

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning the proposed
Canadian *Securities Act*, as set out in Order in Council P.C. 2010-667, dated May 26, 2010

FACTUM OF THE INTERVENER
ONTARIO TEACHERS' PENSION PLAN BOARD
(Reference pursuant to Rule 42 of the *Supreme Court of Canada Rules*)

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INDEX

	page
PART I – STATEMENT OF FACTS.....	1
PART II – POSITION RESPECTING THE QUESTION IN ISSUE.....	6
PART III – ARGUMENT.....	6
PART IV – COSTS.....	10
PART V – ORDER SOUGHT.....	10
PART VI – TABLE OF AUTHORITIES.....	11
PART VII – LEGISLATION.....	12

PART I – STATEMENT OF FACTS

Overview

1. The Ontario Teachers’ Pension Plan Board (“Teachers”) submits that Parliament has the jurisdiction to enact the proposed *Canadian Securities Act* at issue herein (“the *Act*”).

2. The *Act* provides for a comprehensive national scheme of securities regulation to ensure competitive capital markets, to protect investors, and to provide for integrated systemic risk oversight in the financial and securities markets in Canada. The *Act* recognizes the key role of capital markets in Canada’s economic infrastructure and success nationally and globally. The *Act* is a valid exercise of jurisdiction under the general branch of the trade and commerce power in s.91(2) of the *Constitution Act, 1867*.

Teachers’ Role in the Capital Markets

3. Teachers’ invests the pension fund assets and administers the pensions of active and retired teachers in Ontario. With approximately \$96.4 billion in net assets (as at December 31, 2009), Teachers’ is the largest single professional pension plan in Canada.¹

4. Approximately half of Teachers’ investments are outside Canada² and they span several sectors of the global economy. In 2009, its public and private equity investment totalled \$41.2 billion and investment income in 2009 was \$10.9 billion.³ In 2009 Teachers’ Canadian equities totalled over \$8 billion while its investments in equities in other countries totalled almost \$33 billion.⁴

5. In terms of investment strategy, all markets are explored for the best investment opportunities to earn the best returns at an appropriate level of risk. Teachers’ has to factor into

¹ Teachers’ is a corporation continued under the *Teachers’ Pension Act*, R.S.O. 1990, c. T.1, as amended, for the purposes of administering a pension fund for teachers in the province of Ontario, Record of the Intervener, Ontario Teachers’ Pension Plan Board (“Record (OTPP)”), Vol. XXXIII, Affidavit of John C Sheedy sworn October 28, 2010 (“Sheedy”), paras. 3 and 5-6, p.2.

² Record (OTPP), Vol. XXXIII, Sheedy, para. 7, p.2.

³ Record (OTPP), Vol. XXXIII, Sheedy, para. 8, p.3.

⁴ Record (OTPP), Vol. XXXIII, Sheedy, Exhibit C, p.44.

its decision-making the value of Canadian investments versus those from other jurisdictions. Effective securities regulation (or lack thereof) is a criterion in investment decision-making.⁵

6. Teachers' is a large, active institutional investor in Canadian and international markets and its investment activities and results are affected by securities regulation. In light of the test from *General Motors of Canada Ltd. v. City National Leasing*⁶ and *Kirkbi AG v. Ritvik Holdings Inc.*,⁷ Teachers' summarizes below the factual context regarding securities regulation in Canada, particularly those facts demonstrating the national and international nature of capital markets and securities regulation.

Economic and Investment Impact of the Current Regime

7. The interveners in support of a national regulator all concur that Canada's capital markets in both function and effect are national or even international in scope.⁸ Objecting provinces acknowledge the need for regulations to apply nationally. Alberta relies on Professor Rousseau's report, prepared on behalf of the Autorité des Marchés Financiers, in which he notes that "an effective Canada-wide regulatory framework has been an essential goal of the [Canadian Securities Administrators]."⁹ Alberta also relies on a 1995 Joint Report of the CSA which affirms that "Canada has a relatively large and efficient national market with significant regional and sectoral aspects."¹⁰

8. As noted by Claude Lamoureux, a member of the Crawford Panel on a Single Canadian Securities Regulator and CEO of Teachers' at the time, Teachers' takes the regulatory environment into account when making investment decisions:

⁵ Record (OTPP), Vol. XXXIII, Sheedy, para. 29, p.8.

