

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029036-209
(500-06-000838-173)

DATE: February 23, 2022

**CORAM: THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.
GENEVIÈVE COTNAM, J.A.
STÉPHANE SANSAÇON, J.A.**

LAWRENCE CHANDLER
APPELLANT/INCIDENTAL RESPONDENT – Plaintiff
v.

VOLKSWAGEN AKTIENGESELLSCHAFT
RESPONDENT/INCIDENTAL APPELLANT – Defendant

JUDGMENT

[1] The Appellant appeals the judgment rendered on April 16, 2020, by the Superior Court, District of Montreal (Chantal Chatelain, J.S.C.), granting the Respondent's application for a declinatory exception for lack of territorial jurisdiction and dismissing its alternative argument of *forum non conveniens*.¹

[2] For the reasons of Marcotte, J.A., with which Cotnam and Sansfaçon JJ.A. concur,
THE COURT:

[3] **DISMISSES** the appeal, with legal costs;

¹ *Chandler v. Volkswagen Aktiengesellschaft*, 2020 QCCS 1202 [Judgment under appeal].

[4] **DISMISSES** the incidental appeal, without legal costs.

GENEVIÈVE MARCOTTE, J.A.

GENEVIÈVE COTNAM, J.A.

STÉPHANE SANSFAÇON, J.A.

Mtre Shawn Faguy
Mtre Éloïse Moses
FAGUY & CIE, AVOCATS
For the Appellant/Incidental Respondent

Mtre Stéphane Pitre
Mtre Karine Chênevert
BORDEN LADNER GERVAIS
For the Respondent/Incidental Appellant

Date of hearing: October 19, 2021

REASONS OF MARCOTTE, J.A.

CONTEXT

[5] The Appellant, Lawrence Chandler (“Chandler”), was authorized to institute, on behalf of all Quebec residents, a class action in damages against the Respondent, Volkswagen Aktiengesellschaft (“Volkswagen”), a German corporation with no domicile or establishment in Quebec, for the loss of value of the securities they had purchased or held in the company.

[6] The action, which is based on article 1457 of *the Civil Code of Québec* (“CCQ”), alleges that the loss of value resulted from Volkswagen’s misrepresentations and omissions of material facts related to “cheating emissions tests” that made its diesel car engines appear cleaner than they actually were, a situation also known as “dieselgate”.²

PROCEDURAL HISTORY

[7] On May 28, 2018, the Superior Court (Chantal Chatelain, J.S.C.) partially granted Chandler’s Re-Amended Motion for Authorization to Bring a Class Action³ (the “Authorization Judgment”). The judge concluded that Volkswagen had waived its right to raise a declinatory exception based on lack of jurisdiction at the authorization stage⁴ and that, on a *prima facie* basis, Chandler had arguably suffered a loss in Quebec, as per article 3148(3) CCQ, thereby conferring jurisdiction on Quebec authorities.⁵

[8] Volkswagen was denied leave to appeal this judgment.⁶ It subsequently filed an application to limit the class definition to two of the following three types of financial instruments:

² The so called “dieselgate” is summarized in *Leon v. Volkswagen AG*, 2018 ONSC 4265, para. 3 [*Leon v. Volkswagen*]:

[3] Volkswagen AG, based in Wolfsburg Germany, is the world’s largest automobile manufacturer by sales, selling more than 10 million vehicles annually via some 1000 subsidiaries. Three years ago [in 2015], VWAG was caught in a massive fraud involving a “defeat device” that was intentionally installed in its diesel automobiles to circumvent emission-control tests and falsely convey “clean diesel” performance. Not surprisingly, the VW “diesel-gate” scandal resulted in high-profile criminal prosecutions, jail sentences, severe fines and penalties, and multi-billion-dollar class actions.

³ *Chandler v. Volkswagen Aktiengesellschaft*, 2018 QCCS 2270, para. 116 [Authorization judgment]. The Court did not authorize Chandler’s claim for punitive damages. See paras. 78-92.

⁴ *Id.*, para. 37.

⁵ *Id.*, para. 53.

⁶ *Volkswagen v. Chandler*, 2018 QCCA 1347, para. 7 (Schrager, J.).

- Volkswagen shares (the “Shares”);
- American Depositary Receipts (“ADRs”); and
- Credit notes (the “Notes”).

[9] More specifically, Volkswagen sought to limit the class action to the Shares and ADRs while excluding the Notes.⁷

[10] The application was dismissed⁸ and leave to appeal this judgment was again denied.⁹

[11] On May 30, 2019, Chandler filed his Originating Application Instituting a Class Action (the “Originating Application”). Volkswagen accepted service of these proceedings while reserving its right to contest the jurisdiction of Quebec courts over the matter.

[12] On August 16, 2019, Volkswagen filed an Application for Declinatory Exception for lack of territorial jurisdiction. Alternatively, it asked the Superior Court to decline jurisdiction based on *forum non conveniens*. In support of this application, Volkswagen filed an Ontario Superior Court judgment rendered on August 15, 2018, in *Leon v. Volkswagen AG*, declining jurisdiction in a similar context.¹⁰ It also filed an expert report (the “Bernier Report”) explaining the nature of the three financial instruments covered by the action and the manner in which they were issued and traded:¹¹

- The Shares were publicly issued by Volkswagen outside the province of Québec. They were listed for public trading on various stock exchanges and other marketplaces, including over-the-counter (“OTC”) marketplaces, all located outside Canada. Moreover, Volkswagen was never a reporting issuer in any province or territory of Canada.
- The ADRs were publicly issued by Volkswagen outside the province of Québec and were not listed for trading on any stock exchange. They were traded in the U.S. OTC markets.
- The Notes were not publicly issued in Québec. Some notes were privately issued by Volkswagen Credit Canada Inc. (“VCCI”) to investors in Québec during the class period.

[13] On April 16, 2020, in the judgment under appeal, the Quebec Superior Court partially granted the Volkswagen application and dismissed the Originating Application

⁷ Application to specify the class definition and to order that the notice to class members conform to it under articles 579 and 588 C.C.P., dated December 12, 2018.

⁸ *Chandler v. Volkswagen Aktiengestllchaft*, 2019 QCCS 467, paras. 18-19.

⁹ *Volkswagen Aktiengesellschaft v. Chandler*, 2019 QCCA 641, para. 24 (Kasirer, J.).

¹⁰ *Leon v. Volkswagen*, *supra*, note 2.

¹¹ Exhibit A-2: Bernier Report dated September 16, 2019, A.B., vol. 3 [Bernier Report].

for want of jurisdiction. It also specified that, had it otherwise recognized the jurisdiction of Quebec courts, it would have refused to decline jurisdiction and dismissed the alternative argument of *forum non conveniens*.

JUDGMENT UNDER APPEAL

[14] After a short introduction, Chatelain, J. briefly summarized the context of the matter and the proceedings introduced in the United States, Germany and in Ontario, based on the same cause of action.

