

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

**NHK SPRING CO., LTD., NHK INTERNATIONAL CORPORATION
NHK SPRING (THAILAND) CO. LTD., HEADWAY TECHNOLOGIES INC.,
NHK SPRING (THAILAND) CO. LTD., MAGNECOMP CORPORATION,
NAT PERIPHERAL (HONG KONG) CO. LTD., HUTCHINSON TECHNOLOGY,
MAGNECOMP PRECISION TECHNOLOGY CO. LTD.,
TDK CORPORATION, SAE MAGNETICS (HK) LTD.**

APPELLANTS
(Appellants)

and

**TONY CHEUNG
SYLVIE DE BELLEFEUILLE
GRAEME HONEYMAN**

RESPONDENTS
(Respondents)

(Style of cause continued on next page)

**FACTUM OF THE INTERVENER
OF PUBLIC INTEREST LITIGATION INSTITUTE**

(Rule 42 of the Rules of the Supreme Court of Canada)

Lawrence David, LL.M
Jeffrey Orenstein, LL.M
Public Interest Litigation Institute
150 Elgin Street – 10th Floor
Ottawa, ON K2P 1L4
Tél : (343) 961-6186
Email: lawrencedavidlegal@gmail.com
Counsel for the Proposed Intervener
Public Interest Litigation Institute

and

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL
OF ONTARIO, PUBLIC INTEREST LITIGATION INSTITUTE,
CONSUMERS COUNCIL OF CANADA, META PLATFORMS INC.,
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY &
PUBLICINTEREST CLINIC, CRIMINAL LAWYERS ASSOCIATION
(ONTARIO), PASS HERALD LTD.**

INTERVENERS

ORIGINAL TO: THE REGISTRAR
 Supreme Court of Canada
 301 Wellington Street
 Ottawa, ON K1A 0J1

COPIES TO:

David Gadsden Ahmed Shafey Brendan O’Grady Baker & McKenzie LLP 181 Bay Street, Suite 2100 Toronto, Ontario M5J 2T3 Telephone: (416) 863-1221 Email: david.gadsden@bakermckenzie.com Counsel for Appellants: NHK Spring Co., Ltd., NHK International Corporation, NHK Spring (Thailand) Co., Ltd., NAT Peripheral (Hong Kong) Co., Ltd.,	
Nikiforos Iatrou Byron Shaw Alexandra E. Cocks McCarthy Tétrault LLP Suite 5300, TD Bank Tower Toronto, Ontario M5K 1E6 Telephone: (416) 362-1812 Email: niatrou@mccarthy.ca Counsel for Appellants: TDK Corporation, SAE Magnetics (HK) Ltd., Headway Technologies, Inc., Magnecomp Precision Technology Co., Ltd., Magnecomp Corporation, Hutchinson Technology Inc.	
Reidar M. Mogerman, K.C. David G.A. Jones Camp Fiorante Matthews Mogerman 400-856 Homer Street Vancouver, British Columbia V6B 2W5 Telephone: (604) 689-7555 Email: rmogerman@cfmlawyers.ca Counsel for Respondents: Tony Cheung, Sylvie de Bellefeuille, Graeme Honeyman	Michael Sobkin Michael Sobkin Law Corporation 331 Somerset Street West Ottawa, Ontario K2P 0J8 Telephone: (613) 282-1712 Email: msobkin@sympatico.ca Agent of Respondents: Tony Cheung, Sylvie de Bellefeuille, Graeme Honeyman

Mohsen Seddigh Sofia Sugumar Sotos LLP 55 University Avenue, Suite 600 Toronto, Ontario M5J 2H7 Telephone: (416) 977-0007 Email: mseddigh@sotosllp.com Counsel for Intervener: Consumers Council of Canada	
Christine Mohr Michelle Kellam Department of Justice Canada 120 Adelaide Street West, Suite 400 Toronto, Ontario M5H 1T1 Telephone: (416) 953-9546 Email: christine.mohr@justice.gc.ca Counsel for Intervener: Attorney General of Canada	Bernard Letarte Department of Justice Canada National Litigation Sector 275 Sparks Street, St-Andrew Tower Ottawa, Ontario K1A 0H8 Telephone: (613) 294-6588 Email: SCCAgentCorrespondentCSC@justice.gc.ca Agent of Intervener: Attorney General of Canada
Grace Choi Jennifer Gibson Attorney General of Ontario 720 Bay Street 10th Floor Toronto, Ontario M7A 2S9 Telephone: (416) 326-4600 Email: grace.choi@ontario.ca Counsel for Intervener: Attorney General of Ontario	
David Kent James Musgrove Samantha Gordon McMillan LLP 181 Bay Street, Suite 4400 Toronto, Ontario M5J 2T3 Telephone: (416) 865-7143 Email: david.kent@mcmillan.ca Counsel for Intervener: Meta Platforms Inc.	Nadia Effendi Borden Ladner Gervais LLP 100 Queen Street, suite 1300 Ottawa, Ontario K1P 1J9 Telephone: (613) 787-3562 Email: neffendi@blg.com Agent of Intervener: Meta Platforms Inc.

