

## Legal update

### BC Court of Appeal affirms broad jurisdiction of securities regulator

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#### April 2016 Securities Transnational litigation

A recent British Columbia Court of Appeal decision confirms the broad reach of provincial securities regulators to sanction conduct targeting non-residents.

In *McCabe v British Columbia (Securities Commission)*,<sup>1</sup> the court affirmed the jurisdiction of the British Columbia Securities Commission (the Commission) to sanction a British Columbia resident for making misrepresentations in documents distributed exclusively to residents in the United States.

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#### Background

From his home in British Columbia, Mr. McCabe was commissioned and paid by a British Virgin Islands corporation to write “tout sheets” promoting the shares of a Nevada mining company. The tout sheets were printed and distributed in the United States. There was no evidence they were ever received, read or known to any person in British Columbia. Securities regulators in both British Columbia and the United States brought proceedings against McCabe in relation to the tout sheets, which were alleged to be grossly misleading.

Prior to the hearing on the merits, McCabe argued, unsuccessfully, that the Commission’s proceedings should be stayed in favour of those in the United States on the basis of *forum non conveniens*. That decision was not appealed.

At the liability hearing, he submitted that the Commission lacked jurisdiction to sanction him because the tout sheets containing the alleged misrepresentations had been sent only to residents of the United States and related to shares that were traded only in the United States. The Commission disagreed, and McCabe appealed.

#### Broad mandate to regulate conduct

The Court of Appeal affirmed that Mr. McCabe’s actions had a real and substantial connection with British Columbia and therefore fell within the Commission’s jurisdiction.

Noting that conduct involving securities will often be transnational in nature, the court characterized the jurisdictional issue to be determined as whether there was **a** real and substantial connection between the impugned conduct and the province, not whether the connection was the **most** real and substantial. That question was to be answered within the context of the applicable regulatory regime, the provision being applied, the impugned conduct, the subject individual and the realities of modern securities regulation.

The court reviewed prior case law that affirmed the ability of provincial securities regulators to sanction residents targeting investors outside the province and recognized that the protective nature of provincial securities legislation extends to protecting investors outside the province from unfair, improper or fraudulent activities committed by persons within the jurisdiction.

The court observed that the statutory provision McCabe was found to have breached did not contain any language limiting its geographic applicability. The material element of the provision was the making of the statement constituting a misrepresentation, which occurred within the province when McCabe drafted the tout sheets.

McCabe's submission that, by analogy to principles of tort law, the wrongful act occurred where the statement was published, read or acted upon, not where it was written, was rejected. Tort law focuses on the place where damage occurs because it is intended to protect individuals who have been injured by the conduct of another. The primary focus of regulatory law is fundamentally different: to regulate conduct, not to remedy harm to victims.

Ultimately the court agreed with the Commission's finding that the evidence disclosed a real and substantial connection between McCabe's conduct and British Columbia, finding it had correctly analyzed the factors relating to jurisdiction. McCabe, a resident of British Columbia, had written the tout sheets from his home within the province and received compensation for doing so in a British Columbia bank account. On that basis the appeal was dismissed.

## Conclusion

This decision highlights the jurisdiction of provincial securities regulators to address not only conduct having a local impact, but also activities originating within the province that are directed at foreign markets. Securities regulators enjoy a broad mandate to protect the public interest, and the fact their jurisdiction may overlap with that of foreign authorities will not necessarily preclude them from bringing proceedings.

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*The authors wish to thank Kaitlin Shung, articling student, for her help in preparing this legal update.*

## Footnote

<sup>1</sup> *McCabe v British Columbia (Securities Commission)*, 2016 BCCA 7.

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