# Ontario Court of Appeal clarifies jurisdictional limits of secondary market claims in Yip v. HSBC Holdings plc

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The recent judgment of the Ontario Court of Appeal in *Yip v. HSBC Holdings plc*[1] provides helpful guidance on the jurisdictional limits of secondary market proceedings commenced in respect of securities traded on a foreign exchange. In particular, the Court cautioned against the risks of "jurisdictional overreach," and confirmed that the common law "real and substantial connection" test for jurisdiction must be satisfied in respect of both statutory and common law misrepresentation claims against a foreign public issuer. While the Court acknowledged that a "responsible issuer" under Part XXIII.1 of the *Securities Act*[2] goes beyond a reporting issuer, such that an action for secondary market misrepresentation may be sustained even where the underlying securities are not listed or traded on a Canadian exchange, the mere fact that the securities can be purchased online by an Ontario resident is not – in and of itself – sufficient to satisfy the common law test for jurisdiction. What is more, the principles of comity dictate that the forum analysis in respect of secondary market claims will often favour the forum of the exchange(s) where the securities are traded.

## Background

The underlying proceedings were commenced by a Canadian resident who purchased securities issued by HSBC Holdings plc. (HSBC Holdings), the parent holding company of an international banking conglomerate with its head office in London, U.K. Notably, the securities at issue were never traded or listed on any Canadian exchange.[3] The plaintiff acquired his shares online from Ontario, using a Hong Kong bank account on the Hong Kong Stock Exchange, and accessed HSBC Holdings' disclosure documents from its website (not from the website of its domestic banking subsidiary, HSBC Canada).

The plaintiff alleged that HSBC Holdings' continuous disclosure documents and public statements contained material misrepresentations relating to its asserted compliance with anti-money laundering and anti-terrorist financing laws, as well as to its disclaimer of participation in an illegal scheme to manipulate certain international benchmark interest rates. Notably, for the purposes of his analysis, the motion judge proceeded on the assumption that these misrepresentations were in fact communicated.

On the basis of the foregoing facts, Justice Perell concluded that HSBC Holdings did not carry on business in Ontario (even though it was subject to Canadian banking regulations under the *Bank Act*[4] and its subsidiary did itself carry on business in Ontario), and ruled that the Ontario courts did not have jurisdiction *simpliciter*.[5] In the alternative, Justice Perell concluded that Ontario would not be the appropriate forum in any event, deferring instead to the forum where the trades took place. Accordingly, Justice Perell dismissed the plaintiff's proposed statutory claim for secondary market misrepresentation under the *Securities Act* and stayed the parallel common law negligent misrepresentation claim.

On appeal, the plaintiff's arguments were threefold: (i) the court should adopt a statute-specific and unique interpretation of the words "real and substantial connection" in the definition of "responsible issuer" in section 138.1 of the *Securities Act*, (ii) even if the common law test for a real and substantial connection applies to the statutory definition of a responsible issuer, the motion judge erred in his application of the common law test and (iii) the motion judge erred in his application of the doctrine of *forum non conveniens*.

The Court of Appeal ultimately dismissed the appeal, subject to a variation of the underlying costs award,[6] and concluded that it was in "substantial agreement with the reasons of the motion judge." However, in so doing, the Court took the opportunity to offer "jurisprudential observations" in respect of three discrete but overlapping issues arising from the jurisdictional questions raised by the proceeding:

(i) the proper interpretation of the definition of "responsible issuer" in s. 138.1 of the *Securities Act*;

(ii) the application of the jurisdiction *simpliciter* test to the common law and statutory tort claims of misrepresentation; and

(iii) the application of the doctrine of *forum non conveniens*.

## The Court of Appeal's "jurisprudential observations"

### (a) The proper interpretation of "responsible issuer" under section 138.1 of the *Securities Act*

While the Court of Appeal acknowledged that Part XXIII.1 of the *Securities Act* is remedial legislation and further accepted that the definition of "responsible issuer" under the Act goes beyond a reporting issuer whose shares may be listed or traded on a Canadian exchange, it ultimately rejected the plaintiff's argument that "responsible issuers" should be expansively defined by reference to a purposive analysis that applies a unique statute-based conception of jurisdiction. In particular, the Court noted that s. 138.1 defines a "responsible issuer" to mean a reporting issuer or "any other issuer *with a real and substantial connection to Ontario*" whose securities are publicly traded, signaling an intention of the legislature to track the common law test for jurisdiction. Accordingly, the Court rejected the plaintiff's argument that "an issuer that knows or ought to know that its investor information is being made available to Canadian investors has a securities regulatory *nexus*." While it acknowledged that this proposed formulation was an attempt to import the Supreme Court's articulation of "real and substantial connection" in *Moran v. Pyle*[7] (a products liability case) into the securities realm, the Court concluded that the net effect of doing so would be to "make Ontario a universal jurisdiction for secondary market misrepresentations made anywhere in the world."

After reviewing the legislative history of Part XXIII.1 of the *Securities Act* and the evolution of the common law in relation to matters of jurisdiction, the Court concluded that "the Legislature was content to allow the common law to develop in the ordinary course, as it did with *Van Breda* ... [and] had no expectation that the test for a real and substantial connection, in relation to securities matters, would diverge over time from the common law test." In an effort to avoid "jurisdictional overreach," therefore, the Court expressly limited the definition of a "responsible issuer" to an issuer that could be demonstrated to have a real and substantial connection to Ontario.

