S.C.C. File No. 39920

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

BETWEEN:

FREDERICK LANGFORD SHARP

Appellant

-and-

AUTORITÉ DES MARCHÉS FINANCIERS

Respondent

-and-

SHAWN VAN DAMME, VINCENZO ANTONIO CARNOVALE, PASQUALE ANTONIO ROCCA, FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL, ONTARIO SECURITIES COMMISSION AND ATTORNEY GENERAL OF QUÉBEC

Interveners
(CONTINUED)

FACTUM
ONTARIO SECURITIES COMMISSION, INTERVENER

(Pursuant to Rule 42, *Rules of the Supreme Court of Canada*)

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Interveners

AND BETWEEN:

SHAWN VAN DAMME, VINCENZO ANTONIO CARNOVALE and PASQUALE ANTONIO ROCCA

Appellants

-and-

AUTORITÉ DES MARCHÉS FINANCIERS

Respondent

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The outcome of this appeal has significant implications for the effective enforcement of provincial securities laws. The appellants are challenging the ability of the Autorité des marchés financiers (**AMF**) to assert jurisdiction over them regarding an alleged pump-and-dump scheme that has connections to numerous jurisdictions. In so doing, the appellants are asking this Court to make determinations about the nature and scope of the common law test for territorial jurisdiction of provincial securities commissions, including its application to out-of-province respondents.

2. In the securities regulatory context, courts and tribunals take a broad, flexible approach to territorial jurisdiction. This approach accounts for the modern realities of securities regulation. These realities include the proliferation of online illegal investment schemes that allow perpetrators to engage with investors worldwide with few physical connections to any jurisdiction.

3. Narrowing the territorial jurisdiction test would undermine the ability of provincial regulators to protect their domestic investors and markets—particularly where local investors and markets are threatened by the out-of-province actors.

PART II – QUESTION IN ISSUE

4. The only issue addressed in this memorandum of argument is the nature and scope of the common law test for territorial jurisdiction, including whether and when it permits provincial securities commissions to bring proceedings against out-of-province persons and companies.

PART III – ARGUMENT

A. Overview

5. This Court has long recognized the international nature of our capital markets and the consequent need for securities regulators to transcend provincial and national borders.[1] Consistent with this principle, when called upon to assess the jurisdiction of provincial securities regulators, courts and tribunals have adopted a broad, flexible approach. This approach allows provincial regulators to take action against out-of-province actors whose activities threaten local investors and markets.

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[1] *Global Securities Corp v British Columbia (Securities Commission),* 2000 SCC 21 at para 28, [2000] 1 SCR 494 [*Global Securities*].

6. If the territorial jurisdiction test were to involve a compartmentalized analysis of the connections between each individual respondent and the territory of the regulator, this would negatively impact the ability of the Ontario Securities Commission (**OSC**) and other provincial securities regulators to protect their respective investors and markets. OSC enforcement proceedings against offshore online trading platforms illustrate both the threat that foreign entities pose to domestic markets and investors and the importance of ensuring that the territorial jurisdiction test accounts for the modern realities of the investment landscape.

i. Illegal securities schemes are routinely perpetrated across multiple jurisdictions

7. As technology has advanced, so has the ability of perpetrators to commit securities-related misconduct across national and international borders. Canadian courts have repeatedly recognized the inter-jurisdictional nature of securities markets.[2] Over two decades ago, this Court observed that "the Internet has greatly increased the ability of securities traders to extend across borders"[3] and that "regulators must equally be able to respond, and surmount borders where legally possible."[4]

8. The use of the internet to conduct illegal investment schemes across borders is reflected in the surge of OSC enforcement proceedings against offshore online trading platforms that offer securities to Ontario investors in violation of Ontario securities laws. These include proceedings

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[2] *Global Securities, supra* note 1 at para 28; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 1, [2013] 3 SCR 895 [*McLean*]; *Torudag v British Columbia (Securities Commission)*, 2011 BCCA 458 at paras 20-22 [*Torudag*]; *McCabe v British Columbia (Securities Commission)*, 2016 BCCA 7 at paras 32, 37 [*McCabe*].

