

QUEBEC COURT SIDES WITH RESIDENTS LIVING NEAR WASTE SITE

By: Dan Kirby and Shari Elliott

The decision of the Quebec Superior Court of the District of Chicoutimi in *Girard v. 29447828 Quebec Inc.*, is an example of recent decisions in which regulators are found liable and it may further change the way regulators approach their relationship with industry. Regulators increasingly appear to be using strict enforcement of environmental legislation rather than relying upon voluntary compliance, even where, on a policy basis, voluntary compliance might be the most appropriate approach in the circumstances.

In *Girard*, the plaintiffs – residents living near a construction waste disposal site – commenced a class action against the site operator, the local municipal government and the Quebec Ministry of the Environment (Ministry). The plaintiffs claimed that violations of environmental legislation and the terms of the operator's permit from the Ministry resulted in contaminated leachate migrating onto the plaintiffs' properties. Moreover, it was alleged that the poor conditions maintained at the site contributed to the proliferation of rats, foul odours and noxious biogas.

The residents based their action against the Ministry on the fact that it had continued to permit the operation of the site despite the constant and continuous violations by the operator.

The court found that the Ministry was aware from the outset that violations by the operator were occurring. It concluded that, other than sending numerous notices requesting corrective action, the Ministry unduly delayed seeking redress through legal actions which were within its jurisdiction.

Ultimately, the court found that the Ministry did not act with reasonable vigilance in overseeing the authorization granted to the operator. Only after 2 ½ years of consistent violations did the Ministry inspector recommend that legal proceedings be commenced. It took an additional eight months before injunction proceedings were taken, an additional year before the Minister filed documents revoking the operator's permit in May 1998 and two years before regulatory charges were filed. After the permit was revoked, the Ministry did nothing to force the operator to close down.

In its reasons the court stated that the Ministry had a responsibility, under article 1457 of the Civil Code, to ensure supervision and follow-up on the site and to ensure that the operator complied with its permit.

The Ministry was not reasonably vigilant in carrying out these responsibilities. The court was harshly critical of the Ministry for not revoking the permit or intervening sooner to end the unacceptable activities of the operator, and the court rejected its defence that the Ministry lacked sufficient resources to fully attend to its responsibilities.

The court also ruled that the municipality bore a degree of liability for failing to enforce its own nuisance by-laws. Justice Babin found that the operators, the Ministry and the Municipality were severally liable with liability apportioned equally amongst them.

Justice Babin went further and stated that the insurance company for the Municipality would have to bear the costs ordered against the Municipality flowing from the presence of rats because the presence of rats was an insured risk.

Both the Ministry and the Municipality have filed appeals, so has the Municipality's insurance company.

While in the *Girard* case the failure of the Ministry to act appears to have been particularly egregious, the decision could reinforce the apparent fear of some regulators of being called to account before the courts if they fail to act in the face of even reasonably trivial violations of the law.

Regulators are generally particularly sensitive to being found by the courts to be at fault and the *Girard* decision might encourage regulators to more keenly pursue the regulated community in the future (even in situations that are not nearly as egregious as in *Girard*) merely to protect themselves and avoid potential criticism by the courts.

Such a trend would be unfortunate, in our view, since properly implemented voluntary measures, backed by a rational enforcement policy with a goal of achieving environmental compliance, are generally more efficient and cost-effective than a strict enforcement regime with liability avoidance as its basis.

Hopefully regulators will see the *Girard* decision as an extreme case restricted to the particular circumstances of the case and act in a manner consistent with rational environmental policies as opposed to self-interest.

However, given that current political trends may also support a "get tough" stance, be prepared for further regulatory actions that may, at best, be marginally justifiable on the basis of sound environmental protection policy.

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