SCC Court File No.:

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

B E T W E E N

SHAWN VAN DAMME,
VINCENZO ANTONIO CARNOVALE and
PASQUALE ANTONIO ROCCA

APPLICANTS (Appellants)

- and -

AUTORITÉ DES MARCHÉS FINANCIERS

RESPONDENT (Respondent)

- and -

FREDERICK LANGFORD SHARP

INTERVENER (Mis-en-cause)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(Applicants Shawn Van Damme, Vincenzo Antonio Carnovale and Pasquale Antonio Rocca, Applicants)

MEMORANDUM OF ARGUMENT

LCM ATTORNEYS INC.
2700-600, De Maisonneuve West
Montréal, QC H3A 3J2

M^tre^ Patrick Ferland
M^tre^ Sébastien C. Caron

Tel.: (514) 375-2681 | (514) 375-2679
Fax.: (514) 901-2005
Email: pferland@lcm.ca | scaron@lcm.ca

Counsel to the Applicants,
Shawn Van Damme, Vincenzo Antonio Carnovale and Pasquale Antonio Rocca

OLTHUIS VAN ERT
66 Lisgar St.
Ottawa, ON K2P 0C1

Gabriel Poliquin

Tel.: (613) 983-8062
Fax: (613) 651-0304
Email: gpoliquin@avocatsov.com

Agent for the Applicants,
Shawn Van Damme, Vincenzo Antonio Carnovale and Pasquale Antonio Rocca

ORIGINAL TO: **THE REGISTRAR OF THE SUPREME COURT OF CANADA**

COPIES TO:

CONTENTIEUX DE L'AUTORITÉ DES MARCHÉS FINANCIERS
800, Square-Victoria, 4th Floor
Montréal, QC H4Z 1G3

M^tre^ Stéphanie Jolin
M^tre^ Simon Ouellet

Tel.: (514) 395-0337, ext. 2474 (M^tre^ Jolin)
(514) 395-0337, ext. 2496 (M^tre^ Ouellet)

Fax: (514) 864-3316

Email: stephanie.jolin@lautorite.qc.ca
simon.ouellet@lautorite.qc.ca

Counsel for the Respondent,
Autorité des marchés financiers

LANGLOIS LAWYERS LLP
1250, René-Lévesque Blvd. West, 20th Floor
Montréal, QC H3B 4W8

M^tre^ Sean Griffin
M^tre^ Daniel Baum

Tel.: (514) 842-9512

Fax: (514) 845-6573

Email: sean.griffin@langlois.ca
daniel.baum@langlois.ca

Counsel for the Intervener,
Frederick Langford Sharp

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. THE ISSUES OF PUBLIC IMPORTANCE RAISED BY THE PRESENT CASE

[1] When can a Quebec court or tribunal hear proceedings brought by a public entity for violations of a regulatory regime allegedly committed by foreigners? Are the provisions of the *Civil Code of Quebec* which govern the international jurisdiction of Quebec authorities applicable to such proceedings? Despite the increasing importance played by administrative tribunals in the administration of justice in Quebec, and despite the fact that disputes submitted to the courts increasingly involve international aspects, this case is the first time that this issue has been directly raised, and it provides a clear opportunity to reassert the *Civil Code*'s function and the importance of the specific conflict rules it provides.

[2] Seized with proceedings instituted by the Quebec securities regulators against foreign defendants for acts essentially committed outside of Quebec, a majority of the Court of Appeal determined that the *Code*'s jurisdictional provisions were entirely inapplicable. This was the first time that a Quebec court had come to such a conclusion. The minority disagreed, finding that the *Code* was applicable to *all* proceedings falling within the province's constitutional power over property and civil rights and that this case was no exception. Faced with the fact that no provision of the *Code* could support a finding of jurisdiction in the context of this case, however, the minority determined that the *Code*'s provisions could be applied "by analogy" to ground the jurisdiction of Quebec authorities even in cases which the Legislature had not sought to cover. This was also the first time that a Court had come to such a conclusion.

[3] The issue raised by the present case is one of importance for Quebec law, but also for that of all Canadian jurisdictions. In this era of globalisation, the regulation of securities has become increasingly complex. In Canada, where securities regulation remains first and foremost under provincial jurisdiction, there is undoubtedly a need to ensure that provinces are able, within the constraints imposed by the *Constitution Act, 1867*, to ensure the proper implementation and enforcement of their laws as securities get traded across provincial and international borders and capital moves back and forth. Equally important, however, is that rules governing the regulation of markets be clear, that citizens and corporations be able to ascertain their legal obligations, and that they know what court or tribunal could be called to determine the legality of their actions. Indeed, justice and fairness in the legal system "*cannot be attained without a system of principles and rules*

that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect"[1].

[4] In *Van Breda*[2], this Court insisted on the necessity to elaborate a coherent system of conflicts rule where the assumption of jurisdiction by courts would be based not on an *ad hoc* evaluation of whether a sufficient connection exists between the dispute and their province, but rather on the application of predetermined, objective connecting factors. It pointed to Quebec as an example of a jurisdiction where such a work of systematizing jurisdictional rules had been undertaken. It underlined that the *Civil Code of Québec*[3] "attempt[s] to codify the entire field of private international law"[4] and that it "rel[ies] on specific facts linking the subject matter of the litigation to the jurisdiction"[5].

