

AMF not successful in convincing Court of Appeal in a market manipulation case

SEPTEMBER 18, 2018 4 MIN READ

Related Expertise

- [Banking and Financial Services](#)
- [Capital Markets](#)
- [Class Action Defence](#)
- [Construction](#)
- [Corporate and Securities Disputes](#)
- [Corporate Governance](#)
- [Financial Services](#)
- [Technology](#)

Authors: [Fabrice Benoît](#), [Frédéric Plamondon](#)

Very recently, the Québec Court of Appeal rendered a judgment addressing the elements constituting an offence for market manipulation as set forth in section 195.2 of the Québec *Securities Act* (SA). According to the Court of Appeal, this infraction is inconceivable without an element of dishonesty. Otherwise, a significant number of stock exchange transactions would fall under this section simply because these transactions had or could have an impact on a security's price.

The Court of Appeal, just as the Superior Court and the Court of Québec, therefore refused the arguments made by the Autorité des marchés financiers (AMF) and confirmed acquittal of the respondents.

Summary of the proceedings

In this case, the AMF had filed two notices of offence against Clément Forget (Forget) for having influenced or attempted to influence the capital stock of Clemex Technologies Inc. (Clemex). The AMF had also filed a notice of offence against Claude Parent (Parent), Forget's securities representative, for having helped Forget, by act or omission, to influence or attempt to influence Clemex's securities. Specifically, the AMF blamed Forget, Clemex's founder, president and insider, of having bought — using his wife's brokerage account — Clemex securities to foster the conclusion of a private investment. On March 5, 2015, Justice Marco LaBrie, from the Court of Québec, (Criminal and Penal Division), acquitted Forget and Parent of all three charges.

The AMF appealed this decision to the Superior Court (first level of appeal in criminal and penal cases in Québec). On December 22, 2016, Justice Sophie Bourque rejected the AMF's appeal and upheld the Court of Québec's decision.

The AMF decided to try again before the Québec Court of Appeal. The AMF mainly blamed the Superior Court for having erred in concluding that bad faith on the part of the defendant was an essential element of the offence set forth in section 195.2 of the SA.

The Court of Appeal's decision

The first argument for the appeal raised by the AMF is, in our opinion, the most interesting. It was, among other things, to determine if bad faith on the part of a person accused of having manipulated the market as set forth in section 195.2 of the SA constitutes an essential element of the said offence. The section states the following:

195.2 Influencing or attempting to influence the market price or the value of securities by means of unfair, improper or fraudulent practices is an offence.

From the outset, the Court of Appeal states that the text in section 195.2 of the SA indicates that it is a *mens rea* offence and that a guilty intent is necessary. More specifically, according to the Court of Appeal, the purpose of the legislation, the specific wording of section 195.2 in the SA and the seriousness of the sentence (in this case, five years less one day of imprisonment, in addition to a fine) support the fact that it is an offence of intent and not one of strict liability.

The AMF pled before the Court of Appeal, once again unsuccessfully, that it wasn't necessary to prove bad faith (or dishonesty) by a defendant for the said defendant to be convicted under section 195.2 in the SA. According to the AMF, the terms "*unfair, improper or fraudulent practices*" instead mean practices that are objectively reprehensible and harmful to the market's integrity. Moreover, before the Superior Court, the AMF maintained that the terms "*unfair, improper or fraudulent practices*" in section 195.2 in the SA were useless and superfluous.

As for the Superior Court and the Court of Québec, the Court of Appeal rejected the AMF's arguments and concluded instead that the terms "*unfair, improper or fraudulent practices*" are inconceivable without an element of dishonesty. The AMF did not prove beyond reasonable doubt the existence of a dishonest practice, in the eyes of a reasonable person placed in the same circumstances.

As stated by the Court of Appeal, it is not sufficient, at least in this case, to establish that the price of the securities was influenced by Forget's transactions, in order to prove the existence of an unfair, improper or fraudulent practice. In this regard, the Court noted that all stock exchange transactions can influence the price of a security, especially when the security is not very active and the market is unstable, and that this element is insufficient to convict a person accused of market manipulation.

Conclusion

It is an important decision and will serve, we hope, as a guide for the Québec securities regulatory authority in its current and future market manipulation investigations.

This decision may be the subject of an application for leave to appeal to the Supreme Court of Canada.