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State Agencies in Quebec – Exemption from Liens

David H. Kauffman*

A recent judgment of the Court of Appeal of Québec appears to imply that a legal hypothec of persons having taken part in the construction or renovation of an immovable (construction hypothec) is not available in the Province of Québec against the property of agencies of the Provincial crown. Many have interpreted this judgment in that fashion. Appearances may be deceiving.

In *HMI-Promec, s.e.n.c. c. 2954-4095 Québec inc. (Construction Kay-Bek Inn)*¹, a subcontractor registered a construction hypothec against certain administrative offices, housing, sports and recreational units at the Eastmain Camp in northern Québec belonging to Hydro-Québec, Société d'énergie de la Baie James (hereafter "Hydro-Québec SEBJ").² Hydro-Québec SEBJ is a subsidiary of Hydro-Québec.³ The subcontractor then instituted an action to confirm its construction hypothec against the property of SEBJ and to obtain a personal condemnation against the contractor and its surety. The contractor presented a motion and then the owner, Hydro-Québec SEBJ, the contractor and its surety presented another motion, all seeking to delete or to cancel the subcontractor's action and its construction hypothec.

The resulting litigation raised, among other issues⁴, the troubling quandary of whether or not a construction hypothec can be registered against the immovable property of Hydro-Québec or its subsidiary?

*Mr. Kauffman is one of the Editors of *Construction Law Reports*. He is a partner in De Grandpré Chait LLP, in Montreal.

¹(2007), 74 C.L.R. (3d) 153 (Que. C.A.).

²Leave to appeal to the Supreme Court of Canada was refused on July 3, 2008. [2008 CarswellQue 6057]

³Although not mentioned in the judgment, the writer notes that Hydro-Québec, Société d'énergie de la Baie James is a wholly-owned subsidiary of Hydro-Québec (ref. to Article 39.2 of *Loi sur Hydro-Québec*, L.R.Q., c. H-5). Article 39.3 of that Act applies the *Hydro-Québec Act* to Hydro-Québec, Société d'énergie de la Baie James where that Act differs from Part 1 of the *Québec Companies Act*, c. C-38. It is fair to assume, as does the Court of Appeal, that the Articles cited in the judgment regarding the rights and privileges of Hydro-Québec under the *Hydro-Québec Act* apply equally to its subsidiary, Hydro-Québec SEBJ.

⁴Another issue is whether the subcontractor's construction hypothec was properly registered against the buildings and structures in the Eastmain camp even though the electri-

In the Superior Court, St-Julien, J. held that certain assets of Hydro-Québec SEBJ were seizable under the circumstances in virtue of an exception in the law governing Hydro-Québec (and hence these assets could be affected by a construction hypothec).⁵ The exception in the law governing Hydro-Québec is described later on in this commentary. Because of this exception, which seems to permit a recourse against the assets of Hydro-Québec, the trial judge refused to dismiss out of hand the action of the subcontractor which was based upon a construction hypothec that may have been properly registered and in respect to which the subcontractor was entitled to his day in court.

The Court of Appeal reversed the trial judge for several reasons. To begin with, the Court of Appeal held that the particular statute which governed Hydro-Québec, the *Loi sur Hydro-Québec (Hydro-Québec Act)*, L.R.Q., c. H-5, confirms the status of Hydro-Québec as an agent of the State whose property belongs to the State. In this regard, the *Hydro-Québec Act* provides, in the language of both its English and French versions, that:

3.1.1 The Company, for the purposes of this Act, is, and has been ever since 14 April 1944, a mandatary of the State. *La Société est, pour les fins de la présente loi, un mandataire de l'État et l'a toujours été depuis le 14 avril 1944.*

3.1.2 The Company shall have power to possess property, and such power shall be unlimited. *La Société a le pouvoir de posséder des biens; ce pouvoir n'est pas limité.*

cal-mechanical installation of the subcontractor took place in the power station. The trial judge concluded that the power station and adjacent camp structures formed one development unit (*unité d'exploitation*), so that the construction hypothec could be registered against the adjacent structures as well. The Court of Appeal appears to concur (para. 14 of the judgment in *HMI-Promec, s.e.n.c. c. 2954-4095 Québec inc., supra*), this issue not being a focal point of the judgment. Regarding the notion of the development unit, see D. H. Kauffman and G. Gilain, *The Construction Hypothec* (Montreal: Wilson & Lafleur Ltée, Montreal, 2007), section 3.5ff; Pierre Ciotala, *Droit des sûretés* (Montréal, Les Éditions Thémis, 3rd Ed., 1999), p. 171.