Marina Pavlovic Melissa Dupuis-Crane Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic University of Ottawa, Faculty of Law 57 Louis Pasteur Street Ottawa, Ontario K1N 6N5 Telephone: (613) 562-5800 Ext: 2675 Email: marina.pavlovic@uottawa.ca Counsel for Intervener: Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic	
Matthew R. Gourlay Nikolas De Stefano Henein Hutchison Robitaille LLP 2100-22 Adelaide Street West Toronto, Ontario M5H 4E3 Telephone: (416) 368-5000 FAX: (416) 368-6640 Email: mgourlay@hhllp.ca Counsel for Intervener: Criminal Lawyers' Association (Ontario)	Marie-France Major Supreme Advocacy LLP 340 Gilmour Street Suite 100 Ottawa, Ontario K2P 0R3 Telephone: (613) 695-8855 Ext: 102 FAX: (613) 695-8580 Email: mfmajor@supremeadvocacy.ca Agent of Intervener: Criminal Lawyers' Association (Ontario)
Adil Abdulla David Sterns Jean-March Leclerc Maria Arabella Robles Sotos LLP 55 University Avenue, Suite 600 Toronto, Ontario M5J 2H7 Telephone: (416) 977-0007 FAX: (416) 977-0717 Email: aabdulla@sotos.ca Counsel for Intervener: Pass Herald Ltd.	

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PARTS I & II : OVERVIEW AND LEGAL ISSUES FOCUSED ON BY INTERVENER

1. A central question raised in this appeal concerns the applicable test for a court to assume territorial jurisdiction over supranational defendants in respect of a civil cause of action asserted under s. 36(1) of the *Competition Act*, [R.S.C. 1985, c. C-34](#), and the extent to which, if at all, the common law real and substantial connection test crystallized in *Club Resorts Ltd. v. Van Breda*, [2012 SCC 17](#) is displaced by s. 6(2) of the *Criminal Code*, [R.S.C. 1985, c. C-46](#) and the real and substantial link test developed in *Libman v. The Queen*, [\[1985\] 2 S.C.R. 178](#).

2. As these questions arise in the context of multijurisdictional consumer class actions alleging a price-fixing conspiracy,¹ Public Interest Litigation Institute (“PILI”) seeks to illuminate the potential ramifications of the present appeal on consumer class actions *generally*. Indeed, s. 36 of the *Competition Act* is not limited to price-fixing conspiracies targeted by s. 45 but instead extends to conduct covered under other provisions codified in Part VI of the Act that are frequently asserted in consumer class actions – often alongside claims under consumer protection legislation.²

3. Public Interest Litigation Institute’s submissions on this issue are as follows:

- A. The resolution of the questions on appeal should advance, rather than undermine, the complementary purposes of the *Competition Act*, consumer protection legislation, and Canadian class actions legislation;
- B. The institution of a civil action based in whole or in part on the civil remedy codified in s. 36(1) of the *Competition Act* is not contingent upon a prior successful criminal prosecution for conduct contravening a provision in Part VI of the Act;
- C. Territorial jurisdiction over extraterritorial defendants in respect of a civil claim under s. 36(1) of the *Competition Act* is determined under the real and substantial connection test synthesized in *Van Breda* – not under the test in *Libman* pertaining to s. 6(2) of the *Criminal Code*.

4. Contrary conclusions on any of these points would disrupt longstanding jurisprudential tendencies in Canadian consumer class actions, place unnecessary impediments to access to justice for consumers, and undermine binding precedents of this Honourable Court including *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#), *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013 SCC 58](#), and *Pioneer Corp. v. Godfrey*, [2019 SCC 42](#).