[3] *Global Securities, supra* note 1 at para 28.

[4] *Global Securities, supra* note 1 at para 28.

involving platforms offering binary options,[5] contracts for difference,[6] and crypto asset products.[7] In each of these cases, the respondents were based outside Ontario and the platforms had no physical presence in Ontario.

9. Online trading businesses operate in a largely virtual space. As such, they are able to engage with investors worldwide with few physical connections to any jurisdiction. They require no physical connections to Ontario to harm Ontario investors and the integrity of Ontario's capital markets. It is critical that the territorial jurisdiction test be flexible enough to permit enforcement action to be taken in such circumstances. Indeed, offshore trading businesses may pose greater risks to Ontario investors and markets than domestic ones. As the Ontario Capital Markets Tribunal has observed in relation to crypto asset trading platforms, these platforms are "frequently located in offshore locations that have little if any local regulation or oversight" yet offer "complex and risky products" to Ontario retail investors, thereby "heightening" the need for "protections of Ontario securities law."[8]

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[5] *Cartu (Re)*, 2021 ONSEC 14 at para 5; *Cartu (Re)*, 44 OSCB 4801 (Settlement Agreement) at paras 1-2, 4, 10, 13, 17-18, 23, 25, [Book of Authorities "BOA", Tab 4]; *Cartu (Re)*, 2022 ONSEC 4 at paras 6, 23(q), 25, 103; *TCM Investments Ltd (Re)*, 2017 ONSEC 35 at paras 11-12, 14-15, 17, 38.

[6] *eToro (Europe) Limited, Re*, 2018 ONSEC 49 at paras 3, 6, 18; *eToro (Europe) Limited, Re*, 41 OSCB 8172 (Settlement Agreement) at paras 2-3, 6, 9, 23, [BOA, Tab 5]; *International Capital Markets Pty Ltd (Re)*, 2019 ONSEC 28 at paras 1, 3; *International Capital Markets Pty Ltd (Re)*, 42 OSCB 6507 (Settlement Agreement) at paras 3, 8, 10-12, 17, 19, [BOA, Tab 6]; *Ava trade Ltd (Re)*, 2019 ONSEC 27 at paras 1-3; *Ava trade Ltd (Re)*, 42 OSCB 6499 (Settlement Agreement) at paras 2, 8-9, 11-12, 29, [BOA, Tab 2]; *Vantage Global Prime Pty Ltd (Re)*, 2021 ONSEC 18 at paras 3, 6; *Vantage Global Prime Pty Ltd (Re)*, 2021 44 OSCB 6391 (Settlement Agreement) at paras 1-4, 10, 17, 29, [BOA, Tab 7].

[7] *Mek Global Limited (Re)*, 2022 ONCMT 15 at paras 6-9, 11, 90; *Polo Digital Assets, Ltd (Re)*, 2022 ONCMT 32 at paras 6-7, 13-17, 55 [*Polo Digital Assets*]; *Bybit Fintech Limited (Re)*, 2022 ONCMT 16 at paras 4, 7, 11; *Bybit Fintech Limited (Re)*, (2022) 45 OSCB 6374 (Settlement Agreement) at paras 3, 8, 10-11, 17-18, 26, [BOA, Tab 3]; *Aux Cayes Fintech Co Ltd (Re)*, 2022 ONCMT 30 at paras 4, 6, 13; *Aux Cayes Fintech Co Ltd (Re)*, 45 OSCB 8953 (Settlement Agreement) at paras 3, 8, 10-11, 17-18, 30 [BOA, Tab 1].

