

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, May 26, 2010

FACTUM OF THE INTERVENER
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(Rules 42 and 46(12) of the *Rules of the Supreme Court of Canada*)

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PART I – POSITION AND RELEVANT FACTS

Overview

1. The Investment Industry Association of Canada (the “IIAC”), the national organization representing investment dealers, submits that Parliament has the constitutional jurisdiction to enact the proposed Canadian *Securities Act*. The proposed Act would be a valid exercise of Parliament’s power under s. 91(2) of the *Constitution Act, 1867* to regulate general trade and commerce affecting Canada as a whole. It satisfies both the overall purpose of the five indicia for an exercise of this power set out by this Court and each of the five indicia.
2. Space limitations preclude the IIAC from presenting in this factum an all-encompassing argument supporting the constitutionality of the proposed Act. Instead, most of the factum draws on the record filed by the IIAC to highlight investment dealers’ perspective, as key participants in the capital market activities subject to securities regulation, on the national and international nature of the capital market and the inadequacy of the current regulatory system. This perspective informs the IIAC’s long-standing support of a national securities regulator, and more importantly, contributes to establishing the constitutional basis for the enactment of the proposed Act as a general regulation of trade.

The IIAC’s membership and mandate

3. The IIAC and its membership reflect the national structure of the investment industry. The IIAC has offices in Toronto, Montréal and Vancouver. Its 183 member firms, located across Canada, include almost every institutional and retail investment dealer firm conducting business in the capital market. Member firms account for 99 % of the business conducted by dealers in the primary and secondary debt and equity markets in Canada.¹
4. The IIAC’s mandate is to advance the positions of dealer firms on regulatory and public policy issues and promote an efficient, fair and competitive capital market.² It also represents its member firms in interactions with counterpart organizations in other countries.³

¹ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 9-11 at Tab 2, p. 4.

² Record (IIAC), Vol. XXXI, *Smith Affidavit*, para. 13 at Tab 2, p. 5.

³ Record (IIAC), Vol. XXXI, *Smith Affidavit*, para. 15 at Tab 2, p. 5.

The IIAC's policy position on a national regulator

5. The IIAC has stated in policy forums that the capital market is national and international in scope, and that effective regulation in Canada requires a single, national regulator.⁴

How investment dealers see the capital market

6. As professionals engaged every day in the capital market, IIAC member firms see and experience the primary and secondary equity and debt markets in Canada as national and international in scope – not local as some other participants in this reference assert. The IIAC's record contains on-the-ground evidence describing the activities of three member firms – Cormark Securities Inc., BMO Capital Markets and Scotia Capital. Each firm's evidence addresses one of three key components of the capital market – the primary equity market, the secondary equity market and the secondary fixed income market.

7. This evidence shows that dealer firms' market activities, as well as those of issuers and investors (both institutional and retail, and both international and domestic) regularly extend beyond provincial and national borders. Market participants look for the best financing and investment opportunities wherever they present themselves. The systems for consummating and implementing transactions also extend beyond jurisdictional boundaries; they both permit and facilitate national and international market activity.

8. ***The primary equity market is national and international*** – The primary equity market is the market in which issuers interact directly or indirectly with investors for equity financing.⁵ Cormark, a dealer firm with offices across Canada,⁶ undertakes financing activities for its clients in this market through initial public offerings ("IPOs"), follow-on offerings and private placements. These methods take on different structures and target a range of investors depending on the issuer's objectives.⁷ The pool of investors from which Cormark seeks financing for issuers is typically national or international. Cormark regularly targets potential investors from all over North America and in Europe, South America, Africa and Australia.

⁴ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 16-18, 20 and Exhibit "C" at Tab 2, pp. 5-7 and Tab 5, pp. 23-30.

⁵ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, para. 20 at Tab 8, p. 39.

⁶ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 1, 12-13 at Tab 8, pp. 35, 38.

⁷ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, para. 3 at Tab 8, pp. 35-36.

