September 24, 2018

The Court of Appeal Places Limits on Secondary Market Misrepresentation Claims: Ontario is not a default jurisdiction for foreign issuers whose securities were purchased in Ontario

In *Yip v HSBC Holdings plc* ("*Yip*") the Ontario Court of Appeal recently confirmed that "there is nothing unfair" in tying jurisdiction to litigate against a foreign defendant in a secondary market misrepresentation to the place where the securities were traded. The Court's decision reflects the international standard that purchasers who use foreign exchanges should look to the relevant foreign court to litigate their claims and closes the door on creating a universal or default jurisdiction for secondary market claims under the Ontario *Securities Act*.

Mr. Yip proposed to bring a class action in Ontario against a foreign issuer, HSBC Holdings ("HSBC"), an international banking conglomerate with its head offices in London, U.K. He had purchased shares from HSBC on its website using a Hong Kong bank account on the Hong Kong Stock Exchange. Mr. Yip asserted that HSBC misled investors by way of disclosure documents published on its website (not the website of its Canadian banking subsidiary), causing them to lose USD $7 billion.

Mr. Yip argued HSBC's misrepresentation formed the basis of a statutory claim for misrepresentation under s.138.3 of the *Securities Act*, R.S.O. 1990, c. S.5 and a common law negligent misrepresentation claim. The motion judge dismissed Mr. Yip's claim under the *Securities Act* and stayed the common law claim. His Honour found that an Ontario court did not have jursidction *simpliciter*, and even if it did, Ontario was not the appropriate forum.

The Court of Appeal dismissed Mr. Yip's jurisdiction appeal because they were "in substantial agreement with the reasons of the motion judge". The Court went on to make jurisprudential observations in respect of (i) the proper interpretation of the definition of "responsible issuer"; (ii) the application of

jurisdiction *simpliciter* to common law and statutory misrepresentations claims; and (iii) the application of the doctrine of *forum non conveniens* in secondary market misrepresentation claims.

(i) The Proper Interpretation of the Definition of Responsible Issuer in s. 138.1 of the Securities Act

A secondary market misrepresentation action claim under s.138.3 only lies against a "responsible issuer." As the term is defined in s.138.1 of the *Securities Act*, two groups qualify as "responsible issuers": a "reporting issuer" and "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded." The question before the Court was whether HSBC was a "responsible issuer". It was conceded that HSBC was not a reporting issuer.

Mr. Yip argued that the term "real and substantial connection" should be read purposively and in a manner that gives effect to the *Securities Act*'s goal of protecting investors from fraudulent practices. He proposed 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* with Ontario" sufficient to establish a "real and substantial connection." In the alternative, Mr. Yip submitted that the Court should identify a new presumptive connecting factor for cases of secondary market misrepresentation.

The Court rejected Mr. Yip's argument because the legislative history indicated that the Legislature did not intend in introducing civil liability for market misrepresentations to make Ontario "the default jurisdiction for issuers around the world whose securities were purchased by residents of Ontario." The Court also found that the phrase "real and substantial connection" was consistently interpreted to prevent jurisdictional overreach, and, in line with the *Van Breda* principle that "universal jurisdiction should be avoided." The Legislature had chosen this common law term consciously, and had "no expectation that the test for a real and substantial connection, in relation to securities matters, would depart from the common law test."

(ii) The Proper Application of the Common Law Test for a Real and Substantial Connection

Next Mr. Yip argued that even if the common law test for a real and substantial connection applied to the statutory definition of "responsible issuer", the motion judge erred in his application of the common law test for a real and substantial connection. Mr. Yip asserted that HSBC was caught be two of the four presumptive connecting factors established by the Supreme

Court of Canada in *Van Breda*: it committed a tort in Ontario; and it carries on business in Ontario.

The motion judge concluded that HSBC did not carry on business in Ontario, even though its subsidiary, HSBC Canada, does carry on business in Ontario. The Court of Appeal agreed, commenting that the mere fact that a website can be accessed from a jurisdiction did "not suffice to establish that the defendant is carrying on a business there." HSBC could not be said to be carrying on a business in Ontario merely because its disclosure information could be accessed there.

However, the Court, agreeing with the motion judge, concluded that the presumptive connecting factor of a tort committed in the province was present (assuming that misrepresentation had, in fact, occurred), but that in the circumstances, it was rebutted. The fact that HSBC's materials could be downloaded from its website by Ontario residents on their computers established only an "extremely weak connection". It would not be reasonable to expect HSBC to believe it was obliged to comply with securities regulation in Ontario.

Ultimately, the Court concluded that HSBC did not have a "real and substantial" connection with the province and could not be categorized as a "responsible issuer" under the *Securities Act*.

(iii) The Proper Application of the *Forum Non Conveniens Doctrine*

Lastly, the Court held in *obiter* that even if a "real and substantial connection" had been established, the *forum non-conveniens* doctrine would have justified judicial discretion to refuse to hear the case on the basis that the U.K. or Hong Kong were clearly more appropriate jurisdictions. In the securities setting, the Court held that the principle of comity dictated that the standard should be that jurisdiction is tied to the place the securities were traded.

In this significant decision, the Court has limited its jurisdiction over international issuers to ensure that Ontario does not become a "universal jurisdiction" for secondary market misrepresentations which are only incidentally related to Ontario. It is important in its wake to ensure investors are aware of the added risks they incur when purchasing securities from a foreign issuer. In Ontario, there may be no domestic remedy available where an investor buys shares from an international company even if he or she has done so on the basis of misleading information. Indeed, *Yip* has already been applied by the Superior Court of Justice in *Leon v. Volkswagen AG* in granting the defendant's motion to dismiss the proposed class action on jurisdictional grounds. Buyer, beware.