SCC File 39920

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

B E T W E E N

FREDERICK LANGFORD SHARP

APPELLANT

- and -

AUTORITÉ DES MARCHÉS FINANCIERS

RESPONDENT

- and -

SHAWN VAN DAMME,
VINCENZO ANTONIO CARNOVALE and
PASQUALE ANTONIO ROCCA

INTERVENERS
(Mis-en-cause)

- and -

FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL

INTERVENER
(Rule 22(2)(c)(iii))

APPELLANT'S FACTUM

FILED BY THE APPELLANT, FREDERICK LANGFORD SHARP
PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: OVERVIEW AND STATEMENT OF FACTS

I. Overview

1. This case concerns the limits to the jurisdiction of Québec's Financial Markets Administrative Tribunal (the "**FMAT**").

2. In a marked departure from the known intent of Québec's legislature and the existing jurisprudence of this Court, a majority of the Québec Court of Appeal has found that the provisions of the *Civil Code of Québec* setting out the "*International Jurisdiction of Québec Authorities*"[1] do not apply to administrative proceedings brought by the *Autorité des Marchés Financiers* (the "**AMF**") before the FMAT, a statutory administrative tribunal. Instead, the Court of Appeal has adopted an open-ended jurisdictional test that conflates the notions of adjudicative and legislative jurisdiction, while eroding the constitutional boundaries underlying the division of powers.

3. Unmoored by the rules of the C.C.Q. or any previously recognized connecting factors at common law, the Court of Appeal has affirmed the FMAT's jurisdiction over the Appellant Frederick Langford Sharp ("**Sharp**"), a British Columbia resident with no discernable connection to Québec, let alone a "real and substantial" one.

4. In view of upholding a fair, predictable, and objective framework for the assumption of extraterritorial jurisdiction by Quebec's administrative tribunals, this Court should order that the judgment of the Court of Appeal be set aside, and that the FMAT decline jurisdiction over Sharp.

II. Procedural History

a) The FMAT

5. On or about February 28, 2017, the AMF applied to the FMAT for various administrative sanctions against Sharp and others for alleged violations of the Québec *Securities Act*[2] namely: "influencing or attempting to influence the market price or the value of securities by means of unfair, improper or fraudulent practices." (s. 195.2, QSA); and engaging in transactions, trading methods,

[1] CQLR c. CCQ-1991 ("**C.C.Q.**"), arts. 3134 to 3154, C.C.Q.
[2] CQLR, c. V-1.1 (the "**QSA**").

acts, practices, or courses of conduct creating or contributing to a misleading appearance of trading activity or an artificial price for the securities (s.199.1, QSA). The securities in question were those of Solo International Inc. ("**Solo**"), a company based in Nevada, whose securities were traded on the Over-The-Counter Bulletin Board ("**OTCBB**") in the United States.

6. The AMF petitioned the FMAT for a monetary administrative penalty against Sharp of two million dollars ($2,000,000.00) (s. 273.1, QSA); an order to cease any activity in respect of a transaction in securities; and an order prohibiting Sharp from acting as a director or officer of an issuer, dealer, adviser, or investment fund manager. (s. 273.3, QSA).

7. On or about March 30, 2017, the FMAT granted an *ex parte* motion by the AMF to serve Sharp via press release published on the AMF's website.[3]

8. On or about June 26, 2017, Sharp petitioned the FMAT to decline jurisdiction over him.[4] The other Appellants filed similar applications. Solo did not appear before the FMAT. One of Solo's directors, Michel Plante, a Québec resident, did not contest the FMAT's jurisdiction.

9. In support of his application, Sharp argued that the AMF's allegations as against him were solely comprised of foreign elements.

10. Sharp, a resident of British Columbia, has no domicile or residence in the province of Québec. None of the corporate entities allegedly connected to Sharp are based in Québec, nor are they alleged to have conducted operations in Québec. None of the transactions involving Solo securities occurred in, or had a link to, the province of Québec. None of the bank accounts of these corporate entities are in Québec. No sums obtained from the sale of the Solo securities on the U.S. OTCBB transited through bank accounts or corporate entities situated in the province of Québec. Finally, the AMF does not allege that Sharp played any role in the promotion of Solo or its securities in Québec.

11. On November 22, 2017, the FMAT dismissed Sharp's application, thus asserting jurisdiction over the AMF's application against him. In support of its assertion of jurisdiction, the FMAT found,

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[3]Minutes of hearing and order of the FMAT (March 30, 2017), Appellants' Joint Record ("Appellants' Record")**,** Tab 7.

[4] Motion for Declinatory Exception – Appellants Van Damme *et al.* (June 7, 2017), Appellants' Record, Tab 8.

"first and foremost," that it had "wide discretion" on matters of jurisdiction in accordance with its statutory "public interest" discretion.[5] The FMAT further based its decision on the AMF's conclusion to the effect that Sharp would have "used" several foreign companies to dissimulate his "central role" in the alleged scheme.[6]

12. Moreover, the FMAT found that a minimal number of Québec investors incurred losses which were spurred by promotional activities conducted on behalf of Solo, in which Sharp is not alleged to have participated.[7] The FMAT further reasoned that the international character of market manipulation schemes creates challenges for provincial securities regulators.[8]

b) <u>The Superior Court of Québec (Collier J.)</u>

13. Sharp applied to the Superior Court of Québec for judicial review of the FMAT Decision.

14. On January 9, 2019, the Superior Court (Collier J.) dismissed Sharp's application for judicial review. Collier J. held that, irrespective of the standard of review to be applied, the FMAT's decision should be upheld.[9] Notably relying upon this Court's decision in *Club Resorts Ltd. v Van Breda*,[10] the Superior Court found that the FMAT properly considered its public interest discretion as a "presumptive connecting factor" in assessing its jurisdiction over Sharp.[11]

15. Collier J. further held that the defendants, including Sharp, had a relationship with Québec and its regulatory authorities for having been shareholders of Solo, a company that was a deemed reporting issuer in Québec, and which had a subsidiary that once had an office in Montréal. Collier J. further held that the defendants "presumably knew" that Solo was promoting mining activities in Québec.[12]

16. Collier J. further held that certain defendants – though not Sharp – had drafted misleading

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[5] *Autorité des marchés financiers c Solo International inc.*, 2017 QCTMF 114 at paras 66, 68, 73, 82 [FMAT Decision].
[6] FMAT Decision at paras 74–75, 81.
[7] FMAT Decision at para 80.
[8] FMAT Decision at paras 72–73.
[9] Langford Sharp c Financial Markets Administrative Tribunal, 2019 QCCS 94 at para 30 [QCCS Judgment].
[10] 2012 SCC 17 [*Van Breda*].
[11] QCCS Judgment at para 38 [QCCS Judgment].
[12] QCCS Judgment at para 41.

press releases that contained references to Québec,[13] and Québec investors suffered injury, which could respectively constitute a fault and injury in Québec, such that the Tribunal would have jurisdiction under the rules for actions of a "personal, patrimonial nature" under article 3148(3) of the C.C.Q.[14]

c) The Québec Court Appeal

17. On March 19, 2019, a judge of the Québec Court of Appeal (Hamilton J.A.) granted leave to appeal from the decision of the Superior Court, finding that "the extraterritorial jurisdiction of the Tribunal and the standard of review when the decision of the Tribunal on its jurisdiction is taken on judicial review to the Superior Court, are questions of importance on which the Court has not yet expressed itself."[15]

18. The Québec Court of Appeal rendered its decision on the merits on September 15, 2021.[16]

i. The majority opinion (Marcotte and Moore JJ.A.)

19. In their majority opinion, Marcotte and Moore JJ.A. qualified the issue before the Court as being "[…] a constitutional one, but not so much by reason of the fact that it is a jurisdictional issue. Rather, the issue relates to the applicability of a provincial law to foreigners or to matters with extraterritorial aspects."[17] They further held that "contrary to the Appellants' submission, there is no extraterritorial jurisdiction of the FMAT at issue. We are only concerned with the FMAT's territorial jurisdiction over out-of-province defendants for alleged actions that have a connection with the province of Quebec."[18]

20. The majority of the Court Appeal held that "it is obvious that the C.C.Q. rules, including Book Ten entitled 'Private international law', apply to administrative tribunals."[19] However, relying on the decision of this Court in *Libman v The Queen*,[20] the Court ultimately held that the "scope of

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[13] QCCS Judgment at paras 15–16.
[14] QCCS Judgment at para 44.
[15] *Langford Sharp c. Autorité des marchés financiers*, 2019 QCCA 449 at para 2.
[16] *Langford Sharp c Autorité des marchés financiers*, 2021 QCCA 1364 [QCCA Judgment].
[17] QCCA Judgment at para 45.
[18] QCCA Judgment at para 57.
[19] QCCA Judgment at para 70.
[20] 1985 CanLII 51 (SCC) [*Libman*].

Book Ten cannot be broadened to the point of determining jurisdiction in matters of public or criminal law that do not call for private international law rules, where the primary basis of jurisdiction is not personal or real but is territorial, such as in the present case."[21]

21. In support of its reliance on *Libman*, the majority further held that "[…] 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."[22] The majority ultimately determined that "the only relevant criterion for assessing the FMAT's jurisdiction in the case at hand [is] the 'sufficient connection' test which, incidentally, is the same test developed under the constitutional applicability doctrine in *Unifund*, and applied in *Libman*."[23]

22. The majority distinguished this Court's ruling in *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani Utenam)*,[24] by finding that the aboriginal title rights at issue "would qualify as private rights."[25]

23. Applying this "sufficient connection" test to the facts at bar, the majority of the Court of Appeal held that certain defendants (other than Sharp) would have issued misleading press releases in Québec; that Solo had a business address in Montréal; that Solo had purchased mining claims in Québec; and that Solo had a Québec resident as a director.[26] In response to Sharp's alternative argument— i.e., that should the C.C.Q. not apply, the AMF's application does not set out a "real and substantial connection" between him and the province of Québec—the Court of Appeal ultimately held that "[a]n 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*."[27]

i. The Concurring Opinion of Mainville J.A.