[15] Relying on *Club Resorts Ltd. v. Van Breda*¹² and *Québec (Procureur général) c. Imperial Tobacco Canada Ltd.*,¹³ she turned to article 3148 CCQ to assess the jurisdiction of Quebec courts over the matter, while acknowledging that the common law principles of international comity, order and fairness could be of assistance in interpreting the CCQ rules.¹⁴

[16] Applying the principles set out in *Marciano c. Universal Perfumes and Cosmetics*,¹⁵ she held that Volkswagen had adduced “serious enough [evidence] to really challenge the facts alleged by [the] plaintiff respecting the jurisdiction of the court”, thus transferring onto Chandler the burden of proving the facts alleged on a balance of probabilities. She also cautioned herself against the risk of engaging in a detailed analysis that would normally be associated with a hearing on the merits.¹⁶

[17] She refused Volkswagen’s argument that jurisdiction must be examined separately for each type of security contemplated in the application, relying on this Court’s global approach in *Poppy Industries Canada Inc. c. Diva Delights Ltd.*¹⁷

[18] She dismissed Chandler’s argument that the Authorization Judgment had previously ruled on the jurisdictional issue,¹⁸ by distinguishing the nature of the argument made at the authorization stage, which had been based on article 575 (2) CCQ, from the merits of the matter. She also emphasized the difference in the court record at both stages and insisted on the language used in the Authorization Judgment to support this distinction:

¹² *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, para. 21 [*Van Breda*].

¹³ *Québec (Procureur général) c. Imperial Tobacco Canada Ltd.*, 2013 QCCS 2994, paras. 24-25 (leave to appeal dismissed in 2013 QCCA 1702).

¹⁴ Judgment under appeal, *supra*, note 1, paras. 36-38.

¹⁵ *Marciano c. Universal Perfumes and Cosmetics*, 2016 QCCS 4889, paras. 19-30. The Superior Court judge also cited *Transax Technologies inc. c. Red Baron Corp. Ltd.*, 2017 QCCA 626, paras. 13-16.

¹⁶ Judgment under appeal, *supra*, note 1, paras. 40-42.

¹⁷ *Poppy Industries Canada Inc. v. Diva Delights Ltd.*, 2018 QCCA 163, paras. 32-33.

¹⁸ Judgment under appeal, *supra*, note 1, paras. 51-56.

[40] As explained below, the Court finds that, at the authorization stage, taking the facts alleged as true, the Québec courts do appear to have jurisdiction to hear the proposed class action.

(Emphasis added)

[19] She refused to consider that Volkswagen had attorned to the jurisdiction of Quebec courts or that it had waived its right to raise lack of jurisdiction under article 3148(5) CCQ, given that Volkswagen had consistently and repeatedly indicated its intention to contest the jurisdiction of Quebec courts as soon as the Originating Application had been filed, that it had authorized its counsel to accept service of the proceedings “under reserve of its rights to contest the jurisdiction of this Court” and that it had served its application to dismiss at the earliest opportunity.

[20] She noted that, under the provisions of the new *Code of Civil Procedure* and despite the fact that an application for authorization to institute a class action and the subsequent originating application are part of the same class action proceeding, the originating application is considered a new action that is subject to a new set of procedural steps, including preliminary exceptions.

[21] She also relied on *Infineon Technologies AG v. Option consommateurs*¹⁹ in support of the proposition that a judgment dismissing a jurisdictional challenge at the authorization stage could not serve to end the debate over the territorial jurisdiction of Quebec courts.

[22] She went on to discuss the two-pronged test of article 3148(2) CCQ requiring that the defendant have an establishment in Quebec and that the dispute relate to its activities in Quebec. After having acknowledged that Volkswagen did not have such an establishment in Quebec, she held that the fact that VW Credit Canada, Inc. (“VCCI”) is Volkswagen’s wholly owned subsidiary in Quebec would not satisfy the criterion of article 3148(2) CCQ. Nor would the allegation that Volkswagen is a guarantor of the Notes issued by VCCI, as it would not serve to assimilate the two entities as one and the same entity nor demonstrate that Volkswagen has an establishment in Quebec within the meaning of the provision. She also dismissed the argument that Volkswagen carries on business in Quebec through agents who are dealers or distribute securities on its behalf, failing a proper demonstration in this respect.

[23] Regarding article 3148(3) CCQ, Chatelain, J. concluded that no fault had been committed in Quebec, given that the misstatements and omissions were alleged to have been made in financial documents prepared in Germany. She also referred in this respect to her earlier conclusion, in the Authorization Judgment, that the availability in Quebec of some of these financial documents (described as the “Impugned Documents”) could not support a finding of a fault committed in this province, in the absence of allegations that

¹⁹ *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 42 [*Infineon*].

the information emanated from or was prepared in Quebec, or that any decision to publish the information had been made or carried out from Quebec.

[24] She also held that there was no allegation that the purported violation of applicable financial reporting standards had been committed in Quebec, and that allegations that proxies and annual reports were sent to or made accessible to investors in Quebec would not be sufficient to conclude that a fault had been committed in this province.

[25] Moreover, she noted that the prospectuses were remitted to the *Autorité des marchés financiers* by VCCI and not by Volkswagen. The fact that these documents represented that Volkswagen guaranteed the Notes issued by VCCI and incorporated Volkswagen's consolidated interim and yearly financial statements by reference did not serve to bring the matter within the jurisdiction of Quebec courts because "that fact cannot reasonably constitute a fault by [Volkswagen] committed in Québec".²⁰

[26] On the demonstration of an injury suffered in Quebec, however, she departed from her earlier conclusion in the Authorization Judgment that such a demonstration had been made on a *prima facie* basis.²¹ Based on the principles set out in *Infineon* and interpreted by this Court in *Partner Reinsurance Company Ltd. v. Optimum Réassurance inc.*,²² she held that the place in which the contract for the acquisition of securities had been entered into was only one of many relevant juridical facts to be considered, whereas the evidence adduced by Volkswagen, namely the Bernier Report, demonstrated that the Shares had been purchased and sold on stock exchanges in Europe, and that the ADRs had been purchased and sold on the OTC markets in the United States. Hence, the trades had been executed outside of Quebec for both the Shares and the ADRs.

[27] As for the Notes, she insisted that no public distribution had taken place in Quebec and that they had only been privately issued to a limited number of qualified or accredited investors in Quebec under a prospectus exemption and had not been listed on an exchange. She emphasized that the only evidence filed in the record was that VCCI had privately distributed Notes to thirteen accredited investors in Quebec. Furthermore, Chandler himself recognized in the course of this appeal that the distribution to those thirteen accredited investors had occurred outside of the class period.

[28] While acknowledging that the place in which the contract had been entered into was a relevant factor to establish jurisdiction under article 3148(3) CCQ, relying once again on *Infineon*, the judge held that it was not the only relevant factor to be considered. She emphasized that she was also required to determine whether the alleged pecuniary loss flowed directly from such contract and whether the alleged loss was suffered in

²⁰ Judgment under appeal, *supra*, note 1, para. 82.

²¹ Authorization judgment, *supra*, note 3, para. 53.

²² *Partner Reinsurance Company Ltd. v. Optimum Réassurance inc.*, 2020 QCCA 490, paras. 79-82 [*Partner Reinsurance*].

Quebec and resulted from a material event that occurred in Quebec. She concluded that it was not the case.

