No. 39920

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

B E T W E E N

SHAWN VAN DAMME,
VINCENZO ANTONIO CARNOVALE and
PASQUALE ANTONIO ROCCA

APPELLANTS (Appellants)

- and -

AUTORITÉ DES MARCHÉS FINANCIERS

RESPONDENT (Respondent)

- and -

FREDERICK LANGFORD SHARP

INTERVENER (Mis-en-cause)

FACTUM OF APPELLANTS

Shawn Van Damme, Vincenzo Antonio Carnovale
and Pasquale Antonio Rocca

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

[1] This Court has for decades consistently insisted that one of the central objectives of international law was to ensure predictability of solutions, and on the importance of the role played by the *Civil Code of Québec* in this regard.

[2] In this era of globalisation, the regulation of securities has become increasingly complex, with securities being traded across provincial and international borders and capital moving back and forth. In Canada, where securities regulation remains essentially under provincial jurisdiction, there is undoubtedly a need to ensure that provinces are able, within the constraints of the *Constitution Act, 1867*, to ensure the proper implementation and enforcement of their laws. Equally important, however, is that rules regulating markets be clear so that participants be able to ascertain their legal obligations and determine in advance what court or tribunal could be called to adjudicate any dispute or rule on the legality of their actions. This is what justice and fairness require; these "*cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect*"[1].

[3] In *Van Breda*,[2] this Court insisted on the necessity to elaborate a coherent system of conflicts rule where assumption of jurisdiction would be based not on *ad hoc* evaluations of whether the dispute's overall connection with the province is "real and substantial," but rather on the application of predetermined, objective presumptive connecting factors. Interestingly, *Van Breda* pointed to Quebec as an example of a jurisdiction where such a work of systematization had been done. It confirmed that the *Civil Code*[3] "attempt[s] to codify the entire field of private international law"[4] and that it "rel[ies] on specific facts linking the subject matter of the litigation to the jurisdiction"[5].

[4] The decision below[6] stands in stark opposition to these principles and marks a clear step backwards from the objectives sought to be achieved by the adoption of the *Code* and advocated by this Court. Refusing to apply the jurisdictional provisions of the *Code* to the assumption of jurisdiction by the Quebec Financial Markets Administrative Tribunal, the majority turned instead to the common

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[1] *Club Resort v. Van Breda*, 2012 SCC 17, at para. 73 [*Van Breda*].
[2] *Van Breda*, at para. 69-81.
[3] *Civil Code of Québec*, S.Q. 1991, c. 64.
[4] *Van Breda*, at para. 42.
[5] *Van Breda*, at para. 76.
[6] Judgment of the Court of Appeal, 2021 QCCA 1364 (Joint Appellants' Record [JAR], Tab 4).

law approach. Even then, however, rather than applying the systematic, objective approach imposed by *Van Breda* and implemented by the courts over the last decade, it relied on an *ad hoc* consideration of the connections between Quebec and the overall context in which the Appellant would have been involved, opening the door for much uncertainty and unpredictability. The same is true of the minority's approach. Despite confirming the applicability of the *Code*'s jurisdictional provisions, it disregarded the specific wording of the *Code* in favour of their application "by analogy," an approach that will inescapably lead to great unpredictability in all types of disputes.

1. THE FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL

[5] In 2017, the Quebec *Autorité des Marchés financiers* ("**AMF**") instituted proceedings before the Financial Markets Administrative Tribunal ("**FMAT**") against Solo International, Inc. ("**Solo**") and its former CEO Michel Plante, a resident of Quebec. A Nevada corporation, Solo is registered and headquartered in the U.S. and its shares are only tradable in that country, on the "Over-the-Counter" (OTC) market. The AMF claims that through a subsidiary, it would have had an office in Montreal, that this subsidiary would have owned assets in Quebec (in the form of options to purchase two mining claims), and that Solo would thus have been deemed a "reporting issuer" in Quebec[7].

[6] The proceedings were also directed against four other individuals: Appellants Van Damme, Carnovale and Rocca, and Appellant Sharp ("**Sharp**"), none of whom reside in Quebec. The AMF alleges that they would have participated in manoeuvres designed to influence the share price of Solo and that their actions formed part of a larger "pump and dump" scheme to which participated not only the Appellants and the other defendants, but also a number of other individuals and corporations – all of whom reside outside of Quebec. In particular, the AMF claims that Appellants engaged in a number of transactions involving Solo's shares and contributed to the promotion of Solo's stock by way of publications available on the Internet. A small number of Quebec investors (fifteen (15), as it turned out) would have lost money as a result (a total of approx. $15,000)[8].

[7] The AMF alleges that Appellants' actions constitute violations of sections 195.2 and 199.1 of the Quebec *Securities Act*[9], which make it an offence to "*[i]nfluenc[e] or attempt[t] to influence the market price or the value of securities by means of unfair, improper or fraudulent practices*" and to participate in transactions that one knows or ought reasonably to know "*creates or contributes to a*

[7] *Demande introductive d'instance*, at para. 7-11 [Originating Application] (JAR, Tab 6, at p. 90).
[8] Judgment of the Court of Appeal, at para. 15.
[9] *Securities Act*, CQLR, c. V-1.1.

misleading appearance of trading activity in, or an artificial price for, a security". The AMF chose not to institute penal proceedings (which are provided under different provisions of the *Securities Act*) and instituted instead administrative proceedings seeking monetary condemnations ($500,000 for Van Damme, $300,000 for Carnovale and $630,000 for Rocca), as well as prohibitions from trading in securities and acting as director or officer of certain types of private entities.[10]

[8] Appellants and Sharp filed motions for declinatory exception claiming that the FMAT lacked jurisdiction to hear the proceedings against them[11]. Not only do they all reside outside Quebec (Van Damme, Carnovale and Sharp reside in British Columbia), but as appears from the allegations of the AMF's originating demand,[12] none of the actions which would constitute violations of the *Securities Act* on their part would have been carried in Quebec – whether in whole or in part. The impugned transactions were all carried outside of Quebec and there is no allegation that any would have involved a Quebec resident or that any amounts would have transited through Quebec. The companies which the AMF claims the Appellants used to carry out these transactions are also all foreign companies[13] without activity in Quebec or any connection with Quebec. As for the "market" which would have been impacted by Appellants' alleged actions – the OTC, where any transaction in Solo's shares would have taken place – it is, it is in the United States and under the supervision of foreign regulators.

[9] The FMAT dismissed the motions[14] on the basis that the link between Quebec and the alleged "scheme" would be sufficient to ground the FMAT's jurisdiction. The FMAT based this conclusion on five elements, none of which specifically concerns Appellants' actions: (a) Solo would have had an office in Montreal; (b) it would have been considered a reporting issuer in Quebec; (c) co-defendant Plante would have been a resident of Quebec; (d) the promotion of Solo's stock would have covered the territory of Quebec and would have reached its investing public; and (d) Quebecers would have been shareholders of Solo or would have been affected by the decline in price.

2. JUDICIAL REVIEW PROCEEDINGS AND THE SUPERIOR COURT DECISION

[10] Appellants and Sharp instituted judicial review proceedings against the FMAT's decision on

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[10] Sections 265, 273.1 and 273.3 of the *Securities Act*.

[11] Motion for Declinatory Exception of Appellants (JAR, Tab 8); Motion for Declinatory Exception of Sharp (JAR, Tab 9).

[12] Originating Application (JAR, Tab 6).

[13] Originating Application, at para. 26, 27, 33 and 37 (JAR, Tab 6, at p. 92-93).

[14] Judgment of the Financial Markets Administrative Tribunal (JAR, Tab 1).

the basis that the FMAT had erred on the issue of its jurisdiction.[15] Because the limitation on the FMAT's jurisdiction over out-of-province defendants is a matter of constitutional law, and given the importance of the question for the legal system as a whole, Appellants argued that the applicable standard of review was correctness.

[11] Before the Superior Court, Appellants *inter alia* argued that in the absence of any provisions in the *Securities Act* or in the FMAT's constituting statute[16] regulating the territorial or international jurisdiction of the FMAT, the *Code*'s jurisdictional provisions applied, and that none gave jurisdiction to the FMAT in the circumstances of the case.[17] A careful review of the *Code* demonstrates that the only jurisdictional provision that can apply to the present proceedings is the general, by default rule set out in 3134 *C.C.Q.* ("In the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec"). Indeed, none of the Special Provisions (art. 3141-3151 *C.C.Q.*) applies to the AMF's proceedings. Appellants not being domiciled in Quebec, the FMAT had no jurisdiction to hear the claims against Appellants.

[12] The Superior Court (Collier J.) dismissed the judicial review proceedings[18]. Although he refused to rule on the applicable standard of review and did not directly address the issue of the applicability of the *Code*'s provisions, Collier J. concluded that "*in appropriate cases, [the FMAT] may exercise jurisdiction over a foreign defendant*" (at para. 35), and that it had in this case "*correctly recognized the limits of its extraterritorial reach, by applying the real and substantial connection test*" (at para. 36). Like the FMAT, the Superior Court did *not* conclude that any of the actions constituting the alleged *Securities Act* violations would have occurred in Quebec. Collier J. rather based his decision on the fact that a real and substantial connection existed between Quebec and certain aspects of the alleged "scheme" (para. 37).

[13] Appellants and Sharp were granted leave to appeal by Hamilton J.A.[19]

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[15] Application for Judicial Review of Appellants (JAR, Tab 11); Application for Judicial Review of Sharp (JAR, Tab 12).

[16] *Act respecting the regulation of the financial sector*, CQLR, c. E-6.1 [the *ARRFS*].

[17] Cf. Factum of the Appellants in support of their Application for Judicial Review (JAR, Tab 13); With respect, Marcotte J.A. is mistaken when she indicates that this issue was raised for the first time in appeal (at para. 65).

[18] Judgment of the Quebec Superior Court (JAR, Tab 2).

[19] Judgment of the Court of Appeal granting leave to appeal, at para. 2 (JAR. Tab 3, at p. 36).

3. THE JUDGMENT OF THE COURT OF APPEAL

[14] Two sets of reasons were issued by the Court of Appeal[20]: the first by Marcotte J.A. (Moore J.A. concurring), and the second by Mainville J.A. Although Marcotte J.A. and Mainville J.A. agree to dismiss the appeals, they are sharply divided on the most fundamental issue raised by the appeal – the applicability of the jurisdictional provisions of the *Civil Code*.

[15] Only Marcotte J.A. comments on the standard of review, confirming that the applicable standard is correctness, first because the question of jurisdiction relates to a constitutional issue (at para. 45), and second because of "*the central importance of the issue to the legal system*" (para. 48).

3.1 Majority reasons (Marcotte J.A., Moore J.A. concurring)

[16] Marcotte J.A.'s main conclusion – and main point of disagreement with Mainville J.A. – is that the *Code*'s provisions governing the international jurisdiction of Quebec authorities are inapplicable to the FMAT's jurisdiction given that she considers that the AMF's proceedings do not involve "private rights". Although she acknowledges that the purpose of the *Code*'s provisions is to govern the assumption of jurisdiction by *all* Quebec courts and administrative tribunals, she concludes that this does not mean "*that these rules will be held to apply systematically to all matters dealing with property and civil rights contemplated by Section 92 (13) of the Constitutional Act of 1867, regardless of whether there are any private rights at issue*" (at para. 70).

[17] For Marcotte J.A., the situation "does not bring about any conflict of laws or jurisdiction regarding the alleged violations of the Securities Act which are connected to this province" (para. 79). For her, the issue "is strictly one concerned with the constitutional applicability of a provincial law, being the [Securities Act], to acts committed by persons who reside outside the limits of the province but whose actions were allegedly performed both inside and outside the province, given the transnational nature of their alleged wrongdoings" (para. 81).

[18] Having concluded that the *Civil Code* does not apply, Marcotte J.A. turns to identifying the appropriate jurisdictional standard. She concludes that "*[t]he FMAT's authority should be determined by relying on the real and substantial connection as developed in Unifund*[21]" (para. 90). Referring in particular to *Libman v. The Queen*[22], a criminal case, she concludes that such a connection was present here because the AMF claims that the alleged "pump and dump" scheme would have

[20] Judgment of the Court of Appeal, at para. 38 (JAR, Tab 4, at p.47).
[21] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 [*Unifund*].
[22] *Libman v. The Queen*, [1985] 2 S.C.R. 178 [*Libman*].

been dependent on the business carried by Solo in Quebec (although the AMF's factual allegations are to the effect that this "business" would have been carried by Solo's subsidiary and seems limited to owning options to acquire mining claims[23]), and because the press releases issued by Solo made multiple references to Quebec (para. 99-100).