9. Two recent IPOs, PBS Coals Corporation’s \$350 million IPO and Uranium Participation Corporation’s \$100 million IPO, illustrate the breadth of the financing activities undertaken by Canadian dealers.⁸ Before its IPO, PBS was a private company with U.S., European and Canadian shareholders and owned assets and properties outside of Canada.⁹ Uranium Participation Corporation is an investment fund listing on the Toronto Stock Exchange that gives investors a vehicle to invest indirectly in uranium.¹⁰

10. In both IPOs, Cormark targeted potential investors both in and beyond Canada. Meetings, group presentations and road shows took place in Canada, the U.S. and Europe.¹¹ Cormark obtained significant institutional investor orders for the PBS financing not only from Canada but also from the U.S., Europe and Australasia.¹² After the IPO, PBS was the target of a successful cash takeover bid by a major Russian-based steel producer.¹³ The UPC financing also attracted investor interest and financing from the U.S., Europe and Canada. In 2010, UPC purchased all of the outstanding shares of Uranium Limited, a similar investment fund listed on the AIM stock exchange in London.¹⁴

11. Two non-IPO transactions further demonstrate the national and international nature of the primary equity market. Cormark’s \$100 million follow-on offering for North American Palladium was marketed to public markets in both Canada (excluding Québec) and the U.S. For the U.S., Cormark used the Multi-Jurisdictional Disclosure System (the “MJDS”), an agreement between the U.S. and the provincial securities commissions that streamlines regulatory requirements for cross-border transactions.¹⁵ Cormark’s private placement financing for an Australian public company, Orocobre Limited, was marketed to institutions in the U.S., Europe and Canada; the issue was ultimately sold to U.S. and Canadian investors.¹⁶ Orocobre ultimately sought an additional listing on

⁸ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 21-44 at Tab 8, pp. 39-44.

⁹ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, para. 32 at Tab 8, p. 42.

¹⁰ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, para. 40 at Tab 8, p. 44.

¹¹ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 36, 42 at Tab 8, pp. 43-44.

¹² Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, para. 36 at Tab 8, p. 43.

¹³ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, para. 38 at Tab 8, p. 43.

¹⁴ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 43-44 at Tab 8, p. 44.

¹⁵ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 50-54 at Tab 8, pp. 46-47.

¹⁶ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 58-60 at Tab 8, pp. 48-49.

the TSX because of the Canadian capital market's international reputation as a deep and liquid market for mining projects.¹⁷

12. ***The secondary equity market is national and international*** – The secondary equity market consists of organized public marketplaces – specialized stock exchanges and alternative trading systems (“ATs”) that provide information on prices of securities listed on stock exchanges in Canada and platforms on which participants can execute trades in those securities.

13. BMO Capital Markets, a full-service dealer firm active in all aspects of the capital market,¹⁸ has experienced and had to adapt to significant structural changes over the last decade both in the secondary equity securities market and in trading practices within that market. BMO attributes these changes to the advent of electronic trade execution and the increasingly national and international nature of the market.¹⁹ Among other things, regional stock exchanges across Canada, which served local investors primarily, have reorganized and consolidated into three national marketplaces, the TSX, the TSX Venture Exchange (in Calgary) and the Montréal Exchange (the “MX”), each specializing in the listing and trading of different types of securities.²⁰

14. BMO's electronic trade execution process highlights the trans-border nature of the secondary equities market. Investors from the U.S., the U.K. and Asia regularly execute trades on the TSX through BMO.²¹ International orders are typically routed to BMO using the Financial Information Exchange protocol, a language for the electronic communication of trade messages developed by market participants from around the world.²² Through its U.S. affiliate, BMO also often executes transactions in securities of Canadian companies inter-listed on U.S. stock exchanges. This is a common practice of dealer firms.²³ When BMO executes trades, it does so through one of two electronic systems. In either case, the system connects electronically to all stock exchanges and ATs, aggregates available order information and executes the trade according to the client's instructions. These electronic trades can be executed on Canadian stock exchanges or on ATs

¹⁷ Record (IIAC), Vol. XXXI, *Kennedy Affidavit*, paras. 57-59 at Tab 8, pp. 47-48.

¹⁸ Record (IIAC), Vol. XXXI, *Miller Affidavit*, paras. 1, 13 at Tab 10, pp. 52, 55.

¹⁹ Record (IIAC), Vol. XXXI, *Miller Affidavit*, para. 19 at Tab 10, p. 56.

²⁰ Record (IIAC), Vol. XXXI, *Miller Affidavit*, paras. 22-23, 25-26 at Tab 10, pp. 57-58.