⁵The trial judge does not categorically state that all assets of Hydro-Québec are seizable. In the Superior Court judgment, St-Julien J. observed that only some of the charged immovables in the camp did not serve the public utility, raising the implication that only those parts of the Eastmain camp that housed the workmen were seizable [see *HMI-Promec, s.e.n.c. c. 2954-4095 Québec inc. (Construction Kay-Bek Inn)*, EYB 2007-129357, at para. 46: "Le Tribunal retient que le campement visé par l'hypothèque légalement était le seul actif qui n'était pas d'utilité publique, puisque ce bâtiment servait à loger les travailleurs oeuvrant à la centrale d'Eastmain"]. At the early stage of the proceedings, the trial judge did not have to rule on that subject.

The property possessed by the Company is, and has been since 15 April 1944, the property of the State but the performance of the obligations of the Company may be levied on such property. *Les biens possédés par la Société sont la propriété de l'État, depuis le 15 avril 1944 mais l'exécution des obligations de la Société peut être poursuivie sur ces biens.*

The Court of Appeal additionally maintained that Hydro-Québec, as an agent of the State, benefits from the same privileges as does the State. No one may appropriate property of the State (Article 916 of the Civil Code of Québec).⁶ Consequently, property of Hydro-Québec cannot not be seized or be the object of execution procedures.

When dealing with the assets of an agent of the State, the law does not distinguish between property of the agent that falls into the public domain or into the private domain. The Court of Appeal declined to apply the distinction that Hydro-Québec may have both “public” property “established in the public interest that is appropriated to public utility” (Article 916(2) C.C.Q.) as well as, by converse inference, “private” property that is not appropriated to public utility. The Court held that theory of dual domains – namely that some property of a public entity falls into the public domain which cannot be appropriated in execution of a construction hypothec and other property falls into its private domain which may be appropriated in execution of a construction hypothec – does not pertain to agents of the State.⁷ Therefore the property of Hydro-Québec, which is declared by statute to belong to the State, is not susceptible to any such distinctions.

⁶Art. 916(2) of the C.C.Q. provides that: “No one may appropriate property of the State for himself by occupation, prescription or accession (. . .) *Nor may anyone acquire for himself property of legal persons established in the public interest that is appropriated to public utility*” (emphasis added). In Québec, agencies of the State (Crown), quaintly termed “legal persons established in the public interest”, are subject to their enabling legislation: Art. 300(1) of the C.C.Q. provides that: “legal persons established in the public interest are primarily governed by the special Acts by which they are constituted and by those which are applicable to them; (. . .).”

⁷*Richard Lasalle Construction ltée c. Concepts Ltd.*, [1973] C.A. 944. Author's note: by contrast, the theory of dual domains has been applied in the case of property belonging to a municipality, where some municipal assets may fall into its public domain and some into its private domain. See Peter Hutchins and Patrick Kenniff, “La dualité domaniale en matière municipale”, *Les Cahiers de Droit* (1971), 12 C. de D. 440; A. Lemay, “La Propriété immobilière municipale”, *Développements récents en droit municipal*, (1998) Les Ed. Yvon Blais, Cowansville, 33, at p. 40 f and specially at sections 2.1 and 2.2; Y. Crack, S. Duchesne, M.-H. Dupont, “L'hypothèque légale du constructeur sur l'immeuble de la personne morale du droit public”, *Développements récents en droit de la construction*, (2003) Les Ed. Yvon Blais, Cowansville, 75, specially at p. 87.

