Is this a Conflicts Case?

In *Sharp v Autorité des marchés financiers*, 2023 SCC 29 (available here) the Supreme Court of Canada has held that a Quebec administrative tribunal, the Financial Markets Administrative Tribunal, can hear a proceeding brought by the administrative agency that regulates Quebec's financial sector, the Autorité des marchés financiers, against four defendants who reside in British Columbia. The AMF alleged in the proceedings that the defendants had contravened the Quebec *Securities Act*.

The courts below, including a majority of the Quebec Court of Appeal, focused the analysis on s. 93 of the *Act respecting the Autorité des marchés financiers*, CQLR, c. A-33.2, which grants the FMAT jurisdiction to make determinations under the *Securities Act*. They interpreted and applied this provision in light of *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40, a leading decision on the scope of application of provincial law, which held that a provincial regulatory scheme constitutionally applies to an out-of-province defendant when there is a "real and substantial connection", also described as a "sufficient connection", between the province and the defendant. This test was met on the facts [see para 22] and so the FMAT had jurisdiction. This analysis is not generally understood as being within the field of conflict of laws. Indeed, the majority of the Court of Appeal "saw no conflict of jurisdiction or any conflict of laws that would require the application of private international law rules to this case" [see para 29].

In separate concurring reasons at the Court of Appeal, Mainville JA found that the FMAT's jurisdiction was to be found in Title Three of Book Ten of the *Civil Code of Quebec*, which establishes rules for the "International Jurisdiction of Québec Authorities". These are Quebec's private international law rules for taking jurisdiction and so squarely this is a conflict of laws approach.

The majority of the Supreme Court of Canada observed [para 7] that "the character of the proceedings and the conclusions sought before the FMAT could suggest, at first blush, a regulatory matter that does not concern the C.C.Q. The dispute involves a public regulator seeking prohibitions and administrative penalties under a legislative scheme designed to protect the public interest in the securities markets. One might indeed expect jurisdiction over this regulatory

scheme to stand outside the scope of Quebec's law of general application established by the C.C.Q." Roll credits! In fairness, that was the view of the courts below and it seems a very straightforward way of resolving the issue. Surprisingly, then, it does not end up being adopted by the court.

The court concludes that because securities regulation has a "hybrid character" [para 7] the starting point for analysis has to be the general approach to taking jurisdiction under the conflict of laws, looking to the provisions in the CCQ. Because they are laws of general application, the "provisions of Title Three of Book Ten of the C.C.Q. can, in principle, apply to an administrative tribunal like the FMAT, even if no private right is in issue and even if no conflict of jurisdiction arises" [para 41; see also para 63]. However, the court then concludes, contrary to the decision of Mainville JA, that the FMAT does not have jurisdiction under the CCQ [para 73]. But a majority of the court goes on to hold that s. 93 provides the FMAT with jurisdiction over the defendants in accordance with *Unifund* (Cote J dissents from this view). Section 93 is a special jurisdictional rule, beyond the CCQ, which gives the FMAT jurisdiction [paras 93-94]. In the end, the detour/digression into conflict of laws and the CCQ is not a significant factor in arriving at the ultimate result. The majority explains that "[t]o evaluate whether these statutes may be applied in such circumstances, the Quebec securities scheme must be interpreted to determine its territorial reach. That issue involves consideration of this Court's decision in *Unifund*, which holds that the permissible territorial application of provincial legislation is determined by assessing the sufficiency of the connection among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated" [para 102]. This aligns very closely with the position of the majority of the Court of Appeal below.

Particularly with respect to the law of Quebec, the decision is important for what it says about the relationship between the conflicts rules in the CCQ and the jurisdiction of any administrative tribunal. It also offers, in setting out its conclusions that none of the general CCQ rules apply, some observations on the scope of those provisions, which could be helpful for future disputes. Both the majority decision and the dissent contribute to these issues. In addition, the majority opinion offers several observations about the *Unifund* test regarding the extraterritorial application of provincial law [paras 111-23]. One of these is that the "real and substantial connection" test used in *Unifund* is different from other

"real and substantial connection" tests used elsewhere in the law, such as for purposes of assumed jurisdiction under *Club Resorts Ltd. v Van Breda*, 2012 SCC 17. The majority describes this as a "family" of tests [para 118], noting that "the same formula of words … involves different considerations in each of the varying contexts in which the formula is employed". This has been reasonably well understood prior to this decision but it is interesting to see it explained as such by the court.

Justice Cote dissents. She agrees with the primacy of the CCQ provisions in the analysis and that none of them apply to give the FMAT jurisdiction. She disagrees with the majority on the basis that, in her view, none of the statutory provisions beyond the CCQ give the FMAT jurisdiction over the British Columbia resident defendants [para 156ff]. In her view, *Unifund* does not apply to this issue because the concern is the territorial jurisdiction of the FMAT and not the application of the *Securities Act* [paras 174-75].

In the Canadian context, it will be interesting to think about what the decision might herald for subsequent analysis of the jurisdiction of an administrative tribunal in a common law province. Will the starting point in those situations be the private international law rules on jurisdiction in that province, whether found in a court jurisdiction statute or in the jurisprudence?