¹ *Cheung v. NHK Spring Co. Ltd.*, [2022 BCSC 1738](#), paras. 1-4.

² e.g., *Mattiuzzi c. La Personnelle*, [2026 QCCS 1163](#), para. 69; *Strathdee v. Johnson & Johnson Inc.*, [2025 ONSC 3738](#), paras. 7, 38-40, 159-175; *Bosco v. Mentor Worldwide LLC*, [2024 BCSC 1931](#), paras. 64-74; *Klaus v. Black Diamond Equipment Ltd.*, [2022 BCSC 1182](#), para. 2.

PART III: PILI'S ARGUMENTS

A. This Court's Judgment Should Advance The Complementary Purposes of The Competition Act, Consumer Protection Legislation, and Class Actions Legislation

5. The respective purposes of the *Competition Act*, of consumer protection legislation, and of class actions legislation are complementary and should be advanced – rather than undermined – by this Court's resolution of the questions on appeal. Simply put: consumer class actions asserting causes of action under s. 36(1) of the *Competition Act* and consumer protection legislation are essential to ensuring access to justice for consumers in the face of harmful business practices.

6. The complementarity of these purposes is clear. Section 1.1 of the *Competition Act* identifies its purpose as, *inter alia*, “to maintain and encourage competition in Canada... in order to provide consumers with competitive prices and product choices.” This Court has identified deterrence of, and compensation for, anti-competitive business practices as additional objectives.³ The *Competition Act* is “the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public,”⁴ as part of the federal government's overall regulation of the Canadian economy “at a structural level.”⁵ Within the Canadian constitutional framework, the federal *Competition Act* and provincial and territorial consumer protection legislation play complementary roles in protecting and advancing consumers' interests.⁶ For example, the civil remedy in s. 36(1) of the *Act* is not limited to price-fixing conspiracies in contravention of s. 45 but instead extends to conduct covered under other provisions codified in Part VI of the *Act* that are often asserted in consumer class actions.

7. Section 52(1) provides that “No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.” Similarly, all Canadian consumer protection legislation prohibits businesses from making false or misleading representations to a consumer. For example, and reflecting their complementarity, s. 218 and 219 of Quebec's *Consumer Protection Act* are “based to a large extent” on s. 52 of the *Competition Act*.⁷ It is,

³ *Infineon Technologies AG v. Option consommateurs*, [2013 SCC 59](#), at para. 111.

⁴ *Richard v. Time Inc.*, [2012 SCC 8](#), at para. 43, citing *R. v. Colgate-Palmolive Ltd.*, [\[1970\] 1 C.C.C. 100](#), at 102.

⁵ *Richard v. Time Inc.*, [2012 SCC 8](#), at paras. 34-35.

⁶ *Richard v. Time Inc.*, [2012 SCC 8](#), at para. 38.

⁷ *Richard v. Time Inc.*, [2012 SCC 8](#), at paras. 44-45.

therefore unsurprising that civil causes of action under s. 36(1) for contraventions of s. 52(1) of the *Competition Act* are often asserted in consumer class actions alongside causes of action under analogous provisions of provincial or territorial consumer protection legislation.⁸

8. Importantly, consumer class actions are essential to advancing these complementary purposes and provisions and to ensuring access to justice for consumers. Class actions also seek to achieve behaviour modification and deterrence of further harmful conduct, which directly dovetails with the compensation and deterrence objectives of the *Competition Act*.⁹ The interpretation and application of s. 36(1) should be informed by these considerations.

9. In order to ensure that these complementary purposes are advanced – rather than undermined – this Court should hold that a civil remedy under s. 36(1) of the *Competition Act* is not contingent upon a prior successful criminal prosecution and that territorial jurisdiction over extraterritorial defendants over a civil claim under s. 36(1) is determined using the real and substantial connection test articulated in *Van Breda* – not *Libman* and s. 6(2) of the *Criminal Code*.