[5] The decision below[6] stands in stark opposition to these principles and marks a clear step backward from the objective advocated by this Court. Refusing to apply the jurisdictional provisions of the *Code* to the assumption of jurisdiction by the Quebec Financial Markets Administrative Tribunal, it turned instead to the common law approach. Rather than applying the systematic, objective approach developed by common law courts in similar cases, however, it advocated in favour of an *ad hoc* consideration of the overall connections between Quebec and the context of the dispute, opening the door for much uncertainty and unpredictability. The same is true of the minority's approach. Despite confirming the applicability of the *Code*'s jurisdictional provisions, the "by analogy" approach it favours will also inescapably lead to great unpredictability in the assumption of jurisdiction by Quebec courts, and this in all types of disputes.

[6] Given the centrality of the issues raised by the present case, and the clear impact that the judgment below will have on the development of Quebec law, Applicants submit that leave to appeal should be granted.

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

2. CONTEXT AND PROCEDURAL HISTORY

2.1 The Financial Markets Administrative Tribunal

[7] In 2017, the Quebec *Autorité des Marchés financiers* (the "**AMF**") instituted proceedings before the Financial Markets Administrative Tribunal (the "**FMAT**") against Solo International Inc. ("**Solo**") and its former CEO Michel Plante, a resident of Quebec. Solo is registered and headquartered in the United States and its shares are only tradable in that country, but the AMF claims it would have had an office in Montreal, that a *subsidiary* of Solo would have owned assets in Quebec (two mining rights), and that Solo would have been considered a "reporting issuer" in Quebec[7].

[8] The AMF proceedings were also directed against four other individuals: Applicants Van Damme, Carnovale and Rocca, and Intervener Sharp, none of whom reside in Quebec. The AMF alleges that Applicants would have participated in manoeuvres designed to influence the share price of Solo and that their actions formed part of a "pump and dump" scheme to which participated not only the above-mentioned defendants but also a number of other individuals and corporations – all of whom reside outside of Quebec. In particular, the AMF claims that Applicants engaged in a number of transactions involving Solo's shares and contributed to the promotion of Solo's stock by way of publications available on the Internet. According to the AMF, certain Quebec investors who were or became shareholders of Solo during the period covered by the scheme would have lost money as a result (in fact, all those Quebec investors combined would have lost a total of approximately $5,000).

[9] The AMF alleges that Applicants' actions constitute violations of sections 195.2 and 199.1 of the Quebec *Securities Act* ("***QSA***")[8], which make it an offence to "*[i]nfluenc[e] or attempt[t] to influence the market price or the value of securities by means of unfair, improper or fraudulent practices*" and to participate in transactions that one knows or ought reasonably to know "*creates or contributes to a misleading appearance of trading activity in, or an artificial price for, a security*". The proceedings instituted by the AMF against the Applicants therefore seek the imposition of administrative sanctions (as opposed to *penal* sanctions, which are provided under different provisions). The AMF requests monetary condemnations against Applicants ($500,000 for Van Damme, $300,000 for Carnovale and $630,000 for Rocca), as well as prohibitions from trading

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[7] *Demande introductive d'instance* ("**Originating Application**"), para. 7-11.
[8] *Securities Act*, CQLR, c. V-1.1.

in securities and acting as director or officer of certain types of private entities[9].

[10] Applicants and Intervener Sharp filed motions for declinatory exception asking the FMAT to dismiss the proceedings, claiming that it lacks jurisdiction to hear the proceedings against them[10]. Not only do they all reside outside Quebec (in British Columbia), but as appears from the allegations of the AMF's originating demand[11], none of the actions which would constitute violations of the *QSA* on their part would have been carried out in Quebec – whether in whole or in part. The transactions which the AMF claims Applicants would have participated in were all carried out outside of Quebec and there is no allegation that any would have involved a Quebec resident or that any amounts would have transited through Quebec. The companies which the AMF claims the Applicants used to carry out these transactions are also all foreign companies[12] without activity in Quebec or any connection with Quebec. As for the "market" which would have been impacted by Applicants' alleged actions – the OTC, where any transaction in Solo's shares would have taken place – it is, it is in the United States and under the supervision of foreign regulators.

[11] The FMAT dismissed the motions for declinatory exceptions[13] on the basis that the link between Quebec and the alleged "scheme" in which they would have participated was sufficient to ground the FMAT's jurisdiction. The FMAT based this conclusion on five elements, none of which specifically concerns actions of Applicants: (a) Solo would have had an office in Montreal; (b) Solo would have been considered a reporting issuer in Quebec; (c) co-defendant Plante would have been a resident of Quebec; (d) the alleged promotion of Solo's stock would have covered the territory of Quebec and would have reached its investing public; and (d) Quebecers would have been shareholders of Solo or been affected by the decline in price.

2.2 Judicial review proceedings and the Superior Court decision (Collier J.)

[12] Applicants (and Intervener Sharp) instituted judicial review proceedings against the FMAT's decision[14], claiming that the FMAT erred in concluding that it had jurisdiction to hear proceedings

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[9] Sections 265, 273.1 and 273.3 of the QSA.

[10] *Motion for declinatory exception* of Applicants; *Motion for declinatory exception* of Intervener Sharp.

[11] Originating Application.

