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Ontario Court of Appeal Clarifies Jurisdictional Reach of Secondary Market Misrepresentation Claims

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The Ontario Court of Appeal has issued an important decision concerning the jurisdiction of Ontario courts in relation to secondary market misrepresentation claims brought under the Ontario *Securities Act*. In *Yip v HSBC Holdings plc*, released on July 11, 2018, the Court unanimously stayed a proposed class action on the basis that there was no real and substantial connection to Ontario despite the proposed representative plaintiff's presence in Ontario. The decision is important for setting limits on Ontario courts' reach over foreign defendants whose shares are traded by Canadians.

The Court of Appeal's two core holdings were as follows:

- Ontario is not a “universal jurisdiction” for secondary market misrepresentation claims. Rather, the court will prevent claims when the extent of connection to Ontario is merely that a security was purchased by a resident of Ontario or an issuer's investor information is available in Canada.
- The more appropriate jurisdiction for secondary market claims will often be the jurisdiction of the exchange or exchanges where the securities trade.

Background

Mr. Yip, an Ontario-resident shareholder, commenced a statutory and common law misrepresentation class action claim against HSBC Holdings plc. Mr. Yip alleged that HSBC Holdings failed to disclose non-compliance with anti-money-laundering and anti-terrorist financing laws, as well as its alleged participation in an illegal scheme to manipulate international benchmark interest rates. Mr. Yip further alleged that he and other shareholders had been misled by HSBC Holdings' public disclosure and suffered approximately US\$7 billion in damages.

HSBC Holdings is the U.K.-based parent holding company of an international banking conglomerate. HSBC Holdings (through various subsidiaries) has offices in 67 countries and shareholders in 129 countries, including Canada in both cases. However, shares of HSBC Holdings have never been traded or listed on a Canadian stock exchange, so Mr. Yip used his home computer in Markham, Ontario, to purchase HSBC Holdings shares on the Hong Kong Stock Exchange, using a Hong Kong bank account. Mr. Yip also accessed HSBC Holdings' public disclosure through its website, not through the website of its Canadian subsidiary.

The Jurisdiction Motions

At first instance, HSBC Holdings moved to dismiss or stay Mr. Yip's action on the basis that the Ontario court lacked jurisdiction over this case or, in the alternative, that Ontario was an inconvenient forum for the action. Mr. Yip moved at the same time for a declaration that HSBC Holdings was a responsible issuer for the application of section 138.1 of the *Securities Act*.

On the motions, Justice Perell agreed with HSBC Holdings and stayed the action. Justice Perell also found that HSBC Holdings was not a “responsible issuer” for the purpose of section 138.1 of the Ontario *Securities Act*, because it did not satisfy the “real and substantial” connection test.

The Appeal

On appeal, Mr. Yip argued that:

1. A unique test for jurisdiction distinct from the “real and substantial connection” test is required for the purposes of secondary market misrepresentation claims under the *Securities Act*.
2. Justice Perell erred in finding that HSBC Holdings did not have a real and substantial connection to Ontario.
3. Justice Perell erred in finding that Ontario was *forum non conveniens* because he placed too much emphasis on the place of the trade.

Each of these arguments was rejected by the Ontario Court of Appeal, which upheld the stay of proceedings ordered by Justice Perell.

The Definition of Responsible Issuer

The Court held that the common law real and substantial connection test applies in determining whether a non-reporting issuer is a “responsible issuer” under the *Securities Act*.

After a review of the legislative and judicial history of the *Securities Act*, the Court found that the legislature had made a conscious decision to use the common law real and substantial connection test in the definition of a non-reporting “responsible issuer” under the secondary market misrepresentation provisions of the *Securities Act*. Accordingly, the legislature did not expect the test under the *Securities Act* to diverge from the common law test. The Court therefore rejected Mr. Yip’s argument that a responsible issuer is one that “knows or ought to know that its investor information is being made available to Canadian investors.”

In doing so, the Court noted that the legislature did not intend for Ontario to become the universal jurisdiction for secondary market misrepresentation actions, which was the implication of the test proposed by Mr. Yip. Accordingly, the Court rejected Mr. Yip’s proposed definition of a “responsible issuer” under section 138.1 of the *Securities Act*.

The Proper Application of the Common Law Test

The Court upheld the decision of Justice Perell that HSBC Holdings did not have a real and substantial connection with Ontario, and accordingly it was not a responsible issuer for the purposes of section 138.1 of the *Securities Act*.

On appeal, Mr. Yip argued that HSBC Holdings carried on business in Canada because it was required to comply with Canadian banking regulations under the *Bank Act* and because its subsidiary, HSBC Canada, carried on business in Ontario.

The Ontario Court of Appeal rejected these arguments, upholding Justice Perell’s finding that HSBC Holdings’ business was distinct from that of its subsidiaries and involved the management of a “global enterprise of a group of commonly bannered banks.” Therefore, HSBC Holdings was found not to carry on business in Ontario.

Finally, the Court agreed with Justice Perell that Ontario was not the most convenient forum, and the case was better brought in England (the location of HSBC Holdings) or Hong Kong (the location of the exchange on which the securities were traded).

Conclusion

The Court’s decision in *Yip* has helped to better define the circumstances in which a secondary market misrepresentation claim can be brought against a non-reporting foreign issuer under the *Securities Act*. This is a positive development in the law and should help to prevent claims with only a peripheral connection to the jurisdiction. Merely having a shareholder in Ontario and public disclosure available electronically is not sufficient to ground a secondary market misrepresentation case against an issuer when there is no other tie to Ontario.

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