[29] She insisted that Chandler had chosen to argue a single cause of action and a single series of acts and omission for all three instruments contemplated in the proceedings and concluded that “the theoretical connecting factor relating only to where the Notes were acquired is insufficient, too remote and too tenuous to engage the jurisdiction of the Court under Article 3148(3) C.C.Q.”.²³

[30] Finally, she addressed Chandler’s argument based on section 236.1 of the Quebec *Securities Act* (“QSA”).²⁴ Firstly, she emphasized that the action was based on extra-contractual liability and not on securities legislation and did not relate to the distribution of securities. Secondly, she distinguished the distribution of securities by VVCI from that of Volkswagen and indicated that it could not serve as a basis to assert jurisdiction over Volkswagen, pursuant to Section 236.1 QSA. Thirdly, she considered that, by enacting section 236.1 QSA, the legislator could not have intended to circumvent the application of the rules of private international law provided for under article 3148 CCQ.²⁵

[31] Lastly, while having concluded that Quebec courts did not have jurisdiction over the matter, she went on to examine the argument of *forum non conveniens* prior to concluding that had she recognized the authority of Quebec courts over the matter, she would have refused to decline jurisdiction in favour of Germany for the Shares and of the United States for the ADRs, as proposed by Volkswagen. Indeed, after pointing out that two factors would favour other jurisdictions, namely the location where the securities were traded (in the United States and in Europe) and the applicable law (which could not be Quebec law), she recognized that a number of factors would weigh in favour of retaining jurisdiction in this province and would justify her refusal to decline jurisdiction, absent a demonstration that the other forums proposed (Germany or the United States) would clearly be more appropriate or fairer, more efficient or would be in the best interest of justice or of the class that is located in Quebec.

ISSUES

[32] In appeal, Chandler submits that the judge committed several reviewable errors. For one, she failed to correctly apply section 236.1 QSA to establish the jurisdiction of Quebec courts. Alternatively, she failed to recognize that Volkswagen had attorned to the jurisdiction of the Quebec courts pursuant to article 3148(5) CCQ and that the criteria of article 3148(3) CCQ had been met, given that an injury was suffered in Quebec and that a fault was also committed in this province.

²³ Judgment under appeal, *supra*, note 1, para. 103.

²⁴ *Id.*, paras. 105-110.

²⁵ *Id.*, paras. 107-110.

[33] In an incidental appeal, Volkswagen argues that, should this Court conclude in favour of the authority of Quebec courts over the matter, it should set aside the judge's ruling with respect to the doctrine of *forum non conveniens* and decline jurisdiction in favour of foreign courts.

[34] The issues in appeal can be reordered and broken down into the following five questions:

1. Did the judge err by concluding that Volkswagen did not attorn to the jurisdiction of Quebec authorities, as set out in article 3148(5) CCQ?
2. Did she err by concluding that no injury was suffered in Quebec, as set out in article 3148(3) CCQ?
3. Did she err by concluding that a fault was not committed in Quebec, as set out in article 3148(3) CCQ?
4. Does the Superior Court of Quebec have jurisdiction to hear this matter by virtue of section 236.1 QSA?
5. In the event the Court concludes in favour of the jurisdiction of Quebec courts over the matter, did the judge err in concluding that article 3135 CCQ and the *forum non conveniens* doctrine would not lead the Court to decline jurisdiction?

ANALYSIS

1. Did the judge err by concluding that Volkswagen did not attorn to the jurisdiction of Quebec authorities, as set out in article 3148(5) CCQ?²⁶

[35] Chandler claims that because Volkswagen waived its right to raise the issue of territorial jurisdiction at the authorization stage, it implicitly chose to submit to the Superior Court's jurisdiction for the trial on the merits and that the judge erred in not recognizing that it had attorned to the jurisdiction of Quebec courts. He asserts that this Court's judgment in *FCA Canada inc. c. Garage Poirier & Poirier inc.*²⁷ supports his position.

²⁶ Article 3148 (5) CCQ reads as follows :

3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:

[...]

(5) the defendant has submitted to their jurisdiction.

3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants:

[...]

5° Le défendeur a reconnu leur compétence.

²⁷ *FCA Canada inc. v. Garage Poirier & Poirier inc.*, 2019 QCCA 2213, para. 20:

[20] Certes, dans *Centrale des syndicats du Québec c. Allen*, la Cour indique que « [l]e jugement autorisant l'exercice d'une action collective n'est pas un jugement en cours d'instance, mais bien avant l'instance ». Nous pourrions ajouter « avant l'instance proprement dite », en ce sens que le jugement d'autorisation précède la demande introductive d'instance. Toutefois, aux fins des droits d'appel, les jugements avant autorisation font partie de « l'instance » globale de l'action collective, les procédures entre le dépôt de la demande

[36] However, in that case, while the Court did recognize that pre-authorization and authorization judgments form part of the same “proceeding”, it did so in the context of a ruling on the opportunity of granting leave to appeal of a judgment rendered at the pre-authorization stage. In doing so, the Court relied on earlier comments in *Centrale des syndicats du Québec c. Allen*,²⁸ also made in the course of assessing the appropriateness of granting leave to appeal. Hence, neither cases can be interpreted as eliminating the well-recognized distinction, from a procedural perspective, between the authorization stage and the merits of the case,²⁹ so as to successfully argue that Volkswagen waived its right to raise a declinatory exception at the authorization stage.

[37] An implied submission must be obvious.³⁰ Chandler’s claim of an implied submission on the part of Volkswagen for the entire class action proceeding is groundless. As pointed out by the judge, Volkswagen expressed the intention to contest the jurisdiction of Quebec courts, as soon as the Originating Application was filed. It authorized its counsel to accept service of the proceedings “under reserve of its rights to contest the jurisdiction of this Court”, while serving an application to dismiss at the earliest opportunity.

[38] In my opinion, the judge’s conclusion that Volkswagen did not attorn to the jurisdiction of Quebec courts as a result of having waived its right to raise a declinatory exception based on lack of jurisdiction at the authorization stage is well-founded. She underlined that the language used of the Authorization Judgment specifically referred to Volkswagen’s waiver of right as having occurred *at the authorization stage*.³¹ In the judgment under appeal, she ruled that, by doing so, Volkswagen had not waived its right to contest the jurisdiction of Quebec courts *at the merits stage*.³²

[39] This is consistent with *Infineon*,³³ where the Supreme Court acknowledged that the determination of jurisdiction at the authorization stage is not *res judicata* and that the issue

d’autorisation et le jugement statuant sur celle-ci s’inscrivent obligatoirement dans le déroulement de l’action collective.

(Emphasis added; citations omitted)

See also *Levy v. Nissan Canada inc.*, 2021 QCCA 682, para. 46.

²⁸ *Centrale des syndicats du Québec c. Allen*, 2016 QCCA 1878.

²⁹ *Robillard c. Arsenault*, 2017 QCCA 750, paras. 21-22.

³⁰ *Groupe SNC-Lavalin inc. c. Siegrist*, 2020 QCCA 1004, para. 113 [*Siegrist*].

³¹ Authorization judgment, *supra*, note 3, paras 33-37.

³² Judgment under appeal, *supra*, note 1, para. 60.

³³ *Infineon*, *supra*, note 19, para. 42 :

[42] According to a well-established jurisprudence of the Quebec courts, challenges to Quebec’s jurisdiction can properly be made and dealt with at the outset of a proceeding for authorization of a class action. The judgment rendered at this stage will determine, on the basis of the allegations, whether the matter appears to be properly before the court (see *Thompson v. Masson*, 1992 CanLII 3662 (QC CA), [1993] R.J.Q. 69 (C.A.)). However, this does not mean that a judgment dismissing a jurisdictional challenge at the authorization stage ends the debate over the territorial jurisdiction of the Quebec courts. This issue could be raised again later, because the judgment rendered at this stage is only an interlocutory decision (art. 1010 of the C.C.P.). The court may subsequently reconsider the issue in light of all the evidence, and decline jurisdiction, at the trial on the merits (Thompson, at p. 73).