[12] Originating Application, paras. 26, 27, 33 and 37 (JS, vol. 1, pp. 94-95));

[13] Decision of the Financial Markets Administrative Tribunal dated November 22, 2017.

[14] *Application for Judicial Review* of Applicants; Application for Judicial Review of Intervener Sharp.

against Applicants. Because the limitation on the FMAT's jurisdiction over out-of-province defendants is a matter of constitutional law and given the importance of the question for the legal system as a whole, Applicants argued that the applicable standard of review was correctness.

[13] Applicants' and Sharp's judicial review proceedings were dismissed by the Superior Court (Collier J.)[15]. In his reasons, Collier J. refused to rule on the applicable standard of review and did not directly address the issue of what legislative provisions or principles would apply to the assumption of jurisdiction by the FMAT. He concluded that "*in appropriate cases, [the FMAT] may exercise jurisdiction over a foreign defendant*"[16], and that it had in this case "*correctly recognized the limits of its extraterritorial reach, by applying the real and substantial connection test*"[17].

[14] Like the FMAT, the Superior Court did *not* conclude that any of the actions constituting the QSA violations alleged by the AMF would have occurred in Quebec. Collier J. rather based his decision on the fact that a real and substantial connection existed between Quebec and certain aspects of the alleged scheme[18].

[15] Applicants and Intervener Sharp were granted leave to appeal this decision by Hamilton J.A., who pointed out 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 this Court has not yet expressed itself*"[19].

3. THE JUDGMENT OF THE COURT OF APPEAL

[16] Two sets of reasons were issued by the Court of Appeal: the first by Marcotte J.A., with whom Moore J.A. agrees, and the second by Mainville J.A. Although Marcotte J.A. and Mainville J.A. agree that the appeals should be dismissed, on the most fundamental issue raised by the appeal – the applicability of the jurisdictional provisions of the *Civil Code* – they are sharply divided. Indeed, their reasons could hardly be more different, as will be seen below.

[17] Only Marcotte J.A. comments on the standard of review, confirming that the applicable

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[15] Judgment of the Quebec Superior Court.
[16] Judgment of the Quebec Superior Court, at para. 35.
[17] Judgment of the Quebec Superior Court, at para. 36.
[18] Judgment of the Quebec Superior Court, at para. 37.
[19] Judgment of the Court of Appeal granting leave to appeal (March 15, 2019), par. 2.

standard is correctness, first because the question of jurisdiction relates to a constitutional issue (at para. 45), and second because of "*the central importance of the issue* [of the Code's applicability] *to the legal system*" (para. 48).

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

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

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

[20] Having concluded that the *Civil Code* does not apply, Marcotte J.A. turns to identifying the appropriate jurisdictional standard. She concludes that "*[t]he FMAT's authority should be determined by relying on the real and substantial connection as developed in Unifund*[20]" (para. 90), referring in particular to how this Court approached the issue in *Libman v. The Queen*[21], a criminal case. She concludes that such a connection was present here because the AMF claims that the alleged "pump and dump" scheme would have been dependent on the business carried by Solo in Quebec (although this business would have been carried by Solo's *subsidiary*) and because the press releases issued by Solo made multiple references to Quebec (para. 99-100).

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[20] *Unifund Assurance Co. c. Insurance Corp. of British Columbia*, 2003 SCC 40.
[21] *Libman v. The Queen*, [1985] 2 S.C.R. 178 ("***Libman***").

3.2 Minority reasons (Mainville J.A.)

[21] Mainville J.A. disagrees with Marcotte J.A.'s fundamental premise that the *Code*'s jurisdictional provisions do not apply to administrative proceedings instituted by the AMF, or that same would not involve "private rights". He points out that as concerns the scope of the *Code*'s provisions regarding the international jurisdiction of Quebec authorities, "*[l]a volonté legislative ne peut être plus claire*": they apply to all courts and administrative tribunals, including the FMAT, and to all recourses falling within the ambit of provincial constitutional power over property and civil rights (para. 136).

[22] Mainville J.A. also disagrees with Marcotte's conclusion that the proceedings would not involve "private rights". He underlines that the provinces' power to regulate securities remains grounded in their power over "*Property and Civil Rights*" under s. 92(13) of the *Constitution Act, 1867*. For him, "*la réglementation des valeurs mobilières relève du droit civil*" (para. 129): it is regulated by the *Code*, which contains several provisions dealing specifically with securities, and by a number of statutes that abundantly refer to the *Code* and must be interpreted in conformity therewith[22]. Moreover, Mainville J.A. points out that the *QSA* establishes a distinction between penal sanctions, with which this case is not concerned, and the civil and administrative sanctions sought by the AMF in the present case (para. 131).

[23] For Mainville J.A., it is therefore to invoke the jurisdictional rules of the criminal law (in particular those set out in *Libman*), to ground the jurisdiction of the FMAT. Jurisdiction in criminal matters responds to criteria and imperatives that are not necessarily transposable to civil and administrative matters (para. 133).