B. The Civil Remedy in Section 36 of the Competition Act Is Not Contingent Upon a Successful Criminal Prosecution

10. The institution of a civil action based in whole or in part on the civil remedy codified in s. 36(1) of the *Competition Act* is not contingent upon a prior successful criminal prosecution for conduct contravening a provision in Part VI of the Act. Significantly, this Court previously upheld the certification of a consumer class action asserted under s. 36(1) with respect to alleged violations of s. 45 and 52(1) that had not been subject to criminal prosecution.¹⁰ Insisting on a criminal prosecution as a condition precedent to asserting a civil cause of action under s. 36(1) would require overruling *Pro-Sys*, *Infineon*, and *Godfrey* without any compelling reason for doing so.¹¹

11. These judgments are also correct as a matter of statutory interpretation. First, nothing in s. 36 or any other provision of the *Competition Act* or any other statute expressly or impliedly subordinates the civil remedy in s. 36(1) to a successful criminal prosecution.¹² Section 62 states that: “Except as provided in this Part, nothing in this Part shall be construed as depriving any

⁸ *Mattiuzzi c. La Personnelle*, [2026 QCCS 1163](#), para. 69; *Strathdee v. Johnson & Johnson Inc.*, [2025 ONSC 3738](#), paras. 7, 38-40, 159-175; *Bosco v. Mentor Worldwide LLC*, [2024 BCSC 1931](#), paras. 64-74; *Klaus v. Black Diamond Equipment Ltd.*, [2022 BCSC 1182](#), para. 2.

⁹ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#), at paras. 5, 137, 141.

¹⁰ *Pro-Sys*, at paras. 5, 66, 142; *Pioneer Corp v. Godfrey*, [2019 SCC 42](#), at paras. 61-64, 88-89.

¹¹ *John Howard Society of Saskatchewan v. Saskatchewan (AG)*, [2025 SCC 6](#), at para. 33.

¹² *Cygnus Electronics Corporation v. Panasonic Corporation*, [2023 ONSC 2559](#), at para. 75.

person of any civil right of action.” Nothing in Part VI – which includes s. 45 and 52 – deprives any person of the civil right of action in s. 36 or subordinates it to a criminal prosecution. Nor can the fact that the offences in Part VI can be prosecuted criminally “be construed” in this way. Section 36 provides a “stand-alone civil remedy” that is available regardless of whether defendants “were even investigated or charged” for conduct that may constitute a criminal offence.¹³

12. Further, nothing in s. 36 or the rest of Part IV subordinates s. 36(1) to a criminal prosecution. Section 36(4)(a) provides for a limitation period for the civil remedy that is based on the later between two years after “(i) a day on which the conduct was engaged in” and “(ii) the day on which any criminal proceedings relating thereto were finally disposed of.”¹⁴ If a criminal prosecution were a condition precedent to a civil remedy under s. 36(1), s. 36(4)(a)(i) would be unnecessary. As stated in *Godfrey*, “the limitation period in s. 36(4)(a)(i) is triggered by the occurrence of an element of the underlying cause of action – specifically conduct contrary to Part VI” but “the disposition of criminal proceedings is ‘not connected to a plaintiff’s cause of action or knowledge.’”¹⁵ The Court also stated that “where criminal proceedings are *not* brought against a wrongdoer, the putative mitigating effective of s. 36(4)(a)(ii) would be of no assistance to plaintiffs whose right of action has expired by operation of s. 36(4)(a)(i).” As well, the use of “any” in s. 36(4)(ii) refers to “criminal proceedings” *that are actually brought*.

13. It is true that s. 36(2) refers to “[e]vidence of prior proceedings” including criminal prosecutions. But this section only applies if such proceedings were instituted prior to s. 36(1) being asserted in a civil action – not that such an action is subordinate to a prosecution. As well, Parliament has expressly specified when remedies or other procedures set out in Part IV are contingent upon a criminal prosecution or conviction. This is the case for prohibition orders under s. 34(1). Parliament also expressly identified in Part VI instances in which “no proceedings may be commenced” against a person or a particular company – including criminal prosecutions – if the Commissioner of Competition has filed an application for an order.¹⁶ Parliament has therefore directly turned its mind to prioritizing proceedings and could easily have expressly specified that the civil remedy in s. 36(1) is subordinate to a criminal prosecution. It did not.

¹³ *Jensen v. Samsung Electronics Co. Ltd.*, [2021 FC 1185](#), at para. 92; *Cygnus*, at para. 71-72, 75.

¹⁴ *Pioneer Corp. v. Godfrey*, [2019 SCC 42](#), at paras. 45, 50.

¹⁵ *Godfrey*, at paras. 44-45.

¹⁶ See e.g., *Competition Act*, ss. 45.1, 46(2), 49(4), and 52(7).

