



Can in-house counsel be summoned by the AMF to testify in an investigation?

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The Supreme Court of Canada denied leave to appeal with respect to the 2014 Quebec Court of Appeal decision requiring in-house counsel to attend an **Autorité des Marchés Financiers** (AMF) investigation into her employer's trades.

By refusing leave to appeal, the Supreme Court of Canada confirms the Quebec Court of Appeal's decision in **Autorité des marchés financiers c. X** that recognized the validity of a subpoena issued to an in-house counsel (Me X) ordering her to testify on facts in the context of an AMF investigation into Me X's employer and a confidentiality order with respect to the investigation. The challenge, based in substance upon the application of solicitor-client privilege, was considered premature given the absence of evidence that the AMF had asked, or was going to ask, Me X to disclose privileged information. This decision does not affect the scope of in-house counsel's solicitor-client privilege as such privilege can, and very often does, apply to communications (depending on their nature) between employers and their in-house counsel. Nor does this decision prevent Me X from objecting to specific disclosure to the AMF later on the basis of such privilege. Given this ruling, the involvement of external counsel early on when such an investigation is launched, or expected to be launched, would be well advised.

If Me X wished to contest the AMF's order, she should have first availed herself of the Bureau de décision et de révision's review process provided for in the AMF legislation. The "privative clauses" contained in the AMF legislation effectively prohibited a challenge of the kind initiated by Me X (not a challenge respecting the jurisdiction of the AMF) to the courts. A privative clause attempts to protect decisions of administrative tribunals by preventing the parties' appealing such decisions to a court, rather than using the administrative review procedures in the legislation governing the administrative tribunal's decisions.

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