The Court of Appeal is cognisant of an opening to claims against the property of Hydro-Québec originating from a statutory exception in the second paragraph of Section 3.1.2 of the *Hydro-Québec Act*. Under that exception, a party who is a creditor of Hydro-Québec may execute a recourse against the property of Hydro-Québec:

The property possessed by the Company is (. . .) the property of the State but the performance of the obligations of the Company may be levied on such property.

The Court of Appeal succinctly notes that this statutory exception cannot be invoked by a subcontractor who has no direct claim against Hydro-Québec and to whom Hydro-Québec has no direct obligation. This is the crux of the case. In sum total, the Court of Appeal says:

24 L'hypothèque légale prise sur l'immeuble constitue un droit réel, mais ne constitue pas et ne découle pas d'une obligation qu'aurait assumée Hydro-Québec envers l'intimée. En l'absence de toute obligation d'Hydro-Québec de payer les travaux réalisés par l'intimée en vertu de son contrat de sous-traitance conclu avec l'appelante, l'intimée ne peut prétendre poursuivre l'exécution des obligations d'Hydro-Québec sur les biens de cette dernière.

(Our translation: A legal hypothec taken against the immovable constitutes a real right, but it does not constitute, and does not flow from, an obligation which was assumed by Hydro-Québec in favour of the Respondent [the subcontractor]. In the absence of any obligation on the part of Hydro-Québec to pay for the work produced by the Respondent pursuant to its subcontract with the Appellant [the general contractor], the Respondent cannot claim entitlement to pursue the assets of Hydro-Québec in execution of the obligations of Hydro-Québec.)

More the Court of Appeal does not say on this subject.

In fact, the Court of Appeal is addressing and refuting the argument, accepted by the trial judge, that the assets of Hydro-Québec are answerable not only in the event of Hydro-Québec's breach of a direct obligation for which Hydro-Québec is personally liable, but also for a breach of a "real" obligation of Hydro-Québec for which it is not personally but only hypothecarily liable. In the eyes of the trial judge, an hypothecary obligation of Hydro-Québec to an unpaid subcontractor represents no less an obligation of Hydro-Québec than does a personal obligation of Hydro-Québec. In such case, the exception found in the second paragraph of Section 3.1.2 of the *Hydro-Québec Act* would allow a successful

subcontractor to execute an hypothecary recourse against the assets of Hydro-Québec or its subsidiary. In the words of the trial judge:⁸

37 Même en tenant compte de l'arrêt *Maçonnerie Demers inc. c. Agence métropolitaine de transport* ([2004] R.D.I. 288 C.A.), où la Cour d'appel souligne qu'un droit réel n'est pas une obligation au sens de l'article 2 de la Loi sur l'agence métropolitaine de transport (L.R.Q., c. A-7.02), qui est au même effet que l'article 3.1.2 de la *Loi sur Hydro-Québec* et, de ce fait, ne confère aux sous-traitants aucun droit à l'encontre des biens de la société d'État qui demeurent, selon les principes bien connus, insaisissables.

38 Le Tribunal retient les propos du juge Biron dans *Nei Canada Ltd. c. Volcano ltée*, [1982] C.S. 285, inscription en appel (C.A., 05-01-1982), n° 500-09-00007-823, était plutôt d'avis que le législateur ne distingue pas, à l'article 14 de la Loi sur Hydro-Québec, maintenant l'article 3.1.2, entre obligations réelles et obligations personnelles et donc qu'il n'y a pas moins obligation lorsque celle-ci résulte de la loi plutôt que d'un contrat directement passé entre les parties.

Si l'article 3.1.2 de la *Loi sur Hydro-Québec* est applicable à l'obligation réelle, force est de constater l'existence d'une exception législative de saisissabilité faisant obstacle à l'application de la règle générale de l'insaisissabilité des biens de l'état.

As previously noted, the Court of Appeal rejects this line of reasoning. It holds that the hypothecary exposure of Hydro-Québec to a real right secured by a construction hypothec does not constitute an obligation that was assumed by, and is binding upon, Hydro-Québec. The Court of Appeal cryptically states its position, without expressing its rationale.⁹

This then raises the following corollary question, which is not crucial to the case at bar. Granted Hydro-Québec is not in a contractual relationship with a subcontractor and has not assumed a personal obligation to a subcontractor, but what would happen if the claimant were a contractor to whom Hydro-Québec has as-

⁸*HMI-Promec, s.e.n.c. c. 2954-4095 Québec inc. (Construction Kay-Bek Inn)* (2007), EYB 2007-129357, 2007 QCCS 6616, 2007 CarswellQue 13032 (Que. S.C.).