²¹ Record (IIAC), Vol. XXXI, *Miller Affidavit*, paras. 32-33 at Tab 10, p. 59.

²² Record (IIAC), Vol. XXXI, *Miller Affidavit*, para. 38 at Tab 10, pp. 60-61.

²³ Record (IIAC), Vol. XXXI, *Miller Affidavit*, paras. 27-29 and Exhibits “A”-“D” at Tab 10, p. 58 and Tabs 11-14, pp. 63-69.

located anywhere in the world. The clearing and settling of these domestic and cross-border trades take place electronically through the Canadian Depository for Securities (the “CDS”), Canada’s central and national clearing agent and securities depository. It has offices across the country.²⁴

15. ***The secondary fixed income market is national and international*** – The secondary fixed income market is the market for government and corporate debt securities. The IIAC’s record describes the activities of Scotia Capital, a full-service investment dealer,²⁵ in this market.

16. The secondary fixed income market is an “over-the-counter” market. It operates through sophisticated electronic systems that connect market participants, who are often non-residents of Canada. Transactions in this market take place directly between dealers and between dealers and their clients. Dealers create the wholesale market for debt securities by anonymously providing bids to purchase and offers to sell to other dealers, using inter-dealer brokers. The inter-dealer trading of debt securities provides the pricing reference for transactions between dealers and institutional and retail clients.²⁶

17. Scotia Capital’s trading desks in Toronto, Vancouver and Montréal are linked to the four inter-dealer brokers, which connect to dealers not only in Canada but also in the U.S. and Europe. Through these brokers, Scotia Capital has remote on-screen access from its offices across Canada to information on bids, offers and trades. This access permits Scotia Capital to interact and trade with other dealers across Canada.²⁷

18. Institutional and retail clients trade with Scotia Capital electronically and by telephone. CanDeal, the primary electronic trading and distribution provider, provides a list of the best bids and offers for particular securities, as well as online access to 15 debt and derivative marketplaces operated by Tradeweb in the U.S. and Europe.²⁸ Through CanDeal, an institutional investor located anywhere in the world can obtain trading information and execute trades. These investors can also obtain trading information from other online and international sources to make trade decisions and

²⁴ Record (IIAC), Vol. XXXI, *Miller Affidavit*, paras. 34-40 at Tab 10, pp. 59-61; *Smith Affidavit*, paras. 38-40 at Tab 2, pp. 11-12.

²⁵ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 1, 21-22 at Tab 2, pp. 2, 7.

²⁶ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 3, 29-30 at Tab 2, pp. 2-3, 9.

²⁷ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 31-33 at Tab 2, pp. 9-10.

²⁸ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 34-35 at Tab 2, p. 10.

execute trades with dealers by telephone in Canada.²⁹ These trades, like trades in equity securities, clear and settle through the CDS.³⁰

How investment dealers see the current regulatory system

19. The IIAC and its members view the current securities regulatory system as fragmented, costly and inadequate in developing policies and rules to respond to complex and rapid developments in the capital market. This view is grounded in experience. This experience has led the IIAC to maintain that the complex task of securities regulation would be better addressed by a single national regulator.³¹

20. Thirteen provincial and territorial securities commissions currently oversee market participants. They convene as a voluntary umbrella organization, the Canadian Securities Administrators (the “CSA”), with the objective of designing harmonized policies and rules that each commission can then adopt in its own jurisdiction, if it so chooses.³² The CSA is not directly accountable to any single authority.

21. To illustrate what it sees as the inadequacy of the current system, the IIAC has provided evidence of the process undertaken by the securities commissions (through the CSA) to regulate ATSS over the last decade, and in particular since 2005. Since 2006, dealer firms in Canada have traded equity securities on both stock exchanges and ATSS. The emergence of ATSS was expected to create competition within the stock trading business and provide benefits to market participants. From the perspective of the IIAC, some of these benefits have yet to materialize. Because ATSS emerged in Canada without a fully developed regulatory scheme in place to oversee their activities and protect investors, their emergence created issues that continue to burden dealer firms.³³

22. Many of these issues can be traced to market fragmentation – the dispersion of buy and sell orders of the same securities across separate trading systems, both stock exchanges and ATSS.³⁴ Concurrent trading activity in the same securities on more than one marketplace complicated the fulfillment of dealer firms’ regulatory obligation to ensure that their clients obtain the best prevailing

²⁹ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 34, 36-37 at Tab 2, pp. 10-11.