14. Significantly, subordinating the civil remedy in s. 36(1) would undermine the *Competition Act*'s operation, effectiveness, and objectives, "including deterrence of anti-competitive behaviour that impacts the Canadian marketplace and Canadian purchasers."¹⁷ First, as a matter of judicial notice, criminal prosecutions are relatively infrequent with only 5 investigations "referred to the Public Prosecution Service of Canada for consideration and action" between 2020-21 and 2025-26.¹⁸ Prosecutions are also subject to prosecutorial discretion, and actors may be granted immunity precluding any prosecution.¹⁹ Second, if a prosecution is brought, it may take several years for it to conclude. Even if the limitation period in s. 36(4)(a)(ii) would apply here, consumers may not be aware of the outcome, or the evidence may become stale or simply non-existent.

15. Insisting on a criminal prosecution would also undermine Parliament's 1975 amendments to the *Combines Investigation Act* – the *Competition Act*'s predecessor – which "supplemented... [its] exclusively penal... function with regulatory and civil enforcement provisions, including a civil remedy provision (now s. 36(1))."²⁰ The civil remedy in s. 36(1) is "an integral part" of the multi-faceted "economic regulation strategy" embodied in the Act, under which "the civil, administrative, and criminal actions" together and separately "provide a deterrent against breach of the competitive policies" set out in it.²¹ Subordinating s. 36(1) to a prior criminal prosecution guts Parliament's intent and the effectiveness of the Act, to the exclusive benefit of businesses.²² Yet, "[t]he ability of plaintiffs to advance claims for loss arising from conduct contrary to Part VI of the *Competition Act* outweighs defendants' in barring them."²³ As well, Parliament could not have intended to condition a remedy available on the civil standard of proof on a balance of probabilities²⁴ to a criminal prosecution requiring proof of guilt beyond a reasonable doubt.

16. Further, s. 6(2) of the *Criminal Code* does not have the effect of subordinating the civil remedy in s. 36(1) to a criminal prosecution *for foreign defendants located outside of Canada*. First, s. 6(2) "limits territorial jurisdiction for criminal convictions only" and "does not expressly

¹⁷ *Cygnus Electronics Corporation v. Panasonic Corporation*, [2023 ONSC 2559](#), at para. 76.

¹⁸ Competition Bureau Canada, ["Performance Measurement & Statistics Report 2025-2026"](#)

¹⁹ Competition Bureau Canada, ["Immunity and Leniency Programs under the Competition Act"](#)

²⁰ *Pioneer Corp. v. Godfrey*, [2019 SCC 42](#), at para. 82.

²¹ *Cygnus*, at para. 77, citing *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [\[1989\] 1 S.C.R. 641](#), at p. 684.

²² *Cygnus Electronics*, at para. 76.

²³ *Pioneer Corp.*, at para. 48.

²⁴ *Cygnus Electronics*, at para. 75.

or impliedly limit the availability of any civil remedy.”²⁵ Second, nothing in the *Competition Act* provides for such a limitation or “expressly or impliedly circumscribes the availability of the civil remedy to wrongful conduct that occurred within the territorial limits of Canada.”²⁶ Third, as a prosecution is not generally a condition to a civil action under s. 36(1), this civil action remains available even if a prosecution could not be brought based on s. 6(2) and the *Libman* test.

17. Finally, conditioning a civil action under s. 36(1) to a criminal prosecution against *any* defendant would undermine the objectives of class proceedings and essentially sterilize consumer class actions seeking to advance such actions for violations of Part VI of the *Competition Act*.

C. Territorial Jurisdiction Over a Civil Cause of Action Under Section 36(1) of the Competition Act is Determined Under The Van Breda Test

18. Territorial jurisdiction over supranational defendants in respect of a civil claim under s. 36(1) is determined under the real and substantial connection test synthesized in *Van Breda*, and not under the test in *Libman* pertaining to s. 6(2) of the *Criminal Code*. The tests under *Van Breda* and *Libman* are not one and the same: as stated in *Sharp*, they are distinct and part of “a family of tests... [that] involves different considerations in each of the varying contexts” in which each is applied.²⁷ The *Libman* test is used only “to determine whether a transnational crime, which took place partly in Canada, could be prosecuted in Canada.”²⁸ This test cannot, therefore, substitute for the *Van Breda* test used to determine “whether a court can assume jurisdiction over a tort claim” with an international or interprovincial element.²⁹ (emphasis added)