⁶ [1989] 1 S.C.R. 641 at 677 ["*General Motors*"] [AGC Book of Authorities, Tab 13].

⁷ [2005] 3 S.C.R. 302 at para. 17 ["*Kirkbi*"] [AGC Book of Authorities, Tab 16].

⁸ Record (OTPP), Vol. XXXIII, Sheedy, para. 26, p.7; Reference Record of the Intervener, Canadian Bankers Association, Vol. XXVIII, Affidavit of Marion G. Wrobel sworn August 26, 2010, Exhibit 1 at p.7; Reference Record of the Intervener, Investment Industry Association of Canada, Vol. XXXI, Affidavit of Philip S.W. Smith sworn October 29, 2010, paras. 3 and 16, pp. 2 and 5-6; Reference Record of the Intervener, Canadian Foundation for Advancement of Investor Rights, Affidavit of Ermanno Pascutto sworn October 28, 2010, paras. 13, pp.5-6.

⁹ Reference Record, Record of the Attorney General of Alberta ("Record (Alberta)"), Vol. XXI, Executive Summary in Respect of Stéphane Rousseau Report (English Translation), June 22, 2010, p.252 [emphasis added].

¹⁰ Record (Alberta), Vol. XX, Affidavit of Dennis Gartner sworn July 7, 2010, Exhibit J, Working Group of Canadian Securities Administrators and Provincial Officials, "Issues and Alternatives in Securities Regulation," March 6, 1995, para. 3.1.1, p.163. [emphasis added].

We think globally. We look for opportunities where the expected returns justify the risks. One risk we look at is whether capital markets are regulated fairly and our rights as an investor are properly protected... . [O]ur highly fractured regulatory system is one reason why many investors do not bother with Canada. A single securities regulator will reassure them that Canada is an attract[ive] place in which to invest.¹¹

The economy cannot function if Canadian issuers are unable to find adequate, readily available and cost-effective capital. In its submissions to the Wise Persons Committee (“WPC”), Teachers’ also stated “Canada is suffering as a destination for business and capital because [the provinces] refuse to give up jurisdiction to a first class regulatory regime that is administered and enforced by a first class regulator.”¹²

9. Canadian pension funds generally are investing more outside of Canada. From 1993 to 2006, the percentage of such funds’ investment in publicly traded companies that was invested in Canadian companies fell from 87% to 70% while foreign holdings increased from 13% to 30%.¹³ Commentators suggest that this shift may be partly attributed to “inefficiencies in the regulation of Canadian capital markets, which ends up taxing capital market transactions in Canada.”¹⁴

10. Investors will also be economically affected in the current system by missed opportunities¹⁵ for investors in some provinces as issuers eschew filing in some jurisdictions to avoid incurring additional regulatory costs.¹⁶

International Reputation and Competitiveness of Canada’s Capital Markets

11. It is not disputed that securities markets have international aspects in respect of harmonized policies, regulations and enforcement.¹⁷ The uncertainty and inconsistency of the

¹¹ Record (OTPP), Vol. XXXIII, Sheedy, para. 24, p.7.

¹² Record (OTPP), Vol. XXXIII, Sheedy, Exhibit K, p.172.

¹³ Poonam Puri & P.M. Vasudev, “Canadian Pension Funds: Investments and Role in the Capital Markets and Corporate Governance,” (2010) 25 B.F.L.R. 247 at 249 and 257-58 [OTPP Book of Authorities, Tab 2] and Poonam Puri, “The Capital Markets Perspective on a National Securities Regulator,” (2009-2010) 51 Sup. Ct. L. Rev. (2d) 603 at 612 [OTPP Book of Authorities, Tab 3].