24. In concurring reasons, Mainville J.A. found that, while he would also dismiss the appeals, he

[21] QCCA Judgment at para 71 [emphasis in original].
[22] QCCA Judgment at para 77.
[23] QCCA Judgment at para 91 [references omitted].
[24] 2020 SCC 4 [*Uashaunnat*].
[25] QCCA Judgment at para 70.
[26] QCCA Judgement at paras 114 and 116.
[27] QCCA Judgment at para 105.

could not subscribe to the majority's thesis to the effect that the rules of Book Ten, Title Three of the C.C.Q. are neither applicable nor relevant to the case at bar.[28]

25. Mainville J.A. found that this case involved both the constitutional applicability of the QSA, as well as the adjudicative competence of the FMAT, the latter of which is governed by the C.C.Q.[29] He held that it is inappropriate to rely upon the rules of jurisdiction set out in *Libman,* insofar as that case pertained to a criminal matter, such that it should not apply to a case involving administrative penalties sought by the AMF.[30]

26. After conducting a detailed analysis of the legislative scheme governing securities under Québec law, as well as this Court's rulings in *Uashaunnuat* and *Van Breda*, Mainville J.A. concluded that the legislature's intent "could not be clearer" in that the C.C.Q. is to apply broadly as a complete set of rules for the assumption of extraterritorial jurisdiction, including in matters not directly stemming from the C.C.Q. itself.[31]

27. Mainville J.A. ultimately found that the FMAT properly asserted jurisdiction over Sharp and the interveners based on art. 3148(3) of the C.C.Q. "by analogy", or under art. 3136 of the C.C.Q. (i.e., as the "forum of necessity").

PART II – QUESTIONS IN ISSUE

28. This appeal raises the following questions:

(1) Did the Court of Appeal err in deciding that the provisions of the C.C.Q. setting out the "*International Jurisdiction of Québec Authorities*" (arts. 3134 to 3154) do not apply to administrative proceedings before the FMAT?

(2) Did the Court of Appeal err in deciding that the FMAT can assert adjudicative jurisdiction over out-of-province defendants based on legislative or territorial jurisdiction?

[28] QCCA Judgment at para 120.
[29] QCCA Judgment at paras 126–27.
[30] QCCA Judgment at paras 132–33.
[31] QCCA Judgment at paras 136–42.

(3) Did the Court of Appeal err in affirming the FMAT's jurisdiction over the AMF's application against Sharp?

PART III – STATEMENT OF ARGUMENT

I. The Court of Appeal erred in failing to apply the provisions of the C.C.Q. setting out the "International Jurisdiction of Québec Authorities"

29. In finding that the private international law rules of the C.C.Q. do not apply to administrative proceedings brought before the FMAT, the Court of Appeal has significantly deviated from the clear intent of Québec's legislature and the existing jurisprudence of this Court.

a) The private international law rules of the C.C.Q. are to be broadly interpreted and applied

30. It is well established that the C.C.Q. occupies a central role in Québec's legal system, including in matters of private international law.

31. In its preliminary provision, the C.C.Q. expressly provides that it "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." [32]

32. The intended reach of the C.C.Q. is apparent from the legislative history of the codification process, during which prior drafts of the preliminary provision held that the C.C.Q. "*établit le droit et constitue le fondement des autres lois*," or "*établit […] le droit privé*." However, Québec's legislature ultimately abandoned these terms, choosing to enact the term "*droit commun*" and, in English, "*jus commune*."[33]

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[32] Preliminary Provision, C.C.Q. See also *Prud'homme v Prud'homme*, 2002 SCC 85 at paras 27–30 [*Prud'homme*]; *Doré v Verdun (Ville)*, [1997] 2 SCR 862 at paras 12–19 [*Doré*]; Denis Lemieux, "Le Rôle du Code civil du Québec en droit administratif" (2005) 18:2 Can J Admin L & Prac 119 [Lemieux]. Appellant's Book of Authorities ("BOA"), Tab 7.

[33] See Alain-François Bisson, "La Disposition préliminaire du Code civil du Québec" (1999) 44:2 McGill LJ 539, 1999 CanLIIDocs 44.

33. Accordingly, in *Prud'homme,* this Court held that this legislative history "leaves no doubt" as to a "conscious" legislative intent to give the C.C.Q. "the broadest possible operational scope":

> 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*, supra, 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.[34]

34. In *Doré,* this Court further expounded upon the C.C.Q.'s foundational role in Québec law and its resultant broad interpretation:

> The preliminary provision of the *Civil Code of Québec* […] explicitly states that the *Civil Code* is the *jus commune* of Quebec. Thus, unlike statute law in the common law, the *Civil Code* is not a law of exception, and this must be taken into account in interpreting it. It must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved. […].
>
> The *Civil Code of Québec* sets out a number of guiding legal principles. According to the preliminary provision, the Code is also the foundation of all other laws dealing with matters to which the Code relates, although such laws may complement the Code or make exceptions to it. It is therefore the foundation of all statutes that draw mainly or incidentally on civil law concepts. […].[35]

35. In *Fédération des producteurs acéricoles du Québec v Regroupement pour la commercialisation des produits de l'érable inc.*, this Court further explained the suppletive or "gap filling" role of the C.C.Q. vis-à-vis other provincial statutes:

> The *Civil Code of Québec* lays down the *jus commune* (general law) of Quebec. A principal characteristic of the *Civil Code of Québec*, as the *jus commune*, is that it has, in the areas to which it applies, a suppletive role in the event of gaps in special statutes. It "must be interpreted broadly so as to favour its spirit over its letter and enable

[34] *Prud'homme v Prud'homme*, 2002 SCC 85 at para 29.
[35] *Doré v Verdun (Ville)*, [1997] 2 SCR 862 at paras 15–16; See also *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc.*, 2001 SCC 51 at para 40.

> the purpose of its provisions to be achieved."[36]

36. More specifically, in enacting Book Ten of the C.C.Q., on "Private International Law," Québec's legislature expressly sought to enact a complete code governing, *inter alia*, the assumption of international jurisdiction by Québec courts and administrative tribunals.

37. At the time of codification, Québec's legislature sought to palliate existing lacunae in this area of law, which was previously found to be "uncertain and fragmentary." In so doing, Québec's legislature expressly sought to enact a complete code, encompassing elements of pre-existing legislation, jurisprudence, and doctrine, as appears from excerpts of the debates in Québec's National Assembly:

> Le livre dixième: Du droit international privé. Les relations qu'entretiennent actuellement les Québécois avec des citoyens d'autres États, aussi bien à l'échelon interprovincial qu'à l'échelon international, sont de plus en plus importantes et les problèmes qui en résultent ne trouvent pas toujours de solution satisfaisante en raison du caractère souvent incertain et fragmentaire des règles de droit international privé. En effet, ces règles sont au *Code civil* et au *Code de procédure civile* peu nombreuses et ni la doctrine ni la jurisprudence, qui ont pourtant, à partir de ces bases minimes, donné un certain essor à cette branche du droit civil, ne permettent d'assurer la sécurité juridique des parties impliquées.
>
> **Il s'imposait, par conséquent, de réunir les règles de droit international privé contenues dans les codes, dans un seul livre consacré à cette matière et de leur adjoindre les solutions jurisprudentielles et doctrinales en les codifiant.**
>
> Il fallait également examiner ces règles à la lumière du droit conventionnel et des codifications élaborées au cours de ces dernières années dans certains pays étrangers.
>
> **Le livre dixième introduit donc au Code civil un ensemble de règles portant sur le droit international privé**.[…].[37]

38. Accordingly, this Court has consistently found that it is Book Ten of the C.C.Q., rather than

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[36] 2006 SCC 50 at para 10.

[37] Québec, National Assembly, Sous-commission des institutions, *Journal des débats*, 34th Leg, 1st Sess, No 27 (28 November 1991) at SCI-1080 (Mrs. Dionne) [emphasis added]. BOA, Tab 9.

common law conflict rules, that applies in determining jurisdiction of Québec's courts and tribunals.

39. Indeed, this Court held in *Prud'homme* that, in the absence of any incompatible public common law rule, the C.C.Q. should apply. This Court has also frequently cautioned against needlessly importing common law concepts and principles into the general civil law framework.[38]

40. In *Van Breda*, LeBel J., writing for a unanimous Court, held as follows:

> […] Given the nature of private international law, its application inevitably raises constitutional issues. 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, S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see Civil Code of Québec, Book Ten, arts. 3076 to 3168).** [39]

41. In *Spar Aerospace Ltd. v American Mobile Satellite Corp.*,[40] this Court held that the interpretation of Québec's private international law rules must, above all, be grounded in the text of the C.C.Q.:

> As 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. and then inquiring whether or not their interpretation is consistent with the principles which underlie the rules.[41]

42. Crucially, in *Spar*, this Court expressly held that "the criterion of a 'real and substantial' link is a common law principle that should not be imported into the civil law."[42]

43. Moreover,nder its constitutional head of power over "property and civil rights" under s.

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[38] *Prud'homme v Prud'homme*, 2002 SCC 85 at paras 46, 54; See also *Gilles E. Néron Communication Marketing Inc. v Chambres des notaires du Québec*, 2004 SCC 53 at para 56.
[39] *Club Resorts v Van Breda*, 2012 SCC 17 at para 21 [emphasis added, references omitted.].
[40] 2002 SCC 78 [*Spar*].
[41] *Ibid* at para 23.
[42] *Ibid* at para 49.

92(13) of the *Constitution Act, 1867*,[43] Québec's legislature has effectively enacted a complete code regulating securities, including their extra-territorial aspects.

44. Québec's legislature has enacted several specific statues regulating securities, including the QSA and an *Act respecting the regulation of the financial sector*,[44] amongst others. The latter statute establishes the FMAT and its procedural rules, which are complemented by the *Rules of Procedure of the Financial Markets Administrative Tribunal*.[45]

45. The C.C.Q. supplements these specific securities statutes, and itself expressly addresses several aspects of securities law.

46. In terms of private international law, article 3076 C.C.Q. expressly allows for the legislature to enact specific rules that deviate from the general rules of private international law in that "[t]he rules contained in this Book apply subject to those rules of law in force in Québec which are applicable by reason of their particular object."