19. The answer does not change simply because Part VI of the *Competition Act* codifies criminal offences that are amenable to criminal prosecution and to the statutory civil remedy codified in s. 36(1). Instead, the *Van Breda* test applies at common law when the civil remedy in s. 36(1) is asserted in a class action or other lawsuit – even when the claim is based on a provision that may also attract criminal consequences. By contrast, the *Libman* test exclusively applies when the violation of a criminal provision in Part VI is alleged in the context of a criminal prosecution. Applying *Libman* for a court to assume territorial jurisdiction over a civil claim under s. 36(1) would be inconsistent with this Court’s precedent in *Sun-Rype*, where a unanimous court applied

²⁵ *Cygnus Electronics Corporation v. Panasonic Corporation*, [2023 ONSC 2559](#), at para. 73.

²⁶ *Cygnus Electronics*, at para. 74.

²⁷ *Sharp v. Autorité des marchés financiers*, [2023 SCC 29](#), at para. 118.

²⁸ *Sharp*, at para. 121.

²⁹ *Sharp*, at para. 120; *Sinclair v. Venezia Turismo*, [2025 SCC 27](#), at paras. 47, 144-145, 197.

the *Van Breda* test to assume jurisdiction over foreign defendants in respect of a claim under s. 36(1) relating to an alleged price-fixing conspiracy violating s. 45(1).³⁰ The conclusions to the contrary at paras. 92-103 of *Pass Herald Ltd. v. Google LLC*, [2024 FC 1623](#) are thus incorrect.³¹ Significantly, Canadian courts before³² and after *Sun-Rype*³³ have applied *Van Breda* – not *Libman* – when assuming territorial jurisdiction over foreign defendants for a civil claim under s. 36(1).

20. Concluding that the *Libman* test applies for a court to assume territorial jurisdiction over a civil claim under s. 36(1) would also introduce unnecessary complexity, confusion and inefficiency in the jurisdictional exercise, including in consumer class actions.

21. **First**, civil claims under s. 36(1) are, as discussed, frequently asserted in consumer and other class actions alongside other civil claims for conduct alleged to breach ss. 45(1) and/or 52(1) of the *Competition Act*. Section 62 expressly provides that Part VI does not “depriv[e] any person of any civil right of action.” For example, the class action at issue in the present appeal also involves claims in common law conspiracy, restitution and unjust enrichment.³⁴ Section 36(1) has also been asserted alongside statutory torts,³⁵ and claims based on breaches of consumer protection legislation, sales of goods legislation, breach of contract, and common law negligence (including negligent design, negligent misrepresentation, and negligent failure to warn) for conduct also alleged to breach s. 52(1).³⁶ The class actions at issue in *Pro-Sys*, *Sun-Rype*, and *Godfrey*, also involved a claim in common law conspiracy asserted alongside s. 36(1) for an alleged violation of s. 45(1). None of these cases applied *Libman* instead of *Van Breda* (or its predecessor, *Muscutt v. Courcelles* ([2002](#)) [60 O.R. \(3d\) 20 \(ONCA\)](#)). However, if *Libman* is now said to apply to civil claims under s. 36(1), courts will henceforth have to conduct two territorial jurisdiction analyses in the context of a single case. This will add unnecessary complexity and inefficiency and also undermine access to justice in consumer and other class actions.

³⁰ *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013 SCC 58](#), at paras. 44-47.

³¹ *R. v. Chung*, [2020 SCC 8](#), at paras. 18-19; *Ewert v. Canada*, [2018 SCC 30](#), at para. 47.

³² e.g., *Bouchard c. Ventes de Véhicules Mitsubishi du Canada Inc.*, [2010 CF 56](#), at paras. 22, 49-50, 68; *Desjean v. Intermix Media, Inc.*, [2006 FC 1395](#), at para. 3.

³³ e.g., *Ewert v. Höegh Autoliners AS*, [2020 BCCA 181](#), at paras. 78-79, 91-93 (s. 45); *The Jean Coutu Group (PJ) Inc. v. British Columbia*, [2025 BCCA 80](#), at paras. 2, 6 (violation of s. 52).

³⁴ *NHK Spring Co., Ltd. v. Cheung*, [2024 BCCA 236](#), at para. 1. See also *Pro-Sys*, at para. 64.

³⁵ *Jean Coutu*, at para. 6.