[8] *Polo Digital Assets*, *supra* note 7 at para 55.

ii. The existing approach to territorial jurisdiction allows provincial securities regulators to assert jurisdiction against out-of-province actors who pose a threat to local investors and markets

10. In the securities regulatory context, courts and tribunals take a broad, flexible approach to territorial jurisdiction. This approach reflects the interjurisdictional nature of capital markets and the importance of protecting domestic investors and markets within this global context. This Court has confirmed that "the provinces' authority over securities regulation is not limited to purely intraprovincial matters" and that provinces can assert jurisdiction over those outside the province in appropriate circumstances.[9]

11. In accordance with the *Unifund* framework, for a provincial regulatory scheme to apply to matters with extra-provincial elements, there must be a "sufficient" connection between the matter and the province asserting jurisdiction.[10] As the securities regulatory sphere is a provincial regulatory scheme, the *Unifund* framework governs.[11] The sufficiency determination is context

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[9] *Global Securities, supra* note 1 at para 41; *R v W McKenzie Securities Ltd* (1966), 56 DLR (2d) 56 cited with approval in *Global Securities* at para 41.

[10] *Unifund Assurance v Insurance Corp of BC,* 2003 SCC 40 at para 56, [2003] 2 SCR 63 [*Unifund*].

[11] *Crowe v Ontario Securities Commission*, 2011 ONSC 6918 (Ontario Div Ct) at paras 32-36 [*Crowe*]*; Berger v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 89 at paras 61, 63, 66 [*Berger*]; *McCabe, supra* note 2 at paras 34-36. See also *Ontario College of Pharmacists v 1724665 Ontario Inc*, 2013 ONCA 381 at para 67 (affirming the application of the *Unifund* framework to assess the jurisdiction of the College of Pharmacists over out-of-province actors); *College of Optometrists of Ontario v Essilor Group Inc*, 2019 ONCA 265 at paras 94-111 (applying the *Unifund* framework to assess the jurisdiction of the College of Optometrists over an out-of-province individual); *Worley v Ontario Cycling Association*, 2016 HRTO 952 at paras 73-93 (applying the *Unifund* framework to determine whether the Ontario Human Rights Tribunal had jurisdiction over a complaint involving extra-provincial aspects); *S obo X v English Language School Board*, 2015 BCHRT 24 at paras 58-60, 64-70 (applying the *Unifund* framework to determine whether the BC Human Rights Tribunal had jurisdiction over a complaint involving extra-provincial aspects); *NWT & Nunavut Workers' Safety v Harnish et al*, 2021 NWTSC 11 at paras 57-67 (applying the *Unifund* framework to determine whether the Northwest Territories

dependent: "[w]hat constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it."[12]

12. The nature and purpose of provincial securities legislation favours a broad approach to the sufficient connection analysis in the securities regulatory context. The subject matter of Ontario securities law includes a public interest objective of protecting Ontario investors and capital markets from unlawful schemes that frequently span multiple jurisdictions or are conducted largely in a virtual space. Perpetrators residing outside the province can, and do, inflict harm on Ontario's investors and capital markets. The territorial jurisdiction of provincial securities regulators "must reflect the realities of modern securities regulation" which is often "transnational in nature, crossing provincial and state borders."[13]

13. Courts and tribunals have recognized this context by adopting a broad, holistic approach, when assessing the territorial jurisdiction of securities regulators. The threshold for jurisdiction is often formulated as requiring a "real and substantial connection" between the unlawful scheme and the jurisdiction.[14] Although other articulations of this connection threshold also exist—such as "sufficient,"[15] "substantial,"[16] or "significant and substantial"[17]—the essence of the test is the

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Human Rights Adjudication Panel had jurisdiction over a complaint involving extra-territorial aspects). But see *Re Poseidon Concepts Corp*, 2015 ABASC 933 at para 19 (holding it was "not persuaded" that the *Unifund* framework applied in determining the jurisdiction of the Alberta Securities Commission over an out-of-province respondent).