3.2 Minority reasons (Mainville J.A.)

[19] Mainville J.A. disagrees with his colleague's premise that the *Code*'s jurisdictional provisions do not apply to administrative proceedings instituted by the AMF. He points out that as concerns the scope of the *Code*'s provisions governing the international jurisdiction of Quebec authorities, "*[l]a volonté legislative ne peut être plus claire*": they apply to *all* courts and tribunals and to *all* recourses falling within the ambit of the province's power over "property and civil rights" (para. 136).

[20] Mainville J.A. also disagrees that the proceedings here would not involve "private rights". He underlines that the provinces' power over securities remains grounded in their s. 92(13) power over "*Property and Civil Rights*". For him, "*la réglementation des valeurs mobilières relève du droit civil*" (para. 129). It is regulated by the *Code*, which contains several provisions dealing specifically with securities, and by a number of statutes that abundantly refer to the *Code* and must be interpreted in conformity therewith[24]. Moreover, Mainville J.A. points out that the *Securities Act* establishes a distinction between penal sanctions, with which this case is not concerned, and the civil and administrative sanctions sought in the present case (para. 131).

[21] Having concluded that the *Code* applies, Mainville J.A. turns to whether the present proceedings fall within any of the *Code*'s provisions. Acknowledging that they are *not* a "personal action of a patrimonial nature", he nonetheless concludes that art. 3148 par. 1(3) *C.C.Q.* (which applies only to actions of such nature) can be resorted to "by analogy" to ground the FMAT's jurisdiction. For him, "*la publication au Québec des communiqués de presse et les dommages allégués aux investisseurs québécois soutiennent la compétence du [TAMF]* » (para. 144). He also concludes that the FMAT's jurisdiction could alternatively be grounded on the "forum of necessity" doctrine of art. 3136 *C.C.Q.*, which provides that a Quebec authority without jurisdiction over a dispute may nevertheless hear it "*provided the dispute has a sufficient connection with Québec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required*".

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[23] Originating Application, at para. 70 (JAR, Tab 6, at p. 96).

[24] E.g. the *Securities Act*, CQLR, c. V-1.1; *Act respecting the transfer of securities and the establishment of security entitlements*, CQLR, c. T-11.002; *Derivatives Act*, CQLR, c. I-14.01.

[22] As will be demonstrated below, neither the majority nor the minority's approach is well-founded, both risk creating much uncertainty and unpredictability, and both would result in a considerable broadening of the jurisdiction of Quebec courts and tribunals.

PART II – QUESTIONS IN ISSUE

[23] Appellants submit that the questions in issue are the following:

a) Are the provisions of the *C.C.Q.* governing the "International Jurisdiction of Québec Authorities" applicable to administrative proceedings before a Quebec tribunal in the context of disputes relating to the implementation of provincial laws concerning "property and civil rights"?

b) If the provisions of the *Code* are not applicable, must the Court's jurisdiction be founded on the presence of specific and predetermined presumptive connecting factors relating to the alleged violations or is it sufficient for the Court to find some form of "connection" deemed sufficient between Quebec and the overall context within which the violations took place? Is this test met in the circumstances of this case?

c) Can article 3148 *C.C.Q.* be applied "by analogy" to ground the jurisdiction of Quebec courts and tribunal in proceedings of a different nature than a personal action of patrimonial nature?

d) Can article 3136 *C.C.Q.* apply to the present action in the absence of request to this effect before the FMAT and in the absence of *any* evidence as to the impossibility that Appellants' alleged conduct be adjudicated elsewhere?

PART III – STATEMENT OF ARGUMENT

1. STANDARD OF REVIEW

[24] Appellants submit that the applicable standard of review is correctness. As stated in *Vavilov*[25], questions regarding the division of powers between Parliament and the provinces, including the constitutional limits of the powers delegated to an administrative body, must have determinate, defined and consistent limits, which necessitates the application of the correctness standard (para. 55-56). This is precisely what is at issue here: the constitutionally-imposed limitation on a provincial tribunal's jurisdiction to hear matters presenting a strong extra-provincial component. This standard is not displaced because the issue may depend on a mixed fact-and-law analysis[26]. The question of what provisions or rules govern the exercise of the FMAT's jurisdiction is also a general questions of law

[25] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[26] *Westcoast Energy Inc. v. Canada (Office national de l'énergie)*, [1998] 1 RCS 322, at para 39.

of central importance to the legal system as a whole, confirming that correctness applies (para. 62).

2. ABSENT CONTRARY PROVISIONS, THE JURISDICTIONAL RULES OF THE *CIVIL CODE OF QUÉBEC* APPLY TO ALL PROCEEDINGS

[25] The most problematic aspect of the decision below is the majority's conclusion that the *Code*'s jurisdictional provisions do not apply to all proceedings falling within the sphere of provincial powers under section 92(13) of the *Constitution Act, 1867* – that this depends on whether the proceedings concern "private rights" or "public rights". This conclusion is wholly unsupported by precedent or doctrinal source and is profoundly at odds with the structure and text of the *Code*. It also risks creating considerable uncertainty in the law.

2.1 The *Code*'s jurisdictional provisions apply to all matters falling within Quebec's power over "Property and Civil Rights"

[26] Marcotte J.A.'s conclusion that the *Code*'s jurisdictional provisions do not apply to the FMAT is based on a double mistake. First, she concludes that although the purpose of these provisions is to govern the assumption of jurisdiction by *all* Quebec courts and administrative tribunals, this does not necessarily mean that they would "*apply systematically to all matters dealing with property and civil rights* […] *regardless of whether there are any private rights at issue*" (at para. 70). Second, she seems to believe that the proceedings at issue would not concern "private rights." Both these assumptions are wrong, and they are entirely unsupported by any authority. As will be demonstrated below, Marcotte J.A. erred in failing to give effect to the *Code*'s clear wording and to the manifest intent of the Legislature. She also erred in concluding that the *Code*'s jurisdictional provisions would only apply to *certain* proceedings, those sufficiently related to "private rights." Not only is such a litmus test for determining the applicability of the *Code*'s unjustified and unsupported, but the present proceedings clearly relate to "private rights."

2.1.1 Wording and legislative intent confirm the wide scope of the *Code*'s jurisdictional provisions

[27] It is incontrovertible that the *Code*'s jurisdictional provisions (Title Three of Book Ten, "International Jurisdiction of Québec Authorities") – are meant to apply to *all* courts and administrative tribunals whose authority derives from Quebec law, without exception[27], as Marcotte J.A. herself

[27] C. Emanuelli, *Droit international privé* (2011), 3rd ed., at para. 152; H. P. Glenn, "Droit international privé" in *La réforme du Code civil* (1993), at p. 743; S. Guillemard, "Fascicule 8: Règles générales de compétence des tribunaux québécois", at para. 3 in P.C. Lafond, ed. JCQ *Droit international privé* [S.

acknowledges (para. 70). This is the very reason why the Legislature replaced the term "tribunal" in precursor *Projet de loi 125* by the term "authority," as the *Commentaires du ministre* confirm: "*L'objectif général du Titre troisième est de* […] *[prévoir] des règles spécifiques pour déterminer la compétence internationale des autorités du Québec, tribunaux judiciaires ou administratifs et autorités administratives diverses.* […] *L'expression autorité a été retenue plutôt que celle de tribunal pour couvrir à la fois les instances judiciaires, administratives et même ecclésiastiques, par exemple*"[28].

[28] Not only do these rules apply to all administrative tribunals (and thus the FMAT), but they are also meant to determine their jurisdiction <u>in an exhaustive fashion</u>, as the *Commentaires* also confirm ("*Les dispositions du Titre troisième vis[e]nt à prévoir <u>de manière exhaustive</u> la compétence internationale des autorités québécoises*"[29]). Absent specific provisions of a statute granting jurisdiction in circumstances other than those determined by the Legislature, the FMAT, like any other tribunal, must thus ground its jurisdiction on the provisions of art. 3134-3154 *C.C.Q*. Nothing in the text or in the structure of the *Code* suggests that the Legislature wanted these provisions to apply only to *certain types* of proceedings, quite the opposite. By introducing such a distinction, Marcotte J.A. not only goes against the rule that distinctions may not be made where the law does not make it (*Ubi lex non distinguit nec nos distinguere debemus*), she contradicts the Legislature's clear intent.

[29] As Mainville J.A. explains – correctly, in Appellants' view:

> [135] Les dispositions du C.c.Q. portant sur la compétence internationale des autorités du Québec […] s'étendent à l'ensemble des recours relevant des autorités du Québec sous la compétence constitutionnelle provinciale portant sur la propriété et les droits civils. À cet égard, les *Commentaires du ministre de la Justice du Québec* portant sur le titre troisième du livre dixième du C.c.Q. sont plutôt limpides et sont d'une grande pertinence :
>
> > Comme il n'existait pas de règles pour déterminer la compétence des autorités du Québec dans les litiges présentant un élément d'extranéité. La jurisprudence avait étendu à ces situations les règles de compétence du droit interne, prévues au Code de procédure civile.
> >
> > L'objectif général du Titre troisième est de remédier à cette lacune, en prévoyant des règles spécifiques pour déterminer la compétence internationale des autorités du

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Guillemard, *Règles générales de compétence*]; J.A. Talpis & J.G. Castel, "Le Code civil du Québec, Interprétation des règles du droit international privé" in *La réforme du Code civil* (1993), at p. 900 at para. 410 [Talpis and Castel (1993)].

[28] *Commentaires du ministre de la Justice* (1993), t. II, at p. 1998.

[29] *Commentaires du ministre de la Justice* (1993), t. II, at p. 2000; See also C. Walsh, "The International Jurisdiction of Québec Authorities in Personal Actions: An Overview" (2012), at p. 253-54 [C. Walsh (2012)].

> Québec, tribunaux judiciaires ou administratifs et autorités administratives diverses. Il est divisé en deux chapitres, l'un comportant des dispositions générales et l'autre des dispositions particulières aux matières personnelles à caractère extrapatrimonial ainsi qu'aux matières réelles et mixtes. Les règles visent généralement à ne saisir les autorités du Québec que dans les cas où les litiges présentent des liens étroits avec elles, dans un souci de courtoisie internationale.
>
> L'expression *autorité* a été retenue plutôt que celle de *tribunal* pour couvrir à la fois les instances judiciaires, administratives et même ecclésiastiques, par exemple. Cependant une autorité n'en est une que si la loi québécoise la considère comme telle. Également, l'expression traditionnelle de *conflit de juridictions* n'a pas été reprise, car, il s'agit ici uniquement de déterminer les cas où les autorités québécoises auront compétence pour entendre un litige présentant un élément d'extranéité et non pas les cas où les autorités étrangères auront compétence.

> [136] La volonté législative ne peut être plus claire. Premièrement, comme le souligne le ministre, les dispositions du *C.c.Q.* portant sur la compétence internationale des autorités du Québec s'étendent aux tribunaux administratifs, dont nécessairement le Tribunal administratif des valeurs mobilières. Ces dispositions s'étendent à l'ensemble des recours relevant de la compétence constitutionnelle du Québec sur la propriété et les droits civils. Comme l'énonce le ministre de la Justice du Québec dans ses Commentaires, ces règles visent généralement à ne saisir les autorités du Québec, dont les tribunaux administratifs, que dans les cas où les litiges présentent des liens étroits avec elles, dans un souci de courtoisie internationale.
>
> [137] De plus, ces règles s'appliquent qu'on soit en présence ou non d'un conflit de juridiction. Comme le souligne encore une fois le ministre de la Justice du Québec dans ses Commentaires, l'expression traditionnelle de *conflit de juridiction* n'a pas été reprise au titre troisième du livre dixième du *C.c.Q.*, car il s'agit là uniquement de déterminer les cas où les autorités québécoises ont compétence pour entendre un litige présentant un élément d'extranéité et non pas les cas où les autorités étrangères ont compétence. Il n'est donc pas nécessaire d'être en présence d'un conflit de compétence pour appliquer ces règles, celles-ci s'appliquant même en l'absence d'un tel conflit.

[30] The wide breadth of the codification of private international law rules in Book Ten of the *Code* is unquestionable. In the words of LeBel J. in *Van Breda*, Book Ten of the *Civil Code* "attempt[s] to codify the entire field of private international law"[30]. LeBel J. explains:

> "This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, which contains a well-developed set of rules and principles in this area [in French: "*un ensemble complet de règles et de principes en la*

[30] *Van Breda*, at para. 42.

matière"]."[31]

2.1.2 Marcotte J.A. creates a false distinction

[31] To justify her refusal to apply the *Code*'s jurisdictional provisions to the present proceedings, Marcotte J.A. is forced to create a previously unknown distinction: these provisions would not apply where there are no "private rights at issue" (para. 70). Marcotte J.A. cites no supporting authority for this assertion that the scope of the *Code*'s jurisdictional provisions would somehow depend on the extent to which "private rights" would be "at issue" in the proceedings. Such a suggestion seems wholly unsupported by the *Code* itself, by past decisions of the courts and by the writings of authors.

