis was contradicted by worksite reports that presented the results of each blast, none of which ever referred to fragmentation or excavation problems that could lead one to believe, or otherwise indicate, that incomplete detonations had occurred.

20. The cross examination of the MTQ's expert further allowed the Court to draw the following conclusions in his regard:

> "[127] Respectfully, the Court was shocked to see his true colours progressively emerge throughout the course of his testimony.
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> [128] Expert witness Roy became increasingly passionate, making it clear that he was on some sort of crusade against the "evil," negligent and irresponsible dynamiters who didn't take their profession seriously by disregarding industry standards, manufacturer instructions and applicable security standards, to the detriment of riverside residents who were deprived of drinking water due to their faults.
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> [129] **An expert witness that so patently espouses the cause of the party that retained him runs the risk of having his credibility irremediably compromised, as was the case in this matter.**"

C. The MTQ's living interpretation of the contract confirms Couillard's position

21. When the first signs of contamination appeared in 2012, the MTQ took the position that the work aiming to remedy the situation would be paid to Couillard through the internally-controlled claims mechanism, before the MTQ's about-face in January 2013.

22. The applicable edition of the CCDG (2011) which governed the work in question was modified by the MTQ in the 2015 edition to expressly exclude the use of any explosives containing perchlorates.
