

# Guide to Interpreting the Concept of Financing Section 107.7, para. 3(d) of the *Cities and Towns Act*

*Addressed to the municipal auditors general of Québec  
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## Preliminary Considerations and Principles of Interpretation

Under Section 107.7, para. 3(d), organizations that receive more than half of their financing from municipal funds and whose annual revenue is equal to or above \$1,000,000, are subject to the jurisdiction of the municipal auditors general of Québec.

If this condition is met, the organization may be subject, at the discretion of the auditors general, to a financial audit, an audit of the compliance of its operations with the laws, regulations, policies and directives, and an audit of the optimization of its resources.

It seems relevant, therefore, to evaluate the concept of financing introduced by this provision.

We believe that the concept of financing should be interpreted broadly given its purpose.<sup>1</sup> It appears that the conditions set out in section 107.7 are alternatives and not cumulative, thus expressing the desire to cover more organizations receiving financing from municipalities, including those that are subject to the jurisdiction of a municipal auditor general. From all appearances, the objective is to expand the jurisdiction and competency of municipal auditors general and the subjugation to the rules of awarding contracts to organizations not necessarily included in the reporting entity or otherwise linked to the municipality in its statutes and operations.

It also seems relevant to add that the concept of financing applies in determining whether these organizations are subject to sections 573 to 573.3.4 of the *Cities and Towns Act* (hereinafter the “CTA”), establishing the rules governing the awarding of municipal contracts.<sup>2</sup>

The two rules go together since auditors general will thus be assured of compliance with the rules governing the awarding of contracts to organizations under their jurisdiction, in line with their role of auditing the compliance of their operations with the laws, regulations, policies, and directives.

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<sup>1</sup> See, by analogy: *Aréna Marcel Dutil Inc. c. Succession de feu Arthur Gagnon et al*, 2017 QCCQ 3104.

<sup>2</sup> *An Act mainly to recognize that municipalities are local governments and to increase their autonomy and powers*, 2017, chapter 13

## Principles of Application

The concept of financing was analyzed and interpreted as it applies to similar provisions, even where new legal provisions were involved due to their recent introduction into municipal legislation.

The concept of a public organization as set out in paragraph 2.1 of section 5 of the *Act respecting Access to documents held by public bodies and the Protection of personal information* (hereinafter the “**Act respecting access**”)<sup>3</sup> goes back to this concept of financing. The principles of application established by jurisprudence under this provision are therefore relevant to evaluate forms of assistance that can be included in the notion of financing and so, to determine the scope of the jurisdiction of municipal auditors general conferred upon them by section 107.7 of the CTA.

This jurisprudence established the following principles:

- The term *financing* comprises the operations of procuring or obtaining the funds necessary to perform the organization’s activities or specific to its operations;<sup>4</sup>
- This concept therefore includes not only all forms of grants,<sup>5</sup> but also the business income used to fund its operations;<sup>6</sup>
- All revenue must be included to determine the basis for calculation and establish the proportion that the municipal funds represent in the organization’s financial position;<sup>7</sup>
- It must be determined where the financing comes from and who, in fact, is providing it.<sup>8</sup>

It is incumbent upon the municipal auditors general to apply these principles to the various specific scenarios they may encounter.

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<sup>3</sup> CQLR c. A-2.1.

<sup>4</sup> *P.C. c. Corporation de développement culturel de Trois-Rivières*, 2013 QCCA 128.

<sup>5</sup> *P.C. c. Corporation de développement culturel de Trois-Rivières*, supra; *M.B. c. St-Hyacinthe (Ville de)*, 2014 QCCA 169.

<sup>6</sup> *A.B. c. Société du 400e anniversaire de Québec*, 2009 QCCA 175.

<sup>7</sup> *M.L. c. Corporation de développement de Saint-Gédéon-de-Beauce inc.*, CAI, n° 1009420, 2015-09-18 (H. Grenier), 2015 QCCA 202; *Inquiry under the Municipal Ethics and Good Conduct Act into Frédéric Lizotte, councillor of the Municipalité de Saint-Philippe-de-Néri*, CMQ-66606, 2018-08-30.