¹⁴ Puri, *ibid.* at 612 [OTPP Book of Authorities, Tab 3].

¹⁵ Puri, *ibid.* at 621 [OTPP Book of Authorities, Tab 3], citing Wise Persons’ Committee, *It’s Time* (Ottawa: Department of Finance Canada, 2003), online: Wise Persons’ Committee <http://www.wise-averties.ca/reports/WPC%20Final.pdf>, Reference Record, Record of the Attorney General of Canada (“Record (AGC)”), Vol. II at 98 [“WPC”]. See also the general discussion of opportunity costs at 102-03 of the same report.

¹⁶ Record (AGC), Vol. II, WPC at p.103.

Canadian securities regime has a negative impact on the international reputation of Canadian capital markets. This affects our competitiveness.¹⁸ The current regime also impairs our international relationships, influence and credibility. For instance, “[i]f Canada is out of step with other leading jurisdictions, we could be at a competitive disadvantage for reciprocal agreements such as MJDS and free trade agreements.”¹⁹

12. Canada’s international reputation affects investment in Canada. As the WPC noted in its findings:

[i]f foreign investors lack confidence in Canada’s system of securities regulation, they will be less likely to invest in Canadian firms, depriving Canadian issuers of an important source of capital. If foreign issuers decline to participate in Canadian markets because of regulatory complexity, Canadian investors will be deprived of investment opportunities. Moreover, if Canada’s capital markets do not provide ready access to capital on internationally competitive terms, Canadian issuers will be forced outside Canada for their capital needs.²⁰

Indeed, a “Canadian discount” effect has been noted that means Canadian companies pay more for capital than U.S. companies and suffer lower valuations due in part “to our inefficient securities regulatory framework.”²¹

Weaknesses of the Current System Show the National Basis for Regulation

13. Teachers’ has advocated the need for national securities regulation in the debate about Canada’s securities regime.²² In its submissions to the WPC, Teachers’ identified the key weakness of the existing system as follows:

We believe that the key weakness of the current structure is that with 13 different sets of legislation applied by 13 different regulatory authorities there is no consistency, let alone uniformity, in the drafting, interpretation and application of securities legislation even in circumstances where the policy objectives and general legislative approaches in question are identical. This leaves issuers and

¹⁷ Record (AGC), Vol. II, WPC at 69; IOSCO promotes, among others, “global harmonization” of disclosure standards and increased cooperation in enforcement.

¹⁸ Record (OTPP), Vol. XXXIII, Sheedy, para. 30, p.9.

¹⁹ Puri, *supra* note 13 at 617-18 [OTPP Book of Authorities, Tab 3].

²⁰ Record (AGC), Vol. II, WPC at p.69.

²¹ Puri, *supra* note 13 at 606 and 610-11 [OTPP Book of Authorities, Tab 3].

²² Teachers’ involvement in the policy arena is described in its own materials (Record (OTPP), Vol. XXXIII, Sheedy, paras. 19-27, p.5-8) and Puri & Vasudev, *supra* note 13 at 274-76, 289 and 290 [OTPP Book of Authorities, Tab 2].

investors alike in a confused state, and creates unnecessary inefficiencies in the securities regulatory process, increasing compliance costs for issuers and investors and decreasing the pool of resources otherwise available for surveillance and enforcement activities.²³

14. Teachers' and other market participants rejected the "passport model" of regulation because it would not resolve the fragmented, inconsistent and costly system in Canada.²⁴ The Province of Ontario refused to sign the 2004 Memorandum of Understanding that set up the passport system because the system would "not materially improve securities regulation."²⁵ The Ontario Securities Commission also stated that the passport system does not eliminate fees, costs and duplication of multiple regulators, does not fully promote consistency in regulatory decision making, and does not provide for effective enforcement.²⁶

15. The passport system does not achieve consistency in policy and legislation and cannot keep up with complex, evolving markets:

