

"Climate Test" – The Fight Against Climate Change at the Heart of the Overhaul of the Environment Quality Act

Environmental Bulletin

Bill 102 (PDF) tabled on June 7, 2016 by the Minister of Sustainable Development, the Environment and the Fight Against Climate Change, Mr. David Heurtel (the "Minister"), provides for the introduction into the environmental authorization scheme of a "Climate Test". This would enable the Minister to intervene at an early stage prior to the process requiring a project proponent to justify its technological choices, processes and energy sources, or requiring that it file a greenhouse gas emissions reduction plan. A project could even be made subject to the environmental impact assessment and review procedure if in the government's opinion, the project involves major climate change issues, even though such is not otherwise prescribed by regulation.

The "Climate Test"

By introducing directly into the environmental authorization scheme a mechanism to take into account greenhouse gas emissions, the legislator is responding to the requests, made by several environmental groups during the specific consultations which took place in the Fall of 2015, for the Minister to intervene at an early stage in the process. The requests put forward that incorporating the "climate change" aspect to the Minister's assessment matrix, would help reducing greenhouse gas emissions to a minimum and thereby promote the achievement of Québec's greenhouse gas emissions reduction targets.

Our analysis of the provisions of Bill 102 demonstrates that the Minister has granted itself the power to subject a project which, at first glance, appears to involve minor impact to the quality of the environment, to a more stringent analysis for the issuance of the environmental authorization applied for, on the grounds that such is warranted due to the greenhouse gas emissions attributable to the project. Indeed, Bill 102 provides that, under certain circumstances, to be specified in greater detail by government regulations, the Minister can take into account the greenhouse gas emissions attributable to the project. The quantity of greenhouse gas emissions will, therefore, have to have been assessed by the proponent of the project upon submission of an environmental authorization application. The Minister will also be entitled to assess any climate change impact mitigation and adaptation measures that a project may entail.

Bill 102 also provides that the Minister may prescribe that the project proponent take steps to reduce the greenhouse gas emissions attributable to the project. In particular,

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the selection of a specific technology, process or energy source, as well as measures to take into account the climate change impacts on the project itself and climate change adaptation measures as part of the project that the Minister deems warranted. Besides being difficult to predict, these technological requirements could be costly and have a significant impact on the engineering and time frame of a project.

Bill 102 leaves it up to the legislator to pass regulations, which will provide the framework for the exercise of the Minister's discretion regarding the taking into account of greenhouse gas emissions in the assessment of projects. At this time, we have very few hints as to the extent of this power. While it is true that Bill 102 does not explicitly state that the Minister could refuse to grant an authorization to a project that appears likely to be detrimental to the achievement of Québec's targets in the fight against climate change, this proposal remains worrisome. It runs counter to the predictability of the legal framework which ensures a more efficient, transparent and non-arbitrary environmental authorization process.

What Role Will The Cap-and-Trade System Play?

At this juncture, we can only wonder as to the consistency of introducing into the *Environment Quality Act* additional measures aimed at reducing greenhouse gas emissions in light of the already-implemented cap-and-trade system for greenhouse gas emissions. Are we to read into it that the government of Québec already expects the cap-and-trade system to fail as a mechanism enabling Québec to achieve the greenhouse gas emissions reduction targets that it has set for itself?

One should recall that, at the time when the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances* was implemented, the government of Québec drafted the regulation so that it would not be applicable to businesses emitting less than 25,000 metric tonnes CO₂ equivalent per year. The decision was based on the principle that they would become involved in greenhouse gas emissions reduction efforts due to the application of that regulation to fuel and combustibles distributors that transfer the carbon cost to their clients, thereby simultaneously urging their clients to adopt a responsible behaviour on the greenhouse gas emissions reduction front.

In light of the current partnership between Québec and California, with the upcoming arrival of Ontario in January 2017, one can only hope that the government will take all necessary steps to maintain the consistency of the legal framework and ensure the legitimacy of the cap-and-trade system for greenhouse gas emissions in which many Québec businesses have already become involved, directly or indirectly.