⁹The position of the Court of Appeal is set out in *HMI-Promec, s.e.n.c. c. 2954-4095 Québec inc. (Construction Kay-Bek Inn)*, *supra*, at para. 24. Perhaps the rationale may be found in an earlier decision of the Court of Appeal in *Maçonnerie Demers inc. c. Agence métropolitaine de transport* (2004), 41 C.L.R. (3d) 191 (Que. C.A.) (leave to appeal to the Supreme Court refused on September 30, 2004), mentioned later in this article. In footnote 8 to para. 24 in *HMI-Promec, s.e.n.c. c. 2954-4095 Québec*, the Court effectively invokes *stare decisis*, declaring without further explanation that: "Le jugement rendu en 1982 par la Cour supérieure dans *Nei Canada Ltd. c. Hydro-Québec*, [1982] C.S. 285 en appel invoqué par le juge de première instance doit être écarté depuis cet arrêt de la Cour de 2004."

sumed a personal obligation? If Hydro-Québec fails to honour a payment obligation under a construction contract between itself and a contractor, does a contractor have recourse against Hydro-Québec and its property in virtue of the exception found in Section 3.1.2 of the *Hydro-Québec Act* or is this possible recourse illusory? We shall resume this question after a brief digression.

For the sake of being methodical, the Court of Appeal also dealt with the ostensible ability of Hydro-Québec to hypothecate and alienate certain parts of its property under Article 27.4 of the *Hydro-Québec Act*:

27.4 The Company may, for the purposes of this division,¹⁰ acquire any property. It may also, for those purposes, lease, convey, alienate or encumber any property other than an immovable intended for the production, transmission or distribution of energy. *La Société peut, aux fins de la présente section, acquérir tout bien. Elle peut également à ces fins, louer, céder, aliéner ou grever tout bien sauf s'il s'agit d'un immeuble destiné à la production, au transport ou à la distribution d'énergie.*

Does Hydro-Québec's capacity to hypothecate and sell certain parts of its property (other than its immovable property which is intended for the production, transmission or distribution of energy) render Hydro-Québec's property susceptible to seizure in execution of a construction hypothec in the same manner that a secured lender could seize assets of Hydro-Québec upon Hydro-Québec's default to pay its secured lender? The Court of Appeal had dealt with this issue in its milestone 2004 decision in *Maçonnerie Demers inc. c. Agence métropolitaine de transport*.¹¹ As in that case, the Court acknowledged that Hydro-Québec's right to hypothecate and alienate its property was limited to the function of securing financing and granting security for such financing.¹² Article 27.4 of the

¹⁰The division in question is entitled "Financing of the Corporation / *Financement de la Société*".

¹¹*Maçonnerie Demers inc. c. Agence Métropolitaine de Transport* (2004), 2004 CarswellQue 1033, 41 C.L.R. (3d) 191 (Que. C.A.), *supra*, specially Rothman J. at paras. 28-31.

¹²In *Maçonnerie Demers inc. c. Agence métropolitaine de transport*, *supra*, a masonry sub-contractor who furnished certain work for the renovation of the Longueuil metro terminal registered a legal hypothec on the immovable property of the Metropolitan Transport Agency for the work performed but unpaid. Article 65 of the *Agence Métropolitaine de Transport Act* (R.S.Q. Ch. A-7.02) sets out the purposes for which and the conditions under which the Metropolitan Transport Agency may encumber its property: "The Agency may, with the authorization of and subject to the conditions determined by the Government, provide for its financing by means of loans or by any other means and enter into any contract in that respect. It may, among other things, acquire, lease transfer, alienate or encumber property for such purposes." (emphasis added) Article 2 of the *Agence Métropolitaine de Transport Act*, in language similar to that of the *Hydro-Québec Act*,

Hydro-Quebec Act has to be construed in its proper context. As it is to be found in the division of the Act which deals with financing the business of Hydro-Québec, its purport and relevance must be limited to the financing of Hydro-Québec's operations and not extended to other activities.