[24] Having concluded that the *Code* applies, Mainville J.A. turns to the issue of whether the present proceedings meet the conditions of any articles 3134-3154 C.C.Q. Although he acknowledges that the AMF's proceedings are *not* a "personal action of a patrimonial nature", he nonetheless concludes that art. 3148 par. 1(3) C.C.Q. (which applies only to personal action of a patrimonial nature) can be resorted to "by analogy" to ground the FMAT's jurisdiction. For him, "*la publication au Québec des communiqués de presse et les dommages allégués aux investisseurs québécois soutiennent la*

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

compétence du [TAMF] » (para. 144). As an alternative ground, Mainville J.A. also concludes that the FMAT's jurisdiction could have been grounded on the "forum of necessity" doctrine of art. 3136 *C.C.Q.*, which provides that a Quebec authority without jurisdiction over a dispute may nevertheless hear it "*provided the dispute has a sufficient connection with Québec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required*".

* * *

[25] Neither the majority nor the minority's approach is satisfactory, neither resolves the issues raised by the present case, and both risk creating much uncertainty and leading to unpredictability in the law.

PART II – QUESTIONS IN ISSUE

[26] Applicants submit that the questions in issue are:

a) Are the provisions of the *Civil Code of Québec* governing the "International Jurisdiction of Québec Authorities" (art. 3134-3154 *C.C.Q.*) applicable to administrative proceedings instituted before a Quebec court or tribunal in the context of disputes relating to the implementation of provincial laws concerning "property and civil rights"?

b) If the provisions of the *Code* are not applicable, must the Court's jurisdiction be founded on the presence of specific, objective factors relating to the alleged violations or is it sufficient for the Court to find that there exists a "real and substantial connection" between Quebec and the overall context within which the violations took place?

c) Can the provisions of the *Code* be applied "by analogy" to ground the jurisdiction of Quebec courts and tribunal in circumstances *others* than those they cover?

PART III – STATEMENT OF ARGUMENT

1. THE COURT MUST INTERVENE AND CONFIRM THAT THE *CIVIL CODE OF QUÉBEC* APPLIES TO ALL PROCEEDINGS

[27] The most problematic aspect of the decision below is also likely to be its most consequential. It is the majority's conclusion that the *Code*'s jurisdictional provisions do not apply to all proceedings falling within the sphere of provincial powers under section 92(13) of the *Constitution*

Act, 1867 – that this depends on whether the proceedings concern "private rights" or "public rights". This conclusion is wholly unsupported by precedent or doctrinal source and is profoundly at odds with the structure and text of the *Code*. It also risks creating considerable uncertainty in the law.

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

[28] Prior to the *Civil Code of Quebec*, the interaction between "public law" and "private law" had not always been easy, as this Court's decision in *Laurentides Motels*[23] demonstrated. In 1994, the Quebec Legislature sought to put this tension to rest with the adoption of the new *Code*. This was made clear by the preliminary provision, as this Court explains in *Prud'homme*:

> "[T]he new *Code* does not simply lay down a body of private law rules, or 'a law of exception'. As stated in its preliminary provision, it is the *jus commune* of Quebec:
>
> > The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.
> >
> > The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.
>
> The expression "*jus commune*" was not chosen randomly. An earlier version of the provision provided that the Code comprised a body of rules laying down the "private law". In response to the debate in the literature prompted by the decision in *Laurentide Motels*, the expression "private law" was replaced by the more inclusive expression "*jus commune*". The backdrop against which this change was made leaves no doubt as to the very conscious decision made by the legislature to give the Civil Code the broadest possible operational scope."[24]

[29] It is thus "undeniable", as Marcotte J.A. herself acknowledges (at para. 70), that the *Code* applies to certain aspects of public law. What Marcotte J.A. fails to acknowledge, however, is that the *Code*'s provisions dealing with the "*International Jurisdiction of Québec Authorities*" are precisely that: *public law rules*. They govern the circumstances when courts and other tribunals can

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

[24] *Prud'homme v. Prud'homme*, 2002 SCC 85, para. 28-30 [ref. omitted, emphasis in original]. See also A.-F. Bisson, "La Disposition préliminaire du *Code civil du Québec*" (1999), 44 *McGill L.R.* 539; D. Lemieux, "Le rôle du Code civil du Québec en droit administratif", in *Actes de la XVIIe Conférence des juristes de l'État*, Cowansville, Yvon Blais, 2006.

exercise their powers[25]. This is quintessentially a public law matter.

[30] To support her refusal to apply the *Code*'s jurisdictional provisions, Marcotte J.A. claims 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" (at para. 71).

[31] That the international provisions of the *Code* do not apply to criminal matters is uncontroversial. Criminal law is not governed by provincial law and clearly falls outside of provincial jurisdiction over property and civil rights under s. 92(13)[26]. What is more controversial is Marcotte J.A.'s assertions that proceedings concerning the implementation of provincial securities legislation do not concern "private rights". As will be demonstrated in the next section, securities regulation fundamentally *is* a matter of "private rights", essentially consisting in the regulation of contracts and property.

[32] Marcotte J.A.'s conclusion that the *Code*'s jurisdictional provisions do not apply to "public law" matters, but only when "private rights [are] at issue" (para. 70) is entirely unsupported. There is no suggestion anywhere – in the *Code* itself, in past decisions of the courts or the writings of authors – that these provisions were meant to apply only to *certain* of the matters that come before Quebec authorities.

