

**BY EMAIL**

February 3, 2022

Ms. Chantal Charbonneau
Registrar
Supreme Court of Canada
311, Wellington
Ottawa, Ontario K1A 0J1

M^{re} Patrick Ferland

T 514.375.2681

F 514.905.2001

PFerland@lcm.ca

Our ref. 70353.1

Re: *Van Damme et al. v. Autorité des marchés financiers et al.* – SCC File no. 39920

Dear Madam,

Please consider the present letter as the Reply of Applicants Van Damme, Carnovale and Rocca to the Response filed by Respondent Autorité des marchés financiers (“AMF”).

Far from demonstrating that the issues raised by Applicants do not justify that leave to appeal be granted, the AMF’s Response underlines how important these issues are, how they currently remain unanswered in Quebec law, and how potentially harmful the Court of Appeal’s decision could prove to be for the development of the law – and especially for ensuring clarity and predictability, values which this Court recognises as inseparable from the principles of order and fairness which must govern the international field¹.

According to the AMF, the decision below simply confirms that the *Civil Code*’s provisions governing the jurisdiction of Quebec authorities cannot apply to proceedings that are public or administrative in nature. Not only was this very argument dismissed in *Uashaunnuat*², but it fails to acknowledge that the *Code*’s jurisdictional provisions are by no means “private law” rules. They are, undoubtedly and manifestly, *public law* rules, governing as they do the very exercise of the powers conferred upon courts and other “Quebec authorities” – all public bodies. Indeed, in concluding that the *Code*’s provisions simply do not apply to administrative or public law issues, the decision below risks unravelling the teachings of this Court in *Doré* and *Prud’homme*³ concerning the delicate interaction between private and public law in Québec, and the *Code*’s general role in matters of public law.

The AMF’s Response also highlights the far-reaching impact that the Court of Appeal’s decision will have across Canada in relation to the enforcement of securities regulations. In conflating the hitherto distinct notions of legislative and adjudicative jurisdiction (as the AMF argues is the proper approach), the decision below confirms that provincial securities regulators and tribunals across the country could exercise their enforcement jurisdiction over activities

¹ See for instance *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 74.

² See *Application for Leave*, at para. 35 : in *Uashaunnuat*, all judges rejected the Attorney General of Canada’s position that the *Civil Code*’s jurisdictional provisions do not apply in the context of proceedings concerning public law issues such as the rights of the Indigenous people of Canada.

³ *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Prud’homme v. Prud’homme*, 2002 SCC 85.

conducted anywhere in the country, provided there is some sufficient connection (of an entirely undefined nature) with their province.

What this means, in practice, is that several provincial regulators could decide to institute proceedings, each in their home province, against the same defendant, regarding the same conduct. This would result in a multiplicity of proceedings and, for the defendant, the risk of being sanctioned multiple times for the same conduct, and be condemned to pay a multiplicity of hefty monetary fines⁴. Such a result is exactly what this Court decried in *Unifund* when it stated that “*order in the federation would be undermined if every provincial jurisdiction took it upon itself to regulate aspects of the financial impact of the British Columbia car crash in relation to its own residents at the expense of the British Columbia insurer. [...] Such ‘competing exercises’ of regulatory regimes ‘must be avoided’. The cost of such regulatory uncertainties undermines economic efficiency.*”⁵ As the Court continued in *Unifund*, such a problem “*is not at all fanciful*”⁶. Indeed: by its Response, the AMF shows that this is exactly the situation that the Court of Appeal’s decision risks leading to.

Of particular note in the AMF’s Response is its insistence that the Quebec Legislature would have manifested a clear (even “*limpide*”) intention that the territorial scope of the FMAT’s jurisdiction should extend to all circumstances where the Quebec *Securities Act* could be found to apply, irrespective of the location of defendants and of the impugned conduct⁷. Despite the AMF’s insistence, however, it remains that neither the *Securities Act* nor the statute that established and governs the FMAT⁸ contain any single provision relating to the FMAT’s territorial jurisdiction – whether in relation to foreigners or to situations involving extra-provincial issues. With respect, interpreting this complete silence by the Legislature as a manifestation of a clear intent is entirely unjustified – especially when the *Civil Code* expressly mandates that the jurisdiction of *all* Quebec authorities should be governed by articles 3134-3154 C.C.Q.

Lastly, Applicants note that the AMF does not address their argument that the Court of Appeal’s decision (including the minority’s reasons) creates considerable uncertainty and unpredictability for Canadians facing potential legal proceedings by securities regulators. This is quite revealing, and demonstrates how little guidance the Court of Appeal provides to the courts and tribunals that will be called to apply its conclusions in future cases.

For these reasons, Applicants reiterate that leave to appeal should be granted.

Respectfully submitted,

LCM Attorneys Inc.



Patrick Ferland

c.c. M^{re} Stéphanie Jolin and M^{re} Jean-Nicolas Wilkins, AUTORITÉ DES MARCHES FINANCIERS
M^{re} Sean Griffin and M^{re} Daniel; Baum, LANGLOIS LAWYERS, LLP

⁴ Each proceeding being brought by a different regulator, there would be no way for the defendant to invoke *lis pendens* or *res judicata* to avoid all proceedings from going forward.

⁵ *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, para. 40.

⁶ *Ibid.*

⁷ Cf. AMF’s Response, para. 7, 10, 23, 26 and 43.

⁸ *Securities Act*, CQLR c V-1.1; *Act respecting the regulation of the financial sector*, CQLR c E-6.1.