[32] Accepting Marcotte J.A.'s view on this issue would be nothing short of unworkable: when is a dispute *sufficiently* "private" in nature to justify a recourse to the *Code*'s provisions? Not only would it considerably complicate the issues raised by jurisdictional challenges, but it would also inject considerable uncertainty as to their result.

[33] The issue of whether the *Code*'s jurisdictional provisions apply to "public law" matters was considered by this Court (albeit in a different context) in *Uashaunnuat*[32], which concerned claims to Aboriginal title rights pursuant to section 35 of the *Constitution Act, 1982*. Although section 35 rights are undeniably "public" in nature, being "*a central part of the Canadian constitutional order*", both the majority and dissent agreed that the court's jurisdiction had to be determined in accordance with the *Code*'s jurisdictional provisions. To do so, they both had to dismiss the position submitted by the Attorney General of Canada, who had argued that "*the rules of private international law 'are inapposite' where the existing rights of the Indigenous peoples of Canada – which are recognized and affirmed by s. 35(1) of the Constitution Act, 1982 – are at issue*"[33]. Brown and Rowe JJ. (dissenting, but not on this specific point) specifically addressed this argument, emphasising that the *Code* is not limited to "private law" rules: as the "*jus commune*" of Quebec, it encompasses certain aspects of public law. As a result, the analytical framework that courts must follow to establish their jurisdiction "*is not altered by the fact that Aboriginal rights are a public law concept*"[34]. As Mainville J.A.

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[31] *Van Breda*, at para. 21.

[32] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [*Uashaunnuat]*.

[33] *Uashaunnuat*, at para. 99 (Brown and Rowe JJ.).

[34] *Uashaunnuat*, at para. 118; See also *Uashaunnuat* para. 119 ("'[the] boundary between public law and private law…is much less clear in Canada and in Quebec than it is in continental Europe, and 'it is quite easy to accept that this type of mixed relationship [at the boundary between public law and private

recognized, *Uashaunnuat* "*confirme sans ambiguïté que les dispositions du titre troisième du livre dixième du C.c.Q. ont une portée large et s'appliquent aussi à des recours qui ne relèvent pas nécessairement dudit code*" (para. 142).

[34] That the *Code*'s jurisdictional provision apply to administrative or regulatory matters having a "public law" component is not surprising. This is entirely consistent with the universal recognition that the scope of the *Civil Code of Quebec* is not restricted to "private law" ("*droit privé*"). Indeed, as the common law, the *jus commune* of Quebec, the *Code* applies to multiple areas of the law that are essentially "public" in nature.

[35] Prior to the enactment of the *Civil Code of Quebec*, the interaction between "public law" and "private law" had not always been easy, as this Court's decision in *Laurentides Motels*[35] demonstrated. With the new *Code*, in 1994, the Quebec Legislature sought to put this tension to rest. This was made clear by the preliminary provision, as this Court explains in *Prud'homme*:

> "[28] […] [T]he new *Code* does not simply lay down a body of private law rules, or 'a law of exception'. As stated in its preliminary provision, it is the *jus commune* of Quebec:
>
> > The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.
> >
> > The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.
>
> [29] The expression "*jus commune*" was not chosen randomly. An earlier version of the provision provided that the Code comprised a body of rules laying down the "private law". In response to the debate in the literature prompted by the decision in *Laurentide Motels*, the expression "private law" was replaced by the more inclusive expression "*jus commune*". The backdrop against which this change was made leaves no doubt as to the very conscious decision made by the legislature to give the Civil Code the broadest possible operational scope."[36]

[36] As professor Garant explains, the Civil Code (as well as the Code of Civil Procedure) "ne sont

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law] is in principle covered by private international law'", citing G. Goldstein and E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), at nº 6).

[35] *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705 [*Laurentides Motels*].

[36] *Prud'homme v. Prud'homme*, 2002 SCC 85, at para. 28-29 [ref. omitted, emphasis in original] [*Prud'homme*]; See also A.-F. Bisson, "La Disposition préliminaire du *Code civil du Québec*" (1999), 44 *McGill L.R.* 539; D. Lemieux, "Le rôle du Code civil du Québec en droit administratif" in *Actes de la XVIIe Conférence des juristes de l'État* (2006).

pas des lois ordinaires. Ces deux lois de base se substituent à la common law même dans de vastes domaines du droit public, du moins ce qu'on appelle de nos jours le droit public"[37]. He states:

> "On ne peut proclamer que le droit civil est le droit commun du Québec (*the common law of the land is the civil law*) sans devoir en tirer des conséquences qui sont, à notre avis, les suivantes: *a*) le *Code civil du Québec* et le *Code de procédure civile* contiennent certaines règles incontestablement de droit public en ce sens qu'elles visent directement l'État et les personnes morales de droit public; *b*) les deux codes contiennent certaines règles de droit commun qui sont impératives et d'ordre public et qui ont priorité sur toute autre règle d'origine législative ou jurisprudentielle (common law)".[38]

[37] Professeur Denis Lemieux and author France Allard express the same idea:

> "En édictant le *Code civil du Québec*, le législateur québécois a, dans une certaine mesure, remplacé la common law publique par le *Code civil*. Ainsi, 'le point de départ est non pas la common law, mais le *Code civil du Québec* qui représente la loi fondamentale du Québec, comme le prévoit sa disposition préliminaire'[39].
>
> "[C]omme le *Code* n'est pas simplement un code de droit privé, la référence à la fonction de droit commun du *Code* 'en toutes matières auxquelles se rapportent la lettre, l'esprit ou l'objet de ses dispositions' fait en sorte qu'il a aussi eu un impact important sur le champ opérationnel du *Code civil*. Cet impact s'est étendu aux matières de droit public dans la mesure où elles pouvaient relever du *Code*. C'est ce que la Cour suprême du Canada a reconnu à juste titre dans *Prud'homme c. Prud'homme*."

[38] Since the new Code, "le droit civil fait partie du droit commun applicable à l'Administration publique, alors que le Code civil lui-même participe du droit public"[40]. "[L]e Code civil servira donc à compléter, dans toute la mesure possible, les autres lois qui encadrent l'action administrative"[41]. By regulating the circumstances in which the AMF and the FMAT may institute or hear proceedings with a significant international aspect, this is precisely what the Code's jurisdictional provisions do.

[39] Even if was found that these provisions were not meant to apply *directly* to the establishment of the FMAT's jurisdiction, they should nonetheless be used to "fill the gap" left by the absence of any provision relating to the FMAT's international or territorial jurisdiction in either the *Securities Act* or the *ARRFS*. Indeed, « *[l]e Code civil, source principale du droit commun, ne peut être limité*

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[37] P. Garant, "*Code civil du Québec*, *Code de procédure civile* et société distincte" (1996), 37 C. de D. 1141, at p. 1148 [P. Garant (1996)].

[38] P. Garant, *Droit administratif* (2017), 7e ed., at para. 1.3.1; P. Garant (1996), at p. 1147.

[39] D. Lemieux, "Le rôle du Code civil du Québec en droit administratif" (2005), 18 C.J.A.L.P. 119, at p. 125 [reference omitted] [D. Lemieux (2005)].

[40] D. Lemieux (2005), at p. 120.

[41] D. Lemieux (2005), at p. 123; Cf. also *Verdun (Mun.) v. Doré*, [1995] R.J.Q. 1321, at p. 12 (C.A.) ("*Le Code civil du Québec est … une loi fondamentale. Il constitue le droit commun applicable à tous même aux personnes morales de droit public*") (appeal dismissed: [1997] 2 SCR 862).

à son seul texte. Son objet couvre l'ensemble de l'ordre normatif québécois »[42]

[40] As the Court stated in *Fédération des producteurs acéricoles du Québec*,[43] it is "[a] principal characteristic of the *Civil Code of Québec*, as the *jus commune*, […] that it has, in the areas to which it applies, a suppletive role in the event of gaps in special statutes" (para. 10). The Court added that the Preliminary Provision was "intended to encourage the use of the rules of the *Civil Code of Québec* 'to interpret and apply other legislation and fill any gaps in that legislation, where it relates to matters or make use of concepts or institutions that come under the *Civil Code*'" (para. 29). Indeed, "a corpus of rules which constitutes the *jus commune* must be able to extend analogously so as to provide answers to questions that neither the *Code* nor the particular statutes have expressly settled."[44] This is the case here: the international jurisdiction of Quebec authorities is an "area" to which the *Code* applies, a "matter" that comes under the *Code*. Faced with the silence of the *Securities Act* and the *ARRFS*, courts must thus resort to the *Code*'s jurisdictional provisions to fill the gap.

[41] The Court of Appeal resorted to the *Code*'s gap-filling function in *Morin v. Simard*,[45] where it was faced with the silence of the *Police Act*, CQLR c. P-13.1 to deal with how the delay provided by s. 150 ("*[T]he right to lodge a complaint regarding police ethics is prescribed one year after the date of the event or knowledge of the event that gave rise to the complaint*") should be computed. Arguing that the *Civil Code* did not apply to disciplinary matters, appellants argued that art. 2879 *C.C.Q.* was inapplicable and that the right of the *Commissaire à la déontologie policière* to file a complaint before the *Comité de déontologie* was prescribed. The Court of Appeal disagreed:

> "Tout en acceptant que le droit disciplinaire constitue un droit '*sui generis*', il s'agit néanmoins d'un ensemble de règles destiné à régir et normaliser les rapports entre personnes, physiques ou morales, dans le domaine spécifique de la déontologie, et, à mon avis, relève des relations civiles entre ces dernières, c'est-à-dire de la famille du droit commun. Je n'ai donc aucune hésitation à conclure que, devant le silence de l'Article 150 de la *Loi sur la police*, il y a lieu de recourir de manière supplétive aux dispositions du *Code civil du Québec* relatives à la prescription pour, non pas interpréter, mais compléter l'article 150."

[42] Of particular relevance in *Morin v. Simard* is the fact that the Court was faced with an issue relating to the implementation, by a public supervisory body, of a set of statutory rules (concerning

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[42] F. Allard, "La disposition préliminaire et les dispositions finales du *Code civil du Québec*, clés d'accès aux rapports entre le *Code* et les sources externes au *Code*" in *Les Livres du Code civil du Québec*, Les Éd R de D de l'U de S (2014) at p. 19.

[43] *Producteurs acéricoles du Québec v. R.C.P.É.*, 2006 SCC 50, at para. 29.

[44] *Ibid*., at para. 29, quoting P.A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000).

[45] *Morin v. Simard*, 2010 QCCA 2302 (leave to appeal dismissed: 2011 CanLII 43424 (SCC)).

in that case the regulation of police behaviour). The same is true here. The issue relates to the implementation, by a public supervisory body, of a set of statutory rules (concerning the regulation of securities). Contrary to the regulation of police behaviour – an issue which can certainly not be qualified as concerning "private law" matters (especially given the large role played by the common law in regulating police behaviour and the extent of their powers)[46] – the area being regulated by the *Securities Act* is purely a matter of "private law" (as will be discussed below).

[43] In support of its position that the *Code*'s jurisdictional provisions cannot apply to proceedings before the FMAT, the AMF relies to the Court of Appeal's decision in *Donaldson*[47]. This reliance is misplaced. *Donaldson* was concerned with penal charges (not administrative proceedings), and the issue was whether the prescription rules of the *Code* were applicable to penal proceedings, or whether such proceedings were rather covered by the "abuse of process" principles enunciated in *Blencoe*[48]. Appellants argued that the AMF's penal proceedings were subject to the three-year prescription of art. 2925 *C.C.Q.* (which applies to "*action[s] to enforce a personal right*"). The Court concluded that the AMF was not exercising a "personal right", with the result that art. 2925 *C.C.Q.* did not apply. The issue here is entirely different. Whether the civil law institution of "prescription" has anything to say about whether the right to file penal charges can become prescribed (so that the *Code*'s provision may apply in a suppletive manner, as in *Morin v. Simard*) or whether it does not (with the result that a defendant may only rely on *Blencoe* to request a stay of proceedings) is a question that must be resolved before one can determine if the *Code*'s provision are of any help.

[44] Jurisdiction, however, is not a civil law institution that may or may not apply to certain proceeding. A court *must* have jurisdiction; whether it has jurisdiction *must* be determined. There is no way around it. The issue is thus: where should one look to find the rules that are applicable to the FMAT's jurisdiction? Are the jurisdictional rules of the *Civil Code*, the "*jus commune*" of Quebec applicable to this issue or is rather governed by "public" common law? (In fact, this is not even an issue on which there are specific rules of "public" common law, as Marcotte J.A. herself recognizes (at para. 73): the jurisdictional rules applicable to such proceedings in common law provinces are the same jurisdictional rules that apply in purely private claims).