<sup>8</sup> *P.C. c. Corporation de développement culturel de Trois-Rivières*, supra.

## Analysis of Various Specific Scenarios

FORMS OF MUNICIPAL ASSISTANCE TO THE ORGANIZATION	INCLUDED IN THE CONCEPT OF FINANCING			COMMENTS
	Yes	No	Under certain conditions	
Direct grant for operations and/or fixed assets with or without conditions of use	X			Clearly, a grant with or without conditions must be included in the concept of financing, and all amounts paid as such must be included in the calculation of the proportion of financing granted. <sup>9</sup>
Service agreement	X			All revenue originating from a municipality must be considered, including grants or service agreements involving the payment of services performed by the organization. Not only are unconditional grants included in the concept of financing, but also all grants or payments made in return for services rendered. <sup>10</sup>
Amounts paid out from taxation revenue	X			An organization's membership fees funded and levied from the tax account with the goal of then being paid to an organization must also be taken into consideration. <sup>11</sup> Since taxes are the property of the municipality and are included in its revenues, payment of equivalent grants must be treated as financing (for example, membership fees to a Business Development Company "BDC").

<sup>9</sup> *J.N. c. Société de gestion de la zone portuaire de Chicoutimi Inc.*, CAI, n° 1013373-J, 2017-04-28 (C. Constant), 2017 QCCA 104; *M.L. c. Corporation de développement de Saint-Gédéon-de-Beauce Inc.*, CAI, n° 1009420, 2015-09-18 (H. Grenier), 2015 QCCA 202; *M.L. c. Cordi Saint-Gédéon Inc.*, CAI, n° 1009419, 2015-09-18 (H. Grenier), 2015 QCCA 201.

<sup>10</sup> *Inquiry under the Municipal Ethics and Good Conduct Act into Frédéric Lizotte, councillor of the Municipalité de Saint-Philippe-de-Néri*, CMQ-66606, 2018-08-30; *Guibault c. Services animaliers de la Vallée-du-Richelieu*, CAI n° 1011143-J, 2018-01-08 (C. Constant), 2018 QCCA 4, para. 32.

<sup>11</sup> *Guibault c. Services animaliers de la Vallée-du-Richelieu*, para. 34.

FORMS OF MUNICIPAL ASSISTANCE TO THE ORGANIZATION	INCLUDED IN THE CONCEPT OF FINANCING			COMMENTS
	Yes	No	Under certain conditions	
Grant intended for the organization, but is transacted by the municipality		X		A municipality that accepts to channel funds does not finance the activities of an organization. <sup>12</sup> However, amounts received from a third party must not be the property of the municipality or included in its income. Where applicable, the amounts must be considered as financing.
Loan with or without interest from a <b>third party</b> (debt servicing)			X	Following from the principles outlined above, we must question the identity of the person who will in fact be supporting the debt service. The debt service of a loan issued by a third party may be included in the concept of financing, if and only if the debt is settled by a municipality. The payment, in whole or in part, must be included in the calculation of the municipal financing. Only debt financing for the fiscal year must be included in the concept of financing and not the entire loan taken out by the organization.

<sup>12</sup> P.C. c. Corporation de développement culturel de Trois-Rivières, CAI, n° 102074, 2013-05-03 (A. Morissette), 2013 QCCA 128.

FORMS OF MUNICIPAL ASSISTANCE TO THE ORGANIZATION	INCLUDED IN THE CONCEPT OF FINANCING			COMMENTS
	Yes	No	Under certain conditions	
Loan guarantee			X	Acting as a guarantor for an organization does not constitute financing until the day the rights are exercised against the guarantee. De facto, it is only when these rights are exercised that the financing will be covered by the municipality. <sup>13</sup>

<sup>13</sup> *J.N. c. Société de gestion de la zone portuaire de Chicoutimi inc.*, CAI, No. 1013373-J, 2017-04-28 (C. Constant), 2017 QCCA 104.

