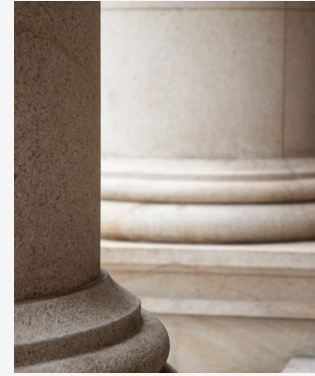


# Superior Court of Québec clarifies obligations of the AMP in an integrity review under the Act respecting contracting by public bodies



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In dismissing an application for judicial review by Neptune Security Services Inc. (Neptune), the Superior Court of Québec clarified and confirmed certain obligations and powers of the *Autorité des marchés publics* (AMP) in the context of a standard of integrity review of an enterprise under the *Act respecting contracting by public bodies* (LCOP).<sup>[1]</sup> In sum, the Court ruled that the AMP has no obligation to prescribe corrective measures prior to revoking an enterprise's authorization to contract with public bodies. However, the AMP does have an obligation to disclose, in the notice of examination, all the information it possesses, at that time, which could demonstrate that the enterprise does not meet the integrity requirements.

## Factual and procedural background

In September 2022, the AMP issued a notice of examination to Neptune, indicating they possessed information suggesting Neptune did not meet the necessary integrity requirements. On February 28, 2023, Neptune received a revocation notice from the AMP revoking its authorization to contract with public bodies. The revocation notice outlined the reasons for this decision and invited Neptune to submit its observations in accordance with the LCOP.

On March 20, 2023, Neptune responded to the notice, expressing willingness to undertake corrective measures. However, on March 27, 2023, the AMP proceeded to revoke Neptune's authorization to contract and placed the enterprise on the *Registre des entreprises non admissibles aux contrats publics* (RENA), pursuant to sections 21.38 and 21.48.4 of the LCOP. In its application for judicial review, Neptune raised several procedural issues, prompting the Superior Court of Québec to clarify the requirements incumbent upon the AMP under the LCOP.

## The AMP is obligated to disclose the information in its

## possession in the notice of examination

Neptune argued that the AMP failed to provide specific information in the examination notice, thus preventing Neptune from properly responding to the facts upon which their investigation was based. According to Neptune, this omission constitutes a violation of their right to be heard, which includes the right to make representations and to know the facts underlying their review. Regarding the requirements of procedural fairness at the notice of examination stage, the wording of article 21.48.2 al. 3 of the LCOP creates a legitimate expectation as to the content of the notice and the possibility of making observations in response to the information contained in same.<sup>[2]</sup> The Court concluded that the AMP had committed a fault by not disclosing information it held at the time of issuing the notice of examination to Neptune. The Court emphasized that it was irrelevant whether the AMP actually relied on the impugned information in issuing the notice of examination, the revocation notice, or its final decision, nor did it matter if the information was publicly available. The AMP must disclose to the enterprise any information it possesses that could demonstrate violation of the LCOP and cannot choose what it includes, or not, in the notice of examination. The requirements of the LCOP are broad and allow solely for the exclusion of information that does not put into question the enterprise's respect of the standards of integrity.<sup>[3]</sup> However, the AMP's obligation only covers the information it possesses at the time of issuing the notice of examination. The AMP does not have an obligation to provide updates or follow-ups throughout the investigation.<sup>[4]</sup> Finally, since the investigation process is constantly evolving, it was within the AMP's authority to issue the revocation notice based on findings discovered during the investigation that were not included in the notice of examination.<sup>[5]</sup>

## The Courts finds that a 20-day period to respond to the Notice of Revocation is reasonable

Neptune argued that the time allotted by the AMP to respond to the revocation notice was insufficient to allow them to present their observations. Neptune submitted that the importance of the decision for its business and the complexity of the case imposed a heightened obligation of procedural fairness upon the AMP. The Court found no fault in the AMP's conduct, confirming the minimum 10-day period provided in section 21.48.3 of the LCOP and section 5 of the *Act respecting administrative justice* had been respected, and even extended, since Neptune had a total of 20 days to respond to the revocation notice. This response period was considered reasonable by the Court.

## The AMP is not obligated to prescribe corrective measures

Neptune also criticized the AMP for revoking its authorization without first proposing corrective measures to address its alleged deficiencies. In response, the AMP stated that corrective measures cannot be used when the investigation reveals a systemic problem within the enterprise, or when the integrity of several of its officers, directors or shareholders is being questioned.

After considering the wording of the Act, the Court concluded that the use, or not, of corrective measures is a decision within the discretion and powers of the AMP. Therefore, there may be situations where the AMP considers that no corrective measures would enable the enterprise to comply with the necessary integrity requirements.<sup>[6]</sup> Although the AMP must consider applying such corrective measures, it is not obligated to prescribe them in all

cases.<sup>[7]</sup> As a specialized body with expertise in the matter, the AMP is responsible for evaluating which integrity issues can be remedied with corrective measures, and the circumstances to be considered in making such an assessment.<sup>[8]</sup> The AMP can thus reasonably interpret the LCOP in such a way as to not offer corrective measures to an enterprise if it considers that these would not enable the latter to meet the required standards of integrity. Additionally, the AMP can arrive at this decision without having to provide the impugned enterprise with an opportunity to submit observations on this discrete point.<sup>[9]</sup>

## Registration to the RENA is not limited to Schedule 1 LCOP violations

The Court confirmed that registration to the RENA is not restricted to cases where the enterprise, or the individuals designated by the Act, are found guilty of offences set out in Schedule 1 thereto. An enterprise's ineligibility may also result from the presence of reasons for automatic exclusion as set out in sections 21.4 and 21.26 of the LCOP. These reasons include an enterprise whose integrity is in question following an integrity examination, as well as the impugnement of the integrity of its officers, shareholders, or directors, pursuant to sections 21.27 and 21.28 of the LCOP.<sup>[10]</sup>

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[1] *Neptune Security Services inc. c. Autorité des marchés publics*, 2024 QCCS 1966.

[2] *Id.*, par. 92.

[3] *Id.*, par. 99.

[4] *Id.*, par. 93.

[5] *Id.*, par. 96.

[6] *Id.*, par. 146.

[7] *Id.*, par. 149.

[8] *Id.*, par. 151.

[9] *Id.*, par. 156.

[10] *Id.*, par. 168.