[33] It is clear that the *Code*'s jurisdictional provisions are meant to apply to *all* courts and administrative tribunals, without exception (Marcotte J.A. recognizes as much at para. 70). And as the

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

[26] Marcotte J.A.'s claim that the primary basis of jurisdiction in criminal law (and in matters such as the present), would not be "personal" but rather "territorial" is also unsupported. Criminal jurisdiction is certainly "territorial" in the sense that a state may exercise its authority only within its own borders, on its own *territory*, lest it be accused of infringing on the sovereignty of its neighbors. This does not mean that criminal jurisdiction is not also *personal* in the sense that it relates to the person and conduct of the offender. As this Court explains in *R. v. Hape*, 2007 SCC 26, at para. 41 and 59, jurisdiction is "*the power to exercise authority over persons, conduct and events*", and it is territorial because "*[i]t is as a result of its territorial sovereignty that a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders*".

Commentaires du Ministre confirm, these rules seek to determine the jurisdiction of Quebec authorities in an exhaustive fashion ("*Les dispositions du Titre troisième vis[e]nt à prévoir de manière exhaustive la compétence internationale des autorités québécoises*"[27]).

[34] The wide breadth of the codification of private international law rules in Book Ten of the *Code* is unquestionable. In the words of LeBel J. in *Van Breda*, Book Ten of the *Civil Code* "attempt[s] to codify the entire field of private international law"[28]. LeBel J. explains:

> "This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, which contains a well-developed set of rules and principles in this area."
>
> [Note: The French version of LeBel J.'s reasons reads "le Code civil du Québec… contient un ensemble complet de règles et de principes en la matière"[29]].

[35] The issue of whether the *Code*'s jurisdictional provisions apply to "public law" matters was considered by this Court (albeit in a different context) in *Uashaunnuat*[30], which concerned claims to Aboriginal title rights pursuant to section 35 of the *Constitution Act, 1982*. Despite the fact that section 35 rights are undeniably "public" in nature, being "*a central part of the Canadian constitutional order*", both the majority and dissent agreed that the court's jurisdiction had to be determined in accordance with the provisions of Title Three of the *Code*. To do so, both had to dismiss the position submitted by the Attorney General of Canada, who argued that "*the rules of private international law 'are inapposite' where the existing rights of the Indigenous peoples of Canada — which are recognized and affirmed by s. 35(1) of the Constitution Act, 1982 — are at issue*"[31]. Brown and Rowe JJ. (dissenting, but not on this specific point) specifically addressed this argument, emphasising that the *Code* is not limited to 'private law' rules; as the '*jus commune*' of Quebec, it encompasses certain aspects of public law. As a result, the analytical framework that courts must

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[27] *Commentaires du ministre de la Justice*, t. II, 1993, at p. 2000.
[28] *Van Breda*, at para. 42.
[29] *Van Breda*, at para. 21.
[30] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 ("***Uashaunnuat***").
[31] *Uashaunnuat*, at para. 99 (Brown and Rowe JJ.).

follow to establish their jurisdiction "*is not altered by the fact that Aboriginal rights are a public law concept*"[32].

[36] For Mainville J.A., *Uashaunnuat* "*confirme sans ambiguïté que les dispositions du titre troisième du livre dixième du C.c.Q. ont une portée large et s'appliquent aussi à des recours qui ne relèvent pas nécessairement dudit code*" (para. 142), but Marcotte J.A. disagrees. For her, *Uashaunnuat* can be distinguished on the basis that a claim of Aboriginal title rights "[is] a *sui generis* right…and as such would qualify as private rights" (para. 70). Although, Marcotte J.A.'s conclusion in this regard goes squarely against the findings of all members of the Court in *Uashaunnuat*, her disagreement with Mainville J.A. on this issue risks complicating even further the already complex task of identifying what constitutes disputes concerning "private rights" for the purpose of determining whether the *Code*'s jurisdictional provisions are applicable.

1.2 The implementation of provincial securities regulation concerns "private rights"

[37] Even if Marcotte J.A. was right in concluding that the *Code*'s jurisdictional provisions do not apply to matters where there are "no private rights at issue", this is clearly not the case here. As Mainville J.A. points out, "*la réglementation des valeurs mobilières relève du droit civil*" (para. 130). In certain respects, it is regulated by the *Code*[33], and in others by specific statutes that also refer to the *Code* and must be interpreted in conformity therewith (the Quebec *Securities Act*, of course, but also others such as the *Act respecting the transfer of securities and the establishment of security entitlements* and the *Derivatives Act*)[34].

[38] Although securities markets are undoubtedly more complex and interconnected than ever before, the regulation of securities essentially remains a matter of private law and private rights. In

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[32] *Uashaunnuat*, para. 118. See also par. 199 ("'[the] boundary between public law and private law…is much less clear in Canada and in Quebec than it is in continental Europe , and 'it is quite easy to accept that this type of mixed relationship [at the boundary between public law and private law] is in principle covered by private international law'", citing G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at No. 6).

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

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

fact, this is a *condition* of the constitutional validity of provincial securities regimes, grounded as they are in the provinces' constitutional power over "Property and Civil Rights in the Province". As this Court explained in *Reference re Securities Act*, the regulation of securities essentially concerns "*contracts and property matters within each of the provinces*"[35]. Indeed, even though provincial power over securities unquestionably extends "*to impacts on market intermediaries or investors outside a particular province*"[36], this is because such regulation is incidental to their regulation within the province. In such a context, how could there not be any private rights "at issue" in the AMF's proceedings when the constitutional validity of the regime that underpins them rests on the constitutional power of provinces to regulate contracts and property matters?