At the risk of redundancy, the Court of Appeal thus presented three arguments indicating that no construction hypothec registered by a subcontractor may affect property of Hydro-Québec or its subsidiary, Hydro-Québec SEBJ. The first argument arises from the general law: property of the State cannot be appropriated and therefore it cannot be affected by a construction hypothec. The second argument arises from the constitutive statute governing Hydro-Québec: it declares the property of Hydro-Québec to be property of the State which, by extension, cannot be appropriated and hence it cannot be affected by a construction hypothec. This second argument is subject to the exception contained in Article 3.1.2 of the Act to the effect that "the performance of the obligations of Hydro-Québec may be levied on its property", which exception does not apply in circumstances where Hydro-Québec has no direct obligation towards a subcontractor. A third argument indicates, in the sole context of a financing, that the property of Hydro-Québec may be appropriated but only by a secured party seeking to execute its security against the property of Hydro-Québec.

provides that: "(...) the execution of the obligations of the Agency may be levied against its property." As in the later case involving *HMI-Promec, s.e.n.c. c. 2954-4095 Québec inc. (Construction Kay-Bek Inn)*, 2007 QCCA 1818, the subcontractor had no direct contractual link (*lien de droit*) with the Metropolitan Transport Agency, a public body.

After citing with approval jurisprudence to the effect that an "obligation" under Quebec law requires a *lien de droit* between a debtor and creditor, Rothman J. held as follows:

"29 But the power to encumber the Agency's property is specifically limited by the condition that this must be for the purpose of *financing*. There is nothing in this case to indicate any contract of loan or the granting of any hypothec to secure any loan or other financing by respondent. There is simply no element of financing present in the construction contract, the sub-contract or any where else, so that respondent would have had no power to encumber its property by hypothec in favour of the general contractor or the subcontractor.

30 In my view, if *Art. 65* prohibited the granting of a conventional hypothec in the absence of financing, the same prohibition would logically be applicable to a legal hypothec asserted by a sub-contractor where no element of financing was involved.

31 Applying the general principle set out in *Art. 916 C.C.Q.*, in the absence of the exception of "financing" provided for in *Art. 65* of the Act, I conclude appellant had no right to appropriate for its own benefit or encumber respondent's metro terminal property, a property serving public utility."

The Court of Appeal mentions at the beginning of its concise judgement that any two of four arguments are sufficient to grant the appeal. We have identified three of the arguments, the fourth being hard to discern without resorting to the briefs of the parties. Ignoring the statutory latitude of Hydro-Québec to hypothecate its property for purposes of a financing, the remaining two operative positions advanced by the Court of Appeal are, firstly, the general proposition that property of the State cannot be appropriated (Article 916 C.C.Q.) and, secondly, the particular proposition that assets of Hydro-Québec are by special statute exempt from seizure, except where Hydro-Québec fails to perform its obligations (Article 3.1.2, *Hydro-Québec Act*).

The Court of Appeal ruled in both the *HMI-Promec* and *Maçonnerie Demers* decisions that the exception allowing seizure of the assets of Hydro-Québec does not apply to claims by subcontractors to whom Hydro-Québec owes no direct obligation. But one assumes the exception indeed does apply, in and of itself, to claims of contractors, architects or engineers who contract directly with Hydro-Québec or Hydro-Québec SEBJ, and who, in such case, would be entitled to register and execute a construction hypothec against its immovable property. The issue may be broadened beyond the construction realm to suppliers and others having a direct *lien de droit* with Hydro-Québec or its subsidiary. Would a claimant with a judgment against Hydro-Québec founded upon extracontractual liability (i.e., delict, akin to tort or negligence) or founded upon a contractual breach (other than in the context of a financing) be entitled to register a legal hypothec against the property of Hydro-Québec in order to execute the judgment in his or her favour?¹³ The answer should be, Yes. Hydro-Québec assumes an obligation not to harm third parties through faulty or negligent conduct as well as the more obvious obligation of respecting its contract with its co-contractants. The exception in Article 3.1.2 of the *Hydro-Québec Act* does not distinguish between categories of obligations, be they contractual or extra-contractual. To descend to even more technical levels, would a financier of Hydro-Québec be able to execute against the immovable property of Hydro-Québec or its subsidiary that is intended for the production, transmission or distribution of energy (prohibited under Article 27.4 of the Act but not prohibited if the financier proceeds in execution of his rights pursuant to Article 3.1.2 of the Act)? The answer is unclear.