[45] Marcotte J.A.'s argument that the rules of the *Code* cannot be applicable because "private

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[46] See *R. v. Bilodeau*, 2004 CanLII 45922 (QC CA).

[47] *Donaldson v. AMF*, 2020 QCCA 401 (leave to appeal dismissed: 2020 CanLII 97858 (CSC)).

[48] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 CSC 44 [*Blencoe*].

international law" would only concern relations between individuals, whereas the issue here would be one of "international public law" is also misplaced.[49] As professors Goldstein and Groffier explain,

> "[L]es frontières entre [le droit international privé et le droit international public] ne sont pas toujours claires. On considère de plus en plus souvent l'individu comme sujet de droit international public; l'État intervient de plus en plus souvent dans les relations privées et l'on peut parfois soumettre les relations entre un État et un ressortissant d'un autre État au droit international privé."[50]
>
> "La notion de relation privée, sous-entendue dans celle de droit international privé se heurte parfois à des problèmes de frontière entre le droit public et le droit privé, distinction beaucoup moins claire au Canada et au Québec qu'elle ne l'est en Europe continentale. […]
>
> Dire alors que l'on se trouve ou non en droit international privé revient à revoir la définition même de cette discipline. Si, en théorie, la question peut présenter un certain intérêt, essentiellement au point de vue pédagogique, en pratique on peut assez facilement admettre que ce type de relations mixtes est couvert en principe par le droit international privé."[51]

[46] In fact, jurisdictional rules are *always* "public" in nature. As this Court explains in *Hape*[52], jurisdiction is "the power to exercise authority over persons, conduct and events"; "[i]t is as a result of its territorial sovereignty that a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders". This is quintessentially a public law matter, irrespective of whether the law being applied is "private law":

> "It is vital at the outset to recognize that jurisdiction is an inherently public law concept. One of the building blocks of the literature regarding the law of jurisdiction has, for many decades, been the division of the state into three entities for the purposes of exercising jurisdiction. These branches are [legislative, executive] […] and the *judicial* or *adjudicative* branch, which refers to the ability of a state's courts to adjudicate cases, and particularly for our purposes, those with foreign elements."[53]
>
> "[A]n act of jurisdiction is still public, even if it is with regard to a subject matter thought

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[49] At para. 77: "In the case at hand, it may be more accurate to refer to international public law rather than public international law, as we are concerned with the relationship between a state and private individuals and not with relations between states" (relying on Mayer, Heuzé and Remy, *Droit international privé*, 12e éd., Paris, L.G.D.J., 2019, at p. 27, nº 4).

[50] G. Goldstein and E. Groffier, *Droit international privé* (1998), vol. 1, at p. 5 [*Goldstein and Groffier*].

[51] Goldstein and Groffier, at p. 12.; Cf. also the definition of private international law given by Brown and Rowe JJ. (dissenting but not on this issue), in *Uashaunnuat*, at para. 101-102.

[52] *R. v. Hape*, 2007 SCC 26, at para. 41 and 59 [*Hape*].

[53] S. Coughlan, R.J. Currie, H.M. Kindred and T. Scassa, *Law Beyond Borders* (2014), Irwin Law, at p. 31 [S. Coughlan *et al.* (2014)].

> of as 'private.' The courts may adjudicate public *law* (for example, criminal, regulatory, privacy, and so on), but they may also preside over private disputes between parties. […] However, the court, as a branch of government, is a public law actor, and the act of adjudication itself is public."[54]

2.1.3 The proceedings directly and essentially concern "private rights"

[47] Even if Marcotte J.A. was right in concluding that the *Code*'s jurisdictional provisions do not apply to matters where there are "no private rights at issue", this is clearly not such a case. Irrespective of how complex and interconnected the securities market has become, the regulation of securities essentially remains a matter of private law and private rights. In fact, this is a *condition* of the constitutional validity of provincial securities regimes, grounded as they are in the provinces' constitutional power over "Property and Civil Rights in the Province." As this Court explained in *Reference re Securities Act*, the regulation of securities essentially concerns "*contracts and property matters within each of the provinces*".[55] In other words, provinces are constitutionally entitled to regulate securities precisely because such regulations essentially involve regulating contracts and property matters – a classic example of provincial regulation over "private rights". If provincial power over securities unquestionably extends "to impacts on market intermediaries or investors outside a particular province"[56], this is because such regulation is incidental to their regulation within the province.

[48] In such a context, how could there not be any private rights "at issue" in the AMF's proceedings when the constitutional validity of the regime that underpins them rests on the constitutional power of provinces to regulate contracts and property matters? As Mainville J.A. points out, "*la réglementation des valeurs mobilières relève du droit civil*" (para. 130). In certain respects, it is regulated by the *Code*[57], and in other respects, by specific statutes that also refer to the *Code* and must be interpreted in conformity therewith (the Quebec *Securities Act*, of course, but also others such as the *Act respecting the transfer of securities and the establishment of security entitlements* and the *Derivatives Act*)[58]. The fact that we are here concerned with the AMF's power to ensure the implementation of this provision, and of the other provisions of the *Securities Act* does not change the fact that the subject of the proceedings is the right of individuals to enter into private contractual transactions. The

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[54] S. Coughlan *et al.* (2014), at p. 33.

[55] *Reference re Securities Act*, 2011 SCC 66, at para. 125.

[56] *Reference re Securities Act*, 2011 SCC 66, at para. 43 and 45.

[57] E.g., art. 2224, 2237, 2677, 2684.1, 2701.1, 2714.1 to 2714.7, 2759, 3108.7 and 3108.8 *C.C.Q.*

[58] Reasons of Mainville J.A., at para. 130; Cf. *Securities Act*, s. 109.6, 235 and 273.3; *Act respecting the transfer of securities and the establishment of security entitlements*, CQLR, c. T-11.002, s. 29, 111 and 129; *Derivatives Act*, CQLR, c. I-14.01, s. 135.1.

remedies sought by the AMF also concern private rights: the creation of an obligation to pay a monetary condemnation, and a limitation of their right to enter into contracts (prohibition on trading in securities) and to hold certain positions within corporations or other private entities[59]. Quite tellingly, one of the very provisions on which the AMF relies against Appellants is s. 273.3 of the *Securities Act*, which gives the TAMF the power to prohibit a person from acting in certain capacities "on the grounds set out in article 329 of the Civil Code."

[49] It should be reminded that the *Securities Act* does allow the AMF to seek penal sanctions, which the AMF chose not to do here. The distinction is important. As this Court outlined in *Guindon*[60], administrative sanctions do not entail true penal consequences and do not result from a criminal process. In fact, it is precisely for this reason that the Appellants cannot claim the *Charter* protections that would apply in a criminal context.

[50] Ironically, had the AMF wanted to institute *penal* proceedings against Appellants, it could not have done so because the tribunal (the Court of Quebec) would not have had jurisdiction. The *Securities Act* provides that every person that contravenes a provision of this Act commits an offence (s. 202) and that penal proceedings may be instituted by the AMF (s. 210). Such proceedings must however be brought either in the judicial district where the defendant resides (or is in detention, where such is the case) or in the district where the defendant "committed the offence"[61]. This shows how wrong it would be to assume, as the AMF suggests, that the legislative intent is to ensure that Quebec courts should be able to hear proceedings under the *Securities Act* irrespective of the defendant's residence or place where the violations occurred, or that courts' jurisdiction in this regard should be grounded on the mere existence of a "sufficient connection" with Quebec. It would also be quite contradictory to conclude that the *Code*'s provisions do not apply to administrative proceedings because of their "public" nature (with the result that they could be brought in Quebec as soon as there any connection with the province) while *penal* proceedings, which are undeniably "public" in nature, are themselves subject to the *Code of Penal Procedure*'s restrictive jurisdictional rules.

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[59] *Securities Act*, s. 265, 273.1 and 273.2.

[60] *Guindon v. Canada*, 2015 SCC 41, at para 75-77 [*Guindon*].

[61] *Code of Penal Procedure*, CQLR c. C-25.1, art. 142 (art. 143, "An offence committed within a distance of two kilometres from the boundary of two or more judicial districts, … in a vehicle in the course of a journey that crosses several districts, or an offence begun in one judicial district and ended in another, is deemed to have been committed in one or the other of those districts."

2.2 The impact of the Court of Appeal's decision will far exceed the issue of the FMAT's jurisdiction

[51] By concluding that the jurisdictional provisions of the *Civil Code* do not apply to the AMF's proceedings in the case at bar, the majority's decision impacts much more than the jurisdiction of the FMAT. By ruling that Book Ten of the *Code* applies only to certain cases, the majority is effectively creating two types of disputes in Quebec: those over which the courts may only assert their jurisdiction in accordance with the *Civil Code*'s provisions, and those where they may disregard the *Code* entirely and assert their jurisdiction simply on the basis of some "real and substantial connection", untethered to any specific provision of Quebec law.

[52] As for ascertaining on which side of the divide any given proceeding will fall, this will require the elaboration of some indeterminate litmus test to determine if the case "sufficiently" concerns private rights to justify their application, reigniting a dispute about the proper role of the *Civil Code of Quebec* in all matters that go beyond the rights of private individuals.

3. THE APPEAL SHOULD BE GRANTED EVEN IT THE *CODE*'S JURISDICTIONAL PROVISIONS DO NOT APPLY

[53] The majority's approach and the result of its decision are a perfect example of what this Court sought to banish in *Van Breda*. Marcotte J.A.'s approach to evaluating the sufficiency of the connections to Quebec, untethered to any predetermined list of factors, runs flatly counter to the main teaching of *Van Breda* – its clear rejection of "on-the-fly," discretionary gauging of the sufficiency of the connection with the forum in favour of a principled approach based on the existence of presumptive connecting factors. As such, the judgment *a quo* represents a significant step back from the predictability *Van Breda* sought to achieve. The decision below also represents an obvious case of jurisdictional overreach, precisely what *Van Breda* sought to avoid.

3.1 Marcotte J.A. erred in not following *Van Breda* and in refusing to adopt a principled approach to jurisdiction

[54] *Van Breda*' main conclusion is certainly that the "real and substantial connection" test should not be seen as a rule directly governing the taking of jurisdiction,[62] but rather as a principle establishing the (constitutionally mandated) outer limits of provincial adjudicative jurisdiction. The analysis of a court's jurisdiction *simpliciter* should not be based on the judge's overall appraisal of the various

[62] S. Pitel, "Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada" (2018) 55 Osgoode Hall LJ 63, at p.67-68 [S. Pitel (2018)].

elements connecting the dispute with the forum, followed by their assessment about whether these raise to the level of a "real and substantial connection." Nor should jurisdiction *simpliciter* be based on individual judges' assessing whether values such as fairness and justice justify asserting jurisdiction. Determining a court's jurisdiction *simpliciter* should rather be based on the existence of predetermined, objective "presumptive connecting factors":

> "[T]he framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis — however laudable the objective of individual fairness may be.… Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect." (at para. 73)
>
> "Jurisdiction must […] be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. […] Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a 'real and substantial' connection." (para. 82)

[55] Presumptive connecting factors are not mere indicators that a court may assert jurisdiction, failing which a court could ground its jurisdiction on other factors it considers sufficient to establish a real and substantial connection. The presence of a presumptive connecting factor is a *sine qua non*[63]:

> "If […] no recognized presumptive connecting factor – whether listed or new – applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system." (para. 93)

[56] For tort claims, LeBel J. established four presumptive factors: (a) the defendant is domiciled or resident in the province; (b) the defendant carries business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province (para. 90). Although he recognized that this list was not closed, he emphasized that in identifying a new factor, courts should consider its similarity with factors already identified, and consider how the proposed factor is treated in case law, in statute law and in the laws of other comparable legal systems (para. 91). Identifying new presumptive connecting factors should be done on a case-by-case basis. It does

[63] See also S. Pitel (2018), at p. 67-68; Pitel and Rafferty, *Conflicts of Laws*, (2016) 2nd ed., Irwin Law, at p. 96 [Pitel and Rafferty (2016)].

not imply looking at the case to determine if its circumstances create a degree of connection equivalent to those created by the *Van Breda* factors. It requires identifying *objective*, stable factors which, in all proceedings of the same nature, would "generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in the forum" (para. 92).

[57] The *presence* of a presumptive connecting factor is a *sine qua non* but is not in itself determinative: the defendant can rebut the presumption it creates and demonstrate that despite its existence, the connection is insufficient to ground the court's jurisdiction. This possibility to rebut the presumption at the jurisdiction *simpliciter* stage (quite apart any *forum non conveniens* argument) is crucial, . As the Ontario Court of Appeal points out, the Supreme Court "has repeatedly cautioned against creating an 'irrebuttable' presumption of jurisdiction"[64].