[T]he derivatives market is to a large degree unaddressed by securities legislation in Canada. ... Tribunals are increasingly faced with attempting to adjudicate market conduct in synthetic instruments by applying securities legislation that has not adequately contemplated the rapid development of investment products and techniques....[A] fully-integrated legislative approach, dealing with securities, derivatives and other investment products in a consistent manner ... would be preferable.²⁷

16. Another concern is the current system's inability to respond in a timely fashion.²⁸ Typical policy initiatives can take one or two years to reach the implementation stage, while complex initiatives "take much longer."²⁹ Such roadblocks have been blamed for the nearly two-year delay in implementation of a Canadian response to the U.S. *Sarbanes Oxley Act* and for Canada's belated implementation of a short-selling ban in the wake of the 2008 banking crisis.³⁰

²³ Record (OTPP), Vol. XXXIII, Sheedy, para. 22, p.6.

²⁴ Record (OTPP), Vol. XXXIII, Sheedy, para. 23, pp.6-7 and Exhibit L.

²⁵ Reference Record, Record of the Attorney General of Ontario ("Record (Ontario)"), Vol. XXIV, Affidavit of Robert Christie sworn October 28, 2010 ("Christie"), para. 29, p.12.

²⁶ Record (Ontario), Vol. XXIV, Christie, para. 30, p.13.

²⁷ Record (OTPP), Vol. XXXIII, Sheedy, para. 27, pp.7-8 and Exhibit N, pp.219-20.

²⁸ Record (Ontario), Vol. XXIV, Christie, para. 44, p.19.

²⁹ Record (Ontario), Vol. XXIV, Christie, para. 48, p.20.

³⁰ Puri, *supra* note 13 at 619-20 [OTPP Book of Authorities, Tab 3].

PART II – POSITION RESPECTING THE QUESTION IN ISSUE

17. Teachers’ position is that the proposed *Act* is within the legislative authority of the Parliament of Canada.

PART III – ARGUMENT

The Approach to Determine Constitutionality

18. Teachers’ generally adopts the Attorney General of Canada’s statement of the test for determining the constitutionality of the *Act* set out in paragraphs 46-136 of its factum, including its statement of the five indicia from *General Motors* and *Kirkbi*. The “proper approach” to assessing federal jurisdiction under the general trade and commerce power is “a careful case by case assessment.”³¹ The five factors, criteria, or indicia provide “an indication of validity under the trade and commerce power” but “the presence or absence of any of these five criteria [is not] necessarily determinative.”³²

19. The fundamental assessment is to distinguish whether the matters addressed by the legislation at issue relate to trade and commerce as a whole or are of a local nature.

20. In *Multiple Access Ltd. v. McCutcheon*,³³ this Court assessed the constitutionality of “very similar” insider trading sections in both federal and Ontario legislation. Dickson J. (as he then was) stated that “in determining the validity of each law, the existence and terms of the other law are irrelevant”³⁴ and “[t]he validity of the federal legislation must be determined without heed to the Ontario legislation.”³⁵ This is particularly relevant in this case where the objecting parties appear to urge the Court to reject federal jurisdiction over securities because of the existence of provincial securities schemes. This would not be appropriate.

21. It appears clear that the purpose of the *Act* is to set out a comprehensive regulatory regime designed to cover all aspects of investor protection, capital markets regulation, enforcement, adjudication and administration of securities matters in Canada, combined with an

³¹ *Kirkbi*, *supra* note 7 at para. 17 [AGC Book of Authorities, Tab 16], citing *General Motors*.

³² *Ibid.*

³³ [1982] 2 S.C.R. 161 [“*Multiple Access*”] [AGC Book of Authorities, Tab 21].

³⁴ *Ibid.* at 165 and 168-69 [AGC Book of Authorities, Tab 21].

³⁵ *Ibid.* at 175 [AGC Book of Authorities, Tab 21].

appropriate regulator, thereby meeting the first and second indicia. Teachers' submissions will therefore address the remaining factors raised in *General Motors* and *Kirkbi*, predominantly focused on the national nature of securities regulation arising under indicia three.