(Emphasis added)

of territorial jurisdiction can be raised again *on the merits*. At the authorization stage, the judge had not been not tasked with the determination of whether Volkswagen had waived its right to contest jurisdiction on the merits. Her judgment certainly cannot be interpreted as having decided the issue.³⁴

[40] In the absence of a demonstrated error in the judge's reasoning or in her conclusion regarding the absence of attornment to Quebec courts, this ground of appeal must be set aside.

2. Did the judge err by concluding that no injury was suffered in Quebec, as set out in article 3148(3) CCQ?

[41] Each of the connecting factors listed in article 3148(3) CCQ³⁵ are independent and must be considered separately. They are not cumulative.³⁶

[42] The judge considered all three securities globally, and based on the Bernier Report, she held that, concerning the Shares and the ADRs, the injury resulted from contracts entered into in Europe and in the United States. While she recognized that the contracts for the purchase of the Notes may have been entered into in Quebec, she found this connection to be too weak to support the conclusion that every class member had suffered an injury in Quebec. The fact that the Note holders suffered an injury in Quebec could not establish jurisdiction over the holders of the Shares and ADRs. She wrote:³⁷

[93] The Court therefore has to determine the real *situs* of the injury alleged by Mr. Chandler. Based on *Infineon*, the place where the contract for the acquisition of the securities was concluded is a relevant juridical fact for that purpose, and this, notwithstanding if VW was a party or not to the contract.

[94] In that respect, the Court agrees with VW that the alleged economic injury resulting from a decrease in value of the Shares and of the ADRs would normally occur in the jurisdiction where the Class members purchased and sold these securities because, indeed, it is typically an important juridical fact from which the pecuniary loss would flow.

³⁴ *Rogers Communications, s.e.n.c. (Rogers Sans-fil, s.e.n.c.) v. Brière*, 2016 QCCA 1497, para. 62.

³⁵ Article 3148(3) CCQ reads as follows:

3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:

[...]
(3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

3148 Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants:

[...]
3° Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée

³⁶ *Infineon, supra*, note 19, para. 45; *Partner Reinsurance, supra*, note 22, para. 47.

³⁷ Judgment under appeal, *supra*, note 1, paras 93-99.

[95] So, where were the securities at issue purchased and sold?

[96] With respect to the Shares and the ADRs, contrary to the allegations of Mr. Chandler, the evidence adduced by VW demonstrates that the Shares are purchased and sold on market exchanges in Europe and that the ADRs are purchased and sold on the OTC markets in the United States.

[97] According to the uncontested expert report of Mr. Jean-François Bernier pertaining to regulatory and operational matters in the securities industry, an investor residing in Québec cannot execute a trade himself in VW's Shares. The Shares publicly trade solely in Europe and can only be bought and sold by a non-Canadian broker who is an approved trading member, subscriber or participant to one of those European marketplaces. The trade is therefore executed outside of Québec.

[98] Mr. Bernier explains that the same applies to the purchase and sale of ADRs. VW ADRs are publicly traded solely in the United States OTC markets, and can only be bought and sold by a United States broker-dealer who is an approved trading member, subscriber or participant to the United States OTC markets. Again, the trade is executed outside of Québec.

[99] With respect to the Shares and the ADRs, the Court finds that the place where these securities were acquired is an important juridical fact from which the pecuniary loss flowed. Consequently, the economic injury relating to the decrease in value of the Shares and the ADRs was not suffered in Québec.

(Emphasis added; citations omitted)

[43] Her conclusion is once again consistent with the principles of *Infineon*³⁸ whereby to confer jurisdiction on Quebec courts, a purely economic injury, or damage, must be substantially *suffered* and not merely *recorded* in Quebec.³⁹ 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.

[44] In *Sanexen Services environnementaux inc. c. Englobe Corp.*,⁴⁰ this Court emphasized the need to establish a connection of one or more material facts to Quebec

³⁸ *Infineon, supra*, note 19, paras. 45-47.

³⁹ *Infineon Technologies AG v. Option consommateurs*, 2011 QCCA 2116, paras. 64-69 (confirmed by the Supreme Court: 2013 SCC 59, paras. 45-47). See also *Nakisa inc. c. Mullen*, 2020 QCCA 1808, para. 8; *Siegrist, supra*, note 30, paras 91-93. For an overview of the caselaw on that particular question, see *Partner Reinsurance, supra*, note 22, paras. 72-78.

⁴⁰ *Sanexen Services environnementaux inc. c. Englobe Corp.*, 2021 QCCA 1284, para. 38 [*Sanexen*], citing *Siegrist, supra*, note 30, para. 93.

so as to tie the resulting economic damage to this province⁴¹ and gave examples of material facts that can help locate where purely economic damage was substantially suffered:

[38] Certes, tenter de situer le préjudice matériel qui consiste en une perte de revenus ou de profits, bien meuble intangible, dans un lieu ou sur un territoire physique, ne sera pas toujours évident. On pourra toutefois établir au moyen d'une preuve l'endroit où a été conclu le contrat constituant véritablement la source du préjudice, celui où aurait été exercée l'activité qui aurait généré les revenus et les profits prétendument perdus, où aurait été localisée la machinerie ou la main-d'œuvre impliquée dans l'activité génératrice, ou encore où le paiement aurait été exigible du débiteur. Ce ne sont que des exemples de facteurs de rattachement possibles; il peut y en avoir d'autres sans doute. Il appartiendra aux juges d'instance d'apprécier et de pondérer les facteurs prouvés pour déterminer l'endroit, ou plus précisément le district judiciaire, où le préjudice économique allégué par un demandeur aura été subi. Chaque cas en sera évidemment un d'espèce.

(Emphasis added; references omitted)

[45] The Supreme Court has repeatedly stressed that a class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings:⁴²

[52] This Court has stated on several occasions that a class action is merely a procedural vehicle and that its use does not have the effect of changing the substantive rules applicable to individual actions (*Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 105-8; *St. Lawrence Cement*, at para. 111). In other words, the class action mechanism cannot be used to make up for the absence of one of the constituent elements of the

[52] Notre Cour a affirmé à plusieurs reprises que le recours collectif ne constitue qu'un moyen procédural et que son utilisation n'a pas pour effet de modifier les règles de fond applicables au recours individuel (*Bisaillon c. Université Concordia*, 2006 CSC 19, [2006] 1 R.C.S. 666, par. 17; *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34, [2007] 2 R.C.S. 801, par. 105-108; *Ciment du Saint-Laurent*, par. 111). En d'autres termes, on ne peut s'autoriser du mécanisme du recours collectif pour suppléer à l'absence d'un des éléments

⁴¹ *Sanexen, supra*, note 40, paras. 32-35. See also Catherine Walsh, "The International Jurisdiction of Québec Authorities in Personal Actions: An Overview", (2012) 71 *R. du B.* 249, p. 271 [Walsh]. For example, in *Infineon*, the material fact connecting the financial loss to Quebec was the contract between the parties, which was deemed to have been concluded in Montreal under the *Consumer Protection Act*. See 2011 QCCA 2116, para. 72.

⁴² *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, para. 52.

cause of action. A class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.

constitutifs du droit d'action. Le recours collectif ne pourra réussir que si chacune des réclamations prises individuellement justifiait le recours aux tribunaux.

