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Not Necessarily Here: Ontario Court of Appeal Clarifies Jurisdictional Limits for Secondary Market Misrepresentation Claims

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August 16, 2018

In its recent decision in Yip v. HSBC Holdings plc*, the Ontario Court of Appeal clarified the jurisdiction of the Ontario courts with respect to secondary market misrepresentation claims. By staying a proposed class action on the basis that there was no real and substantial connection to Ontario, the Court of Appeal has confirmed that Ontario is not a "universal jurisdiction" for such proceedings.*

Key Takeaways

- **The "real and substantial connection" test applies when determining whether a non-reporting issuer is a responsible issuer under the *Securities Act*.** This finding is supported by the legislative intent that the test under the statute would not diverge from the common law test.
- **The Court of Appeal is concerned with Ontario becoming a "universal jurisdiction."** Consistent with that concern, the Court of Appeal held that simply accessing a non-reporting issuer's disclosure from the internet in Ontario does not result in jurisdiction *simpliciter*.
- **The Court confirmed that comity underlies the *forum non conveniens* analysis.** And the more appropriate forum for secondary market claims will often tend toward the jurisdiction where the securities are traded.

Summary and Background

The Ontario Court of Appeal recently dismissed an appeal in a proposed class action relating to alleged secondary market misrepresentation by a Canadian resident who purchased shares of HSBC Holdings plc.

The plaintiff purchased his shares online in Ontario through a Hong Kong bank account. The shares were traded on the Hong Kong Stock Exchange. HSBC Holdings is headquartered in the United Kingdom and its shares had never traded on a Canadian exchange. The plaintiff accessed HSBC Holdings' continuous disclosure materials from its website and alleged that these documents contained material misrepresentations with respect to compliance with anti-money laundering and anti-terrorist financing laws, and a disclaimer of participation in a benchmark interest rate manipulation scheme.

On HSBC Holdings' motion to dismiss or stay the proceedings, the lower court found that even though a

subsidiary of HSBC Holdings carried on business in Ontario, HSBC Holdings itself did not. Therefore, the Ontario courts did not have jurisdiction *simpliciter*. In addition, the lower court held that Ontario was not the most appropriate forum in any event. For these reasons the lower court dismissed the proposed class action.

The Appeal

Three main arguments were advanced by the plaintiff on appeal. First, the court should adopt a unique interpretation of the "real and substantial connection" test in respect of a "responsible issuer" under section 138.1 of the *Securities Act*.[1] Second, even if the common law meaning of "real and substantial connection" applied, the motion judge applied the test incorrectly. Third, the motion judge applied the doctrine of *forum non conveniens* incorrectly.

While acknowledging that the definition of "responsible issuer" under the *Securities Act* is more expansive than the definition of "reporting issuer," the Court of Appeal found that "responsible issuer" should be defined with reference to the common law "real and substantial connection" test. The Court of Appeal relied on the use of the phrase "real and substantial connection" in s. 138.1 of the *Securities Act* when describing "responsible issuers," and took the use of this language to hold that the legislative intent was to mirror the common law test for jurisdiction. In doing so, the Court of Appeal recognized the risk that to do otherwise could cause Ontario to become a "universal jurisdiction" for secondary market misrepresentation claims.

The Court of Appeal's decision that HSBC Holdings did not carry on business in Ontario was based on its finding that its management business was completely distinguishable from the activities conducted by its subsidiary, HSBC Canada, in Ontario. Since downloading disclosure material from a issuer's website was an extremely weak connection, the presumption that the Ontario courts had jurisdiction due to the alleged tort being committed in Ontario was rebutted.

Finally, the Court of Appeal also provided clarification on the issue of *forum non conveniens*. In particular, consistent with its previous jurisprudence, it emphasized that comity is a key consideration underlying the *forum non conveniens* analysis.

The Upshot

The Court of Appeal has added clarity with respect to when a secondary market misrepresentation claim can be advanced against a foreign non-reporting issuer under the *Securities Act*. This guidance may serve to deter potential statutory claims with very weak connections to Ontario from being commenced in the Ontario courts.

The Court of Appeal's decision in *Yip v. HSBC Holdings plc* is available here.

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If you have any questions concerning this case or securities litigation generally, please contact Lara Jackson, John M. Picone, or any other member of the Cassels Securities Litigation Group.

The authors of this article gratefully acknowledge the contributions of summer student Kieran May.

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[1] R.S.O. 1990, c. S.5.