[58] Although *Van Breda* was issued in the context of a tort claim, its central teachings are directly relevant in the present context. The need for certainty and predictability is as important in the regulatory context as it is in tort, and arguably greater. People who engage in a regulated activity should be able to readily determine what regulatory regime(s) may apply to their activity, and what court or authority could potentially have jurisdiction over their conduct. Thus, "courts since *Van Breda* have not hesitated to bring that requirement [of a presumptive connecting factor] to bear on statutory causes of action."[65] For instance, this Court has applied *Van Breda* and the presumptive connecting factors it identified to a statutory conspiracy claim under the *Competition Act*[66].

[59] Appellants submit that the *Van Breda* approach – with its insistence on predictability and the necessity to ground jurisdiction on the existence of predetermined presumptive connecting factors – is especially apposite in the area of securities regulation such as the present case. With the interconnectedness of financial and securities markets, where each jurisdiction has its own set of rules and its own authorities to implement them, clarity and predictability have become even more crucial.

[60] Here, it is obvious that none of the presumptive connecting factors of *Van Breda* are present: (a) Appellants are not domiciled or resident in Quebec; (b) Appellants do not carry business in Quebec; (c) No tort was committed in Quebec (the AMF's claim not being based in tort, the fact that a

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[64] *Yip v. HSBC Holdings plc.*, 2018 ONCA 626, at para. 45 (leave to appeal dismissed: 2019 CanLII 23866 (SCC)) [*Yip*].

[65] S. Pitel and V. Black, "Assumed jurisdiction in Canada: identifying and interpreting presumptive connecting factors" (2018), 14 J of Private Int'l L 2 at p. 214 [Pitel and Black (2018)].

[66] *Sun-Rype v. Archer Daniels Midland*, 2013 SCC 58.

tort occurred here would not be determinative either); and (d) No contract connected with the dispute was made in the province. A review of Marcotte J.A.'s reasons, however, demonstrates that she did not even look at these presumptive connecting factors and opted instead for an "on the fly" assessment based on a cursory glance of disparate elements included in the factual matrix surrounding the AMF's claim – essentially focusing, like that of the FMAT and Superior Court, on the connection between Solo and Quebec, rather than between the Appellants and the forum:

> "[97] […] Solo's presence in Quebec pointed to a strong relationship between the FMAT's territorial jurisdiction and the subject matter of the litigation, being the Appellants' alleged violations of sections 195.2 and 199.1 of the *Securities Act*.
>
> [98] The AMF alleged that the Appellants were part of that pump and dump scheme in contravention of sections 195.2 and 199.1 of the *Securities Act.* The "pump" aspect of the violation consisted in collectively "influencing the value of securities by means of fraudulent practices" and "engaging in a series of transactions in securities knowing it contributes to a misleading appearance of trading activity in, and an artificial price for, a security".
>
> [99] The "pump" aspect of the violation was highly dependent upon the business carried on *in Quebec* by Solo. This business was essential for creating an appearance of profitability and for luring investors into buying its shares.
>
> [100] The connection to this province was apparent in the multiple references to Quebec in the press releases (two of which bear the mention "Montreal" at the beginning), which claim that "the company is taking this opportunity to highlight the significance of focusing its mining efforts on Quebec".
>
> [101] As far as the connection between the infractions and the Appellants is concerned, the Respondent alleged that all the Appellants contributed to the financing of Solo's acquisition of mining claims. As a result, they were no strangers to the business carried on in the province and they allegedly participated at one point or another in the pump and dump scheme, although they were not all operating from within the province since modern financial schemes can operate from multiple locations at a given time through the internet and offshore entities."

[61] In fact, Marcotte J.A. specifically disagreed that her analysis of the FMAT's jurisdiction had to be based on factual connections between Quebec and the claims against each of the Appellants:

> [102] The Appellants argue that the allegations of the proceedings do not sufficiently single out their actions to justify asserting jurisdiction over each of the Appellants individually. They argue that a real and substantial connection would require that their situs, or at least one of the alleged infractions' components, be within the province of Quebec
>
> [105] An individual connection was not required in order to establish a real and substantial connection with each of the Appellants. It was sufficient to show a connection between the subject matter of the litigation (the infractions) and the forum, as Laforest, J. proposed in *Libman* [*v. The Queen*,[1985] 2 S.C.R. 178]".

[62] Marcotte J.A.'s reference to the *Libman* decision of this Court requires a comment. *Libman* is a criminal law case, and as such raises significantly different jurisdictional issues, as Mainville J.A. rightly points out.[67] First and foremost, the accused in a criminal trial must be found within the jurisdiction of the court, failing which the criminal court has no jurisdiction over their person. Thus, *Libman* being present in the jurisdiction, the question in that case was limited to determining how the *Criminal Code* could apply to infractions partly committed outside of the jurisdiction.

[63] *Libman* is nonetheless instructive. A Canadian resident, Libman was accused of devising and carrying out a scheme to defraud U.S. investors by enticing them to purchase worthless shares in mining companies. Charged with counts of fraud and conspiracy to commit fraud, he challenged the jurisdiction of Canadian courts on the basis that the "gist" of these offences was the deprivation of the victims, which had occurred outside of the country. In rejecting the notion that a court could have jurisdiction only if the gist of the offence occurred within the forum, La Forest J. explained:

> "[A]ll that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well-known in public and private international law" (p. 212-13).

[64] In the case at bar, La Forest J. had no problem finding that the offence had indeed taken place in Canada since "the scheme was devised here, the whole operation that made it function, the directing minds, the boiler room – all were situate in Toronto" (p. 211).

[65] Of particular relevance in *Libman* is that despite the fact that the defendant was a resident in Canada, present in the jurisdiction (which is itself a *significant* connection with the forum), the Court did not conclude that Canadian courts may hear charges as soon as there is *some* connection, deemed sufficient, between Canada and the charges. *Libman* rather established a requirement for the court to determine (a) what specific activities "constitute the offence"; and (b) whether a significant portion of these activities took place in Canada.

[66] By requiring that the connection with the forum be based on the specific actions that constitute the basis for the criminal charges (rather than on whatever surrounding circumstances the court may consider relevant), the test in *Libman* ensures a certain level of predictability in the determination of the court's jurisdiction, an element that is all the more important in light of *Van Breda*.

[67] Such an exercise, however, is precisely what Marcotte J.A. refused to do. In dismissing

[67] Judgment of the Court of Appeal, at para. 133.

Appellants' argument that the FMAT's jurisdiction had to be grounded on the specific acts which the AMF claims would constitute violations of the *Securities Act* by each Appellant, Marcotte J.A. (like the FMAT and the Superior Court) disregards the *Libman* test in favour of an open-ended, discretionary, unstable, "on-the-fly" approach that takes no account of the constituting elements of the violations, or indeed of the multiplicity of individual defendants – the opposite of what *Van Breda* mandates.

[68] Had Marcotte J.A. looked at the "activities constituting the offence" or the violations alleged by the AMF, she would have found that no such activity took place in Quebec. Neither the "*fraudulent practices*" nor the "*transactions in securities*" forming the basis of the AMF's specific claims against each Appellants under s. 195.2 and 199.1 *Securities Act* would have taken place in Quebec[68].

[69] All the alleged acts of Appellants which the AMF claims would constitute alleged violations would have occurred outside of Quebec. This is true even in relation to the press releases, on which Marcotte J.A. insists (two of which "bear the mention Montreal", as Marcotte J.A. points out at para. 100). Indeed, although the AMF alleges that one of the Appellants (Van Damme) was involved in the preparation of Solo's press releases[69], there is simply no allegation that he was involved in the *publication* of the press releases, or that same were in fact issued from Montreal. (In fact, there is even no allegation that these press releases were ever *seen* by anyone in Quebec). In fact, there is no single allegation in the AMF's proceedings before the FMAT that *any part* of the Appellants' conduct would have taken place in Quebec, or that any of them would ever have been present in Québec.

3.2 No real connection, goes beyond all precedents – Jurisdiction "*by ricochet*"

[70] Quite apart from the fact that Marcotte J.A.'s approach fails to rely on the presence of presumptive connecting factor, her approach also results in a clear case of judicial overreach, a central concern of this Court in *Van Breda*. As the Ontario Court of Appeal points out in *Yip v. HSBC Holdings plc*,

> "Justice LeBel [in *Van Breda*…] repeatedly expressed one of the primary aims of the test: to reduce the 'risk of jurisdictional overreach'; to 'prevent improper assumptions of jurisdiction'; to prevent 'courts from overreaching by entering into matters in which they had little or no interest'; and to reduce the risk of 'sweeping into that jurisdiction[,] claims that have only a limited relationship with the forum'."[70]

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[68] The *Securities Act* does contain a provision regarding "*conspiracy to commit an offence*" (s. 207) but this only applies to *penal* sanctions and does not form part of the AMF's administrative charges here.

[69] Originating Application, at para. 80 (JAR, Tab 6, at p. 97).

[70] *Yip v. HSBC Holdings plc*, 2018 ONCA 626, at para. 30, citing *Van Breda* at para. 22, 26, 38 and 89 [reference omitted].

[71] Here, this jurisdictional overreach results in large part from Marcotte J.A.'s focus on Solo and on the "scheme," rather than on the specific claims brought against each Appellants. According to the AMF this "scheme" would be a complex construct involving securities transactions on the OTC market (in the United States), transfers of money and securities (all between various foreign entities) and promotion activities (all done through the Internet). A large number of people would each have played a role in it: Solo, Plante, a firm called Filer Support Services, Caroline Danforth, Jacqueline Danforth, Appellant Sharp and three entities controlled by Sharp, as well as the three Appellants and four corporations with which they would allegedly have links.[71] With the exception of Plante, none of these individuals and entities are domiciled or reside in Quebec.

[72] This focus on the "scheme" is misplaced. The FMAT is not seized with a global claim against an indivisible group of defendants having participated in some indivisible "scheme". The AMF's decision to lump the proceedings against all defendants within a single tribunal file does not change the fact that the FMAT's jurisdiction must be assessed in relation to the specific claim brought against each Appellant. In the words of the British Columbia Court of Appeal, "[a] plaintiff must establish territorial competence against each party and cannot 'bootstrap' its claim against the defendant by establishing jurisdiction against a different party."[72] The FMAT's jurisdiction cannot be established "over a scheme." It must be established over claims brought against individuals for specific acts they each would have committed.

[73] What is striking from the judgments of the courts below is how little attention is devoted to what, precisely, the Appellants are accused of having done, and where these acts would have taken place. The only references the FMAT makes in this respect[73] is by referring to the AMF's allegations that Appellants "*ont participé à l'élaboration d'un illicite et massif stratagème*" (FMAT, para. 34), that they were "*impliqué[s] dans une ou plusieurs [des] étapes*" of the scheme (para. 37) (without specifying which), that they were "*les auteurs d'un stratagème*" (para. 57) and were "*au cœur de la mise en œuvre*" of the scheme (para. 67). The FMAT also points out that Appellant Van Damme would have acted as Solo's lender and that Appellants Carnovale and Rocca would have been "*impliqués dans des opérations essentielles au niveau du financement de Solo, dans la promotion de*

[71] Originating Application, at para. 7-40 (JAR, Tab 6, at p. 90-93).

[72] *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*, 2021 BCCA 182, at para. 10; Pitel and Black (2018), at p. 223 ("[Concurrent jurisdiction] must be construed narrowly… It should not be extended to causes of action based on different facts and especially should not be extended to different defendants").

[73] Judgment of the FMAT (JAR, Tab 1, at p. 6).

cette dernière et du délestage de ses titres" (para. 79). Not only do these sweeping assertions not constitute allegations of fact that must be taken as true at the declinatory exception stage, but they do not establish any connection between Quebec and the Appellants.

[74] Marcotte J.A is no more precise. She refers to the AMF's allegations that Appellants "were part of" the scheme (para. 98), that they "contributed to the financing of Solo's acquisition of mining claims" (para. 1010), that as a result "they were no strangers to the business carried on" in Quebec (para. 101), that "they allegedly participated at one point or another" in the scheme (para. 101).