[12] *Unifund, supra* note 10 para 62.
[13] *McCabe, supra* note 2 at para 37.
[14] *McCabe, supra* note 2 at para 49; *Torudag, supra* note 2 at para 29; *Ontario Securities Commission v DaSilva*, 2017 ONSC 4576 at para 55; *Meharchand (Re)*, 2018 ONSEC 51 at para 48; *Lehman Cohort Global Group Inc et al*, 2010 ONSEC 15 at para 116 [*Lehman*]; *World Stock Exchange, Re*, [2000] 9 ASCS 658 at p 22, [BOA, Tab 8]; *Libman v The Queen*, [1985] 2 SCR 178 at para 74, 1985 CanLII 51 (SCC); *Re Deyrmenjian*, 2018 BCSECCOM 125 at para 194 [*Deyrmenjian*].
[15] *Unifund, supra* note 10 at para 56; *Crowe, supra* note 11 at paras 32, 36*; Berger, supra* note 11 at para 63.
[16] *Winick, Re*, 2013 ONSEC 31 at paras 25-27 [*Winick*].
[17] *Doulis v Liberty Consulting Ltd*, 2014 ONSEC 31 at para 24; *Al-Tar Energy Corp, Re*, 2010 ONSEC 11 at paras 45, 52 [*Al-Tar*].

same. There must be sufficient links between the alleged misconduct and the territory of the regulator such that it is appropriate for the regulator to take jurisdiction.[18]

14. There is no requirement that the territory in which jurisdiction is being asserted have the most significant connections, or more connections than any other territory.[19] There is also no separate or heightened test for out-of-province actors. Whether or not a respondent is a resident of the jurisdiction in question, the test is the same.[20] Residency is just one factor to be assessed, together with all other relevant factors, in determining whether a sufficient connection exists.[21] Moreover, in cases involving a single, unlawful securities scheme, the test does not involve an individualized, isolated assessment of the connections that each respondent alleged to be involved in that scheme has with the jurisdiction in question. Rather, the assessment focuses on the connections between the scheme as a whole and that jurisdiction.[22] This is consistent with the first governing principle set out in *Unifund*: "[t]he territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to *matters* not sufficiently connected to it."[23]

15. The OSC acknowledges that this approach allows regulators from multiple jurisdictions to exercise jurisdiction over the same scheme. However, this is a feature, not a flaw. It promotes the seamless coverage of regulatory protection and the imposition of public interest remedies across the territories affected by a single, unlawful scheme. The utility of parallel proceedings by multiple securities regulators is reflected in the "secondary proceeding" provisions of provincial and territorial securities laws.[24] These provisions allow regulators to issue protective orders, such as

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[18] *Torudag, supra* note 2 at para 19; *McCabe, supra* note 2 at para 36.
[19] *McCabe, supra* note 2 at para 35.
[20] *Berger, supra* note 11 at paras 62-66; *Torudag, supra* note 2 at paras 23-29; *Winick, supra* note 16 at paras 25-27; *Lehman, supra* note 14 at paras 12, 116.
[21] *Berger, supra* note 11 at para 64.
[22] See e.g. *Al-Tar, supra* note 17 at para 45; *Berger, supra* note 11 at para 63; *Torudag, supra* note 2 at para 29; *Winick, supra* note 16 at paras 25-27; *Lehman, supra* note 11 at para 116; *Deyrmenjian, supra* note 14 at para 194.
[23] *Unifund, supra* note 10 at para 56 (emphasis added).
[24] *Securities Act,* RSO 1990, c S 5, s 127(10); *Securities Act*, RSA 2000, c S-4, ss 198.1 (2), (3), (4); *Securities Act*, RSBC 1996, c 418, ss 162.07(3); *The Securities Act*, RSM 1988, c S50, s 148.4(1); *Securities Act*, SNB 2004, c S-5.5, s 184.1(2); *Securities Act*, RSN 1990, c S-13, s 138.20(1); *Securities Act*, SNWT 2008, C 10, s 139(1); *Securities Act*, SNU 2008, c 12, s 139(1);

trading bans, based on findings and orders in other jurisdictions. In some cases, these reciprocal orders are automatic.[25] As this Court has held, the benefit of these secondary proceedings provisions is that they prevent the need for regulators to simultaneously bring "overlapping cases" that "would clog up the legal system and overburden the securities commissions."[26]

