

A recent Quebec Court of Appeal decision involving extra-contractual liability of directors

By André Laurin

HIGHLIGHTS

- A director can be held liable for the faulty conduct of employees if he or she does not take reasonable measures to prevent it
- A director cannot ignore clearly identified risks of damage to third parties
- A director may be held extra-contractually liable for faulty decisions made in the course of carrying out his or her duties

On February 2, 2006, the Quebec Court of Appeal rendered an interesting judgment involving directors' liabilities in the case of *Johnson and Marcil v. André Arthur et al* (500-09-012808-028), a lawsuit for slander.

1. The facts

The parties were described as follows by Judge Rochette:

[Translation] "The appellants and defendants are André Arthur, his employers Métromédia C.M.R. Montréal inc. (CKVL) and Cogéco Radio-Télévision inc. (CJMF), and the directors of those two companies. The respondents and plaintiffs are Daniel Johnson, the former premier, and his spouse, Suzanne Marcil."



The comments of the new independent member of Parliament, André Arthur, concerned, among other things, the alleged involvement of Daniel Johnson in the granting of subsidies by the Government of Quebec to the ski resort owned by Les Entreprises Stoneham inc., of which Marc Blondeau, the former husband of Suzanne Marcil, was the principal shareholder.

2. The conclusions of the courts

The Superior Court and the Court of Appeal both found that in fact Daniel Johnson did not intervene personally in the matter of subsidies to the Stoneham ski resort.

The Court of Appeal concluded that the defendants held **liable** by Judge Carole Julien, the trial judge, namely André Arthur, his two employers, and the **directors** of

Cogéco, were indeed liable. Both the Court of Appeal and Judge Julien **exonerated the directors of Métromédia**.

3. Liability of the directors of Cogéco

The decision to hold the directors of Cogéco liable was based on their extra-contractual fault.

The following extracts from the Court of Appeal's decision written by Judge Rochette clearly and succinctly set out the **reasons behind the decision to hold them liable**.

[Translation] "[92] Article 1457 CCQ is of broad scope and it has been given an extensive and inclusive meaning. The expression «every person» found therein covers corporate directors and officers. Thus, a director may personally incur extra-contractual liability for faults committed toward third parties, particularly when it is shown that the decision-making was in itself faulty.

[93] In this case, the appellants have not demonstrated to us a manifest and decisive error in the conclusion of the trial judge that the directors of Cogéco should be held to have committed an intentional fault.

[94] The directors, in their thoughts, did not attach much importance to the notorious danger represented by the style of André Arthur to the privacy of people on whom he would eventually set his sights and the damage to their reputations that could ensue. The hiring of André Arthur was discussed by them and they obviously took on the risk represented by the radio show host.



LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

[95] Also, they were informed of the statements attacking the integrity and reputations of the respondents and did not react to have such statements corrected, even after the respondents sent a demand letter.

[96] Obviously, the very «encouraging» poll results clouded their minds. Even the dismissal of André Arthur by Métromédia in June 1998, though it had been associated in this venture with Cogéco since the fall of 1997, was not the subject of questions, comments or reflection.”

The Superior Court judge even described the behaviour of the directors of Cogéco as **wilful blindness**.

4. Basis for exonerating the directors of Métromédia from liability

The Court of Appeal did not expressly address the issue of the liability of the Métromédia directors and simply maintained the conclusion of the trial judge in this respect.

The only indication given to us by the Court of Appeal, other than its confirmation of the judgement of first instance, was the reference to the fact that Métromédia had dismissed André Arthur (see paragraph 96 cited above).

Judge Carole Julien seems to have given a certain importance to the fact that the directors of Métromédia had adopted a **policy or code of conduct concerning the behaviour of the radio show hosts** on the air whereas the directors of Cogéco had not done so.

5. Context

In *Peoples Department Stores Inc. v. Wise* ([2004] 3 S.C.R.) the Supreme Court of Canada held that a director's duty of loyalty is owed to the entity of which he is a director whereas his duty of diligence can be owed to a broader range of persons.

The case of *Johnson and Marcil v. Arthur et al* (S.C. 500-05-042565-984 - REJB 2002-34413) has, to a certain extent, provided an example of a failure to fulfil the duty

of diligence. Decisions both in the United States and elsewhere in Canada have held directors liable when they have not **investigated information or complaints** of illegal conduct brought to their attention and taken corrective or preventive measures¹.

Note also that in civil law **faults of omission** (not acting, not investigating, etc) are clearly recognized in cases involving allegations of complicity or contributory fault while in common law such a fault is not as readily recognized.

6. Certain precautions available to directors

Based on what can be understood from the judgments of both the Superior Court and the Court of Appeal, there are certain precautions that directors can take and which may protect them against potential liability:

- a. directors should adopt policies and codes of ethics to **control** the activities of the company and the behaviour of its employees and officers; and
- b. directors cannot ignore information brought to their attention in the form of complaints or indications of risk and should **investigate** the same and **take corrective or preventive measures**.

We invite you to **read our November 2005 newsletter entitled «Corporate Directors: Suggested Precautions»** which you can access from our web site, or contact the author's assistant to obtain a paper copy.

André Laurin
514 877-2987
alaurin@lavery.qc.ca

WARNING

The whole or part of this text may not be used or reproduced without the express authorization of Lavery, de Billy or without making reference to its source.

¹ Examples: *McCall v. Schott*, 239 F. 3d 808; 2001 U.S. App. LEXIS 2064; 2001 FED App. 0040p (6th Cir.) Nos. 99-6370/99-6387; *Omnicare Inc. v. NCS Healthcare Inc.*, 818 A. 2d 914; 2003 Del. LEXIS 195, No. 605, 2002 - No. 649, 2002 CONSOLIDATED.

You may contact any of the following members of the Corporate Governance, Securities Law and Directors' and Officers' Insurance and Liability Law groups with regard to this bulletin.

Corporate Governance

At our Montreal office
Isabelle Lamarre
André Laurin

At our Quebec City office
Jacques R. Gingras

Securities Law

At our Montreal office
Josianne Beaudry
Michel Blouin
René Branchaud
Georges Dubé
Isabelle Lamarre
André Laurin
Larry Markowitz
Jean Martel
Michel Servant
Sébastien Vézina
Julia Wojciechowska

Directors and Officers Insurance and Liability

At our Montreal office
Anne Bélanger
Jean Bélanger
Julie Cousineau
Odette Jobin-Laberge
Bernard Laroque
Robert W. Mason
J. Vincent O'Donnell, c.r.
Ian Rose
Jean-Yves Simard

Montréal

Suite 4000
1 Place Ville Marie
Montréal Quebec
H3B 4M4

Telephone:
514 871-1522
Fax:
514 871-8977

Québec

Suite 500
925 Grande Allée Ouest
Québec Quebec
G1S 1C1

Telephone:
418 688-5000
Fax:
418 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval Quebec
H7T 2R5

Telephone:
514 978-8100
Fax:
514 978-8111

Ottawa

Suite 1810
360 Albert Street
Ottawa Ontario
K1R 7X7

Telephone:
613 594-4936
Fax:
613 594-8783

Subscription

You may subscribe cancel your subscription or modify your profile by visiting our website at www.laverydebilly.com/htmlen/Publications.asp or by contacting Carole Genest at 514 877-3071.

©, Lavery, de Billy, L.L.P. - Barristers and Solicitors. This bulletin provides our clients with general comments on recent legal developments. The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.