[39] The remedies sought by the AMF also concern private rights. They are directed at the Applicants' patrimony (monetary condemnations) and their right to enter into contracts (prohibition on trading in securities) and hold certain functions at private entities[37]. As Mainville J.A. points out, the *Securities Act* does allow the AMF to seek penal sanctions, but the AMF's proceedings are not based on the *QSA*'s penal provisions. The distinction is important. As this Court outlined in *Guindon*[38], administrative sanctions do not entail true penal consequences and do not result from a criminal process. In fact, it is precisely for this reason that the Applicants cannot claim the protection of the *Charter* protections that would apply in a criminal context.

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

[40] By concluding that the jurisdictional provisions of the *Civil Code* do not apply to the AMF's proceedings in the case at bar, the majority's decision impacts much more than the jurisdiction of the FMAT to hear proceedings under the *QSA*. By ruling that the *Code*'s jurisdictional provision (and the whole of Book Ten[39]) apply only to *certain* cases, the majority is effectively creating two

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[35] *Reference re Securities Act*, 2011 SCC 66, para. 125.
[36] *Reference re Securities Act*, 2011 SCC 66, para. 43 and 45.
[37] Sections 265, 273.1 and 273.2 QSA.
[38] *Guindon v. Canada*, 2015 SCC 41, par. 75-77.
[39] The same could be said of the rules of Title Four, dealing with the recognition and enforcement of foreign decisions. Are these supposed to apply only to foreign decisions dealing with "private rights"? If so, why did the Legislature provide that decisions resulting from the taxation laws of foreign countries can in some instances be recognized (art. 3162 *C.C.Q.*)?

types of disputes in Quebec: those over which the courts may only assert their jurisdiction in accordance with the *Civil Code*'s provisions, and those where they may disregard the *Code* entirely and assert their jurisdiction simply on the basis of some "real and substantial connection", untethered to any specific provision of Quebec law.

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

2. THE APPROACH OF THE MAJORITY GOES SQUARELY AGAINST THE OBJECTIVES OF CERTAINTY AND PREDICTABILITY THAT SHOULD GOVERN THE ASSUMPTION OF JURISDICTION BY COURTS

[42] According to Marcotte J.A., "*[t]he FMAT's authority should be determined by relying on the real and substantial connection as developed in Unifund*". How should the existence of such a real and substantial connection be established (on the basis of what factual elements and applying what factors precisely) is far from clear, however. Although Marcotte J.A. refers and quotes at length from this Court's decision in *Libman*, a careful review of her reasons demonstrates that she in fact adopts a much more open-ended and less structured approach to establishing jurisdiction. In fact, she expressly dismisses Applicants' arguments, grounded in *Libman*, that establishing a real and substantial connection with respect to each Applicant would require a demonstration that some of their specific actions took place in Quebec, opting instead for an *ad hoc* evaluation of the overall connections between the alleged "pump and dump scheme" in which they would have played a role.

[43] Marcotte J.A.'s rejection of the test developed in *Libman* is clear. In *Libman*, the Court had to determine if the defendant, a Canadian resident who was accused of criminal fraud in relation to the sale of securities to U.S. residents, could properly be prosecuted in Canada. The Court concluded that he could, pointing out that although the victims were defrauded in the United States, most of the fraudulent activities had taken place in Canada, within the jurisdiction of the criminal court. The Court concluded that in criminal matters, a real and substantial connection with the jurisdiction will be found to exist when "*a significant portion of the activities constituting the offence took place in*

Canada"[40].

[44] Based on this, Applicants argued before the courts below that even if the *Code*'s provisions were found not to be applicable, the proceedings should nonetheless be dismissed since none of the activities they were accused of undertaking had taken place in Quebec. Marcotte J.A. summarized this argument as follows: "*[Applicants] argue that a real and substantial connection would require that their situs, or at least one of the alleged infractions' components, be within the province of Quebec*" (para. 102). Marcotte J.A. dismissed Applicants' argument, concluding that it was sufficient for the AMF to allege a connection between Quebec and the overall scheme: "*[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*" (para. 105).

[45] Although neither the "*fraudulent practices*" nor the "*transactions in securities*" forming the basis of the AMF's specific claims against each Applicants under s. 195.2 and 199.1 *QSA* would have taken place in Quebec[41], Marcotte J.A. found that a sufficient connection existed with the overall "pump and dump" scheme since "*[t]he 'pump' aspect of the violation was highly dependant upon the business carried on in Quebec by Solo"* (at para. 99).

[46] In addition to running counter to the principle established in *Libman* and constantly applied since[42], the majority's conclusion in this regard is problematic on a more fundamental level. By opting for an open-ended and *ad hoc* evaluation of the sufficiency of the connection between the overall "dispute" and Quebec – rather than a principled approach based on the specific allegations made against each Applicant – the majority undermines the crucial developments that Canadian courts (especially the Supreme Court) have brought to the law, namely the importance that the assumption of jurisdiction not be an *ad hoc* process but be rule-based, grounded on well-defined presumptive factors. It also goes against this Court's admonition, notably in *Van Breda*, that the "real and substantial connection" should not be seen as a jurisdictional *test* but rather as a descriptor

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[40] *Libman*, at p. 213.

