

Honesty of financial advisors and discretion of the Autorité des marchés financiers: the Québec Court of Appeal rules

■ CATHERINE PARISEAULT and BERNARD LAROCQUE

In a decision issued last May 20,¹ the Québec Court of Appeal affirmed a judgment² of the Superior Court of Québec rendered on October 28, 2013, which dismissed the action in damages for more than \$7 million brought by a former representative in insurance of persons and in group savings plan brokerage, Mr. Alan Murphy, against the Autorité des marchés financiers ("AMF").

Facts

Mr. Murphy was convicted in 2007 by the Disciplinary Committee of the Chambre de la sécurité financière of 32 charges,³ his registration was permanently cancelled, as well as being temporarily cancelled for three years and one year, in respect of his areas of practice, and he was fined a total of \$20,000. He then obtained a stay of both the permanent cancellation and the payment of the fines.⁴ Upon review by the Court of Québec, his sentence was reduced to a temporary cancellation for one year as well as the payment of a \$12,000 fine.⁵ Despite the revocation of his certificate and the numerous notices from the AMF, Mr. Murphy continued acting as a representative, thereby significantly worsening his disciplinary record.

Upon the expiry of the period during which his registration was temporarily cancelled, the AMF refused to renew Mr. Murphy's certificate of practice. Claiming that in doing so the AMF had acted excessively, unreasonably and contrary to the requirements of good faith by multiplying the administrative obstacles, inspections and investigations against him, he sued the AMF in the Superior Court, contending that their actions demonstrated the bad faith required to substantiate a claim for \$7 million in damages. Among other things, Mr. Murphy cited the judgment of the Court of Québec which had changed the sanction imposed on him and criticized the AMF.

In response, the AMF argued that its refusal to issue a new certificate to Mr. Murphy was justified because he lacked the necessary degree of honesty to practise as a representative in insurance of persons and in group savings plan brokerage. Essentially, the issue raised was whether the AMF was protected by the relative immunity conferred on it for acts performed in good faith in the exercise of its functions, as provided in section 32 of the *Act respecting the Autorité des marchés financiers*.⁶

Judgment of the Court of Appeal

Firstly, the Court stated that the clause protecting the AMF is comparable to the clause that protects the Quebec professional orders. It then cited the leading decision of the Supreme Court of Canada on relative immunity clauses, the *Finney case*,⁷ which states that bad faith includes, among other things, intentional fault, which can constitute an abuse of power. This concept also includes serious carelessness or recklessness which "implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed."⁸

¹ *Murphy c. Autorité des marchés financiers*, 2016 QCCA 878.

² *Murphy c. Autorité des marchés financiers*, 2013 QCCS 5764.

³ *Rioux c. Murphy*, June 12, 2007, No. CD00-0404.

⁴ *Murphy c. Chambre de la sécurité financière*, 2007 QCCQ 7950.

⁵ *Murphy c. Chambre de la sécurité financière*, 2008 QCCQ 5427; *Murphy c. Autorité des marchés financiers*, 2010 QCCA 1078; application for leave to appeal to the Supreme Court of Canada dismissed (S.C. Can., 2011-01-27) 33860.

⁶ *Act respecting the Autorité des marchés financiers*, CQLR, c. A-33.2.

⁷ *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17.

⁸ *Ibid.*, para. 40.



Next, to determine whether Mr. Murphy had the necessary honesty to carry on his practice as an advisor in group insurance, the Court considered the numerous decisions which the AMF had rendered against him. It should be noted that Mr. Murphy took all the measures available to him to contest⁹ the decisions rendered against him, while choosing nonetheless to continue practising his profession, despite the fact he no longer had the certificate authorizing him to practice. As a result, several penal complaints¹⁰ were also lodged against him.

The Court of Appeal found that the discretionary power conferred on the AMF under section 220 of the *Act respecting the distribution of financial products and services*¹¹ ("ADFPS") to assess the degree of honesty of persons applying for authorization to practise as a financial advisor, and to issue certificates based thereon, is within the exclusive jurisdiction of the AMF. The fact that Mr. Murphy had illegally engaged in activities reserved for representatives was a sufficient ground which allowed the AMF to conclude that he lacked a sufficient degree of honesty pursuant to sections 219 and 220 of the ADFPS. The Court found that the AMF had adequately assessed Mr. Murphy's lack of honesty in refusing to issue his certificate. Accordingly, the Court of Appeal held that the AMF benefited from the immunity conferred by section 32 of the *Act respecting the Autorité des marchés financiers* against the action instituted by Mr. Murphy. It therefore upheld the judgment of the Superior Court dismissing his action.