Securities Regulation is Concerned with Trade/the Economy as a Whole

22. The operation of the capital markets and securities regulation affect the national economy and Canadians as a whole in at least the following ways:

- (a) companies raise capital for operations and expansion through the public exchange markets or the private market (which is also regulated); the cost of capital is affected by many things, including the cost of the regulatory compliance regime;
- (b) Canadians obtain important and varied investment opportunities through capital markets. As noted in the WPC report, over 46% of Canadians invest in the capital markets and almost all Canadians are invested indirectly in public equity markets when pension funds are included³⁶. Investors may trade securities on the primary or secondary markets, both of which function inter-provincially.
- (c) securities policy is complex and is not local. It must balance investor protection with fostering markets which meet the needs of both large, sophisticated, often inter-listed companies and junior, cash-strapped companies, wherever in Canada they do business; for example, as noted in the evidence, half of the companies listed on the B.C. based Venture Exchange are not from the west. The policy needs of junior companies from the rest of Canada must be addressed also.
- (d) quickly evolving products, instantaneous electronic methods of transaction, and the borderless nature of trading securities mean that the Canadian securities regulator must respond quickly to emerging problems and risks across provincial borders and with international regulators.
- (e) credible regulation which inspires confidence in the Canadian markets requires clear, consistent policy and rules and effective, consistent enforcement.

23. Securities regulation necessarily has at least two broad goals: fostering effective/competitive markets and protecting investors (who hope to gain from, but who may suffer harm from unlawful activity in, the markets). Alberta narrowly suggests that “[s]ecurities

³⁶ As of 2003, 46% of Canadians owned publicly traded equities, either directly or through mutual funds: Record (AGC), Vol. II, WPC at 72.

laws and regulators principally exist to protect investors within their jurisdiction.³⁷ This argument disregards the critical interrelationship and dependency among markets, companies and investors both nationally and globally.

Limits of Provincial Jurisdiction – Provinces Cannot Enact a Comparable Scheme

24. The pith and substance of the proposed legislation is “comprehensive national securities regulation,”³⁸ clearly directed to addressing matters that cross borders, industries and sectors and affect all Canadians. The right of each province to legislate in respect of property and civil rights is limited to property and civil rights “in the province.”³⁹ The fact that the provinces have voluntarily cooperated to create some national policies and processes does not mean they are constitutionally empowered to create an effective scheme covering these national issues.

25. There are many areas integral to a comprehensive national scheme that are beyond a single province’s powers to regulate. Alberta argues its right to regulate its “local” market. However, true local markets contained within one province are rare, if they exist at all. The TSX Venture Exchange, for example, (referenced by Alberta) is physically located in British Columbia but its “regulatory oversight” is done “in partnership with the Alberta Securities Commission.” Further, only “[a]bout half of its 2,000 or so listed companies are from the west.”⁴⁰ As noted recently by the B.C. Executive Director describing the broad scope and role of the B.C. based Venture Exchange:

The Exchange’s importance to the Canadian economy is...not well understood. Consider this: over the past 10 years, over 475 companies have graduated from the Venture Exchange to the Toronto Stock Exchange...⁴¹

26. Further, there is risk in leaving these national interests solely in the hands of provincial jurisdiction where, as noted in *Kirkbi*, “divided provincial and federal jurisdiction

³⁷ Record (Alberta), Vol. XXIII, Supplemental Affidavit of William S. Rice sworn November 28, 2010 (“Rice Supplemental”), para. 8, p.3 [emphasis added].

³⁸ Factum of the Attorney General of Canada at para. 71.

³⁹ This Court recognized that the exercise of a province’s power to legislate in respect of “property and civil rights” is confined by the territorial boundaries of that province in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at paras. 26 and 33 [OTPP Book of Authorities, Tab 1].

⁴⁰ Record (Alberta), Vol. XXIII, Rice Supplemental, Exhibit A, British Columbia Securities Commission, “Financing Small Business: Important to British Columbia, Important to Canada” (November 23, 2010), pp.30-31.