³⁶ e.g., *British Columbia v. McKinsey*, [2023 BCSC 1762](#), at paras. 73-83; *The Hershey Company Limited v. Leaf*, [2023 BCCA 264](#), at paras. 3, 47-50; *Klaus v. Black Diamond Equipment Ltd.*, [2022 BCSC 1182](#), at para. 2; *Miller v. Purdue Pharma*, [2013 SKQB 193](#), at paras. 40-41, 47-50, 74-77.

22. **Second**, and relatedly, a bifurcated approach to territorial jurisdiction would undermine *Van Breda*. Justice LeBel was clear at para. 99 that where a real and substantial connection exists in respect of a factual situation based on one or more connecting factors, “the court must assume jurisdiction over all aspects of the case” as a matter of fairness and efficiency. As such, where multiple claims in tort are asserted, it is unnecessary to conduct the jurisdictional analysis for each cause of action.³⁷ In PILI’s view, where a court has territorial jurisdiction over a claim asserted in parallel to s. 36(1), it automatically has jurisdiction over the s. 36(1) claim without needing to conduct a separate analysis under *Libman*. Thus, in a consumer class action, if jurisdiction is established over a cause of action concerning misrepresentations in breach of consumer protection legislation, the court also has jurisdiction over a s. 36(1) claim asserting a breach of s. 52(1).³⁸ The soundness of this approach is also exemplified by common law claims in unlawful means conspiracy based on the breach of s. 45 asserted in parallel to s. 36(1).³⁹ It would be illogical, inefficient, and unnecessarily complex to require two separate jurisdictional analyses if a real and substantial connection is established under *Van Breda* for the distinct civil conspiracy claim.

23. One of the most important reasons for rejecting *Libman*’s application for a court to assume territorial jurisdiction over a civil claim asserted under s. 36(1) relates to the devastating impact this would have on access to justice in class actions generally, and consumer class actions, specifically. Under *Libman*, jurisdiction is authorized if “a significant portion of the activities constituting the offence took place in Canada.”⁴⁰ (emphasis added) By contrast, since *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, this Court has “rejected the rigid and unduly mechanical ‘place of acting’ test for determining the place of commission of a tort for purposes of determining jurisdiction.”⁴¹ Indeed, *Van Breda* (para. 90) identifies two non-exhaustive presumptive connecting factors for assuming jurisdiction over extraprovincial or supranational defendants separate from the tort having been committed in the province, namely: the defendant carries on business in the province and a contract connected with the dispute was made in the province. The other factor only applies where the tort was committed outside of Canada.

³⁷ e.g., *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862, at paras. 40, 116; *British Columbia v. Pro Doc Limitee*, 2023 BCSC 662, at para. 77.

³⁸ e.g., *Black Diamond*, at paras. 19-20, 42; *Jean-Coutu*, at paras. 2, 6.

³⁹ *Pioneer Corp. v. Godfrey*, 2019 SCC 42, at paras. 83, 87-88.

⁴⁰ *Libman v. The Queen*, [1985] 2 S.C.R. 178, at 212.

⁴¹ *Kaynes v. BP LLC*, 2014 ONCA 580, at para. 27, leave to appeal refused (SCC No. 36127).

24. Under *Van Breda*, then, a court may assume territorial jurisdiction over a supranational or extraterritorial defendant over a statutory tort claim under s. 36(1) in relation to a breach of s. 45 if the defendant does business in the province even if “a significant portion of the activities” alleged to constitute the breach took place outside Canada. The same is true if a contract related to the dispute had been made in the province – and this, even if the defendant was not a party to the relevant contract.⁴² In the context of consumer class actions by indirect purchasers alleging price-fixing conspiracies by foreign defendants, this would be sufficient to ground jurisdiction even if the defendants had not contracted with said purchasers or done business in the province. None of this would be possible under *Libman*. The flexible *Moran/Van Breda* approach to territorial jurisdiction over tort claims with an extraprovincial or supranational element cannot be displaced in favour of a test that places a premium on a defendant’s place of acting.

