

## AMF INVESTIGATIONS: THE DUTY TO ANSWER AN INVESTIGATOR AND HIS JURISDICTION TO RULE ON OBJECTIONS (CONTINUED SEE IN *FACT AND IN LAW EXPRESS*, DECEMBER 2012)

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The *Securities Act* [SA] allows the *Autorité des marchés financiers* [the “AMF”] to order investigations to ensure compliance with the SA and to repress contraventions which may be committed<sup>1</sup>. This is the context in which the Court of Appeal handed down a decision<sup>2</sup> on June 22, 2012 going to the very heart of the role played by the AMF’s investigators and the scope of their powers during examinations conducted in connection with an investigation.

Gilbert Fournier was summoned to appear by an AMF investigator. The summons had certain information blacked out and did not mention the purpose of the investigation, only giving the number of an account opened with a financial adviser. During the examination, Fournier and his lawyer learned that the investigation involved Dominion Investments. As soon as Fournier was asked the first question, which was whether he had a brokerage account, his lawyer objected on the ground that the question was irrelevant and too broad. Believing that Fournier’s lawyer did not have the right to object, the AMF’s investigator insisted that Fournier answer, without success. Given the objections raised by the lawyer and Fournier’s refusal to answer the questions, the investigator ended the questioning.

The AMF served Fournier with a notice of offence under section 195(4) SA, claiming that he had hindered the investigator’s work by refusing to answer the questions. This led the AMF to apply to the Court of Appeal for a ruling against Fournier, following the acquittal rendered by the Court of Québec and affirmed by the Superior Court.

### The lower court judgments

Justice Millette, writing for the Court of Québec<sup>3</sup>, held that the objections of Fournier’s lawyer were justified, as the investigator was not willing to reveal either the nature of his mandate or the purpose of the investigation. Holding that there was no proof of *actus reus*, since Fournier was unaware of the nature of the investigation and therefore unable to determine the relevance of the questions, the Court held that there was no refusal to testify within the meaning of section 195(4) SA and therefore acquitted Fournier.

Justice Paul, writing for the Superior Court<sup>4</sup>, affirmed Fournier’s acquittal on the grounds that [Translation] “a lawyer has a duty to intervene to obtain clarifications and to object if he perceives that the investigation is going off track and is becoming a fishing expedition”<sup>5</sup>. Holding that the summons to appear sent to Fournier was incomplete and that the investigator erred when he said that the lawyer could not object to his questions, the Superior Court upheld the Court of Québec decision. The Court expressed its concern that the AMF’s investigations could turn into a fishing expedition. The Court was also hesitant to render a penal order against someone who had followed his lawyer’s advice.

### The Court of Appeal decision

The AMF appealed the Superior Court judgment. In a unanimous decision written by the Honourable Jacques Dufresne, the Court of Appeal allowed the AMF’s appeal, quashed the two lower court decisions, convicted Fournier of the offence under section 195(4) SA and returned the case to the Court of Québec for a decision on the sentence to be given to Fournier.

The questions submitted to the Court of Appeal in connection with this appeal are the following:

- Did the Superior Court judge err in law in holding that the respondent's lawyer could object during the examination to the questions of the appellant's investigator and require that his objections be decided?
  
- Did the Superior Court judge err in law in holding that the respondent's refusal to answer the appellant's investigator's questions when he was legally compelled to do so can be excused by his lawyer's objections?

Before answering these questions, the Court explained the AMF's mission as well as its role of protecting the public and regulating the markets; it recalled the extensive investigative powers conferred on the AMF and its investigators. The Court also described the legislative framework surrounding these powers, noting that certain provisions of the *Act respecting public inquiry commissions* apply<sup>6</sup>, and in particular section 11 of that statute which grants almost complete immunity to a person who is examined, and section 9(2) of the same statute which states that persons who are examined must answer all questions asked of them.

#### 1. The lawyer's right to make objections and demand that they be decided

Fournier argued that the obligation to answer an investigator's questions under section 241 SA only covers questions relating to the purpose of the investigation. Accordingly, the lawyer of a person who is examined may make objections regarding the relevance of questions which do not relate to that purpose and the person being examined may refuse to answer.

The Quebec Bar, which intervened in this matter, was of the opinion that objections should be decided by a reasoned decision by the investigator, so the decision can be reviewed subsequently if necessary. The Quebec Bar also stressed the importance of the right to make objections, an essential right to guarantee the legality of the questions asked and avoid fishing expeditions.

The Court of Appeal held, on the other hand, that a lawyer who assists a person examined as part of an AMF investigation does not have the right to object. According to the Court, to grant this right would contravene section 241 SA which states that a person called upon to testify by an AMF investigator cannot refuse to answer.

The Court was also of the opinion that a person cannot apply to the Superior Court for the sole purpose of having it rule on objections made with respect to the questions of an AMF investigator, [Translation] "without those questions being asked in connection with proceedings of which that court is otherwise seized"<sup>7</sup>. Stressing the administrative nature of investigations conducted by the AMF and the non-adversarial nature of such an examination, the Court of Appeal held that deciding on objections is a role of the investigator who, according to the Court, does not have to provide reasons for his decision in this regard.

#### 2. The defence based on advice given by the lawyer

This due diligence defence was rejected by the Court of Appeal, which held that it was not sufficient for a witness to follow his lawyer's advice to avoid being penalized for refusing to answer an investigator's questions. It must also be established that the refusal to answer is justified and that it is based on a valid cause or excuse, which was not the case here. Also, it was not proven that a breach of the rule of law or procedural fairness was committed, nor that the AMF's investigator exceeded his mandate. Accordingly, the Court of Appeal held that, in the absence of valid reasons for refusing to answer the questions, Fournier was penally liable, even though his refusal was as a result of advice given by his lawyer.

### Conclusion

People called to testify by an AMF investigator are required to answer his questions. The AMF's investigator therefore has the power to decide on objections raised during such examinations without having to give reasons for his decision. In this case, the Court confirmed the broad investigative powers given to the AMF to enforce compliance with the SA. Referring to a Supreme Court case<sup>8</sup>, the Court noted the importance of not complicating the AMF's investigation process and therefore limiting court interventions when investigations are being conducted by that body.

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<sup>1</sup> Section 239 SA.

<sup>2</sup> *Autorité des marchés financiers v. Fournier*, 2012 QCCA 1179.

<sup>3</sup> Unpublished decision.

<sup>4</sup> *Autorité des marchés financiers v. Fournier*, 2010 QCCS 4830.

<sup>5</sup> *Ibid.*, par. 14.

<sup>6</sup> See sections 240 SA and 14 of the AMF Act.

<sup>7</sup> Par. 48 of the judgment in question.

<sup>8</sup> *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181.

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