## (b) Jurisdiction *simpliciter* in the context of common law and statutory claims of misrepresentation

The Court of Appeal premised its analysis of the question of jurisdiction *simpliciter* on the preliminary conclusion that "HSBC Holdings could not be said to be carrying on business in Ontario simply because the appellant could access a non-reporting issuer's disclosure information using his home computer in Ontario. This would give rise to the universal jurisdiction that LeBel J. explicitly rejected in *Van Breda*." Unlike the facts before the court in *Abdula v. Canadian Solar Inc*.,[8] where a non-reporting issuer was deemed to be a "responsible issuer" by virtue of the real and substantial connection between the defendant and Ontario (including the fact that the issuer was incorporated in Ontario, maintained executive offices and certain business operations in Ontario, and had held its annual meeting in Ontario), the Court of Appeal noted that HSBC Holdings' management business was wholly distinct from the businesses it manages: "Very few, if any, activities of HSBC Holdings' business have ever occurred in Ontario; it has no fixed place of business in Canada; and there is no agent of HSBC Holdings doing its management business in Ontario."

Accordingly, the Court of Appeal ultimately agreed with the motion judge's conclusion that "downloading HSBC Holdings' material from a website was an 'extremely weak connection'" and endorsed the view that "HSBC Holdings had no reason to believe that it was obliged to comply with or would be subject to securities regulation in Ontario." On this basis, the presumptive real and substantial connection to Ontario that arose by virtue of the possible commission of a misrepresentation-based tort in Ontario was deemed to have been rebutted on the evidence.

## (c) The application of the doctrine of *forum non conveniens* in the context of secondary market misrepresentation claims

Although the Court did not need to address the question of *forum non conveniens* in the context of its analysis, having already upheld the motion judge's conclusion that the Ontario courts lacked jurisdiction *simpliciter*, it nevertheless took the opportunity to clarify the application of the common law test to the securities realm. In particular, the Court rejected the plaintiff's submissions that the motion judge "placed too much emphasis on the place of the trade," and clarified that there is no inconsistency between the two *Kaynes* decisions,[9] which had previously been rendered in the context of proposed class actions under Part XXIII.1 of the *Securities Act.*

On the question of "place of trade," the Court of Appeal noted that the motion judge correctly conceded that "there is no place of trading requirement under Part XXIII.1 of the *Ontario Securities Act.*" However, it also agreed with his conclusion that courts should generally favour the forum where the trade took place in the context of secondary market claims. In so doing, the Court also expressly rejected the plaintiff's argument to the effect that the Ontario court's prior statement in *Kaynes (2014)* that "the prevailing international standard tying jurisdiction to the place where the securities were traded" was wrong and was in fact corrected by the court in *Kaynes (2016)*. In particular, the Court of Appeal noted as follows:

"[T]he framework in *Kaynes (2014)* for the *forum non conveniens* analysis in the context of secondary market liability was not reversed by *Kaynes (2016)*. Comity continues to underlie the *forum non conveniens* analysis. Other factors in the *forum non conveniens* analysis must be considered, but comity is a key consideration. As such, the more appropriate forum for secondary market claims will often favour the forum of the exchange(s) where the securities trade."

In this context, the Court of Appeal also clarified that the *Kaynes (2016)* ruling similarly did not "elevate the juridical advantage of asserting a claim as a class action to the status of an inviolable right," and warned of the difficulties of applying the notion of juridical advantage as a factor in the *forum non conveniens* analysis. In particular, the Court echoed the Supreme Court's cautionary statement in *Amchem Products Incorporated v. British Columbia*:[10] "Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum."

## Conclusion

The Court of Appeal's ruling in *Yip v. HSBC Holdings plc* seeks to articulate the jurisdictional bounds of secondary market misrepresentation claims asserted against foreign public issuers. In so doing, the Court recognizes the realities of modern trading activity, which can be effected on global exchanges from virtually anywhere in the world, and acknowledges the inherent tension between the desire to regulate and protect the public markets and the need to respect the rules of comity. With a view to avoiding perceived "jurisdictional overreach," the Court of Appeal's ruling articulates a helpful roadmap for navigating secondary market claims that engage foreign issuers.

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[1] 2018 ONCA 626

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

[3] The securities traded on the London and the Hong Kong Stock Exchanges, with secondary listings on the Bermuda Stock Exchange and the Paris Euronext Stock Exchange. HSBC Holdings' American Depository Receipts also traded on the New York Stock Exchange.

[4] S.C. 1991, c. 46.

[5] "Jurisdiction *simpliciter*" refers to the court's threshold ability to assert jurisdiction over an out-of-province party who has not submitted or otherwise attorned to the Ontario proceedings.

[6] The motion judge's decision was upheld on all issues related to jurisdiction. However, the Court of Appeal reduced the initial costs award on the grounds that the defendants' expert fees were excessive and/or not adequately supported by the evidence. In so ruling, the Court noted as follows: "In our view, a class action defendant does not have carte blanche to unreasonably spend money on experts; we see this obligation of reasonableness in the expenditure of funds on experts as an aspect of ensuring access to justice, one of the principle purposes of class actions."

[7] [1975] 1 S.C.R. 393.

[8] 2012 ONCA 211, 110 O.R. (3d) 256, leave to appeal refused, [2012] S.C.C.A. No. 246.

[9] *Kaynes v. BP, PLC*, 2014 ONCA 580, 122 O.R. (3d) 162, at paras. 31-34, leave to appeal refused, [2014] S.C.C.A. No. 452 ("***Kaynes (2014)***"), and *Kaynes v. BP P.L.C.*, 2016 ONCA 601, 133 O.R. (3d) 29 ("***Kaynes (2016)***").

[10] [1993] 1 S.C.R. 897, at p. 933.