■ CATHERINE PARISEAULT

514 878-5448

cpariseault@lavery.ca

■ BERNARD LAROCQUE

514 877-3043

blarocque@lavery.ca

⁹ 2008-PDIS-0086 (July 25, 2008); 2008-DIST-0090 (September 19, 2008); 2009-PDIS-0190 (July 23, 2009); *Murphy c. Albert*, 2009 QCCS 6366; *Murphy c. Albert*, 2011 QCCA 1147; 2011-PDIS-0249 (October 7, 2011); number unknown (January 10, 2012).

¹⁰ *Autorité des marchés financiers c. Murphy*, 2010 QCCQ 11692; *Murphy c. Autorité des marchés financiers*, 2011 QCCS 3510; *Murphy c. Autorité des marchés financiers*, 2011 QCCA 1688; *Autorité des marchés financiers c. Murphy*, 2016 QCCQ 2992.

¹¹ CQLR, c. D-9.2.

YOU CAN CONTACT THE MEMBERS OF THE FOLLOWING GROUPS WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

PROFESSIONAL LIABILITY

ANNE BÉLANGER	abelanger@lavery.ca	514 877-3091
JÉRÔME BÉLANGER	jebelanger@lavery.ca	514 877-3012
CLAUDIA BÉRUBÉ	cberube@lavery.ca	819 346-3661
DOMINIC BOISVERT	dboisvert@lavery.ca	514 878-5493
FRÉDÉRIK BRETON	fbreton@lavery.ca	819 346-7506
MYRIAM BRIXI	mbixi@lavery.ca	514 878-5449
MARIE-CLAUDE CANTIN	mccantin@lavery.ca	514 877-3006
MARIE-HÉLÈNE CANTIN	mhcantin@lavery.ca	819 346-1240
GENEVIÈVE CHAMBERLAND	gchamberland@lavery.ca	819 346-2562
LOUIS CHARETTE	lcharette@lavery.ca	514 877-2946
MARIE COSSETTE	mcossette@lavery.ca	418 266-3073
MAGALI COURNOYER-PROULX	mproulx@lavery.ca	514 877-2930
ALEXANDRA DUBÉ-LORRAIN	adube-lorrain@lavery.ca	514 877-3063
SIMON GAGNÉ	sgagne@lavery.ca	514 877-2916
CHERYL GILBERT	cgilbert@lavery.ca	819 346-2207
JEAN HÉBERT	jhebert@lavery.ca	514 877-2926
VÉRONIQUE IEZZONI	viezzoni@lavery.ca	514 877-3003
JONATHAN LACOSTE-JOBIN	jlacostejobin@lavery.ca	514 877-3042
MAUDE LAFORTUNE-BÉLAIR	mlafortunebelair@lavery.ca	514 877-3077
BERNARD LAROCQUE	blarocque@lavery.ca	514 877-3043
CATHERINE PARISEAULT	cpariseault@lavery.ca	514 878-5448
MARTIN PICHETTE	mpichette@lavery.ca	514 877-3032
SYLVAIN POIRIER	spoirier@lavery.ca	514 877-2942
IAN ROSE	irose@lavery.ca	514 877-2947
VIRGINIE SIMARD	vsimard@lavery.ca	514 877-2931
NICOLAS THIBAUT-BERNIER	nthibaultbernier@lavery.ca	819 346-0341
EVELYNE VERRIER	everrier@lavery.ca	514 877-3075

GOVERNMENT AFFAIRS AND PUBLIC LAW LITIGATION

PIERRE-L. BARIBEAU	pbaribeau@lavery.ca	514 877-2965
VALÉRIE BELLE-ISLE, CRHA	vbelleisle@lavery.ca	418 266-3059
LOÏC BERDNIKOFF	lberdnikoff@lavery.ca	514 877-2981
LAURENCE BICH-CARRIÈRE	lbichcarriere@lavery.ca	514 877-2937
DANIEL BOUCHARD, AD. E.	dbouchard@lavery.ca	418 266-3055
JULES BRIÈRE, AD. E.	jbriere@lavery.ca	418 266-3093
MARIE COSSETTE, AD. E.	mcossette@lavery.ca	418 266-3073
RAYMOND DORAY, AD. E.	rdoray@lavery.ca	514 877-2913
CHLOÉ FAUCHON	cfauchon@lavery.ca	418 266-3069
PHILIPPE FRÈRE	pfrere@lavery.ca	514 877-2978
GUILLAUME LABERGE	glaberge@lavery.ca	514 877-3038
ZÉÏNEB MELLOULI	zmellouli@lavery.ca	514 877-3056
SOPHIE PRÉSENT	spregent@lavery.ca	514 877-2948

© All rights reserved 2016 ► LAVERY, DE BILLY, L.L.P. ► LAWYERS

Pour recevoir notre bulletin en français, veuillez envoyer un courriel à info@lavery.ca.

This bulletin provides our clients with general comments on recent legal developments. The texts are not legal opinions. Readers should not act solely on the information contained herein.