47. Moreover, there are several provisions under Book Ten of the C.C.Q. "*Private International Law*" that expressly deal with the applicable law concerning "[s]ecurities and security entitlements to financial assets," including securities issued by foreign States.[46] Together, these statutes and the C.C.Q. form a complete code governing securities in Québec.

48. The QSA also contains an extensive legislative scheme relating to the "[i]nterjurisdictional [c]ooperation" between "Québec authorities," including the FMAT, and "extra-provincial securities commissions."[47] For instance, s. 308.2.1.2 QSA provides, subject to certain conditions, that:

> […] a decision rendered by a securities authority in Canada and imposing sanctions, conditions, restrictions or obligations on a person entails, by operation of law, an absolute presumption that a decision having the same effect in Québec was rendered in respect of the person by the Authority or the Tribunal, according to their respective jurisdictions.[48]

49. It is also noteworthy that the predecessor entity to the FMAT was empowered to "hold

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[43] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.
[44] CQLR c E-6.1 [*ARRFS*].
[45] CQLR c E-6.1, r 1; See also *ARRFS*, ss 92ff.
[46] See arts 3108.1ff C.C.Q.
[47] See QSA, ss 305.1ff.

hearings in conjunction with and consult with any other authority responsible for the supervision of securities trading."[49]

50. Furthermore, Section 236.1 QSA contains its own jurisdictional rule, conferring jurisdiction upon the court of the plaintiff's residence over civil actions brought under Title VIII of the QSA in matters relating to the distribution of a security, as well as take-over and issuer bids:

> 236.1. Any action under this Title or any action 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 may be brought before the court of the plaintiff's residence.

51. In the case at bar, the majority of the Court of Appeal adopted an expansive interpretation of this provision in support of its decision, holding that:

> This provision [s. 236.1 QSA] confers upon the *Securities A*ct the status of a law of immediate application ("loi d'application immédiate", also known as "loi police") by virtue of article 3076 C.C.Q., "by reason of its particular object." In my view, in this context, it would defy logic to submit the administrative sanctions to the private international law rules of the C.C.Q. restricting the FMAT's jurisdiction or the application of the *Securities Act*, when said Act stipulates that these rules are without effect with respect to civil sanctions.[50]

52. In other words, the Court of Appeal correctly recognized that Québec's legislature can displace the private international law rules of the C.C.Q. where it so chooses. However, the Court adopts an overbroad interpretation of s. 236.1 as displacing the C.C.Q. in <u>all</u> civil claims, as opposed to those specifically enumerated therein, and fails to recognize the suppletive nature of the C.C.Q.

53. In the recent matter of *Chandler c Volkswagen Aktiengesellschaft*, the Québec Superior Court (Chatelain J.) adopted a far more restrictive interpretation of s. 236.1 QSA, in dismissing a class action for lack of jurisdiction:

> The case law on Section 236.1 of the Securities Act is scarce and, as readily admitted by Mr. Chandler, there is no case law supporting his position that the Court's jurisdiction can be founded on this

[48] QSA, s 308.2.1.2.
[49] QSA, s 323 as it appeared on 1 February 2004.
[50] QCCA Judgement at para 89.

> provision. Based on the wording of Section 236.1 and the remedial nature of the Securities Act which must receive a large and liberal interpretation, he nevertheless posits that so long as the purchaser of a VW security resides in Québec, the Québec courts have jurisdiction, regardless of the place where the purchase was concluded.
>
> The Court disagrees because Section 236.1 of the Securities Act contains an important qualification: the action must be "related to the distribution of a security" or, in French, "pour des faits reliés au placement d'une valeur".
>
> In the Court's view, this class action is not "related to the distribution of a security" within the meaning of Section 236.1 of the Securities Act. The class action relates to misrepresentations or omissions of VW in relation to the compliance of certain of its vehicles with the applicable emissions standards and the consequences of these acts and omissions on the value of VW securities. The action is not based on securities legislation nor does it relate to the distribution of securities. Rather, invoking the general extra-contractual civil liability regime in Québec codified in Article 1457 CCQ, the action alleges that VW committed a civil extra-contractual fault for which Mr. Chandler seeks compensatory damages for the loss in the value of VW securities resulting from alleged misrepresentations and omissions. […]
>
> The Court considers that if the intention of the legislator by enacting Section 236.1 of the Securities Act had been to modify the application of the rules of private international law in Québec and of Article 3148 CCQ as suggested by Mr. Chandler, a clearer language would have been used.[51]

54. Affirming the decision in *Chandler* on appeal, the Québec Court of Appeal (Marcotte J.A., writing for the Court) held that allowing s. 236.1 QSA to entirely displace the existing rules of private international law "would lead to jurisdictional overreach" and "would likely be unconstitutional":

> A reading of section 236.1 QSA, as proposed by Chandler, would allow a Quebec resident, based on his residence alone, to bring an action before the Quebec courts for any securities acquired abroad regardless of the circumstances. In my view, this would lead to

[51] 2020 QCCS 1202 at paras 106–110.

> jurisdictional overreach. In fact, such a broad basis of jurisdiction with no other connection to the province would likely be unconstitutional.[52]

55. At bottom, Québec's legislature has extensively contemplated and addressed matters of extra-provincial securities enforcement. Where the legislature intended to displace rules of private international law in the field of securities, it has expressly done so. By contrast, Québec's legislature has elected not to enact specific rules governing the jurisdiction of the FMAT in adjudicating proceedings with extraterritorial elements.

56. It is also noteworthy that even in the case at bar, the courts and tribunal below have relied upon private international law rules of the C.C.Q., albeit inconsistently. First, while the FMAT did not apply the rules of the C.C.Q. in asserting jurisdiction *simpliciter*, it nevertheless applied art. 3135 of the C.C.Q. in assessing whether it should decline jurisdiction based on *forum non conveniens*.[53] On judicial review, the Superior Court of Québec cited private international law provisions of the C.C.Q., either directly or by analogy, in support of its decision to affirm the FMAT's jurisdiction.[54]

b) The private international law rules of the C.C.Q. apply to administrative proceedings before the FMAT

57. It is abundantly clear that the private international law rules of the C.C.Q. apply to administrative tribunals, including the FMAT.

58. In enacting the C.C.Q., Québec's legislature expressly sought to address the extraterritorial jurisdiction of Québec's administrative tribunals – and not just its courts. The official comments of Québec's Minister of Justice relating to the C.C.Q. are explicit in that regard:

> 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 Québec, tribunaux**

[52] *Chandler c Volkswagen Aktiengesellschaft*, 2022 QCCA 272 at para 82 [*Chandler*].
[53] FMAT Decision at paras 84–87.
[54] QCCS Judgment at para 44.

> **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 juridiction* 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. [55]

59. Indeed, the C.C.Q. broadly applies to matters of public and administrative law, as recognized by the Québec Court of Appeal:

> Lors de l'adoption du *Code civil du Québec* de 1994, le professeur Lemieux soulignait quant à lui le rôle important qu'il était appelé à jouer en droit administratif :
>
> > Le nouveau régime établi par le *Code civil du Québec* a introduit de nouveaux rapports entre le droit public et le droit privé et a, dans une certaine mesure, « civilisé » le droit administratif.
> >
> > Le droit civil est devenu le droit commun de l'Administration. Le *Code civil* participe également du droit public car il a remplacé ou intégré certaines règles traditionnelles du droit public. Il sert également à interpréter les lois et règlements qui encadrent l'action administrative. […]
> >
> > Les dispositions pertinentes du *Code* constituent donc des clauses naturelles des lois et autres textes administratifs, dans tous les cas où n'existe pas de mention expresse au contraire. […]

[55] Québec, Ministère de la justice, *Commentaires du ministre de la justice*, vol 2 (Québec: Publications du Québec, 1993) at 1998–2000. BOA, Tab 8.

> Il faudra une dérogation claire au droit commun pour contrecarrer ce rôle du *Code*.[56]

60. For instance, art. 1376 C.C.Q. expressly provides that "[t]he rules set forth in this Book [Obligations] apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them." The C.C.Q. has also been held to be applicable in a suppletive manner in matters of provincial tax law, which necessarily involve relations between the State and individuals:

> Il a raison de dire qu'il est possible d'avoir recours au *Code civil du Québec* pour interpréter les lois fiscales québécoises. D'abord, la disposition préliminaire du *Code civil du Québec* édicte le droit commun, lequel ne se limite pas au droit privé. Le *Code civil du Québec* est d'application générale et supplétive et il constitue, à ce titre, un complément normatif et un réservoir conceptuel pour les lois particulières.[57]

61. In practice, most of Québec's administrative tribunals deal with inherently local matters, such that issues of extraneity seldom arise in practice. In the rare instances that issues of extraterritorial jurisdiction are raised in Québec's other administrative tribunals, they have applied the private international law rules of the C.C.Q.[58]

62. In the case at bar, the majority opinion of the Court of Appeal correctly acknowledges that "[…] it is obvious that the C.C.Q. rules, including Book Ten entitled 'Private international law', apply to administrative tribunals."[59] Nevertheless, the Court of Appeal goes on to exclude the application of the C.C.Q. private international law rules to the proceedings before the FMAT, finding that "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

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[56] *Filliatreault c Commission des normes, de l'équité, de la santé et de la sécurité au travail*, 2021 QCCA 457 at para 44, citing Denis Lemieux "Le Rôle du Code civil du Québec en droit administratif" (2005) 18:2 Can J Admin L & Prac 119. BOA, Tab 7.
[57] *Agence du revenu du Québec c Larocque*, 2016 QCCA 556 at para 51.
[58] See *Bourgoin c Régie des marchés agricoles et alimentaires du Québec*, 2008 QCCS 5348, rev'd on other grounds 2010 QCCA 1593, leave to appeal to SCC refused, 2010 CanLII 7714.
[59] QCCA Judgment at para 70.

relations between states." [60]

63. The distinction drawn by the Court of Appeal is misguided.

64. Indeed, it is well established that the FMAT's jurisdiction derives from – and is constrained by – the provincial power over "property and civil rights" under s. 92(13) of the *Constitution Act, 1867*.[61] Qualifying the FMAT's jurisdiction as being of "public law" cannot expand or denature its constitutionally limited powers.