(Emphasis added)

[46] In 2012, this Court made a similar observation in *Telus Mobilité c. Comtois*:⁴³

[23] It is also well established that class action proceedings do not empower the Quebec Superior Court to exercise jurisdiction over a person as a member of the group where it could not do so if it dealt with an individual claim from the said person.

(References omitted)

[47] In the case at hand, the location of the economic injury is determined by the location of the conclusion of the contract for the purchase of the securities. Contrary to Chandler's proposition, the relevant contract for the purpose of determining the location of the injury is not the contract entered into between the Quebec resident and the investment dealer registered in Quebec or the Canadian broker. The sole fact that a Quebec investor may have given an order to purchase in Quebec cannot serve to transform his purchase in Europe or in the United States into a contract entered into in Quebec by virtue of article 1387 CCQ. The Bernier Report provides helpful insight regarding the circumstances of the purchase of the Shares and the ADRs:⁴⁴

Shares

Québec Resident (submits order to buy or sell) → investment dealer registered in Québec (routes order to buy or sell to Non-Canadian Broker) → **Non-Canadian Broker (executes trade) → International (Non-Canadian) Stock Exchanges and OTC marketplaces**

ADRs

Québec Resident (submits order to buy or sell) → Canadian Broker (routes order to buy or sell to U.S. Broker-Dealer) → **U.S. Broker-Dealer (executes trade) → U.S. OTC Markets Group**

(All emphasis added)

[48] Chandler has not demonstrated any palpable or overriding error on the part of the judge in concluding that the injury flows from the location where the Shares and ADRs

⁴³ *Telus Mobilité v. Comtois*, 2012 QCCA 170, para. 23. See also *Société canadienne des postes c. Lépine*, 2007 QCCA 1092, para. 66 (appeal dismissed in 2009 SCC 16).

⁴⁴ Bernier Report, *supra*, note 11, pp. 282 and 287.

were purchased and sold, being where the activity at the origin of the loss of profit occurred.⁴⁵

[49] The contracts for the purchase of Shares and ADRs were entered into abroad, where the non-Canadian broker executed the order as an agent.⁴⁶ The non-Canadian broker acted as an agent of the investment dealer registered in Quebec or the Canadian broker, not the Quebec investor.⁴⁷ The non-Canadian broker bought or sold the Shares or the ADRs abroad, on behalf of the Quebec or Canadian broker, for the Quebec investors.⁴⁸ While Quebec investors enter into the Order Contract, which is a service contract with their Quebec or Canadian broker, such contract is not directly at the origin of the injury suffered.⁴⁹

⁴⁵ See *Sanexen*, *supra*, note 40, para. 38.

⁴⁶ *Aliments Trigone inc. c. 9192-4548 Québec inc. (Cuisine Soleil)*, 2017 QCCQ 14906, paras. 18-21; Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed (Montreal, Thémis, 2018), No. 393:

...La remise de l'acceptation, par l'acceptant, au mandataire vaudrait, alors et en ce lieu, remise au mandant lui-même. En fait, ce ne serait qu'une application logique, via la notion de représentation, de la théorie de la réception, puisque le contrat serait formé au lieu et à l'endroit où serait reçue l'acceptation par le représentant de l'offrant.

⁴⁷ Bernier Report, *supra*, note 11, p. 282, para. 8:

Under such an operational consolidated structure, again, commonly referred to in industry parlance as an *omnibus* account arrangement, the non-Canadian broker does not know the identity of the end-clients of the investment dealer registered in Québec on whose behalf the VVVAG Shares are ultimately publicly traded. The non-Canadian broker only interacts with one client and it is the investment dealer registered in Québec on behalf of which the non-Canadian broker maintains an execution and clearing/settlement account.

(Emphasis added)

The same reasoning applies for the ADRs; see *id.*, p. 286, para. 31.

⁴⁸ *Id.*, p. 282, para. 7:

The non-Canadian broker maintains consolidated accounts (long and short) in the name of the investment dealer registered in Québec and such accounts will hold all of the positions resulting from trading instructions emanating from the investment dealer registered in Québec, with the resulting positions, both long and short, held in custody with the non-Canadian broker, on behalf of the investment dealer registered in Québec, in the non-Canadian broker's internal clients' securities ledgers which will reconcile to the investment dealer registered in Québec's "consolidated" securities accounts at the European depository of the VVVAG Shares, Clearstream Banking Frankfurt ("CBF").

(Emphasis added)

Again, the same reasoning applies for the ADRs; see *id.*, p. 286, para. 31.

⁴⁹ *Id.*, p. 282, para. 6:

In practice, a resident of the province of Québec would need to deal with an investment dealer that can provide indirect trading access to a European marketplace where the VVVAG Shares are publicly traded. I use the adjective "indirect" because an investment dealer registered in the province of Québec would enter into an execution and clearing arrangement with a non-Canadian broker who is an approved trading member, subscriber or participant to one of those European marketplaces where the VVVAG Shares are publicly traded. These arrangements usually take the form of omnibus account arrangements where the non-Canadian executing broker enters into a consolidated account agreement to provide trade' execution and settlement services for the investment dealer registered in the province of Québec's clients' trading needs.

(Emphasis added)

[50] As far as the Notes that were privately distributed in Quebec are concerned,⁵⁰ it is true that the contract at the origin of the injury was entered into in this province. However, this is not sufficient to establish jurisdiction in this matter.

[51] The judge insisted on the need to assess the class jurisdiction globally:⁵¹

[47] ...there is only one class that has been defined pursuant to the Authorization judgment and VW never suggested or requested that subclasses should be created. Its attempt to segregate the jurisdictional analysis according to the nature of the security held by the Class members constitutes an indirect review of the Authorization judgment and of Class definition judgment. Applications for leave to appeal both these judgments have been dismissed.

[48] Second, although it may be possible at a later stage of these proceedings that the Class as defined pursuant to the Authorization judgment be divided into subclasses and that the claim be dismissed against one of the subclasses and not another, for the purposes of the jurisdictional analysis, that eventuality does not change the fact that only one cause of action is alleged by Mr. Chandler with respect to all VW securities, not three distinct causes of action respecting three distinct types of securities.

[49] In any event, even if more than one cause of action was at issue, in *Poppy Industries Canada Inc.*, the Court of Appeal indicated that jurisdiction must be determined globally, and not segmented for each cause of action. As such, jurisdiction over one of the causes of action suffices to grant jurisdiction over the whole proceeding:

[...]

(Emphasis added; references omitted)

[52] She took the approach that the entire class must have the *same* connecting factor. In other words, the connecting factor must provide a real and substantial link between the province and the entire class:⁵²

[101] That said, it is not contested that the Notes were only privately issued to qualified or accredited investors in Québec under a prospectus exemption and that no public distribution took place in Québec. It is also established that the VCCI Notes have never been listed for exchange. Finally, as indicated above, the only evidence filed by the parties is that VCCI privately distributed Notes to only 13 unique accredited investors in Québec. It may be that other issuances took place, but the parties, and Mr. Chandler in particular, on whom the burden of proof lies, elected not to adduce additional evidence in this regard.

⁵⁰ *Id.*, p. 290, para. 52.

⁵¹ Judgment under appeal, *supra*, note 1, paras. 47-49.

⁵² *Id.*, paras. 101-103.