This leads to a quandary. Does the general interdiction in Article 916 of the Civil Code of Quebec prohibiting the appropriation of property of the State, prevail over the exception contained in Article 3.1.2 of the *Hydro-Québec Act* per-

¹³Article 2724(4) of the Civil Code of Québec provides a legal hypothec to a creditor having an unrequited claim under a judgment.

mitting a party toward whom Hydro-Québec has assumed obligations to pursue and execute against the property of Hydro-Québec?

The proposition may be advanced that particular legislation pre-empts legislation of a general nature.¹⁴ The exception which the sovereign authority legislated in Article 3.1.2 of the *Hydro-Québec Act* must be given effect, otherwise it is devoid of meaning.

Thus, parties (such as contractors, architects and engineers) who contract directly with Hydro-Québec or its subsidiary, Hydro-Québec SEBJ, and to whom Hydro-Québec or its subsidiary has obligations, most likely are entitled to execute a claim secured by a construction hypothec against its property by virtue of the exception set out in Article 3.1.2 of the *Hydro-Québec Act*. Conversely, according to the Court of Appeal of Quebec in both the HMI-Promec and Maçonnerie Demers decisions, parties (such as subcontractors and suppliers) who do not contract directly with Hydro-Québec or its subsidiary, Hydro-Québec SEBJ,

¹⁴Reeves, J., the trial judge in *Maçonnerie Demers inc. c. Agence Métropolitaine de Transport*, REJB 2001-28024, held that a specific legislative exception allowing for the seizure of State assets under a particular statute overrides the general rule which declares that public property serving the ends of public utility are unseizable (“44. En somme, la règle est l’insaisissabilité, art. 916. L’exception est la saisissabilité lorsque les termes d’une loi particulière sont assez larges pour le permettre, art. 300, al. 1. Sinon l’insaisissabilité doit s’appliquer, à titre complémentaire, art. 300, al. 2.”). This statement was endorsed in appeal: *Maçonnerie Demers inc. c. Agence Métropolitaine de Transport*, [2004] R.D.I. 288, Rothman J. para. 34. With regard to state agencies (i.e., a legal person established in the public interest), note that Article 300 C.C.Q. provides: “(1) Legal persons established in the public interest are primarily governed by the special Acts by which they are constituted and by those which are applicable to them; legal persons established for a private interest are primarily governed by the Acts applicable to their particular type. (2) Both kinds of legal persons are also governed by this Code where the provisions of such Acts require to be complemented, particularly with regard to their status as legal persons, their property or their relations with other persons.” In *Bâtiments Kalad’Art Inc. c. Construction D.R.M. Inc.* ([2000] R.J.Q. 72, REJB 1999-15886), the Court of Appeal of Québec considered a situation where a municipal salt and sand warehouse was the object of a supplier’s construction hypothec; the stored materials serving salt and sand to the streets of the municipality. Mailhot, J. held at para. 28 that “l’article 916 C.c.Q. et les termes « affectés à l’utilité publique » qui s’y trouvent devraient recevoir une interprétation large, qui fusionne les diverses interprétations données aux versions française et anglaise de l’article 2220 C.C. ... une portée aussi large donnée à l’article 916 C.c.Q. n’irait pas à l’encontre de la volonté du législateur qui, en édictant la règle du bien affecté à l’utilité publique, n’a voulu qu’empêcher que des biens bénéficiant à la population d’une municipalité, ne tombent dans le domaine privé et deviennent saisissables.”

and toward whom Hydro-Québec or its subsidiary owes no personal obligation, are not entitled to execute a construction hypothec against its property