65. The author André Tremblay explains the interrelation between s. 92 (13) and the C.C.Q. as follows:

> Subsection 92(13) of the British North America Act therefore seems to be intimately connected to the history of Canada, particularly to the preservation of French civil law in the province of Quebec. In the Quebec Act, 1774, the expression "property and civil rights" is a legal guarantee for the preservation of French civil law; it guarantees the continuity of the French intellectual tradition in private law. It authorizes Canadians, in accordance with the principles of international law and the practice of nations, to regulate their private relationships according to a well-known legal system.[62]

66. The Québec Court of Appeal has explained this as follows:

> This review of Canada's various constitutional documents reveals that the expression "Property and Civil Rights in the Province" reflects the evolution of the protection of private law in Quebec since the fall of New France. It follows that the meaning of this expression must take into account the historical and political context in which it originated. The enactment of the *Quebec Act*, 1774, offered some protection to the existence of French Canadians. The expression therefore refers to the entire body of private law governing the interactions between persons in Quebec. The best-known example of this power is, without contest, the enactment of the *Civil Code of Lower Canada* in 1865, the precursor to the current *Civil Code of Québec*. […].[63]

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[60] QCCA Judgment at para 77.
[61] *Reference re Securities Act*, 2011 SCC 66 at paras 100–01.
[62] André Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils* (Ottawa: Éditions de l'Université d'Ottawa, 1967) at 126. BOA, Tab 11.
[63] *Québec (Procureure générale) c Canada (Procureure générale)*, 2011 QCCA 591 at para 131; See

67. In other words, while the C.C.Q. and provincial securities legislation each address elements of "public" law (i.e., relations between state actors and individuals), they are ultimately founded upon – and subject to – provincial power over private law. Provincial power to regulate securities through the AMF or the FMAT could not exist without its constitutional competence over private law matters.

68. The FMAT's adjudicative powers cannot be exercised in a constitutional vacuum. Excluding the application of the C.C.Q. on the basis that the FMAT adjudicates matters of "public law", as proposed by the Court of Appeal, simply does not withstand scrutiny.

69. Moreover, according to professors Goldstein and Groffier, the distinction between private and public international law are often nebulous:

> [l]e droit international privé est un droit applicable à des individus alors que le droit international public s'applique à des États. Bien sûr, les frontières entre les deux 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.[64] […]
>
> 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.[65] […]
>
> 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.[66]

70. Seeing as the FMAT essentially adjudicates matters brought forward by state actors, such as

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also Gérald-A. Beaudouin, "Le Canada: droit civil et common law, quelques notes historiques" (2002) 32:1 RGD 87, 2002 CanLIIDocs 312.

[64] Gérald Goldstein and Ethel Groffier, *Droit international privé,* tome 1 (Cowansville: Éditions Yvon Blais, 1998) at 5 [Goldstein and Groffier]. BOA, Tab 4.

[65] *Ibid* at 11. BOA, Tab 4.

the AMF or self-regulatory organizations recognized by that body, the rationale of the Court of Appeal would entail that the C.C.Q. rules of private international law could apply to other provincial administrative tribunals where they adjudicate disputes between private actors. If affirmed, the Court of Appeal's proposed rationale would entail that tribunals in Québec must first ascertain "whether there any private rights at issue" before determining which rules to apply in determining their jurisdiction. This would lead to uncertainty and confusion.

71. In *Van Breda*, this Court cautioned that "the framework for the assumption of jurisdiction cannot be an unstable, ad hoc system made up 'on the fly' on a case-by-case basis."[67] The rationale of the Québec Court of Appeal in the present case illustrates and exacerbates the persistent confusion and instability in the law governing the assumption of exterritorial jurisdiction.

72. More recently, in *Uashaunnuat*, a 5-4 majority of this Court ruled that the Superior Court of Québec had jurisdiction over an application brought by Innu First Nations concerning open-pit mines straddling the border between Québec and Newfoundland and Labrador. In confirming that the Québec Superior Court properly asserted jurisdiction over the portions of the application relating to the Newfoundland and Labrador sections of the mine, the Court's majority applied the C.C.Q. private international law rules to what it qualified as a *sui generis* claim based on aboriginal land rights protected by s. 35 of the *Constitution Act*.

73. Dissenting on other grounds, Brown and Rowe JJ., explained that the analytical framework surrounding the application and interpretation of the C.C.Q rules are "not altered by the fact that Aboriginal rights are a public law concept," thereby rejecting the intervener's argument that jurisdiction should be determined on the basis of the Court's inherent jurisdiction and the "real and substantial connection test."[68] The dissenting justices held that:

> […] **the C.C.Q. is not limited to "private law" rules; rather, it is the "jus commune" of Quebec**, as is expressly stated in its preliminary provision. Therefore, in the matters to which it relates — including the jurisdiction of Quebec authorities, which is the subject

[66] *Ibid* at 12. BOA, Tab 4.
[67] *Club Resorts v Van Breda*, 2012 SCC 17 at para 73.
[68] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani – Utenam)*, 2020 SCC 4 at para 99.

> of Title Three of Book Ten **— the C.C.Q. encompasses certain aspects of public law**.[69]

74. In the present case, the majority of the Court of Appeal attempted to distinguish this Court's rationale, by making the dubious assertion that Aboriginal rights claims under s. 35 of the *Constitution Act* are "personal rights": "[i]t must be emphasized that in *Uashaunnuat*, the rights claimed were personal rights and a *sui generis* right (an aboriginal title right under section 35 of the *Constitution*)."[70] This finding is erroneous, as it directly contradicts this Court's finding that such rights are "neither real rights nor personal rights as defined in the civil law […]."[71]

75. By contrast, the Québec Court of Appeal's decision in *Donaldson c Autorité des marchés financiers*,[72] held that the rules of extinctive prescription under art. 2925 of the C.C.Q. for "action[s] to enforce a personal right or movable real right," did not apply to administrative proceedings before the FMAT. In *obiter*, the Court of Appeal cast a degree doubt as to the applicability of the C.C.Q. in administrative matters before the FMAT. The hearing before the Court of Appeal in *Donaldson* took place prior to the judgment of this Court in *Uashaunnuat*, such that the effects of the latter judgment were not considered. Moreover, the case in *Donaldson* deals with the specific rule of prescription (limitation) for certain enumerated types of civil claims, which are readily distinguishable from the rules of private international law, which are rules of broad application to courts and administrative tribunals alike.

76. In sum, in the absence of specific legislation to the contrary, the C.C.Q. contains a complete code by which Québec's administrative tribunals are to determine their jurisdiction over international matters, including in matters involving state actors.

77. Accordingly, the FMAT should have assessed its jurisdiction on basis of the rules of the C.C.Q. governing the international jurisdiction of Québec authorities. Its failure to do so is an error of law that warrants this Court's intervention.

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[69] *Ibid* at para 119 [emphasis added, references omitted].
[70] QCCA Judgement at para 70.
[71] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani – Utenam)*, 2020 SCC 4 at para 36.
[72] 2020 QCCA 401 [*Donaldson*].

II. The Court of Appeal erred in affirming the FMAT's adjudicative jurisdiction based on legislative and territorial jurisdiction

78. In the case at bar, the majority of the Québec Court of Appeal correctly recognized that "[…] it is undeniable that the C.C.Q. acts as suppletive law for a large number of matters, including certain aspects of public law."[73]

79. In spite of this, Marcotte J.A. determined that the C.C.Q. is of no relevance to the present dispute, holding that "the scope of Book Ten cannot be broadened to the point of determining jurisdiction in matters of public or criminal law that do not call for private international law rules, where the primary basis of jurisdiction is not personal or real, but is territorial, such as in the present case;" and that "in the international public law context of the matter, where the issue is one of constitutional applicability, there is no need to rely on the private international law rules of the C.C.Q."[74]

80. Instead of assessing the FMAT's jurisdiction based on the C.C.Q., the Court of Appeal has effectively articulated a novel, open-ended test by which securities commissions and provincial administrative tribunals across Canada are to assert their jurisdiction.

81. This proposed test is ostensibly an amalgam of the test for criminal jurisdiction set out by this Court in *Libman*[75] and the "sufficient connection" test for legislative jurisdiction set out by this Court in *Unifund Assurance Co. v Insurance Corp. of British Columbia*.[76]

82. The test adopted by the Court of Appeal is both erroneous and unprecedented.

83. In support of its rationale, the majority of the Court of Appeal first fundamentally misconstrues the notion of "territorial jurisdiction", holding "this matter is not one of private international law, and that the primary basis for jurisdiction is territorial in a public law context"[77] and that "there is no extraterritorial jurisdiction of the FMAT at issue […]."[78]

84. This affirmation runs counter to pre-existing notions of extraterritorial jurisdiction as notably

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[73] QCCA Judgment at para 70.
[74] QCCA Judgment at para 90.
[75] *Libman v The Queen*, 1985 CanLII 51.
[76] 2003 SCC 40 [*Unifund*].
[77] QCCA Judgment at para 73.

expounded in recent commentary: "territorial jurisdiction over a particular offence is used when an offence occurs within a State's territory by a person physically present in the territory. […] When States claim jurisdiction over a matter that is not based on territory as a foundation, it is exercising some form of extraterritorial jurisdiction."[79]

85. This case is undeniably one of "assumed jurisdiction" over out-of-jurisdiction or extraterritorial defendants, as opposed to one of "territorial jurisdiction." These notions are summarized as follows by Professor Hogg:

> The jurisdiction of courts has always been assumed to be territorially limited, even in a unitary state such as the United Kingdom. This assumption was reflected in the rule of the common law that a court could take jurisdiction of a civil suit only if the defendant was personally served with the writ (or other originating process) within the territory of the court's jurisdiction (*presence-based jurisdiction*), or if the defendant had consented to the jurisdiction, for example, by appearing and defending the proceedings on the merits (*consent-based jurisdiction*). These two bases of jurisdiction are essentially territorial, and of course the ultimate order of the court is applicable only in the territory of the court. These rules continue to apply to Canadian courts, unless they have been modified by legislation. However, in all Canadian jurisdictions, a third basis of jurisdiction has been added by legislation, namely, assumed jurisdiction, which is based on the service of process on a defendant outside the territory of the court. Assumed jurisdiction is created by "long-arm" statutes or rules of court (made under statutory authority) which authorize "service *ex juris*" on out-of-jurisdiction defendants. […].[80]