[41] The *QSA* does contain a provision regarding "*conspiracy to commit an offence*" (s. 207) but this only applies to *penal* sanctions and does not form part of the administrative charges brought by the AMF.

[42] See for example *McCabe v. British Columbia (Securities Commission)*, 2016 BCCA 7; *Crowe c. Ontario Securities Comm.*, 2011 ONSC 6918; *Williams (Re)*, 2016 BCSECCOM 18.

of the outer limits of provincial jurisdiction:

> "The real and substantial connection test does not mean that problems of assumption of jurisdiction … must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of a private international law system. […]
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> "…[T]he framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis — however laudable the objective of individual fairness may be.… Justice and fairness … cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. […]
>
> "…[S]tability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it."[43]

[47] Because it is based on the identification of objective factors (the specific activities constituting the offence), the *Libman* test responds to the requirement identified in *Van Breda* of allowing the parties "to predict with reasonable confidence whether a court will assume jurisdiction". Not so with the majority's approach.

[48] In the present case, had Marcotte J.A. looked at the "activities constituting the offence", as *Libman* instructs, she would have found that none took place in Quebec. Instead, like the FMAT and Collier J. before her, Marcotte J.A. did not focus on the specific violations the Applicants are alleged to have committed, on the "activities" constituting those violations, or on the place where these activities would have been carried out. Instead, she chose to take a general look at what the AMF calls the "scheme" – a complex construct which the AMF presents as involving securities transactions (on the OTC market, in the United States), transfers of money and securities (all between various foreign entities) and promotion activities (all done through the internet), and in which a large number of people would each have played a specific role (Solo, Plante, a firm called Filer Support Services, Caroline Danforth, Jacqueline Danforth, Sharp and three entities controlled

[43] *Van Breda*, at para. 70, 73 and 75.

by him, in addition to the Applicants and four corporations with which they would allegedly have links[44]).

[49] The majority's conclusion in the present case is all the more troubling given that Applicants do not reside in the jurisdiction – contrary to the situation in *Libman* and in the overwhelming majority of cases that have applied it. Indeed, because Mr. Libman resided in Canada (within the jurisdiction of the criminal court), the only question was whether the court could hear the charges when part of the alleged offence took place outside of the jurisdiction. The situation here is far different: not only do the proceedings relate to violations that would have been entirely committed outside of Quebec but the Applicants also reside outside of the jurisdiction.

[50] In the end, what results of Marcotte J.A.'s *ad hoc* approach in the present case is a conclusion that engaging in a violation that is itself related to a larger "scheme" having a connection with Quebec is sufficient. Such an approach certainly does not foster the objectives of security and predictability advocated by this Court in *Van Breda*.

3. THE DECISION BELOW WILL BRING UNCERTAINTY IN HOW THE *CODE*'S PROVISIONS ARE INTERPRETED AND APPLIED

[51] Mainville J.A.'s conclusion (with which Marcotte J.A. does not express disagreement) that the *Code*'s jurisdictional provisions may be applied "by analogy" to establish the jurisdiction of Quebec courts will also lead to considerable uncertainty in the law – this time in the way the *Code*'s jurisdictional provisions are interpreted and applied by Quebec courts.

[52] Although the AMF's proceedings are most definitely not a "personal action of a patrimonial nature"[45], as Mainville J.A. himself acknowledges, he nonetheless concludes that this should not prevent the Court from resorting "by analogy" to article 3148, par. 1(3) *C.C.Q.*, which provides that "[i]n personal actions of a patrimonial nature, a Québec authority has jurisdiction where: (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec…". Such a conclusion – that Quebec Courts can put aside the specific wording of the *Civil Code* and apply the provisions of Title Three "by analogy" to take jurisdiction even in circumstances where

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[44] Originating Application, at para. 7-40.

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

the *Code* would otherwise not allow it – is unprecedented, runs counter to the teachings of this Court and could wreak havoc in the development of the law governing assumption of jurisdiction by Quebec courts.

[53] In *Spar*, LeBel J. emphasised that "*[a]s the basic rules of private international law are codified in Quebec, courts must interpret those rules by first examining the specific wording of the provisions of the C.C.Q.*"[46]. Indeed, Quebec Courts, with the Supreme Court at the forefront, have since 1994 expanded considerable efforts to define the exact scope of each ground of jurisdiction – for instance regarding the proper interpretation of what constitutes "damage" suffered in Quebec for the purposes of art. 3148(3) *C.C.Q.*[47]. In light of the approach advocated by Mainville J.A., one might be forgiven to wonder whether such efforts were necessary. Why should courts worry about the specific interpretation of the *Code*'s provisions if in the end, they can apply these provisions "by analogy" to gain jurisdiction even when the text would not allow it?