[75] A review of the AMF's originating application shows that the acts complained of by the AMF were all committed abroad and that none of them has a connection with Quebec. In fact, the allegations made against the Appellants consist solely of foreign elements:

a) The appellants all reside outside Quebec, including two in British Columbia, where Appellant Sharp is also a resident;[74]

b) There is no allegation that the Appellants ever carried on any activities in Quebec, were ever present in Quebec, ever had property in Quebec or ever did *anything* in Quebec;

c) Solo is incorporated and headquartered in Nevada, and governed by the laws of Nevada;[75]

d) Solo's shares are traded on the OTC market, in the United States,[76] and all transactions take place through this exchange;

e) The AMF has no supervisory role or authority of any kind in relation to the OTC;

f) The corporations that the AMF alleges to be related to the Appellants and to have been involved in the various transactions it describes (Craigstone Ltd., Ventura Capital SA, Futuna Ltd. and Anatom Associates SA) are all companies incorporated and domiciled outside Canada;[77]

g) Even Solo did not directly carry business in Quebec, or even had property in Quebec. The facts alleged by the AMF are rather that a subsidiary of Solo purchased "an exclusive option to acquire an undivided 100% right, title and interest in and to certain mineral claims located in Portland Township, Outaouais, Quebec (the 'Property'), which consists of 2 mineral claims"[78];

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[74] Originating Application (Heading) (JAR, Tab 6, at p. 88).
[75] Originating Application, at para. 7 (JAR, Tab 6, at p. 90); Exhibit D-1, at p. 40.
[76] Originating Application, at para. 1 and 7 (JAR, Tab 6, at p. 90).
[77] Originating Application, at para. 26, 27, 33 and 37 (JAR, Tab 6, at p. 92-93).
[78] Originating Application, at para. 70 (JAR, Tab 6, at p. 96).

h) There is no allegation that any of the corporations allegedly associated with the Appellants ever had any activity in Quebec, any property in Quebec, or any connection with Quebec;

i) The banking and brokerage accounts that would have been used for the transactions described by the AMF are all located in foreign countries;[79]

j) There is no allegation that any of the transactions in which the Appellants participated were carried out in whole or in part in Quebec, involved any person from Quebec, or that the sums involved in any of these transactions would have transited in Quebec;

k) Although press releases issued by Solo refer to the existence of mining claims in Quebec (and to the Quebec mining regime in general), there is no allegation that these releases were published in Quebec[80], that there was any promotion made in Quebec or targeting Quebec investors, or indeed that the press releases were ever read or seen by anyone in Quebec;

l) As for the losses suffered by Quebec investors, it is difficult not to see them as somewhat trivial: in all, fifteen (15) investors would have lost a total, aggregate amount of $5,000.[81]

[76] Although the AMF presents Solo as an "*émetteur assujetti au Québec*"[82] (reporting issuer), this is simply the result of a deeming provision contained in a regulation that was adopted by the AMF (and other provincial securities regulators) and that applies to corporations whose securities are traded on the United States OTC market, but not traded on any Canadian exchanges.[83] In the case of Solo, its "principal regulator" in Canada pursuant to this regulation was British Columbia.[84] With respect, to claim that such qualification of Solo as a "reporting issuer," resulting as it does from a regulation's deeming provision, could then serve to justify the application of Quebec law and ground the jurisdiction of Quebec authorities – not only over Solo but over transactions involving its securities and whoever was involved in those transactions – is a clear bootstrapping argument.

[77] This review shows that the AMF is essentially seeking to bring before the FMAT an action against three out-of-province residents for acts that they committed entirely outside Quebec because

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[79] Originating Application, notably para. 28, 34, 38, 43, 55, 57, 58, 60 and 74 (JAR, Tab 6, at p. 92-96).

[80] Marcotte J.A. states that two press releases "*bear the mention 'Montreal' at the beginning*" (para. 100), but there is no allegation that their publication (through the Internet) was made here Quebec.

[81] Judgment of the Court of Appeal, at para. 15.

[82] Originating Application, at para. 10 (JAR, Tab 6, at p. 90).

[83] *Regulation 51-105 respecting issuers quoted in the U.S. over-the-counter markets*, CQLR, c. V-1.1, r. 24.1.

[84] See Solo's Issuer Profile on SEDAR, Exhibit P-4, as of August 18, 2017 (There is no evidence or allegation that this was not the case in 2011-2012).

they would have impacted the share price of a foreign company trading on a foreign market regarding which the AMF plays no role. There is nothing in the AMF's allegations to link the specific allegations against the appellants to Quebec, and the vague and general claim that the appellants participated in a "scheme," and that certain aspects of this scheme affected Quebec is utterly insufficient to demonstrate the existence of a real and substantial connection between Appellants and Quebec.

[78] In fact, what the AMF seeks to do – and what the courts below would allow it to do – is to establish jurisdiction on the basis that Appellants would have connections with a scheme which itself has a connection with Quebec. This is jurisdiction *by ricochet*, where the court is essentially asked to "hopscotch" its way from one element to the next in search of a basis to ground its jurisdiction.

[79] Following the logic of the Court of Appeal would essentially mean that the FMAT – or any other Quebec board, tribunal or court – could claim jurisdiction over any transaction involving the securities of any foreign corporation, wherever in the world it takes place, whatever exchange through which it is transacted, irrespective of whether any Quebec resident is involved in the transaction, provided that the corporation has activities or property in Quebec, or any connection with the province. This comes as close as can be to granting the FMAT a "universal jurisdiction," a clearly unacceptable proposition.[85]

[80] Such an approach would lead to Quebec claiming jurisdiction over countless transactions or activities taking place in foreign jurisdictions (each with their own regulatory authorities), creating obvious risks of regulatory conflicts, multiplicity of proceedings and contradictory decisions. Not only would this fly in the face of Quebec's obligations of comity towards other jurisdictions, but it also goes against the normal expectations of market participants that their transactions will be regulated by the authorities of the forum where the trades take place. As the Ontario Court of Appeal explains in *Yip*, referring to a judgment of Justice Sharpe:

> "In *Kaynes* (2014) Sharpe J.A. emphasized the role of comity and suggested that courts generally favour the forum where the trading took place. He noted[:]
>
> > […] 'Order and fairness will be achieved by adhering to the prevailing international standard tying jurisdiction to the place where securities were traded and a multiplicity of proceedings … will be avoided. […]
> >
> > It would surely come as no surprise to purchasers who used foreign exchanges that they should look to the foreign court to litigate their claims'[86]

[85] *Yip v. HSBC Holdings plc*, 2018 ONCA 626, at para. 30.
[86] *Yip v. HSBC Holdings plc.*, 2018 ONCA 626, at para. 60-61.

3.3 The connections between Appellants and Quebec are much more tenuous here than anything Canadian courts have considered sufficient in the past

[81] Courts and regulatory tribunals in common law provinces have often accepted to hear securities regulation cases where the alleged violations did not entirely take place within the confines of the jurisdiction. As the AMF insists, the provinces' constitutional authority to regulate securities is not limited to purely intra-provincial trades. There is nothing surprising there. A review of the case law demonstrates, however, that for the FMAT to assume jurisdiction over the present proceedings against the Appellants would go much farther than previous decisions and would represent an unprecedented extension of provincial adjudicative jurisdiction.

[82] A vast majority of the cases relied upon by the AMF to argue that provincial regulators have jurisdiction even in cases of interprovincial or international transactions are in fact cases where provincial regulators have brought charges against *residents of their own province*, and the issue raised was whether the interprovincial or international character of the charges deprived the provincial authority of its jurisdiction against its resident. Even though the first presumptive connecting factor of *Van Breda* (residence in the province) was met in these cases, a close reading of the decisions shows that the court recognized that residence may not be sufficient and that they had to ensure that a real and substantial connection existed also with the defendant's *actions*.

[83] Thus, in ***McCabe***,[87] the British Columbia Court of Appeal concluded that the B.C. Securities Commission had jurisdiction over a B.C. resident accused of making false representations in a "tout sheet" published in the United States. In addition to being resident in the province, the defendant had been contacted in British Columbia, had written the tout sheet in British Columbia and had been paid for his services in British Columbia. In ***Crowe***,[88] the Court concluded that Ontario had jurisdiction to hear proceedings claiming that Ontario residents had illegally traded in securities through transactions with offshore investors. Although the trades occurred outside of Ontario, the Court considered that the securities were issued in Ontario, that they were securities in the capital of Ontario-based corporations, that the majority of the shares were held by Ontarians, and that the funds were deposited in Ontario. In ***Da Silva***[89], the Ontario Securities Commission concluded that it had jurisdiction over residents of Ontario in relation to charges relating to transactions conducted out of the province because the defendants were present in their Ontario premises when they made the trades and solicited

[87] *McCabe v. British Columbia (Securities Commission)*, 2016 BCCA 7 [*McCabe*].
[88] *Crowe v. Ontario Securities Comm.*, 2011 ONSC 6918 [*Crowe*].
[89] *Ontario Securities Commission v. Da Silva*, 2017 ONSC 4576 [*Da Silva*].

investors, and because a portion of the profits from their illegal activity was returned to Ontario. In ***World Stock Exchange***[90], the Alberta Securities Commission concluded it had jurisdiction against individuals and a corporation purporting to operate a "foreign" Internet stock exchange based on server located abroad. In addition to the corporation and the individuals all being domiciled in Alberta, the Commission concluded that the company was operated from Alberta and that the individuals spent most of their time promoting it to Albertans.

[84] In ***Williams***,[91] the B.C. Securities Commission agreed to hear cases against British Columbia residents accused of orchestrating a Ponzi Scheme involving deposits in foreign financial institutions. The Commission had no trouble finding jurisdiction against the B.C residents and companies incorporated and having their 'mind and management' in B.C., where the fraud was orchestrated and where many of the defrauded investors were located. Crucially, however, the Commission concluded that it did *not* have jurisdiction regarding the charges brought against out-of-province residents who were also accused of participating in the scheme. The Commission concluded that these individuals had acted outside of the jurisdiction and that despite having been involved in the scheme and having received commissions from a B.C. corporation that were paid from a B.C. bank account, their links to the province did not raise to the level of a "real and substantial connection."

[85] In the very few securities cases where Canadian courts have taken jurisdiction over *out-of-province* residents, the proceedings concerned violations that were specifically and deliberately targeted at the forum province. Thus, in ***McKenzie Securities***,[92] the courts of Manitoba were found to have jurisdiction over an Ontario broker charged with violating Manitoba securities law by personally soliciting a Manitoba investor, sending documents to his home and calling him in Manitoba, where the solicited investments were eventually made. Similarly, in ***Torudag***,[93] a resident of Alberta was accused of insider trading in relation to the purchase (predominantly from British Columbia investors) of shares of a British Columbia corporation. The transactions had taken place on the TSX Venture Exchange. Given the close connection with British Columbia, and particularly the regulatory and supervisory role which the B.C. Securities Commission plays over the TSX-V, the Commission

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[90] *World Stock Exchange (Re)*, 2000 LNABASC 39 [*World Stock Exchange*].

[91] *Williams (Re)*, 2016 BCSECCOM 18 [*Williams*].

[92] *R. v. W. McKenzie Securities Ltd*., 1966 CanLII 485 (MB CA) (leave to appeal dismissed: [1966] S.C.R. ix) [*McKenzie Securities*].

[93] *Torudag v. B.C. (Securities Commission)*, 2011 BCCA 458, at para. 11 and 29 (leave to appeal dismissed: 2012 CanLII 49130 (SCC)); *Torudag (Re),* 2009 BCSECCOM 145, at para. 4.

found that it had jurisdiction to hear the charges. In ***Poseidon***[94], the Alberta Securities Commission concluded that it had jurisdiction over a resident of the United States who had acted as an officer of an Alberta corporation headquartered in Calgary, who had attended meetings in Alberta and had directed employees in Alberta to provide misleading financial information about the corporation.

[86] In some of the cases cited by the AMF in the courts below, securities commissions had concluded that the connections with the province were insufficient, but appeal courts intervened to quash their findings. In ***Berger***[95] the Saskatchewan Financial and Consumer Affairs Authority was seized with charges against an out-of-province defendant accused of soliciting investments from a Saskatchewan resident. The Commission concluded (ostensibly on the basis of *McKenzie Securities*) that the solicitation in Saskatchewan was sufficient to ground this jurisdiction. The Court of Appeal quashed this decision and sent the file back to the Commission, concluding that such circumstances were in themselves insufficient to establish a real and substantial connection. Similarly, in ***Deyrmenjian***[96], the British Columbia Securities Commission found (based on *Torudag*), that it had jurisdiction over two foreign defendants who had collaborated with B.C. residents in orchestrating a scheme relating to the securities of a foreign corporation. The British Columbia Court of Appeal granted leave on this aspect, concluding that *Torudag* did not settle the issue and that the Commission's jurisdiction raised a substantial question that needed to be addressed in appeal[97].

[87] What is apparent from this review is how significantly different the present case is. In none of these cases were the connections with the jurisdiction as tenuous and indirect as in the present case – far from it. Should the decision below be allowed to stand, it would mark a radical departure from past jurisprudence, and open the doors to the type of overreach Canadian courts, including this Court, have repeatedly warned against.