86. It is noteworthy that prior to the enactment of the C.C.Q., in *Dupont v Taronga Holdings Ltd*., the Québec Superior Court held that "[i]n the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules."[81] At the time, it was generally recognized that service *ex juris* required that "a defendant voluntarily submitted himself to the risk of litigation in the courts of a forum province" or that minimum contacts require "some act by which the

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[78] QCCA Judgment at para 57.
[79] Lee-Ann Conrod, "A Closer Look at Libman's Impact on Transnational Crime Cases", CanLII Authors Program, 2017 CanLIIDocs 3952 [Conrod].
[80] Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2021) (loose-leaf) at para. 13.10. BOA, Tab 6.
[81] 1986 CanLII 4011 at para 23 [*Taronga*].

defendant purposefully avails itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws."[82]

87. Nevertheless, relying on *Libman* and *Unifund*, the majority of the Québec Court of Appeal incorrectly held that it need not consider notions of private international law (or conflict of laws) at all in assessing the FMAT's jurisdiction. The Court notably held that, "contrary to the Appellants' submission, there is no extraterritorial jurisdiction of the FMAT at issue. We are only concerned with the FMAT's territorial jurisdiction over out-of-province defendants for alleged actions that have a connection with the province of Quebec" and that "[t]he FMAT's authority should be determined by relying on the real and substantial connection as developed in *Unifund* […]."[83]

88. In so doing, the Court of Appeal has conflated the notion of adjudicative jurisdiction (i.e., the power of a court or tribunal to decide a case) with legislative or prescriptive jurisdiction (i.e., the power to make or apply law or regulation). This key distinction was articulated as follows in *R. v Hape*:

> Prescriptive jurisdiction (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation. Enforcement jurisdiction is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. … Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force.[84]

89. In support of its rationale, the Court of Appeal improperly relies upon *Libman*, a criminal case in which the accused had sought to quash his committal to trial by alleging that the offences he was charged with were committed outside of Canada. Seeing as the accused, Libman, was a Canadian resident, there was no live issue as to whether the Court should assume adjudicative jurisdiction over him.

90. As succinctly put by the Ontario Superior Court of Justice in *Chowdhury v. H.M.Q.*, "where adjudicative jurisdiction is asserted, a court must have jurisdiction over both the person accused and

[82] *Ibid* at paras 31, 35.
[83] QCCA Judgment at para 57.

the offence. The two are separate and discrete issues."[85] In the present case, the issue was whether the FMAT could properly assert jurisdiction over the administrative sanctions sought by the AMF, but also against Sharp himself.

91. Moreover, there is no clear authority for relying upon the *Libman* test in a civil or administrative law context. Indeed, the Court in *Libman* specifies that "[t]he primary basis of **criminal** jurisdiction is territorial."[86]

92. In his concurring opinion, Mainville J.A. aptly noted that the C.C.Q. contains several provisions governing securities, which are of provincial jurisdiction under section 92(13) of the *Constitution Act, 1867*, such that it is inappropriate to apply criminal or penal law in determining the adjudicative jurisdiction of the FMAT.[87] Again, it is well-settled law that provincial power to regulate securities derives from section 92(13) of the *Constitution Act* i.e., "Property and Civil rights in the Province."[88]

93. In this regard, Mainville J.A. correctly held as follows:

> Il est donc inapproprié, quant à moi, d'invoquer les règles de compétence du droit criminel, dont plus particulièrement l'arrêt *Libman*, pour asseoir la compétence du Tribunal administratif des marchés financiers dans cette affaire puisque cet arrêt s'applique tout au plus aux recours en sanctions pénales et non pas aux autres types de recours entrepris en vertu de la Loi sur les valeurs mobilières. Quoi qu'il en soit, les règles de compétence à l'égard d'infractions criminelles répondent à des critères et des impératifs propres au droit criminel, qui ne sont pas nécessairement exportables aux recours civils ou administratifs. Ainsi, de façon générale, on ne peut procéder à un procès criminel si l'accusé n'est pas présent, ce qui met en cause la procédure d'extradition dans le cas d'accusés domiciliés à l'étranger. Or, ce n'est pas la procédure d'extradition qui s'applique à un défendeur étranger contre lequel on cherche à imposer une mesure administrative, mais plutôt les principes du droit international privé, entre autres les règles qui confèrent compétence

[84] *R. v Hape*, 2007 SCC 26 at para 58 [references omitted].
[85] *Chowdhury v H.M.Q.*, 2014 ONSC 2635 at para 13.
[86] *Libman v The Queen*, 1985 CanLII 51 at para. 11 [emphasis added].
[87] QCCA Judgment at paras 128, 133.
[88] Lee-Ann Conrod, "A Closer Look at Libman's Impact on Transnational Crime Cases", CanLII Authors Program, 2017 CanLIIDocs 3952 [emphasis added].

> au tribunal et celles qui permettent d'exécuter le jugement du tribunal à l'étranger lorsqu'il vise un défendeur étranger.[89]

94. According to the relevant commentary, the principle of territoriality is of limited significance outside of the criminal law context:

> Quand nous parlons de l'extraterritorialité des lois en relation avec des personnes qui vivent en territoire étranger, on doit tout d'abord distinguer selon qu'il s'agit de droit civil ou de droit pénal. Du point de vue du droit civil, la question consiste à se demander si le droit international public prescrit des règles obligatoires que les États doivent suivre dans l'élaboration de leur droit international privé. À ce chapitre, il faut bien constater que le droit des gens n'offre pas de critères généraux propres à dégager des directives précises et la seule règle qu'on peut reconnaître est probablement celle de la liberté de l'État. […].
>
> […] En matière civile, le principe territorial jouit donc d'une importance mineure puisque les États se reconnaissent mutuellement, à travers leur droit international privé, le principe de l'équivalence de leur justice civile; l'application de lois étrangères par le juge du for ne se rencontre en effet qu'en droit privé.
>
> Quand nous abordons le domaine du droit pénal, on constate assez vite que le principe qui prétend qu'une loi nationale puisse régir des faits qui surviennent sur le territoire d'une autre État ou des personnes qui s'y trouvent semble aller directement à l'encontre d'un autre principe fondamental voulant qu'un État ne puisse accomplir des actes de puissance publique que sur son propre territoire.[90]

95. It is therefore inappropriate for provincial administrative tribunals to rely on criminal law precedents such as *Libman*. Furthermore, this Court has recognized that monetary administrative sanctions are generally civil –not penal or criminal – in nature:

> A number of judgments in tax matters support the conclusion that an administrative sanction is not penal in nature: [references omitted], Pratte J.A. correctly summarized the Canadian case law on the subject as follows: "It is common ground that seizures and forfeitures under

[89] QCCA Judgment at para 133.
[90] Jean-Maurice Arbour et Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 340–41, BOA, Tab 1.

> the Customs Act are not criminal but civil proceedings and penalties."[91]

96. The Court's rationale in *Martineau v M.N.R.* is readily transposable in the case at bar:

> This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.[92]

97. In *Guindon v Canada*, this Court specified that "[a]dministrative monetary penalties are designed as sanctions to be imposed through an administrative process. They are not imposed in a criminal proceeding."[93] The Court further held "[t]he use of words traditionally associated with the criminal process, such as 'guilt', 'acquittal', 'indictment', 'summary conviction', 'prosecution', and 'accused', can be a helpful indication as to whether a provision refers to criminal proceedings."[94]

98. Here, the administrative penalties that can be imposed by the FMAT under QSA bear none of the traditional hallmarks of those imposed in a criminal proceeding. By contrast, another chapter of the QSA sets out "Penal Provisions" which are adjudicated by the criminal courts in Québec.[95]

99. Furthermore, the very notion of territoriality is a common law concept, which is not the foundation of private international law in Québec. In this regard, Professor Emanuelli explains:

> Le principe de la territorialité des lois sous-tend le droit international privé tel qu'il s'applique traditionnellement dans les pays de Common Law. Il s'y est traduit par des règles strictes qui régissent la compétence internationale des tribunaux, la reconnaissance des décisions étrangères et le règlement des conflits de lois. Au Québec, le principe de la territorialité des lois n'est pas le fondement du droit

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[91] 2004 SCC 81 at para 54 [*Martineau*].
[92] *Ibid* at para 45.
[93] 2015 SCC 41 (CanLII), at para 75 [*Guindon*].
[94] *Ibid* at para 63.
[95] QSA, ss 202ff.

> international privé. On trouve, cependant, son influence dans certaines règles, dont les articles 3129, 3151 et 3165(1) CCQ.[96]

100. The rationale of the Court of Appeal has also conflated notions of adjudicative and legislative jurisdiction. *Unifund* concerned the application of Ontario legislation to a British Columbia defendant and did not concern adjudicative jurisdiction over the defendant in question. Similarly, the case in *McCabe v British Columbia (Securities Commission)*,[97] on which the courts and tribunal below rely to assert jurisdiction over Sharp, is not transposable to the present case, as it involved a British Columbia resident contesting the jurisdiction of a British Columbia securities commission.

101. In applying *Unifund*'s "sufficient connection test" as a stand-alone rule for asserting adjudicative jurisdiction, the Court of Appeal has injected confusion and uncertainty in the law of jurisdiction. Indeed, the test proposed by the Court of Appeal runs counter to the cardinal principles of jurisdiction articulated by this Court: order, certainty and fairness.