⁴¹ *Ibid.* at p.30 [emphasis added].

could mean that the provincial law could be changed by each provincial legislature”⁴² and where national regulation is integral to the “legitimacy, legal standards and efficacy”⁴³ of capital markets and investor protection.

27. As in *General Motors*, the Court’s consideration of the question will turn on whether it is the case that securities regulation cannot be effective unless it is regulated *nationally*.⁴⁴ The record of provincial regulation is proof that even *with* the participation of the provinces and territories, the provinces individually or in groups, cannot effectively regulate the capital markets and protect all investors. Abundant examples show the serious gaps in a provincially based system, including the need to take active steps to obtain reciprocal enforcement orders in each province after a party has been sanctioned in one province.

Participation of All Provinces and Territories

28. The fifth indicia of federal jurisdiction is that failure to include one or more provinces in the scheme would jeopardize the successful operation of the scheme in other parts of the country.

29. The existing system is a de facto acknowledgment of the national nature of securities in that the provinces have attempted to harmonize regulatory matters. The passport system, in purpose and design, itself shows the need for consistent, reliable, effective national regulation and acknowledges that provincial regulation alone cannot address the national issues.

30. The purpose of the *Act* is clearly to harmonize and administer securities regulation nationally. It does so, pragmatically and respectfully, by an opt-in process which respects cooperative federalism. The *Act*, if otherwise constitutional, should not fail by reason only that Parliament chose an opt-in process.

Summary and Conclusion

31. Those opposed to the *Act* essentially say “the existing voluntary system to harmonize certain securities regulation nationally is ‘good’ or, at least, ‘good enough’”. These

⁴² *Kirkbi*, *supra* note 7 at para. 29 [AGC Book of Authorities, Tab 16].

⁴³ *Ibid.*

⁴⁴ *General Motors*, *supra* note 6 at 680 [AGC Book of Authorities, Tab 13].

objections are irrelevant to the constitutional analysis as it is not the Court's task to choose the "better" system.

32. The court must determine if these matters are national in scope or merely local. The function and effect of capital markets is national and international. Further, policy issues at the heart of the capital markets are not local. As the WPC noted in its final report "there are very few distinctively local or regional issues relevant to policy making."⁴⁵ While distinct regional factors need to be accounted for, the recent worldwide financial crisis has surely established that financial and capital markets policy issues and regulation raise issues of national and international importance.

PART IV – COSTS

33. Teachers' does not seek costs and requests no costs be awarded against it.

PART V – ORDER SOUGHT

34. Teachers' respectfully asks the Court to answer "yes" to the question whether the *Act* is within Parliament's jurisdiction. Teachers' also requests permission to present oral argument at the hearing of this Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of January, 2011.

"Kelley M. McKinnon"

"Brent J. Arnold"

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Brent J. Arnold

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⁴⁵ Record (AGC), Vol. II, WPC at 86.

PART VI – TABLE OF AUTHORITIES

<u>TAB</u>	<u>AUTHORITY</u>
A. CASES	
1	<i>British Columbia v. Imperial Tobacco Canada Ltd.</i> , [2005] 2 S.C.R. 473 at paras. 26 and 33
2	<i>General Motors of Canada Ltd. v. City National Leasing</i> , [1989] 1 S.C.R. 641 at 677 and 680
3	<i>Kirkbi AG v. Ritvik Holdings Inc.</i> , [2005] 3 S.C.R. 30 at paras. 17 and 29
4	<i>Multiple Access Ltd. v. McCutcheon</i> , [1982] 2 S.C.R. 161 at 165, 168-69 and 175
A. OTHER MATERIALS	
5	Poonam Puri & P.M. Vasudev, “Canadian Pension Funds: Investments and Role in the Capital Markets and Corporate Governance,” (2010) 25 B.F.L.R. 247
6	Poonam Puri, “The Capital Markets Perspective on a National Securities Regulator,” (2009-2010) 51 Sup. Ct. L. Rev. (2d) 603

PART VII – LEGISLATION

The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, ss. 91(2) and 92(13)