16. Those who perpetrate unlawful securities schemes spanning multiple jurisdictions should reasonably expect to face proceedings by regulators from multiple jurisdictions. By the same token, preventing a securities regulator from pursing allegations of misconduct with significant connections to its territory is "an outcome both contrary to the public interest and inconsistent with a responsible enforcement regime."[27] While no inherent unfairness arises where perpetrators face proceedings under multiple regimes, it is open to regulators to accommodate its processes in such circumstances. For example, in *Suman*, an insider trading case with connections to both Ontario and the U.S., the OSC crafted a sanctions order that took into account an existing disgorgement order and civil penalties imposed on the respondents through a U.S. Securities and Exchange Commission enforcement proceeding that related to the same underlying misconduct.[28] *Suman* illustrates that comity is not offended when two regulators take action in relation to a scheme with connections to both regulatory regimes. To the contrary, it shows the complementary nature of such parallel proceedings—whereby regulators work in tandem to protect the integrity of their domestic capital markets.

Securities Act, CQLR, c V-1.1, s 308.2.1.2; *Securities Act*, RSNS 1989, c 418, ss 134B(2); *The Securities Act, 1988*, SS 1988-89, C S-42.2, ss 134.01(2), (4); *Securities Act*, SY 2007, c 16, s 139(1).

[25] *Securities Act*, RSA 2000, c S-4, ss 198.1(3), (4); *Securities Act*, RSBC 1996, c 418, ss 162.07(3), (4); *The Securities Act*, RSM 1988, c S50, ss 148.4 (3), (4); *Securities Act*, SNB 2004, c S-5.5, s 184.1(2); *Securities Act*, RSN 1990, c S-13, s 138.20(2); *Securities Act*, SNWT 2008, C 10, s 139(2); *Securities Act*, SNU 2008, c 12, s 139(2); *Securities Act*, SNU 2008, c 12, s 139(2); *Securities Act*, CQLR, c V-1.1, s 308.2.1.2; *Securities Act*, RSNS 1989, c 418, ss 134B(3), (4); *The Securities Act, 1988*, SS 1988-89, C S-42.2, ss 134.01(2), (4); *Securities Act*, SY 2007, c.16, s 139(2).

[26] *McLean, supra* note 2 at para 57.

[27] *Hugh McCabe (Re)*, 2013 BCSECCOM 250 at paras 2-3, 18.

[28] *Shane Suman et al*, 2012 ONSEC 29 at paras 11-15, 46-48, 56-57, 59-60.

iii. Narrowing the territorial jurisdiction test would undermine the protection of investors and capital markets

17. The territorial jurisdiction test should be sufficiently flexible to allow provincial securities regulators to act against those who, from outside the province, threaten markets and investors within it. The existing approach to territorial jurisdiction does so.

18. If the test were narrowed, this could create gaps and inefficiencies in Canadian securities enforcement, to the detriment of Canadian investors and capital markets. Requiring individualized links between each individual or corporate respondent on the one hand and the territory of the regulator on the other would jeopardize the ability of the OSC and other Canadian securities regulators to protect their domestic investors and capital markets. For instance, offshore, online, trading businesses could be placed out of reach of provincial securities regulators despite being accessible by domestic investors.

19. In addition, an individualized, respondent-by-respondent, analysis of connections to a regulator's territory would likely lead to a situation in which multiple regulators would need to take enforcement action over different subsets of those responsible for a single unlawful securities scheme. With modern technology, perpetrators residing in different jurisdictions can easily work together to unlawful ends. If each of those jurisdictions were required to bring independent proceedings against only those perpetrators residing in their jurisdiction, this would create inefficiencies, undermine the utility of the secondary proceeding provisions and cause exactly the type of "overburden[ing]" of the securities commissions that secondary proceeding provisions are intended to avoid.[29] This approach would also have the effect of artificially fragmenting the adjudication of a single unlawful operation into multiple proceedings, each addressing its own slice of the overall misconduct.

PARTS IV AND V – COSTS AND RELIEF SOUGHT

20. The OSC does not seek costs against any party and asks that costs not be ordered against it. The OSC takes no position on the merits of the appeals.

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[29] *McLean, supra* note 2 at para 57.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2022

Katrina Gustafson/Alexandra Matushenko

PART VI – TABLE OF AUTHORITIES

CASES	PARAGRAPH WHERE CITED
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