102. In *Van Breda*, this Court expressly sought to bring greater certainty to the issue of jurisdiction under Canadian law, explaining that the "real and substantial connection" test occupies a dual role under Canadian law: first, as a common law conflicts rule and second, as an overarching constitutional principle preventing jurisdictional overreach.[98] The Court in *Van Breda* explained that, as a constitutional imperative, the test "sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. However, this test does not dictate the content of conflicts rules, which may vary from province to province."[99]

103. In the common law provinces, such conflicts rules are established by the common law or by statute. Conversely, in Québec, such rules can solely be adopted by the legislature, which, through Book Ten of the C.C.Q., sought "to codify the entire field of private international law."[100]

104. As a constitutional principle, the "real and substantial connection" test sets the outer limits to

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[96] Claude Emanuelli, *Étude comparative sur le droit international privé au Canada* (Montréal: Wilson & Lafleur, 2019) at para 7. BOA, Tab 2.
[97] 2016 BCCA 7 [*McCabe*].
[98] *Club Resorts v Van Breda*, 2012 SCC 17 at para 23.
[99] *Ibid.*
[100] *Ibid* at paras 21, 42.

the assumption of jurisdiction by a province's courts, thereby limiting jurisdictional overreach.[101] A connection between a province and a defendant cannot be weak or hypothetical, as a tenuous connection would cast doubt upon the legitimacy of a province's judicial power.[102] Accordingly, this Court emphasized that, to uphold the cardinal values of order, predictability and certainty, courts and legislatures should couch the assumption of jurisdiction on objective connecting factors, as opposed to abstract principles and pure exercises of judicial discretion.[103]

105. In the case at bar, the Court of Appeal did not follow *Van Breda* in confirming the FMAT's jurisdiction over Sharp; it has instead prescribed a test that will permit administrative tribunals, including the FMAT, to assert jurisdiction based on open-ended, subjective and discretionary factors. In applying this novel test, the Court of Appeal has sanctioned what amounts to a stark departure from the existing cases emanating from Canadian provincial securities tribunals.

106. By importing significant subjectivity into the jurisdictional test, the decision of the Québec Court of Appeal will effectively allow administrative tribunals to assert jurisdiction over foreign matters and defendants at their entire discretion, thereby compromising the underlying principles of order, certainty and predictability — and, thus, enabling jurisdictional overreach.

107. In sum, by erroneously concluding that the C.C.Q.'s rules governing the international jurisdiction of Québec authorities do not apply to administrative proceedings, the majority of the Court of Appeal has significantly deviated from the clear intentions of the legislature and the precedents of this Court, creating significant confusion in this central area of law.

III. The FMAT should have declined jurisdiction over the AMF's application against Sharp

108. Had the FMAT correctly applied the applicable provisions of the C.C.Q. to the present case, it would have declined to assert jurisdiction over the AMF's proceedings against Sharp. Further, and in the alternative, even if the "real and substantial connection" test were to apply, its proper application would not allow the FMAT to assert jurisdiction over Sharp in this case.

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[101] *Ibid* at paras 22, 23, 31; *Spar Aerospace Ltd. V American Mobile Satellite Corp.*, 2002 SCC 78 at para 51.
[102] *Club Resorts v Van Breda*, 2012 SCC 17 at para 31.
[103] *Club Resorts v Van Breda*, 2012 SCC 17 at para 75; See also *Yip v HSBC Holdings plc*, 2017 ONSC 5332 aff'd 2018 ONCA 626 [*Yip*] and *Leon v Volkswagen AG*, 2018 ONSC 4265 [*Leon*].

a) The FMAT has no jurisdiction under the C.C.Q.

109. Properly applied, the rules of the C.C.Q. would not allow the FMAT to assert jurisdiction over the AMF's proceedings as against Sharp.

110. In his concurring opinion, Mainville J.A. correctly determined that the C.C.Q. should apply in determining whether the FMAT should assert jurisdiction over the present proceedings.

111. However, in applying these provisions, Mainville J. erred in finding the FMAT had jurisdiction in this case on the basis of the "forum of necessity" clause under art. 3136 C.C.Q and/or by applying art. 3148, para. 1 (3) C.C.Q. "by analogy."[104]

112. While the majority opinion of the Court of Appeal was to exclude the application of the C.C.Q., Marcotte J.A. also indicates *in obiter* that art. 3136 C.C.Q. would otherwise apply:

> [91] My colleague Mainville proposes to confirm the FMAT's jurisdiction through the application of private international law rules, by resorting to article 3136 C.C.Q. and the two-step analysis which requires the demonstration of a sufficient connection of the matter with the province of Quebec and the impossibility or the unreasonableness of requiring the institution of proceedings abroad. It is obvious that the AMF has no authority to institute proceedings abroad, which brings us back to the only relevant criterion for assessing the FMAT's jurisdiction in the case at hand, namely the "sufficient connection" test which, incidentally, is the same test developed under the constitutional applicability doctrine in *Unifund* and applied in *Libman.*

113. The interpretation of art. 3136 C.C.Q. advanced by the Court of Appeal is at odds with its clear legislative text, as well as the existing case law. Article 3136 C.C.Q. states 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.	**3136**. Bien qu'une autorité québécoise ne soit pas compétente pour connaître d'un litige, elle peut, néanmoins, si une action à l'étranger se révèle impossible ou si on ne peut exiger qu'elle soit introduite, entendre le litige si celui-ci présente un lien suffisant avec le Québec.

114. It is important to emphasize that neither the FMAT nor the Superior Court relied on this

provision in support of its assertion of jurisdiction in the present proceedings. The AMF did not allege this before the FMAT, nor did it adduce any evidence in support of proceedings abroad being "impossible" or that they cannot "reasonably be required."

115. Applying art. 3136 C.C.Q. as proposed by the Court of Appeal in the case at bar would directly contradict this Court's previous rulings to the effect that said provision is exceptional and cannot be raised *proprio motu* by an adjudicative body. In this regard, this Court held as follows in *GreCon Dimter inc. v J.R. Normand inc*:

> Articles 3135 and 3136 C.C.Q. are also among the components of the legislative framework that is relevant in the case at bar. They are part and parcel of a body of suppletive rules that were created by the legislature at the time of the codification and that make it possible to adapt the forum determination process to the circumstances of each case, thus providing a Quebec authority with a degree of flexibility in determining whether it has jurisdiction: arts. 3134, 3135, 3136, 3137 and 3140 C.C.Q. **For example, art. 3136 C.C.Q. authorizes a Quebec authority to determine that it has jurisdiction on an alternative basis where proceedings cannot possibly be instituted outside Quebec.** Article 3135 C.C.Q. gives an authority with jurisdiction the power to decline jurisdiction if the authorities of another country are in a better position to decide a case. **These provisions may be applied only if one of the parties raises them, as the court cannot apply them of its own motion**: see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, at para. 69. Thus, even though the articles dealing with the forum of necessity and the *forum non conveniens* appear in the general provisions section, they are exceptional provisions that are intended to be applied on a suppletive basis, as art. 3135 C.C.Q. clearly confirms. [105]

116. What is more, the burden of proof belongs to the party invoking the forum of necessity under art. 3136 C.C.Q, as held by the Québec Court of Appeal:

> [55] Ici, ce n'est qu'à la demande expresse de l'intimée 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. qui dispose qu'une autorité québécoise qui n'est pas compétente pour connaître d'un litige peut, si une action à l'étranger se révèle

[104] QCCA Judgment at para 160.
[105] 2005 SCC 46 at para 33 [emphasis added].

> impossible ou, si on ne peut exiger qu'une telle action y soit introduite, entendre le litige : […]
>
> [56] Une telle demande aurait par ailleurs nécessité que l'intimée fasse la preuve qu'il y avait impossibilité d'intenter une action en Colombie-Britannique ou encore, qu'on ne pouvait exiger que l'action y soit introduite. Or, le premier juge n'a pas analysé ces critères. [106]

117. The relevant commentary is to the same effect:

> En toute logique, c'est à la partie qui recherche l'assistance du for québécois de prouver que les conditions de l'article 3136 C.c.Q. sont remplies. En général, il s'agit du demandeur qui s'est fait opposer un moyen déclinatoire et qui, "en désespoir de cause, invoque […] l'article 3136 C.c.Q. pour conférer juridiction à l'autorité québécoise".
>
> La jurisprudence confirme cette attribution du fardeau de preuve à la partie qui invoque la nécessité de s'adresser au for québécois.[107]

118. Furthermore, the evidentiary burden of proving that proceedings abroad are "impossible" or that they cannot "reasonably be required" is a very high one that often entails demonstrating that other forums would not allow for a procedurally fair hearing respecting the rules of fundamental justice.[108]

119. The notion of a "legal impossibility" is further explained by Professor McEvoy as follows:

> Applied to "proceedings…instituted outside Quebec" in article 3136, legal impossibility may result from a variety of factors: an incapacity in the moving or responding party, an immunity enjoyed by the proposed defendant, a complete defence or exoneration under the governing substantive law, a procedural defect under the law of the potential foreign forum or, as suggested by Professor Emanuelli, non-existence of an appropriate foreign authority because of juridical upheaval arising from state succession. […].

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[106] *Droit de la famille – 143017*, 2014 QCCA 2188 at para 56 [*143017*]; See also *Anvil Mining Limited v Association Canadienne contre l'impunité*, 2012 QCCA 117 at para 99.
[107] Sylvette Guillemard, "Fascicule 8 – Règles générales de compétence des tribunaux québécois" in *JurisClasseur Québec Droit International Privé*, LexisNexis (loose-leaf) at para 14. BOA, Tab 5
[108] *Lamborghini (Canada) inc. c Automobili Lamborghini S.P.A.*, 1996 CanLII 6047 (QC CA) at 21; *Droit de la famille – 143017*, 2014 QCCA 2188 at para 58.

> Legal impossibilities not raising public order concerns are unlikely to trigger necessity jurisdiction. The legal impossibility may arise because of the availability of a complete defence under the substantive [law] governing the matter in issue or may result from a procedural requirement under the law of the foreign forum. For example, if proceedings are prescribed by the expiry of the applicable prescriptive period or if the cause of action is unknown to the governing foreign law, it cannot have been the intention of the legislator to place a moving party in a better position than that provided by the foreign law (assuming no public order concerns).[109]

120. In the present case, the AMF adduced no evidence whatsoever to the effect that proceedings could not have been brought by securities regulators in other jurisdictions such as British Columbia, the domicile of the defendants. What is more, on a practical level, the AMF could have relied on the "Interjurisdictional Cooperation" provisions of the QSA to collaborate with extra-provincial securities commissions. The AMF ostensibly chose not to do so, and cannot today rely on the exceptional provision of art. 3136 C.C.Q.

