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

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In a decision issued last May 20,[1] the Québec Court of Appeal affirmed a judgment[2] 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.

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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]

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 contest[9] 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 complaints[10] 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.

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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.
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.

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