4. NOTHING IN THE *CODE*'S PROVISIONS CAN GROUND THE FMAT'S JURISDICTION OVER THE PRESENT CASE

[88] Although Mainville J.A. recognized (correctly, in Appellant's view) that the FMAT's jurisdiction could only be based on the provisions of the *Civil Code*, he erred in his interpretation and application of the *Code*'s provision. His decision to interpret art. 3148 *C.C.Q.* "by analogy" to ground the

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[94] *Re Poseidon Concepts Corp.*, 2015 ABASC 933 [*Poseidon*].
[95] *Berger v. Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 89 [*Berger*].
[96] *Re Deyrmenjian*, 2018 BCSECCOM 125 (leave to appeal granted: *Khorchidian v. B.C. (S.C.)*, 2019 BCCA 411).
[97] *Khorchidian v. British Columbia (Securities Commission)*, 2019 BCCA 411.

FMAT's jurisdiction is unprecedented and highly problematic, and his conclusion that the forum of necessity doctrine of art. 3136 *C.C.Q.* applies to the circumstances of the case is equally unjustified.

[89] It should at the outset be pointed out that this is not a case where any sort of interpretation "by analogy" of the *Code* is required to interpret one of its provisions, interpret provisions of a different statute, or fill a gap left by the Legislature. There is simply no gap to fill. The *Code* does provide a specific rule that applies in a case such as this – article 3134 *C.C.Q.*:

> "**3134.** In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec."

[90] The first of Title Three dealing with the "International Jurisdiction of Québec Authorities," art. 3134 *C.C.Q.* consecrates a "*tradition millénaire*"[98] that is "*universelle et permanente puisqu'elle existait dans le droit romain, le droit canonique, le droit coutumier et qu'elle est acceptée actuellement par l'ensemble des législations étrangères*."[99] As the opening article of the "General Provisions" (Chapter I), it provides the general, by-default rule governing the jurisdiction of Quebec authorities. It may be supplanted by specific provisions such as those of Chapter II, which provide alternative grounds of jurisdiction for certain specific types of recourses – wider or narrower grounds, pursuant to the Legislature's specific intent. Art. 3134 *C.C.Q.* is thus a general rule, but it also plays a subsidiary, "gap-filling" role in that it applies by default when no other statutory provision finds application: "*Le codificateur rappelle ainsi qu'il faut d'abord et avant tout chercher, parmi les dispositions qu'il a adoptées, s'il y en a une qui s'applique spécifiquement au problème que l'on tente de résoudre avant de se rabattre, en cas de lacune, sur le principe général.*"[100]

[91] The jurisdictional rule of art. 3134 *C.C.Q.* (like those of Chapter II) can also be modulated by other general provisions which provide flexibility for the court to respond to various circumstances: *forum non conveniens*; forum of necessity (on which we will come back); situations of foreign *lis pendens*; provisional or conservatory measures; jurisdiction over cross demands and incidental claims; and power to take emergency measures to protect persons or property. Together, these provisions "comprehensively codif[y]" the law in this regard. To use LeBel J. phrase in *Van Breda*, they

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[98] S. Guillemard, *Règles générales de compétence*, at para. 5.

[99] S. Guillemard, A. Prujiner and F. Sabourin, "Les difficultés de l'introduction du *forum non conveniens en droit québécois* (1995), 36 C. de D. 913, at p. 937 ("*Il s'agit même d'une règle universelle et permanente puisqu'elle existait dans le droit romain, le droit canonique, le droit coutumier et qu'elle est acceptée actuellement par l'ensemble des législations étrangères*").

[100] Guillemard, *Règles générales de compétence*, at para. 2.

form "*un ensemble complet de règles et de principes en la matière*".[101]

[92] The *Code*'s jurisdictional rules are carefully crafted, and their wording matters. As LeBel J. emphasised in *Spar*, "[a]s the basic rules of private international law are codified in Quebec, courts must interpret those rules by first examining the specific wording of the provisions of the C.C.Q."[102]. Writing once again for the Court in *GreCon,* LeBel J. added:

> "it should be borne in mind that the private international law of Quebec has been codified. The courts must therefore interpret the rules as a coherent whole. They must begin with the specific wording of the provisions. Next, they must inquire into whether their interpretation is consistent with the principles that underlie the rules […]. The particular legal framework of private international law cannot be disregarded, nor can the general objectives that are specific to that law: the principles of autonomy of the parties and the legal certainty of international transactions."[103]

[93] The Quebec Legislature chose *not* to adopt specific provisions to govern the jurisdiction of the FMAT in the context of proceedings pursuant to the *Securities Act*. This is not because the Legislature was unaware that situations presenting foreign elements could present themselves. The *Securities Act* contains a whole chapter (Chapter II of Title X) on "Interjurisdictional Cooperation," giving the AMF the power to cooperate with and even delegate certain powers to securities commissions in other jurisdictions. As regards investors' recourses pursuant to Title VIII of the *Securities Act*, the Legislature chose to derogate from the *Code*'s jurisdictional rules by adopting art. 236.1 of the *Securities Act*, which provides that such actions "may be brought before the court of the plaintiff's residence." It even chose to extend this provision's scope to all other actions "under the ordinary rules of law in respect of facts related to the distribution of a security or to a take-over bid or issuer bid". As for penal proceedings under Title VII, Chapter III of the *Securities Act*, same are subject to the *Code of Penal Proceedings*, which provides its own jurisdictional rules[104].

[94] The AMF may disagree with the Legislature's decision not to derogate from the *Code*'s general jurisdictional rules in proceedings brought by the AMF before the FMAT. It may consider that this reflects a poor policy choice. However, and with due respect for the approach taken by Mainville J.A., it is not for the Courts to second-guess the Legislature, disregard the clear wording of the *Code*'s provisions and "invent" a jurisdictional basis where none exist.

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[101] *Van Breda*, at para. 21; See also C. Walsh (2012), at p. 253 (Book Ten "*comprehensively codifies Québec private international law in all its dimensions*").
[102] *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, at para. 23 [*Spar*].
[103] *GreCon Dimter inc. v. J. R. Normand inc.*, 2005 SCC 46, at para. 19 [*GreCon*].
[104] *Code of Penal Procedure*, CQLR c. C-25.1, art. 142-43; Cf. *supra* para. [61][50] and footnote 61.

4.1 Article 3148 *C.C.Q.* cannot be applied "by analogy" to the AMF's proceedings

[95] Mainville J.A. first concludes that article 3148 *C.C.Q.* can be applied "by analogy" to ground the jurisdiction of the FMAT in the present case. His reasoning is quite laconic, and he cites no precedent or authority in support of his proposition:

> "[144] Il me semble que le recours entrepris contre les appelants, sans être nécessairement une action personnelle à caractère patrimonial au sens classique du droit civil, s'en rapproche sensiblement. Il y a donc lieu, selon moi, d'appliquer par analogie les dispositions de l'article 3148 al. 1(3) C.c.Q., lesquelles stipulent que les autorités québécoises sont compétentes lorsqu'une faute a été commise au Québec, un préjudice y a été subi, ou un fait dommageable s'y est produit. Dans ce cas-ci, comme le juge de la Cour supérieure l'a conclu, la publication au Québec des communiqués de presse et les dommages allégués aux investisseurs québécois soutiennent la compétence du Tribunal administratif des valeurs mobilières sous cette disposition du C.c.Q."

[96] The AMF's proceedings are most certainly not a "personal action of a patrimonial nature," as Mainville J.A. himself recognizes. Indeed, the AMF forcefully argues, and has argued in the past,[105] that its proceedings under the *Securities Act* cannot be qualified as such. The AMF also rejects Mainville J.A.'s proposition that its proceedings could be grounded on article 3148 *C.C.Q.*:

> "[L]'Intimée est d'accord avec les Demandeurs que l'article 3148 *C.C.Q.* ne s'applique pas à la procédure administrative parce qu'il ne s'agit pas d'une action personnelle à caractère patrimonial et, selon elle, il n'y a pas lieu d'appliquer cette disposition par analogie compte tenu de sa position exprimée aux questions en litige précédentes."[106]

[97] Article 3148 *C.C.Q.* is already quite expansive. It reads as follows:

> "**3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
>
> (1) the defendant has his domicile or his residence in Québec;
>
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
>
> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;
>
> (5) the defendant has submitted to their jurisdiction.
>
> However, Québec authorities have no jurisdiction where the parties have chosen by

[105] The AMF has itself strenuously argued that the right it exercises in administrative proceedings such as these is **not** a personal right of a patrimonial nature; See *Donaldson v. AMF*, 2020 QCCA 401.

[106] AMF's response to Appellants *Application for Leave* before this Court (Jan. 24, 2022), at para. 62.

> agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities."

[98] A personal action of a patrimonial nature is "an action for the purpose of acknowledging the existence or the protection of a personal right (a claim), whatever its source or origin"[107]. Not only is the AMF's proceeding not a personal action "*au sens classique du droit civil*," but it bears no resemblance to such an action. Typically, a personal action of a patrimonial nature seeks redress from damage caused to the plaintiff as a result of the fault of the defendant, or to enforce some contractual obligation between the parties. The very elements that form the basis of the claim (the fault and the resulting damage, or the contractual obligation) also serve to ground the tribunal's jurisdiction. Here, there is here no "personal right," no "claim" which the AMF seeks to have recognized. Indeed, there is no pre-existing obligation, no "*lien obligationnel*," between the AMF and Appellants, and the AMF is not seeking the acknowledgment of any "right" of its own, whatever its origin[108].

[99] With respect, nothing warrants or justifies the further expansion of article 3148 *C.C.Q.* As *Spar* highlights, it already provides "a broad basis for jurisdiction" – so much so, in fact, that "in the majority of cases, it enables the plaintiff's courts to assume jurisdiction"[109].

[100] Mainville J.A.'s conclusion that courts can put aside the wording of the *Civil Code* and apply the provisions of Title Three "by analogy" to take jurisdiction even when not provided is unprecedented (indeed, Mainville J.A. cites no supporting precedent). It also runs counter to the teachings of this Court and could wreak havoc in the development of the law governing assumption of jurisdiction by Quebec courts. Indeed, Quebec Courts – with the Supreme Court at the forefront – have since 1994 expanded considerable efforts to define the exact scope of each ground of jurisdiction.

[101] For instance, considerable judicial thought has gone into the proper interpretation of what constitutes "damage […] suffered in Quebec"[110] for the purposes of art. 3148(3) *C.C.Q.*, the distinction between *damage* and *injury*, the sufficiency of financial losses and the difference between damage

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[107] *Uashaunnuat*, at para. 54, citing G. Cornu, *Vocabulaire juridique* (2018), 12nd ed.; *Bern v. Bern*, 1995 QCCA 4635, at para. 24; Cf. P.-A. Crépeau *et al.* (dir.), *Dictionnaire de droit privé*, 2nd ed. (1991), at p. 29; H. Reid, *Dictionnaire de droit québécois et canadien* (2015), 5th ed.

[108] Cf. *Abikhzer v. AMF*, 2016 QCBDR 34, at para. 74; *Ingénieurs (Ordre) v. Léger*, 2017 CanLII 30961 (QC CDOIQ).

[109] *Spar Aerospace*, at para. 58, citing C. Emanuelli, *Droit international privé québécois* (2001), at p. 91; Cf. also *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, at para 47.

[110] Prior to 2014, the English version of para. 3148(3) *C.C.Q.* read "damage was suffered in Québec". The English version now refers to "injury was suffered in Québec."

suffered in Quebec and damage merely *recorded* there.[111] Courts have insisted that the phrase "one of the obligations arising from a contract *was to be* performed in Québec" implied that it was not sufficient for certain obligations to have *in fact* been performed in Quebec if there was no contractual *requirement* that performance take place in Quebec.[112] Similarly, because jurisdiction over personal actions (under 3148 *C.C.Q.*) is much wider than over "real actions" (where jurisdiction exists *only* if the property in dispute is situated in Quebec: art. 3152 *C.C.Q.*), courts have struggled with what precisely constitute "real rights"[113] and insisted that in the case of mixed actions (having a personal and a real component), a Quebec could hear the dispute *only* if it has jurisdiction over *both* the personal and the real aspect of the proceedings – the whole in order to "preven[t] Quebec courts from arrogating jurisdiction over a matter which would otherwise be beyond their reach merely because the parties have amalgamated multiple claims."[114]

[102] One might be forgiven to wonder whether these interpretative efforts were necessary. Why worry about the specific wording of the *Code*'s provisions, about legislative intent, the structure of the *Code* or the interrelation between its provisions, if in the end courts can simply opt to apply the *Code*'s provisions "by analogy" – thereby clearly "arrogating jurisdiction over a matter which would otherwise be beyond their reach"[115]? In fact, the approach advocated by Mainville J.A. would essentially render obsolete the wording of the *Code*, making it a mere canvas on which courts may project their view of the justice or fairness of the case.