[102] Notwithstanding these facts as well as the fact that VW did not issue the Notes and that it is not a party to any contract relating to the acquisition of the Notes, based on *Infineon*, the private issuance of the Notes by VCCI in Québec to a limited number of qualified or accredited investors is a factor to be considered to determine whether the Québec courts have jurisdiction under Article 3148(3) CCQ. However, as indicated above, that is not the only relevant factor. To paraphrase *Infineon*, the Court must look at whether “the alleged pecuniary loss flowed directly from the contract” and whether the alleged loss was suffered in Québec “as the result of a material event that occurred in Québec” (our emphasis).

[103] Here, the consideration of all the relevant facts leads the Court to conclude that the events relied upon by Mr. Chandler are insufficient to ground the Québec courts’ jurisdiction. As strenuously argued by Mr. Chandler, this case is not founded on three causes of action corresponding to each type of security at issue, but on a single cause of action and a single series of acts and omission which allegedly had an impact on VW securities as a whole. Given the way that Mr. Chandler framed his claim, the fact that it indiscriminately targets holders of all types of security and the findings of the Court relating to the manner and circumstances around the acquisition of the securities, including the Shares, the ADRs and the Notes, the Court believes that the theoretical connecting factor relating only to where the Notes were acquired is insufficient, too remote and too tenuous to engage the jurisdiction of the Court under Article 3148(3) CCQ.

(Emphasis added; references omitted)

[53] Chandler argues that, by doing so, the judge improperly distinguished the public and private issuance of Notes. Somewhat surprisingly, he further adds that, in any event, these Notes issued privately to thirteen private investors in Quebec should have no bearing on the outcome of his application, given that they were issued after the end of the class period. In fact, in his view, the actual number of Note holders is irrelevant to the determination of whether they suffered an injury in Quebec.

[54] Here, the judge was of the view that the fact that the Note holders entered into a contract in Quebec was insufficient to conclude that an injury had been suffered in Quebec by every class member. Chandler has failed to demonstrate that this reasoning is flawed. In my opinion, by following the Supreme Court’s approach in *Infineon* regarding the need to tie a purely economic injury to one or more material facts that are tied to Quebec, so as to ensure the connection is not too weak or theoretical,⁵³ the Superior Court judge did not commit any error.

[55] Moreover, to conclude that the Note holders alone serve to bring the matter within the authority of the Superior Court, while the Share and the ADR holders suffered no injury in Quebec would, in my view, amount to jurisdictional overreach and run contrary to the principles of international comity, especially where the number of Note holders is unknown or is believed to be low and where Chandler himself acknowledges that the

⁵³ Walsh, *supra*, note 41.

thirteen accredited investors mentioned by the judge did not acquire the Notes during the class period, in which case, they would not even qualify as members of the class.

[56] Given the foregoing, I propose that Chandler's second ground of appeal also be set aside.

3. Did the judge err by concluding that a fault was not committed in Quebec, as set out in article 3148(3) CCQ?

[57] Chandler asserts that Volkswagen committed a fault in Quebec given that it "sent marketing materials and Impugned Documents which contained the misrepresentations alleged herein to Québec investors in order to induce them to purchase [Volkswagen] vehicles and securities".

[58] He argues that the judge "failed to address the fact that [Volkswagen] made misstatements to the AMF and to Québec investors in [its] base prospectuses". He claims that the judge erred in fact when she wrote that the "prospectuses [were] remitted to the *Autorité des marchés financiers* by VCCI" and that Volkswagen only "guaranteed the Notes issued by VCCI", while failing to notice that the prospectuses identify Volkswagen not only as the guarantor, but also as the issuer of Notes.

[59] Moreover, Chandler claims that, even if it the Court were to conclude that Volkswagen was not the issuer of the Notes, it would have to conclude that it nonetheless committed a fault in this province by sending documents to the AMF and to Quebec investors which contained misrepresentations and omissions of material facts.

[60] Finally, Chandler argues that the judge erred in law by reversing the burden of proof, placing the onus on him to prove that issuances of Notes, other than thirteen private issuances, took place in Quebec.

[61] Firstly, Chandler's argument rests on the Notes and prospectuses sent to the AMF. That argument cannot support a fault committed by Volkswagen with respect to the purchase of Shares and ADRs.

[62] Moreover, Chandler's argument is based on the assertion that Volkswagen remitted the base prospectuses to the AMF, but the letters exchanged with the AMF do not support this assertion. Based on the evidence in the record, the judge did not err in finding that VCCI issued the Notes and that it was VCCI, and not Volkswagen, that had remitted the prospectuses to the AMF.⁵⁴ She was also right in concluding that the

⁵⁴ The following exchanges, including references to the sending of prospectuses, which are filed as P-53 to P-56, appear to be exclusively between VCCI and the AMF:

- P-57, A.B., vol. 3, p. 255, 258, para. 8 and P-62, A.B., vol. 3, p. 534;
- P-58, A.B., vol. 3, p. 259, 262, para. 8 and P-63, A.B., vol. 3, p. 535;
- P-59, A.B., vol. 3, p. 263, 267, para. 8 and P-64, A.B., vol. 3, p. 536;
- P-60, A.B., vol. 3, p. 268, 272, para. 8 and P-65, A.B., vol. 3, p. 537;
- P-61, A.B., vol. 3, p. 274, 278, para. 8 and P-66, A.B., vol. 3, p. 538.

prospectuses remitted *by VCCI*, not Volkswagen, cannot constitute the basis for a fault committed in Quebec *by Volkswagen*.

[63] Although some Impugned Documents may have been available in Quebec, there is no evidence that they were prepared in Quebec or that a decision to publish them had been made in Quebec. They were prepared entirely in Germany.

[64] In *Van Breda*, the Supreme Court had emphasized that a “real and substantial connection” is needed between the province and the issue in dispute⁵⁵ and had also cautioned that, in some instances, recognizing connecting factors that are too broad could amount to granting “universal jurisdiction”.⁵⁶

[65] Professor Catherine Walsh draws a parallel between the reasoning of LeBel, J. in *Van Breda* concerning potential jurisdictional overreach and the reasoning of Kasirer, J.A. (as he then was) in *Infineon*:⁵⁷

Transposed to a Québec context, Justice LeBel’s reasoning [in *Van Breda*] implies that continuing bodily injury suffered in Québec from an injury initially suffered abroad may not, standing alone, mean that “damage was suffered in Québec” for the purposes of article 3148(3). To conform to the constitutional limits on jurisdictional authority, some additional relevant connection to Québec might also need to be present such as the formation of a related contract or a related business activity of the defendant. This is supported by the evident parallel between Justice LeBel’s reasoning in *Van Breda* and Justice Kasirer’s analysis in *Infineon Technologies* on the need for the existence of a material fact connecting financial loss alleged to have been suffered [in] Québec to the province in extra contractual claims by Québec residents. Justice Kasirer’s justification for requiring a material factual connection to Québec – to avoid equating the assumption of jurisdiction with the victim’s domicile in Québec – parallels the concern with jurisdictional overreach that would seem to underpin Justice LeBel’s reasoning in *Van Breda*.

(Emphasis added)

[66] Much in the same way here, in order to avoid jurisdictional overreach, the requirement of one or more material facts tying the connecting factor to the province should be held to apply where the fault alleged is one of misrepresentation by omission.

[67] The “mere allegations” that Volkswagen sent some documents, or that these documents were accessible by investors in Quebec, are insufficient here to conclude that a fault was committed in Quebec. Chandler does not allege that Volkswagen sent documents *specifically* to Quebec investors and, in addition and as previously noted, the

⁵⁵ *Van Breda*, *supra*, note 12, paras. 21, 31-32.