[54] Contrary to Mainville J.A.'s suggestion (at para. 140-141), such an approach is not supported by *Uashaunnuat*, where neither the majority nor the minority sought to apply the *Code*'s jurisdictional provisions "by analogy". The majority ruled that Quebec courts had jurisdiction because the defendants were domiciled in Quebec (3134 *C.C.Q.*) and plaintiffs' action included a claim for damages, a textbook example of a personal action of a patrimonial nature (3148(1) *C.C.Q.*). Far from applying the *Code*'s provisions "by analogy", the majority *refused* to expand the scope of art. 3152 *C.C.Q.* so as to include a claim of Aboriginal title within the ambit of "real actions" (over which courts have jurisdiction only when the property is located in Quebec). As for the minority, it strenuously insisted that a court's jurisdiction could only be based on the wording of the *Code*'s provisions[48]. Finding that the notion of Aboriginal title was not a "domestic institution" in Quebec law, it proceeded to classify it within the domestic institution that it most closely resembles, "real rights"[49]. Such an exercise, frequent in private international law, is a far cry from the redrafting exercise Mainville J.A. invites Quebec courts to perform.

[55] Mainville J.A.'s reasoning signals an important shift away from what this Court has hailed as

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[46] *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, para. 23 ("***Spar Aerospace***").
[47] *Spar Aerospace*; *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59.
[48] *Uashaunnuat*, at para. 117-119 (Brown and Rowe, JJ.).
[49] *Uashaunnuat*, at para. 127-28, 137-38 and 153.

being the advantages of the codification of private international law in the *Civil Code*, which it describes as a "complex, often flexible and nuanced, system of conflicts rule … [which] sets out a number of specific conflicts rules that identify connecting factors to be applied in various international or interprovincial situations"[50]. Far from promoting "security and predictability in the law governing the assumption of jurisdiction by a court", Mainville J.A's approach instead risks ushering the type of approach decried in *Van Breda*, *i.e.* an "unstable, *ad hoc* system made up 'on the fly' on a case-by-case basis"[51].

[56] Mainville J.A.'s alternative conclusion that the FMAT's jurisdiction could also be grounded on the forum of necessity provision (art. 3136 *C.C.Q.*) is no less problematic. The AMF had chosen not to rely on art. 3136 *C.C.Q.* in first instance before the AMF[52], and adduced no evidence that proceedings against the Applicants would be impossible or could not reasonably be instituted in other jurisdictions (such as in British Columbia, where they reside, or in the United States, where Solo is registered and where its shares are traded)[53].

[57] With respect, Mainville J.A. is essentially rewriting Quebec law on "forum of necessity". Courts have repeatedly emphasized that this provision may be relied on only in exceptional circumstances, upon express request of the plaintiff[54] and where plaintiff discharges her burden of demonstrating the impossibility of submitting the dispute to the normally competent jurisdiction[55]. As LeBel J.A. (as he then was) explained, it is "*une exception étroite aux règles normales de*

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[50] *Van Breda*, at para. 39.

[51] *Van Breda*, at para. 73.

[52] Cf. Originating Application.

[53] Mainville J.A. writes that "*le [FMAT] a souligné dans la présente affaire « qu'aucune preuve ne lui a été présentée par les intimés à l'effet que les autorités d'un autre État seraient à même de prendre des décisions dans la présente affaire »*". In reality, the FMAT wrote that there was "*aucune preuve que les autorités d'un autre État seraient **mieux** à même de prendre des décisions dans la présente affaire*" (Decision of the FMAT, at para. 85).

[54] *Barer v. Knight Brothers LLC*, 2019 SCC 13, fn. 4 ("art. 3136 C.C.Q. may be applied only if one of the parties raises it, as the court cannot apply it of its own motion: *Spar Aerospace*, at para. 69; *GreCon* [*Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46], at para. 33) (Brown J., diss.); *Droit de la famille — 143017*, 2014 QCCA 2188, para. 55.

[55] C. Walsh, "The International Jurisdiction of Québec Authorities in Personal Actions: An Overview", (2012) C.B.R. 251 at p. 256. *Anvil Mining Ltd. v. Association canadienne contre l'impunité*, 2012 QCCA 117.

compétence [qui] ne vise pas à permettre au tribunal québécois de s'approprier une compétence qu'il ne posséderait pas autrement". It is meant to solve issues of access to justice "*lorsque le forum étranger normalement compétent lui est inaccessible pour des raisons exceptionnelles, comme une impossibilité en droit ou une impossibilité pratique, presqu'absolue*" such as the breakdown of diplomatic or commercial relations, the need to protect a political refugee or the existence of a serious physical danger if proceedings are brought before the foreign forum[56]. This is certainly not the case here.

[58] Following Mainville J.A.'s approach would essentially transform the forum of necessity into a forum of "convenience", forcing *defendants* to make a positive demonstration that a foreign court is better placed to hear the dispute, failing which the Quebec court will be able to assert jurisdiction in all cases having a connection with Quebec, irrespective of the *Code*'s wording.

PART V – ORDER SOUGHT

[59] For the reasons stated above, the Applicants respectfully submit that leave to appeal should be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2021.

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

[56] *Lamborghini (Canada) Inc. c. Automobili Lamborghini S.P.A.*, 1996 CanLII 6047 (QCCA), para. 44; *Droit de la famille — 143017*, 2014 QCCA 2188; *L.F. c. N.T.*, 2001 CanLII 27958 (QC CA), para. 36 *et seq.*

PART VI – TABLE OF AUTHORITIES

CASES

SECONDARY AUTHORITIES

STATUTORY PROVISIONS

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

Act respecting the transfer of securities and the establishment of security entitlements, CQLR, c. T-11.002

Derivatives Act, CQLR, c. I-14.01

Securities Act, CQLR, c. V-1.1