121. Further, none of the "Special Provisions" of the C.C.Q. governing the international jurisdiction of Québec authorities,[110] including those relating to "personal actions of a patrimonial nature,"[111] apply to the administrative proceedings commenced by the AMF before the FMAT.

122. Sharp submits that, for reasons of predictability and stability, it is inappropriate to apply these provisions "by analogy", as suggested by the Superior Court and the concurring reasons of Mainville J.A. of the Court of Appeal. Moreover, as affirmed by this Court in *Spar* "it would be contrary to principles of interpretation to add this criterion [the real and substantial link test] into art. 3148 where it is also not specifically mentioned."[112]

123. What is more, even if the practice of asserting jurisdiction "by analogy" were found to be appropriate, in the case at bar, the AMF does not allege that Sharp committed any "fault" in Québec as per the terms of art 3148(3) C.C.Q.

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[109] John P. McEvoy, "*Forum of Necessity in Quebec Private International Law: C.c.Q. art. 3136*" (2005) 35:1 RGD 61, 2005 CanLIIDocs 410 at paras 66–67.
[110] Book Ten, Title Three of the C.C.Q. is divided into two chapters: General Provisions (Chapter I) and Special Provisions (Chapter II). Other Special Provisions include "Personal actions of an extrapatrimonial and family nature," and "Real and mixed actions."
[111] Chapter II, Division II., and art. 3148ff C.C.Q.

124. In this regard, it is crucial to note that the AMF does not allege that Sharp had participated in the publication of press releases in Québec.

125. As to whether "injury was suffered in Québec," allowing the AMF to fulfil its burden of establishing jurisdiction on the basis of injury suffered by Québec investors would constitute a novel interpretation that deviates from the clear language of the C.C.Q. In cases such as this one, where the Québec investors represented but a small fraction of those allegedly affected by the scheme (with total losses in the range of $5,000.00), it would effectively grant jurisdiction to the AMF over a limitless number of cases involving the international trading of foreign public companies. Moreover, the interpretation of art. 3148(3) C.C.Q. adopted by the Superior Court and Mainville J.A. substantially deviates from the existing case law, under which the *situs* of an "injury" is not merely the location at which an economic loss was recorded.[113]

126. Indeed, in its recent decision in *Chandler*, the Québec Court of Appeal affirmed a Superior Court decision to the effect that an alleged economic injury resulting from a decrease in value of the shares was not suffered in Québec:

> Her conclusion is once again consistent with the principles of *Infineon* whereby to confer jurisdiction on Quebec courts, a purely economic injury, or damage, must be substantially suffered and not merely recorded in Quebec. Here, class members merely recorded an economic injury in the province. They did not suffer any substantial injury in Quebec within the meaning of article 3148(3) CCQ. [114]

127. The proposed application of art. 3148(3) C.C.Q. by analogy also contradicts any proposed application of art. 3136 C.C.Q., which requires that "Québec authority have no jurisdiction to hear a dispute."

128. Ultimately, absent any further intervention by the legislature, the only applicable foundation for the FMAT's jurisdiction in the present case is art. 3134 C.C.Q., which states that, "[i]n the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec." This article codifies that natural forum in private international law, which has been described as follows:

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[112] *Spar* at para. 49.
[113] *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 at paras 45–48.
[114] *Chandler c Volkswagen Aktiengeselschaft*, 2022 QCCA 272 at para 43.

> Fondée sur la courtoisie internationale et qualifiée de compétence « naturelle », elle reflète une préoccupation de bonne administration de la justice, puisqu'elle veut que l'on n'oblige pas le défendeur à aller se défendre ailleurs qu'au lieu de son principal établissement, étant donné qu'on ne sait pas, à ce stade de la procédure, s'il sera condamné ou non.[115]

129. While there could be instances where the AMF can rely on other provisions of the C.C.Q. to establish the jurisdiction of the FMAT, the allegations and evidence in the present case simply does not allow for it.

b) The FMAT has no jurisdiction under the real and substantial connection test

130. Even in the alternative that this Court were to determine that the C.C.Q. does not apply, it remains that the Court of Appeal erred in affirming the FMAT's jurisdiction over the present proceedings by misinterpreting and misapplying the "real and substantial" connection test.

131. As a constitutional principle, the "real and substantial connection" test sets the outer limits to the assumption of jurisdiction by a province's courts, thereby limiting jurisdictional overreach.[116] A connection between a province and a defendant cannot be weak or hypothetical, as a tenuous connection would cast doubt upon the legitimacy of a province's judicial power.[117]

132. In *Van Breda*, this Court emphasized that, to uphold the values of order, predictability and certainty, courts and legislatures should couch the assumption of jurisdiction on the objective connecting factors, as opposed to abstract principles and pure exercises of judicial discretion.[118] In *Muscutt et al. v Courcelles et al.*, the Ontario Court of Appeal held that applying the "real and substantial connection" test does not invite an exercise of discretion.[119]

133. The existing precedents from provincial securities commissions outside of Québec are to the effect that any assertion of extraterritorial jurisdiction must be grounded on objective evidence of a

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[115] Gérald Goldstein, *Droit international privé: extraits de La référence Droit civil (Commentaires sur le Code civil du Québec (DCQ))*, vol 2 (Cowansville: Éditions Yvon Blais, 2012) at 7. BOA, Tab 3.
[116] *Club Resorts v Van Breda*, 2012 SCC 17 at paras 22-23, 31; *Spar Aerospace Ltd. v American Mobile Satellite Corp.*, 2002 SCC 78 at para 51.
[117] *Club Resorts v Van Breda*, 2012 SCC 17 at para 31.
[118] *Ibid* at para 75; See also *Yip v HSBC Holdings plc*, 2017 ONSC 5332, aff'd 2018 ONCA 626; and *Leon v Volkswagen AG*, 2018 ONSC 4265.
[119] 2002 ONCA 44957, paras. 43 and 44 [*Muscutt*].

"real and substantial connection" between the specific conduct constituting alleged offences, the particular provision being applied, the individual or entity in question, and the forum.[120] Indeed, in each of these precedents, the tribunal or commission has assessed its jurisdiction based on objective connecting factors, such as the domicile of the defendant, the location of the securities exchange, or the situs of the relevant transactions.

134. By contrast, in the present case, the FMAT and the courts and tribunal below asserted jurisdiction over Sharp based on open-ended factors, and without specific allegations or evidence connecting Sharp – or the offences alleged against him – to Québec.

135. At the outset, the FMAT qualified its decision to assert jurisdiction over the present case as being "first and foremost", a function of its statutory "public interest" discretion and in light of the transnational nature of modern market manipulation offences. On judicial review, the Superior Court effectively confirmed the FMAT's jurisdiction over Sharp on the basis of open-ended and subjective concepts such as the "public interest" and the "existence of global interconnected markets." [121] If recognized as connecting factors, such criteria would effectively allow the FMAT to assert jurisdiction over foreign defendants at its entire discretion. [122]

136. In addition to lacking the requisite objectivity and predictability, the FMAT's statutory public interest discretion, which derives from Section 93(2) of the ARRFS cannot be attributive of extraterritorial jurisdiction. To be sure, as a provincial administrative tribunal, the FMAT's home statutes must be interpreted in a manner consistent with – and subordinate to – the constitutional division of powers and the presumption against the extra-provincial application of provincial

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[120] See for example *Crowe v Ontario Securities Commission*, 2011 ONSC 6918 at para 32 [*Crowe*]; *Ontario Securities Commission v DaSilva*, 2017 ONSC 4576, at para 49; *Gregory & Co. v Quebec (Securities Commission)*, [1961] SCR 584 [*Gregory*]; *Libman v The Queen*, 1985 CanLII 51 at para 74; *McCabe v British Columbia (Securities Commission)*, 2016 BCCA 7 at para 35.

[121] QCCS Judgement at paras 6, 40.

[122] *Libman v The Queen*, 1985 CanLII 51 at para 74; *World Stock Exchange (Re)*, 2000 LNABASC 39 at 1–2, 27, 31; *Torudag (Re)*, 2009 BCSECCOM 9 at paras 43–4, 50; *Re Williams*, 2016 BCSECCOM 18 at paras 173–76, 195–97, 200; *Al-Tar Energy Corp. et al.*, 2010 ONSEC 11; *Gregory & Co. v Quebec (Securities Commission)*, [1961] SCR 584 at 589; *R v McKenzie Securities Limited*, 1996 CanLII 485 (MB CA) at 62–3; *McCabe v British Columbia (Securities Commission)*, 2016 BCCA 7; *Crowe v Ontario Securities Commission*, 2011 ONSC 6918 at para 18.

legislation.[123]

137. Because the FMAT has no inherent jurisdiction, its powers and functions must be limited to those expressly set out in its enabling statute.[124] Provincial securities legislation – including the public interest discretion – is subordinate to the principles of order and fairness underlying the constitutional division of powers.[125]

138. It is also improper for the FMAT to rely upon the "existence of global and interconnected markets" as a connecting factor, or to otherwise widen its jurisdiction. Without legislative action, the jurisdiction of securities tribunals cannot properly evolve on an *ad hoc* basis due to external factors such as the globalization of markets or the transnational nature of securities offences.

139. The rationale espoused by the courts and tribunal below would effectively allow the AMF and the TAMF to regulate global financial markets wherever Québec residents can access foreign markets or information via the Internet. Such a rationale would allow the FMAT to exert jurisdiction over foreign matters and defendants with nearly limitless discretion, thereby compromising the underlying principles of order, certainty, and predictability – and enabling jurisdictional overreach.