⁵⁶ *Van Breda*, *supra*, note 12, paras. 87-88, 114.

⁵⁷ Walsh, *supra*, note 41.

base prospectuses referring to documents that contained the alleged misstatements were issued by VVCI and not by Volkswagen.

[68] Chandler therefore has failed to demonstrate that the Superior Court judge erred in concluding that there are no material facts that specifically tie the fault of misrepresentation by omission to this province.⁵⁸ Chandler's third argument must therefore also be set aside.

4. Does the Superior Court of Quebec have jurisdiction to hear this matter by virtue of section 236.1 QSA?

[69] Chandler claims the judge erred in concluding that the class action is not based on facts "related to the distribution of a security" within the meaning of section 236.1 QSA, which reads as follows:⁵⁹

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.

In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.

Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is without effect.

236.1 L'action fondée sur le présent titre ou l'action intentée selon le droit commun pour des faits reliés au placement d'une valeur ou à une offre publique d'achat ou de rachat peut être portée devant le tribunal de la résidence du demandeur.

En ce qui concerne le placement d'une valeur, la loi du Québec est applicable dès lors que le souscripteur ou l'acquéreur réside au Québec, indépendamment du lieu du contrat.

Toute stipulation contraire concernant la compétence des tribunaux ou la loi applicable est sans effet.

(Emphasis added)

⁵⁸ By comparison, in *Kaynes v. BP*, 2014 ONCA 580, para. 30, where the plaintiff alleged that BP had made misrepresentations in documents sent to the shareholders, the Ontario Court of Appeal recognized that Ontario had jurisdiction because "BP released documents that it was legally required to provide its Ontario shareholders, it committed an act that had an immediate and direct connection with Ontario, an act that is sufficient to establish a real and substantial connection between the claim of this plaintiff and Ontario" (emphasis added); in *Yip v. HSBC Holdings*, 2018 ONCA 626, paras 42-50, the Ontario Court of Appeal held that downloading HSBC Holdings' material from a website was an extremely weak connection to Ontario and that the presumptive connecting factor had been rebutted.

⁵⁹ *Securities Act*, CQLR, c. V-1.1, s. 236.1 [QSA].

[70] Chandler argues that the class action is contemplated by section 236.1 QSA, being an action brought on behalf of investors who are residents of Quebec, under the ordinary rules of law, and related to the distribution of a security.

[71] The Superior Court judge dealt with article 236.1 QSA in the following way:⁶⁰

[106] 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 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.

[107] 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*".

[108] 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.

[109] Furthermore, for the reasons outlined above, the distribution of securities in Québec by VCCI cannot be considered as being the distribution of securities by VW and cannot serve as a basis for asserting jurisdiction over VW pursuant to Section 236.1 of the *Securities Act*.

[110] 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.

(References omitted)

[72] Chandler asserts that the judge failed to take into account the meaning of the reference to "the ordinary rules of the law" found in section 236.1 QSA and that she also failed to analyze the term "distribution" as defined in section 5 QSA, where the notion of

⁶⁰ Judgment under appeal, *supra*, note 1, paras. 106-110.

“endeavour to obtain subscribers or acquirers” is repeatedly used. Section 5 QSA reads as follows:⁶¹

“distribution” means

(1) the endeavour to obtain, or the obtaining, by an issuer, of subscribers or acquirers of his securities;

(2) the endeavour to obtain, or the obtaining, by a firm underwriter, of purchasers for securities he has underwritten;

[...]

(5) the endeavour to obtain, or the obtaining, by a subscriber or purchaser of securities which he acquired outside Québec, of purchasers for such securities in Québec, except on a stock exchange or on the over-the-counter market;

[...]

(7) the endeavour to obtain, or the obtaining, by an agent, of subscribers or purchasers of securities being distributed in accordance with subparagraphs 1 to 6;

(8) the giving in guarantee by an issuer of securities issued by him for that purpose;

[...]

«placement»:

1° le fait, par un émetteur, de rechercher ou de trouver des souscripteurs ou des acquéreurs de ses titres;

2° le fait, par le preneur ferme, de rechercher ou de trouver des acquéreurs de titres qui ont fait l'objet de la prise ferme;

[...]

5° le fait, par le souscripteur ou l'acquéreur qui a acquis ses titres à l'extérieur du Québec, de rechercher ou de trouver des acquéreurs au Québec, sauf sur une bourse ou sur le marché hors cote;

[...]

7° le fait, par un intermédiaire, de rechercher ou de trouver des souscripteurs ou des acquéreurs de titres faisant l'objet d'un placement en vertu des paragraphes 1° à 6°;

8° le fait, par un émetteur, de donner en garantie des titres émis par lui à cette fin;

[...]

(Emphasis added)

[73] Relying on the language of section 5 QSA, Chandler argues that the action is based on Volkswagen's dissemination of public statements and documents in an “endeavour to obtain acquirers of its securities”. He invokes the allegations of his own

⁶¹ QSA, *supra*, note 59, s. 5.

Originating Application, that Volkswagen “admitted to having distributed securities from Quebec pursuant to section 12 of the QSA and informed the AMF of such” and that, as a result, it is deemed to have made a distribution of securities to the public pursuant to sections 68(1)(1) and 68(1)(4) QSA.

[74] However these allegations refer to letters issued by the AMF that acknowledge receipt of VCCI’s filings with the AMF and not of Volkswagen.

[75] Chandler argued at the time of the hearing that, because Volkswagen irrevocably and unconditionally guaranteed the Notes, the situation would be one contemplated by paragraph 8 of section 5, which defines the term “distribution” as “the giving in guarantee by an issuer of securities issued by him for that purpose”.

[76] In doing so, he relied once again on the text of the letters addressed by VCCI’s attorneys to the AMF, in the context of a request to be allowed to distribute VCCI Notes to prospective investors “outside Québec”, which do not support his proposition, as per the extract reproduced below:⁶²

“Please accept this letter as formal notice pursuant to the second paragraph of Section 12 of the *Securities Act* (Québec) (the “**Act**”) from our client, VW Credit Canada, Inc. / Crédit VW Canada, Inc. (“VCCI”), of its intention to distribute euro medium term notes (“VCCI NOTES”) under the Programme to prospective investors outside Québec. Under this multi-issuer Programme, Volkswagen Aktiengesellschaft (“VWAG”), Volkswagen International Finance N.V., VW Credit, Inc, and VCCI (collectively, the “**Volkswagen Group**” and each, an “**Issuer**”) may issue notes (collectively, “**Notes**”). Notes to be issued under the Programme (other than Notes issued by VWAG) are irrevocably and unconditionally guaranteed by VWAG. The method of distribution of each Tranche of Notes will be stated in the applicable final terms supplement (the “**Final Terms**”) relating to each tranche of Notes issued under the Programme.

Distribution Without Prospectus

Set out below is the information required by Section 115 of the Regulation passed under the Act for the purpose of applying the second paragraph of Section 12 of the Act:

[...]

(Emphasis added)

[77] Indeed, the letters mention that “[Volkswagen] is irrevocably and unconditionally guaranteeing notes issued “under the Programme (other than Notes issued by [Volkswagen])”. They also confirm that the Notes were issued by VCCI and not Volkswagen, a situation not contemplated by paragraph 8 of section 5 and that these

⁶² P-57: See for example the letter dated September 17, 2010, A.B., Vol. 3, p. 255.