25. The futility of applying *Libman* to determining territorial jurisdiction over foreign defendants for a civil claim under s. 36(1) of the *Competition Act* also weighs against it displacing *Van Breda*. Some cases state that *Libman* may be satisfied based on the harmful consequences of prohibited conduct having occurred in Canada even if “a significant portion of the activities” took place outside of Canada.⁴³ Even if one assumes to be permitted under *Libman*, territorial jurisdiction under *Van Breda* can also be assumed over a foreign defendant if the “tort was committed in the province.”⁴⁴ In turn, a tort is committed in the jurisdiction substantially affected by the defendant’s activities or its consequences or where the important elements of the tort occurred.⁴⁵ Significantly, the harmful consequences of particular conduct form part of the constituent elements of several torts, in addition to establishing where the tort was committed. This is the case for common law torts such as negligence⁴⁶ and, relevantly, conspiracy⁴⁷ – the latter of which may be asserted alongside a civil cause of action under s. 36(1) based on a price-fixing conspiracy in violation of s. 45 of the *Competition Act*.⁴⁸ The fact that jurisdiction may be assumed over a price-fixing conspiracy under *Van Breda* and under a broad reading of *Libman* – and the

⁴² *Sinclair v. Venezia Turismo*, [2025 SCC 27](#), at paras. 58 (majority) and 215 (dissent).

⁴³ *Pass Herald Ltd. v. Google LLC*, [2024 FC 1623](#), at para. 99 and the cases cited therein.

⁴⁴ *Van Breda*, at para. 80, 90, 100; *Venezia Turismo*, at paras. 47 (majority) and 202 (dissent).

⁴⁵ *Paniccia v. MDC Partners Inc.*, [2017 ONSC 7298](#), at para. 90; *Gebien v. Apotex Inc.*, [2023 ONSC 6792](#), at para. 192; *Moran v. Pyle National (Canada) Ltd.*, [\[1975\] 1 S.C.R. 393](#), at 409.

⁴⁶ *Moran*, at 409; *Shah v. LG Chem*, [2015 ONSC 2628](#), at paras. 119-120.

⁴⁷ *Ontario v. Rothmans Inc.*, [2013 ONCA 353](#), at para. 14.

⁴⁸ *Pioneer Corp. v. Godfrey*, [2019 SCC 42](#), at paras. 83, 87-89.

fact that *Van Breda* provides additional connecting factors for territorial jurisdiction not encompassed under *Libman* – weighs against the latter displacing *Van Breda* when s. 36(1) is asserted in the context of a civil claim. This is especially – but not exclusively the case – when s. 36(1) is asserted alongside statutory and/or common law private causes of action. Doing so would also undermine consumer class actions and the *Competition Act*’s regulatory design and objectives. Fundamentally, a test used to determine whether a court of criminal jurisdiction has jurisdiction to try a criminal offence should not be used to determine jurisdiction over a civil claim.

26. As well, it is irrelevant that foreign defendants may be able to assert defences in a criminal prosecution under the *Competition Act*.⁴⁹ First, most criminal defences do not apply in civil litigation. Second, substantive defences are impertinent to determining territorial jurisdiction or whether a class action should be certified and are only examined at the merits stage on the basis of evidence. Third, the successful assertion of a criminal law defence in criminal proceedings does not preclude a finding of civil liability on the lower standard of proof on a balance of probabilities.

27. Finally, the recent judgment in *Sharp v. Autorité des marchés financiers*, [2023 SCC 29](#) provides a useful parallel for the present case – and this, even if the bases for territorial jurisdiction in Quebec are codified in Book Ten of the *Civil Code of Quebec* and are not governed by *Van Breda* (para. 123). In essence, a majority of this Court held that Book Ten “*Can Apply to Administrative Tribunals Even if Private Rights Are Not At Issue*”⁵⁰ – in that case, in regulatory securities proceedings before Quebec’s Financial Markets Administrative Tribunal for securities violations that can also trigger criminal prosecutions (emphasis added).⁵¹ The fact that the conduct could lead to criminal consequences did not displace Book 10 in favour of *Libman* and s. 6(2) of the *Criminal Code*. Similarly, *Libman* does not displace *Van Breda* for territorial jurisdiction at common law over a civil claim under s. 36(1) of the *Competition Act*. By definition, “private rights” would directly be “at issue” in such claims.

28. Overall, territorial jurisdiction over a civil claim under s. 36(1) should be determined under *Van Breda* – not *Libman* – whether the claim is asserted on its own or in parallel with others.

THE WHOLE RESPECTFULLY SUBMITTED THIS 2nd DAY OF JUNE 2026



Lawrence David, LL.M

⁴⁹ *NHK Spring Co., Ltd. v. Cheung*, [2024 BCCA 236](#), at para. 91.

⁵⁰ Heading above para. 56. See also paras. 7, 9, 10, 67.

⁵¹ Market manipulation is prohibited under s. 382 of the *Criminal Code*.

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