140. In addition to the above, the FMAT failed to meaningfully assess whether the constitutive elements of the infractions alleged by the AMF against Sharp had any connection to Québec, and more specifically, whether:

a) any "unfair, improper or fraudulent practices"[126] alleged against Sharp took place in Québec;

b) any "acts", "transactions," "trading methods" allegedly carried out by Sharp were carried out in or from Québec;[127] or

c) any "act", "practice" or "courses of conduct" allegedly engaged in by Sharp took place in Québec.[128]

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[123] Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: Lexis Nexis, 2022) at para 26.04. BOA, Tab 10.
[124] *Financière Manuvie c Proteau*, 2013 QCBDR 137 at paras 25–26; *Autorité des marchés financiers c Beaudoin, Rigolt & Associés inc*., 2015 QCBDR 70 at paras 176–77 aff'd in part 2016 QCCQ 9295 at paras 120, 124; Jean-Pierre Villaggi, "Chapitre I – La justice administrative", in *Collection de droit 2016-2017*, vol 7 (Cowansville: Yvon Blais, 2016) at 159. BOA, Tab 12.
[125] *Unifund Assurance Co. v Insurance Corp of British Columbia*, 2003 SCC 40 at paras 56, 71–72.
[126] QSA, s 195.2.
[127] QSA, s 199.1.

141. The courts and tribunal below omitted to conduct an individualized analysis of the AMF's allegations against Sharp, or to distinguish those allegations from those brought against the co-defendants.

142. For instance, the Superior Court presumed, without any evidentiary basis or equivalent finding, that Sharp "presumably knew that the company, with an office in Montréal, was promoting mining activities in Québec and that the company was governed by Québec securities law and subject to the authority of the AMF."[129] Yet, the FMAT itself did not make such a presumption, nor did the AMF allege it.

143. In its majority opinion, the Court of Appeal held that "[a]n 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*."[130]

144. Had the courts and tribunal below properly assessed the AMF's allegations against Sharp, they would have concluded that these allegations were composed of only foreign elements with no discernable connection to Québec, let alone a real and substantial one.

145. In its application, the AMF sets out the alleged scheme in seven steps: (1) the acquisition of Solo securities;[131] (2) the operations of Solo;[132] (3) the first period of promotion of Solo;[133] (4) the first sale of Solo securities;[134] (5) the second period of promotion of Solo;[135] (6) the second sale of Solo securities;[136] (7) and finally the distribution of profits.[137]

146. According to the AMF, Sharp would have been involved[138] only in steps relating to the acquisition and the sale of Solo securities on the Foreign OTC Market via foreign corporate entities

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[128] QSA, s 199.1.
[129] QCCS Judgment at para 41.
[130] QCCA Judgement at para 105.
[131] AMF's Application at paras 43–64, Appellants' Record, Tab 6.
[132] AMF's Application at paras 65–75, Appellants' Record, Tab 6.
[133] AMF's Application at paras 76–89, Appellants' Record, Tab 6.
[134] AMF's Application at paras 90–92, Appellants' Record, Tab 6.
[135] AMF's Application at paras 93–97, Appellants' Record, Tab 6.
[136] AMF's Application at paras 98–101, Appellants' Record, Tab 6.
[137] AMF's Application at paras 102–03, Appellants' Record, Tab 6.

using funds in foreign bank accounts. The allegations against Sharp relating to these steps are solely comprised of foreign elements.

147. Moreover, central to the reasoning of the courts and tribunal below in confirming the FMAT's jurisdiction over Sharp is the alleged publication of press releases and online promotions relating to the securities of Solo.[139]

148. The fact that Solo is a reporting issuer in Québec by operation of law is not a proper consideration with respect to its jurisdiction over Sharp. Conferring jurisdiction to Québec securities authorities over all matters involving reporting issuers in Québec would lead to boundless jurisdiction.

149. It is crucial to note that the AMF does not allege that Sharp had any role in the financing, publication or production of these press releases or promotions. In other words, there is no allegation that Sharp would have participated in the "pump" aspect of the alleged scheme. The courts and tribunal below entirely failed to consider this distinction in its analysis of the FMAT's jurisdiction over Sharp.

150. Moreover, the AMF's Application recognizes that neither Sharp, nor the corporate entities allegedly related to him, are based in Québec.

- Corporate House Inc., is incorporated in Vancouver, British Columbia;[140]
- Tandem Growth LLC (formerly Terra Equity LLC) is incorporated in Nevis in the West Indies;[141]
- Peaceful Lion Holdings Ltd. is incorporated in Samoa;[142]
- Morris Capital Inc. is incorporated in Belize;[143]
- Quezon Group Inc. is incorporated in Nevis in the West Indies and its bank account is located in Switzerland;[144]

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[138] AMF's Application at paras 29–31, Appellants' Record, Tab 6.
[139] QCCS Judgment at paras 15–16, 18, 42, 44.
[140] AMF's Application at para 29, Appellants' Record, Tab 6.
[141] AMF's Application at para 30, Appellants' Record, Tab 6.
[142] AMF's Application at para 30, Appellants' Record, Tab 6.
[143] AMF's Application at para 30, Appellants' Record, Tab 6.
[144] AMF's Application at para 30, Appellants' Record, Tab 6.

151. The AMF alleges that the transfer of Solo securities from the initial shareholders to Terra and Peaceful was carried out from British Columbia to Switzerland. In other words, the initial acquisition of Solo securities has no connection to Québec.[145] Moreover, the securities held by Terra and Peaceful did not originate from Québec investors, but from foreign investors.[146]

152. The AMF does not allege that the transactions of Solo securities allegedly carried out by Sharp or corporations under his control were carried out in Québec. Rather, it is alleged that Solo securities were held in the account of Quezon in Switzerland.[147]

153. The AMF does not allege that either Sharp or any of the foreign corporations under his control, received or disbursed any funds in Québec. The AMF acknowledges that the bank accounts of all of the foreign corporations were situated outside of Québec.[148]

154. The first alleged "dump" of Solo securities in January and February 2012 was done from Tandem's bank account in Switzerland.[149] There is no allegation that the securities allegedly sold by Tandem on the Foreign OTC Market in January and February 2012 were ever bought by Québec investors.

155. The second alleged "dump" of Solo securities in November 2012 was allegedly from Tandem and Morris' bank accounts, which are located in Switzerland.[150] Again, there is no allegation to the effect that any Québec investors acquired any securities allegedly sold by Tandem and Morris in November 2012 on the Foreign OTC market.

156. None of the alleged sums obtained from the sale of the Solo securities in January, February and November 2012 transited through bank accounts or corporations situated in Québec.[151] As acknowledged by the AMF, the alleged distribution of sums following the sale of Solo securities entirely transited through bank accounts of foreign corporations located outside of Québec.[152]

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[145] AMF's Application at paras 51–54, Appellants' Record, Tab 6.
[146] AMF's Application at paras 51–54, Appellants' Record, Tab 6.
[147] AMF's Application at para 61, Appellants' Record, Tab 6.
[148] AMF's Application at paras 53–102, Appellants' Record, Tab 6.
[149] AMF's Application at para 91, Appellants' Record, Tab 6.
[150] AMF's Application at para 99, Appellants' Record, Tab 6.
[151] AMF's Application at paras 99, 102, Appellants' Record, Tab 6.
[152] AMF's Application at para 102, Appellants' Record, Tab 6.

157. In the evidence filed by the AMF, there is no indicia of any connection between Solo or Mr. Plante and the corporate entities allegedly related to Sharp.

158. In the absence of specific allegations, the courts and tribunal below erroneously and unjustly confirmed the FMAT's jurisdiction over Sharp based on the AMF's conclusive allegation concerning his central role in the alleged scheme. Indeed, it is well established that legal characterisations do not bind a tribunal and cannot alone establish territorial jurisdiction.[153]

159. In sum, none of the conduct alleged against Sharp, or against the corporations alleged to be related to him, had have discernable nexus with Québec. At bottom, the allegations and evidence adduced by the AMF to the FMAT as against Sharp are entirely comprised of foreign elements. Accordingly, any connection between Sharp, the offenses alleged against him, and Québec are, at best, tenuous and hypothetical.

160. Whether applying the provisions of the C.C.Q., or existing iterations of the real and substantial connection test, the FMAT should have properly declined jurisdiction over the AMF's proceedings as against Sharp. The appeal should therefore be allowed.

PART IV – SUBMISSIONS ON COSTS

96. The Appellant requests an order for costs throughout, in the present appeal and in the courts and tribunal below.

PART V – ORDER SOUGHT

97. The Appellant Frederick Langford Sharp requests that this Court allows the present appeal, sets aside the decision of the Québec Court of Appeal, and declares that the Financial Markets Administrative Tribunal has no jurisdiction over the AMF's proceedings as against him. Seeing as the errors in the courts and tribunal below are jurisdictional, an order remitting this matter to the FMAT would be inappropriate.[154.]

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[153] *Consultant Service médical (MSC) inc./Medical Service Consultant (MSC) Inc. v Porous Material Inc.*, 2017 QCCS 665 at paras 29–36; *Green Planet Technologies Ltd. v Corporation Pneus OTR Blackstone/OTR Blackstone Tire Corporation*, 2013 QCCA 56 at para 11.
[154] See *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 161 and *Giguère v Chambre des*

THE WHOLE RESPECTFULLY SUBMITTED ON THIS 25th DAY OF JULY 2022

Langlois lawyers LLP

LANGLOIS LAWYERS, L.L.P.
Sean Griffin and Daniel Baum
Counsel for the Appellant
Frederick Langford Sharp

notaires du Québec, 2004 SCC 1 (Deschamps J., dissenting) at paras 65–67.

PART VII – TABLE OF AUTHORITIES

Civil Code of Québec, CCQ-1991	
(English) Preliminary Provision, 1376, 2925, 3076, 3108, 3134-3154 (French) Disposition préliminaire, 1376, 2925, 3076, 3108, 3134-3154	2, 3, 15, 25-31, 34, 36, 39, 41, 45-47, 52, 56-62, 65, 66, 68, 70, 72, 75-80, 86, 92, 103, 107-113, 115, 120, 121, 123, 125, 127, 128, 130, 160
Constitution Act, 1867, 30 & 31 Vict, c 3	43, 64, 72, 74, 92
(English) 35, 92(13) (French) 35, 92(13)	
Rules of Procedure of the Financial Markets Administrative Tribunal, CQLR c E-6.1, r 1	44
Securities Act, CQLR c V-1.1	5, 6, 25, 44, 48, 50, 53, 54, 98, 120
(English) 195.2, 199.1, 236.1, 273.1, 273.3, 305.1, 308.2.1.2, 323 (French) 195.2, 199.1, 236.1, 273.1, 273.3, 305.1, 308.2.1.2, 323	