Notes were intended to be sold outside of the province of Quebec under a prospectus exemption, bringing them outside the scope of a distribution of securities in Quebec.

[78] In order to qualify Volkswagen's actions as a "distribution of securities" within the definition found under section 5 QSA, Chandler also argues that Volkswagen's misrepresentations presuppose some form of positive action to obtain acquirers. However, in my opinion, misrepresentations on the compliance of vehicles with the applicable emissions standards can hardly be held to qualify as positive actions to obtain acquirers.

[79] This Court's recent ruling in *Langford Sharp v. Autorité des marchés financiers*⁶³ serves as useful comparison and is an example of an endeavour to obtain acquirers of securities in Quebec. In that case, the alleged goal was to lure investors into buying the shares through a pump-and-dump scheme.⁶⁴

[80] Hence, Chandler's argument that the judge would have overlooked the applicability of section 236 QSA, must be dismissed. While the action is undeniably initiated before the Quebec Superior Court, on behalf of Quebec residents and under the ordinary rules of law, it fails to meet the third requirement because it does not relate to the distribution of securities, as the Superior Court judge concluded.

[81] The judge came to this conclusion after pointing that there is very little jurisprudence on the precise meaning of "distribution".⁶⁵ Her conclusion is also consistent with the Bernier Report, which stands for the proposition that Volkswagen did not distribute securities in the province⁶⁶ and that VCCI was the entity that privately distributed the Notes in Quebec.⁶⁷ Chandler has failed to demonstrate that the judge's interpretation of the expression "related to the distribution of a security" is flawed.

[82] 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 jurisdictional overreach. In fact, such a broad basis of jurisdiction with no other connection to the province would likely be unconstitutional.⁶⁸

[83] Moreover, as the Superior Court judge pointed out, the fact that VCCI privately distributed the Notes cannot serve as a basis to apply section 236.1 QSA against Volkswagen. As previously mentioned, Chandler's argument rests on the incorrect premise that the Notes were issued by Volkswagen. It contradicts the Bernier Report,

⁶³ *Langford Sharp v. Autorité des marchés financiers*, 2021 QCCA 1364, para. 5, footnote 4 and paras. 98-100 [*Langford Sharp*].

⁶⁴ *Id.*, paras. 98-100.

⁶⁵ Judgment under appeal, *supra*, note 1, para. 106.

⁶⁶ Bernier Report, *supra*, note 11, p. 292.

⁶⁷ *Id.*, p. 290, para. 52.

⁶⁸ *Van Breda*, *supra*, note 12, paras. 23 and 114.

which explained the role of Volkswagen as compared to that of VCCI at the time the Notes were issued, and stated that Volkswagen did not distribute securities in the province⁶⁹ and that VCCI was the entity that privately distributed the Notes in Quebec.⁷⁰

[84] The Bernier Report also pointed out that, while section 11 QSA⁷¹ sets out the requirement that a person who intends to distribute securities prepare a prospectus, the prospectus requirement was not triggered in this case, thereby suggesting that there was no distribution within the meaning of section 5 QSA.

[85] Consequently, section 236.1 QSA cannot be held to apply to a class action related to the distribution of securities with no connection to the province.⁷² This is especially so because the QSA, as a constitutional requirement, must apply within the province.⁷³

⁶⁹ Bernier Report, *supra*, note 11, p. 292.

⁷⁰ *Id.*, p. 290, para. 52.

⁷¹ Section 11 QSA provides that the distribution of securities triggers a prospectus requirement:

11. Every person intending to make a distribution of securities shall prepare a prospectus that shall be subject to a receipt issued by the Authority. The application for a receipt must be accompanied with the documents prescribed by regulation.

11. Toute personne qui entend procéder au placement d'une valeur est tenue d'établir un prospectus soumis au visa de l'Autorité. La demande de visa est accompagnée des documents prévus par règlement.

Notwithstanding the foregoing, in the case of a distribution made by a dealer acting as firm underwriter, the issuer is responsible for preparing the prospectus.

Toutefois, dans le cas du placement par un courtier de titres pris ferme, il incombe à l'émetteur d'établir le prospectus.

⁷² See Ariane Bisailon, Andrea Laing and Marc-André Landry, "Recours collectif en matière de responsabilité sur les marchés secondaires – les enjeux selon une perspective pancanadienne", (2014) 380 *Colloque national sur les recours collectifs : développements récents au Québec, au Canada et aux États-Unis*, p. 64, paras. 44 and 45 (CAIJ):

[44] – *Jurisdiction et droit applicable*. – L'article 236.1 L.v.m. prévoit une exception au principe général en matière de compétence territoriale des tribunaux et permet au demandeur d'intenter le recours devant le tribunal de son lieu de résidence. De plus, en vertu de cet article, le droit québécois est applicable « dès lors que le souscripteur ou l'acquéreur réside au Québec », et ce, peu importe le lieu de l'opération ou du contrat. Cette disposition est d'ordre public et ne peut être écartée par contrat.

[45] – L'affaire *Facebook*. – Une décision récente de la Cour supérieure du Québec dans l'affaire *Facebook* suggère toutefois que lorsque l'émetteur visé par le recours n'est pas un émetteur assujéti et ne distribue pas de valeurs mobilières au Québec, il appartient au demandeur de démontrer que le recours proposé présente un lien suffisant avec le Québec. Cette approche nous paraît conforme aux dispositions de l'article 225.2 L.v.m., qui prévoit que le recours peut être exercé contre un émetteur « qui a un lien étroit avec le Québec ». Or, dans cette affaire, la Cour a accueilli l'exception déclinatoire présentée par les intimées et a rejeté le recours au motif qu'il ne présentait pas de lien suffisant avec le Québec. En effet, le seul facteur de rattachement mis de l'avant par la requérante était la perte financière subie au Québec, ce qui, selon une jurisprudence bien établie, ne constitue pas un facteur de rattachement suffisant au sens de l'article 3148 CCQ.

(References omitted)

The authors are referring to the matter of *Mouaikel v. Facebook*, 2013 QCCS 4176.

⁷³ *Langford Sharp, supra*, note 63, paras. 56, 59 and 82; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, paras. 54-58.

[86] Again, the situation must be distinguished from that in *Langford Sharp*, where there was indeed a meaningful connection between the alleged fault of misrepresentation by omission and the province of Quebec: press releases at the root of the alleged pump-and-dump scheme had been issued in Montreal,⁷⁴ the issuer of the shares had a business address in Montreal and the company issuing the shares was a reporting issuer in this province.⁷⁵

[87] For these reasons, I also propose to dismiss this last ground of appeal.

[88] Given that Chandler has failed to convince me that the judge committed any reviewable error that would warrant the Court's intervention by dismissing the action for want of jurisdiction, I would propose to dismiss the appeal with legal costs.

[89] In light of my conclusion regarding the absence of jurisdiction of Quebec courts over the matter, there is no basis for addressing the argument of *forum non conveniens* raised in the incidental appeal. Hence, I would also propose to dismiss the incidental appeal, but without legal costs, under the circumstances.

GENEVIÈVE MARCOTTE, J.A.

⁷⁴ *Langford Sharp*, *supra*, note 63, 2021 QCCA 1364, paras. 11 and 15.

⁷⁵ *Id.*, para. 100.