FORMS OF MUNICIPAL ASSISTANCE TO THE ORGANIZATION	INCLUDED IN THE CONCEPT OF FINANCING			COMMENTS
	Yes	No	Under certain conditions	
Loan of material resources (premises, systems, vehicles, other) and/or human resources			X	<p>The inclusion of such forms of municipal assistance carries certain risks.</p> <p>On the one hand, assessing the value of these loans could be a perilous task. CPA Canada Standards suggest that this contribution in goods or services should only be considered if it can be subject to a reasonable estimation of fair value, and when the materials and services are used in the normal course of the organization's operations and would otherwise have been purchased (Manual, Part III, Section 4410). Generally, these free goods or services are then recognized in the organization's financial statements, which attest to the financial status of the organization.<sup>14</sup></p> <p>On the other hand, jurisprudence under the <i>Act respecting access</i> considers this form of assistance as not included in the concept of financing. This jurisprudence suggests that the goods put at the disposal of an organization come under the management of funds that do not belong to the organization, which goes beyond the concept of financing provided under the Act.<sup>15</sup></p> <p>Even if a cautious approach could be adopted, we might validly maintain that the contributions paid in the form of right of use should be included in the concept of financing in compliance with the accounting standards recommended in section 4410. Failing this, it would be permissible to circumvent the Act.</p>

<sup>14</sup> P.C. c. *Corporation de développement culturel de Trois-Rivières*, CAI, No. 102074, 2013-05-03 (A. Morissette), 2013 QCCA 128.

<sup>15</sup> *Idem*.

FORMS OF MUNICIPAL ASSISTANCE TO THE ORGANIZATION	INCLUDED IN THE CONCEPT OF FINANCING			COMMENTS
	Yes	No	Under certain conditions	
Gifts (e.g., transportation fare, work assumed by the municipality that becomes an asset of the organization, other)			X	The same comments as for the loan of material resources apply here. <sup>16</sup>
Gifts (goods or services assumed by the municipality that become an asset of the organization, other)			X	The various fees and acquisition costs of goods and services assumed by the municipality, <u>but that become an asset of the organization</u> , should be included in the concept of financing. <sup>17</sup>
Indirect contribution			X	This must be a contribution paid to an organization and not to a separate legal entity. Financing paid to a third party that is a separate legal entity does not constitute financing under the Act. <sup>18</sup>

<sup>16</sup> *Idem.*

<sup>17</sup> See, by analogy: *J.N. c. Société de gestion de la zone portuaire de Chicoutimi Inc.*, CAI, n° 1013373-J, 2017-04-28 (C. Constant), 2017 QCCA 104.

<sup>18</sup> *A.M. c. Ville de Sorel-Tracy*, CAI, n° 080135, 2010-08-04 (J. Chartier).



## Rulings Identified and Considered

*A.B. c. Société du 400e anniversaire de Québec*, CAI, n° 081371, 2009-08-07 (J. Chartier), 2009 QCCAI 175

*A.M. c. Ville de Sorel-Tracy*, CAI, n° 080135, 2010-08-04 (J. Chartier)

*P.C. c. Corporation de développement culturel de Trois-Rivières*, CAI, n° 102074, 2013-05-03 (A. Morissette), 2013 QCCAI 128

*M.L. c. Cordi Saint-Gédéon inc.*, CAI, n° 1009419, 2015-09-18 (H. Grenier), 2015 QCCAI 201

*M.L. c. Corporation de développement de Saint-Gédéon-de-Beauce inc.*, CAI, n° 1009420, 2015-09-18 (H. Grenier), 2015 QCCAI 202

*A.G. c. Aréna Marcel Dutil inc.*, CAI, n° 1009418, 2015-09-16 (H. Grenier), 2015 QCCAI 200

*Aréna Marcel Dutil inc. c. Succession de feu Arthur Gagnon et al*, 2017 QCCQ 3104

*J.N. c. Société de gestion de la zone portuaire de Chicoutimi inc.*, CAI, n° 1013373-J, 2017-04-28 (C. Constant), 2017 QCCAI 104

*Guibault c. Services animaliers de la Vallée-du-Richelieu*, CAI n° 1011143-J, 2018-01-08 (C. Constant), 2018 QCCAI 4

*Inquiry under the Municipal Ethics and Good Conduct Act into Frédéric Lizotte, councillor of the Municipalité de Saint-Philippe-de-Néri*, CMQ-66606, 2018-08-30