

Summary of the decision in *Ville de Sherbrooke v. Sherax Immobilier Inc.*: Duty of good faith in public-private partnerships

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The duties of good faith, cooperation, loyalty and information have been recognized in many decisions affecting the construction industry. Let us consider, for example, *Bail Lté* (1992), *Janin Construction* (1983), *Walsh & Brais* (2001), *Janin-Atlas (Janin Atlas Inc. v. Hydro-Québec*, 2019 QCCS 4523, on appeal) and, specifically with respect to the duty of good faith and information at the pre-contract stage, *Inter-cité v. MTQ* (2015, affirmed on appeal: *Procureure générale du Québec v. Inter-Cité Construction ltée*, 2017 QCCA 1525).

This familiar line of case law forms the basis of the Superior Court ruling outlined in this article, as these same principles were applied by the Court in *Ville de Sherbrooke v. Sherax* (2021) in the context of a public-private partnership.

Key facts

- In 2005, the City of Sherbrooke (the City) issued a call for tenders for the design, construction and management of an indoor soccer centre (the Centre) under a public-private partnership contract. The call for tenders included an estimated number of hours the City and its recognized organizations (e.g., soccer associations) would have to book the Centre.
- Groupe Axor Inc. (Axor), which subsequently transferred all of its rights to Sherax Immobilier Inc., was the sole bidder and was awarded the contract. Axor's financial proposal explicitly stated that the estimated rental hours set out in the call for tenders were fundamental – not only to the proposal itself, but to progressively meet the debt service coverage ratio required by the lenders financing the project.
- In a counterclaim, Axor claimed that the City should be ordered to pay \$3,003,862 in damages because, for the 13 years the Centre was in operation, the City and its recognized organizations rented it for far fewer hours per year than what was estimated in the call for tenders.

Decision

Duty to inform

Only after the Centre was built and opened did Axor representatives learn that the City was not going to provide the financial assistance needed by the recognized organizations to afford renting the Centre for the number of hours indicated in the call for tenders. The organizations also expected to receive additional grants for use of the Centre; this became clear when they cancelled their reservations after the City's budget allocations were announced, whereas the bookings represented roughly the number of hours stated in the call for tenders before the announcement.

Considering the parameters of Axor's financial proposal, the Court held that Axor would not have entered into the contract had it known the City would not provide financial support to its organizations, since Axor had legitimate reason to believe that the information provided by the City was realistic due to the proximity of the City to its recognized organizations and the short window of time Axor had to respond to the call for tenders. In the Court's opinion, the use of the words "estimated" and "for information purposes" in the call for tenders did not permit the City to mislead its co-contractor about partnership information it knew to be unrealistic.

The City also claimed that its liability was limited to the \$400,000 annual minimum rental revenue threshold provided for in the contract, *i.e.*, that it did not intend to grant its recognized organizations funding beyond what was required to meet the minimum revenue threshold. However, the Court concluded that this was a guarantee clause and not a limitation of liability clause, and therefore did not absolve the City of its duty of good faith.

Consequently, the City's fault lay in its lack of transparency in failing to disclose that it did not intend to grant the additional funding knowing that without it a substantial part of the hours provided for in the call for tenders would never materialize. Thus, the Court concluded that the City failed in its duty of good faith, as measured minimally by the pre-contract duty to inform developed by the case law on fixed-price contracts, although in this case the duty to inform was, according to the Court, more stringent because of the partnership contract between the parties.

Duty of loyalty

Moreover, the same year the Centre opened, the City built an artificial turf soccer field with free public access some 10 metres from the Centre. The turf field could be used seven months out of the year, whereas the natural fields that existed before the contract was awarded to Axor could only be used for five months – a fact that was expressly stated in the call for tenders.

By building an artificial turf field so close to the Centre, the City was directly competing with its co-contractor. The City, which refused to listen to Axor's concerns about it, was therefore in breach of its obligations of loyalty and cooperation implicit in the partnership between the parties.

Conclusion

The Court concluded that the City of Sherbrooke was fully liable and ordered it to pay damages in the amount of \$2,686,492.28, *i.e.*, the difference between the number of hours actually rented by the City and its recognized organizations and the number of hours stated in the call for tenders.

Interestingly, according to the Court, the duty of good faith, and more specifically the duty to inform at the pre-contract stage, is more important in the context of a public-private partnership than in a standard-form contract because of the relationship between the parties.

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