4.2 Mainville J.A.'s reliance on the "forum of necessity" doctrine is misplaced

[103] Mainville J.A.'s conclusion that the jurisdiction of the FMAT can also be grounded on the "forum of necessity" doctrine of art. 3136 *C.C.Q.* is also highly problematic and creates a dangerous precedent. It widens the doctrine beyond recognition, contradicting consistent case law and academic writings; it transforms what was meant as an exception into a rule of general application and reverses the burden of evidence; and it profoundly misconstrues the nature of the AMF's proceedings and the

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[111] See *inter alia Option Consommateurs v. Infineon Technologies, a.g.*, 2011 QCCA 2116, at para. 41-72 [conf. by *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59]; S. Gaudet, "Le livre X du Code civil du Québec: bilan et enjeux" (2009) 88 R. du B. can. 313.

[112] *Green Planet Technologies Ltd. v. Corporation Pneus OTR Blackstone/OTR Blackstone Tire Corporation*, 2013 QCCA 56, at para. 7-8; *D.D.H. Aviation inc. v. Fox*, 2002 CanLII 41085 (QC CA).

[113] *Uashaunnuat*, at para. 18; *CGAO v. Groupe Anderson inc*., 2017 QCCA 923; *Bern v. Bern*, 1995 QCCA 4635.

[114] *Uashaunnuat*, at para. 18; *CGAO v. Groupe Anderson inc.*, 2017 QCCA 923, at para. 10.

[115] *Uashaunnuat*, at para. 18.

rationale of art. 3136 *C.C.Q.*

[104] Article 3136 *C.C.Q.* provides as follows:

> "**3136.** Even though a Québec authority has no jurisdiction to hear a dispute, it may nevertheless hear it provided the dispute has a sufficient connection with Québec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required."

[105] In the landmark case on art. 3136 *C.C.Q.*, LeBel J.A. (as he then was) writes:

> "Selon ses sources législatives, [l'art. 3136 C.c.Q] représente […] une exception étroite aux règles normales de compétence. Elle ne vise pas à permettre au tribunal québécois de s'approprier une compétence qu'il ne posséderait pas autrement. Elle veut régler certains problèmes d'accès à la justice, pour un plaideur qui se trouve dans le territoire québécois, lorsque le forum étranger normalement compétent lui est inaccessible pour des raisons exceptionnelles, comme une impossibilité en droit ou une impossibilité pratique, presqu'absolue. Ainsi, on peut penser à celles résultant de la rupture des relations diplomatiques ou commerciales avec un État étranger ou de la nécessité de la protection d'un réfugié politique, ou à l'existence d'un danger physique sérieux, si l'on entame un débat devant le tribunal étranger. […]
>
> L'article 3136 C.c.Q. exprime une règle d'exception basée sur l'impossibilité démontrée d'avoir accès au tribunal étranger, dans un litige qui possède un lien suffisant avec le Québec. Les coûts et les inconvénients relatifs à un procès en Italie n'en justifient pas l'application. L'Italie possède, comme le Canada, un système juridique rattaché à la tradition occidentale. On n'a même pas tenté de plaider que ce forum ne permettrait pas une audition conforme aux règles fondamentales du droit ou de la procédure."[116]

[106] Authors agree that art. 3136 *C.C.Q.* must be interpreted restrictively.[117] As Hamilton J. (then at the Superior Court) explains:

> "La barre est très haute. Il ne suffit pas de démontrer qu'il serait préférable de poursuivre au Québec. Il ne suffit pas de plaider que la qualité du système judiciaire ou de la justice est moindre dans l'autre pays. Il faut démontrer l'impossibilité ou une situation qui s'y approche. Il s'agit d'un 'for de nécessité' et non d'un 'for de convenance'."[118]

[107] The same conclusion applies with respect to equivalent doctrine in common law provinces, where the *Lamborghini* decision of LeBel J.A. is often cited. As the Ontario Court of Appeal recently explained: "it is well established that this doctrine is 'very stringently construed' and 'reserved for exceptional' cases, and therefore typically unavailable because of its high bar".[119]

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[116] *Lamborghini (Canada) inc. v. Automobili Lamborghini SPA*, 1996 CanLII 6047 (QC CA), p. 20-21.

[117] Talpis and Castel (1993), at p. 903. For a review, see G. Goldstein, "Commentaires sur l'article 3136 C.c.Q., in *Commentaires sur le Code civil du Québec (DCQ)* (2013) (EYB2013DCQ1276); Guillemard, *Règles générales de compétence*, at para. 7 *et seq*.

[118] *Zoungrana v. Air Algérie*, 2016 QCCS 2311, at para. 103 (appeal dismissed: 2019 QCCA 298).

[119] *Bowles v. Al Mulla* Group, 2020 ONCA 761; Cf. Pitel and Rafferty (2016), at p. 110-11.

[108] An example of how stringent the doctrine is can be found in the Quebec Court of Appeal's decision in *Anvil Mining*.[120] In that case, a mining company with an office in Montreal was sued in Quebec by ACCI, an association representing Congolese residents who had been the victims of severe armed repression by the Congolese army. ACCI claimed that the company had assisted in the repression by transporting troops, providing foods rations and remunerating soldiers. None of the criteria of art. 3148 *C.C.Q.* being applicable, the Court turned to the application of art. 3136 *C.C.Q.* Although ACCI argued that victims could not hope for justice before Congolese courts, and although they had been unable to institute proceedings in the jurisdiction where the company was domiciled (Australia) because no lawyer could be convinced to take the case, the Court of Appeal concluded that this did not meet the high threshold of art. 3136 *C.C.Q.*, the plaintiffs having failed to demonstrate the impossibility to institute proceedings before a foreign court. The Court's final comments are instructive as to the article's limited reach even in the face of clear access to justice problems:

> "Il est regrettable de constater que des citoyens ont autant de difficulté à obtenir justice; malgré toute la sympathie que l'on doit éprouver pour les victimes et l'admiration que suscite l'engagement des ONG à l'intérieur de l'ACCI, je suis d'avis que la législation ne permet pas de reconnaître que le Québec a compétence pour entendre ce recours".

[109] The present case does not begin to compare with the situation in *Anvil Mining*. The stated purpose of the AMF's proceedings – to ensure the public's confidence in the securities market and prevent abusive trading schemes – could be achieved by similar proceedings in the United States (where Solo is located and where all transactions in Solo's shares took place[121]). Proceedings against the Defendants could also have been instituted in their place of domicile or residence (British Columbia, in the case of two of the Appellants and of Sharp). The AMF could also have cooperated with these or other regulators, including through reliance on the *Securities Act* "Interjurisdictional Cooperation" provisions (ss. 305.1 *et seq.*). The AMF provided no evidence (or allegation) regarding other securities regulator's investigations or actions regarding Solo and the other defendants, nor did it provide evidence of any communications with such authorities, or why it preferred not to cooperate with them. In this regard, alleging that no proceedings have in fact been instituted elsewhere is clearly insufficient: this does not in any way demonstrate that it would not have been possible to do so, and says nothing about the reasons why foreign regulators chose not to file proceedings.

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[120] *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117 (leave to appeal dismissed: 2012 CanLII 66221 (SCC)) [*Anvil Mining*].

[121] This is especially true given that only the U.S. Securities and Exchange Commission could claim a regulatory role over the OTC, where the trades would have taken place.

[110] The AMF thus provided no evidence whatsoever regarding the impossibility (or unreasonableness) of ensuring that Appellants' alleged conduct be properly scrutinized, adjudicated and potentially sanctioned in another jurisdiction. This hardly surprising: the AMF simply did not argue before the FMAT that its jurisdiction could be grounded on the forum of necessity doctrine (whether on the basis of art. 3136 *C.C.Q.* or of the equivalent common law doctrine).[122]

[111] By concluding that the FMAT's jurisdiction could be grounded on art. 3136 *C.C.Q.* despite no request to this effect having been made, and despite no evidence having been presented regarding art. 3136 *C.C.Q.*'s strict conditions, Mainville J.A. distorts the role of the forum of necessity doctrine. As the Court of Appeal has stated, "*ce n'est qu'à la demande expresse [du demandeur] que le juge aurait pu conférer aux autorités du Québec une compétence qu'elles ne possèdent pas sur le fondement de l'article 3136 C.c.Q.*"[123] The burden of demonstrating the Court's jurisdiction always lies on the plaintiff, and this is even more true with respect to a rule of exception like art. 3136 *C.C.Q.*[124]

[112] The only element considered by Mainville J.A. in this regard is a comment made by the FMAT that "aucune preuve ne lui a été présentée par les intimés [the Appellants] que les autorités d'un autre État seraient à même de prendre des décisions dans la présente affaire" (at para. 159). Such a reasoning turns art. 3136 C.C.Q. on its head: it is no longer a narrow exception which plaintiff has the burden of demonstrating. It shifts the burden on defendant to demonstrate positively that another jurisdiction could in fact hear the case, and transforms art. 3136 C.C.Q. into a default provision. Professor Goldstein highlights the problem with this approach:

> "Adopter une conception différente serait donner un caractère général à l'art. 3136 C.c.Q. puisque, comme pour les autres cas de litiges, le plaideur déclencherait la compétence québécoise à la suite d'un calcul 'raisonnable', de l'avantage comparatif présenté par la législation applicable au fond devant le tribunal québécois. Ce serait aussi mettre en échec tout l'effort mis par le codificateur pour énoncer des critères de compétence juridictionnelle précis, fondée sur un lien réel et substantiel, puisque, alors, ces chefs de compétence seraient susceptibles d'être facilement remplacés par le critère plutôt vague d'un lien 'suffisant'. Or, l'art. 3136 C.c.Q. n'est pas l'équivalent d'une règle *générale* de compétence fondée sur le *forum conveniens*, parallèle à celle de l'art. 3135 C.c.Q."[125]

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[122] Cf. AMF's Plan of argument before the FMAT (JAR, tab 10, at p. 116).

[123] *Droit de la famille – 143017*, 2014 QCCA 2188, at para. 55; *Droit de la famille – 211290*, 2021 QCCA 1123, at para. 42.

[124] *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117, at para. 99; Talpis and Castel (1993), at p. 903; G. Goldstein, "Commentaires sur l'article 3136 C.c.Q., in *Commentaires sur le Code civil du Québec (DCQ)* (2013), at para. 3136 550 (EYB2013DCQ1276).

[125] G. Goldstein, "Commentaires sur l'article 3136 C.c.Q.", in *Commentaires sur le Code civil du Québec (DCQ)* (2013), at para 3136 550 (EYB2013DCQ1276).

[113] As for the AMF's arguments that it could not *itself* have instituted proceedings in a foreign jurisdiction (as underlined by Marcotte J.A. at para. 91), it is entirely inapposite. As stated above, the AMF is not seeking to have any right *of its own* recognized; it is not seeking "justice" *for itself*. The AMF insists that it is acting in furtherance of a widely-construed notion of the public's interest. Indeed, this is one of the primary reasons it insists that the *Code*'s provisions should not apply at all. If the proceedings' objective is to further the public's interest, then it cannot be "impossible" (or "unreasonable") that this very same objective be attained through proceedings instituted by another securities regulator before its own jurisdiction, and recognizing that Quebec authorities have no jurisdiction to hear the claims against the Appellants results in no "denial of justice."

[114] Lastly, Mainville J.A.'s argument also fails on art. 3136 *C.C.Q.*'s requirement that the proceedings have a "sufficient connection" to Québec. As Talpis and Castel write, like all instances of provincial adjudicative jurisdiction, a court's jurisdiction based on art. 3136 *C.C.Q.* would conform with the constitutional regarding the extent of provincial jurisdiction only if the matter presents a connection with Quebec that is at the same time "sufficient" within the meaning of art. 3136 *C.C.Q.* and "real and substantial".[126] As seen above, however, this is clearly not the case here.

* * *

[115] For the above reasons, Appellants respectfully submits that the Court of Appeal's judgment is ill-founded, that the FMAT has no jurisdiction to hear the AMF's proceedings against Appellants, and that the appeal should therefore be granted.

PART IV – SUBMISSIONS ON COSTS

[116] Appellants requests an order for costs throughout, including before the FMAT.

PART V – ORDER SOUGHT

[117] Appellants respectfully ask this Court to allow the present appeal, set aside the decision of the Québec Court of Appeal, and declare that the Financial Markets Administrative Tribunal has no jurisdiction to hear the AMF's proceedings against Appellants[127].

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[126] Talpis and Castel (1993), at p. 903 at para. 426; See also Pitel and Rafferty (2016), at p. 111 ("*An important issue is whether forum of necessity is constitutional*").

[127] The errors in the courts and tribunal below being jurisdictional, an order remitting the matter to the FMAT would not be appropriate: *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 161.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2022.

Patrick Ferland
Counsel for the Appellants
Shawn Van Damme, Vincenzo Antonio Carnovale and Pasquale Antonio Rocca

PART VI – TABLE OF AUTHORITIES

CASES

SECONDARY AUTHORITIES

STATUTORY PROVISIONS

Civil Code of Québec, S.Q. 1991, c. 64