³⁰ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 38-40 at Tab 2, pp. 11-12.

³¹ Record (IIAC), Vol. XXXI, *Russell Affidavit*, paras. 8, 13-15, 56-57 at Tab 15, pp. 71-73, 85.

³² Record (IIAC), Vol. XXXI, *Russell Affidavit*, paras. 8-9, 12 at Tab 15, pp. 71-72.

³³ Record (IIAC), Vol. XXXI, *Russell Affidavit*, paras. 17-20 at Tab 15, pp. 74-75.

³⁴ Record (IIAC), Vol. XXXI, *Russell Affidavit*, paras. 23-25, 34 at Tab 15, pp. 75-76, 78.

bid and ask prices for securities (sometimes described as preventing clients with better-priced orders from having their orders “traded-through” by an inferior-priced order).³⁵

23. Since 2005, dealer firms have had to try to meet this obligation by ensuring that they do business and connect in real time with every exchange and ATS on which Canadian-listed securities can be traded. This has been difficult and costly, in large part because market developments outpaced regulatory efforts.³⁶

24. The securities commissions initiated consultation on the “trade-through” issue in July 2005. A regulation addressing it is scheduled to come into force in February 2011 – five and a half years after consultation commenced.

25. Since 2005, the securities commissions have published several rounds of notices, papers and proposed regulations and held a stakeholder consultation forum on it and related issues. However, for several lengthy periods – between October 2006 and April 2007, between July 2007 and October 2008, and again in 2009 – there were no formal consultations. Their efforts in these periods were focused on achieving consensus within the CSA and on informal meetings with stakeholders.³⁷ Since 2005, therefore, dealers have had to expend considerable time and money to comply with their regulatory obligations while the commissions sorted through the “trade-through” issue under the CSA umbrella. Despite the time the process has consumed, dealer firms are not convinced that the regulation scheduled to into force in February 2011 will resolve all of the issues created by ATSs.³⁸

PART II – POSITION ON THE QUESTION IN ISSUE

26. The ILAC’s position is that the question referred to this Court – Is the annexed Proposed Canadian *Securities Act* within the legislative authority of the Parliament of Canada? – should be answered “yes.”

PART III – STATEMENT OF ARGUMENT

27. To determine whether federal legislation validly regulates general trade and commerce affecting Canada as a whole, within the second branch of s. 91(2), this Court has set out five indicia

³⁵ Record (ILAC), Vol. XXXI, *Russell Affidavit*, paras. 25-26, 34-35 at Tab 15, pp. 76, 78.

³⁶ Record (ILAC), Vol. XXXI, *Russell Affidavit*, paras. 36-37 at Tab 15, pp. 78-79.

³⁷ Record (ILAC), Vol. XXXI, *Russell Affidavit*, paras. 34-53 at Tab 15, pp. 78-84.

³⁸ Record (ILAC), Vol. XXXI, *Russell Affidavit*, para. 56 at Tab 15, p. 85.

(neither exhaustive nor mandatory) to consider. These indicia are all aimed at one dispositive question: whether the federal enactment addresses a genuinely national economic concern or just a collection of local ones.³⁹ Investment dealers' experience helps to show that the proposed Canadian *Securities Act* addresses a genuinely national economic concern. It also helps to demonstrate that the third and fourth indicia of validity, among others – that the Act is concerned with trade in general, and that the provinces cannot jointly or severally achieve the aims of the proposed Act – are met.

The proposed Act addresses a genuinely national economic concern

28. The proposed Act is addressed to activities in the capital market.⁴⁰ Investment dealers' experience shows in a variety of ways that there is a rational basis to conclude that the proposed Act targets a genuinely national economic concern. First, the industry itself is organized nationally – both the IIAC and the industry's self-regulatory organizations.⁴¹ Second, the fact that in dealers' experience, market participants look for the best financing and investment opportunities wherever they present themselves – both across Canada and elsewhere – makes the concern with securities regulation national in nature. Third, capital market activities and trading systems and activities are also national and international. This is so in both the primary and the secondary markets.

29. In the primary equity market, Canadian issuers, and Canadian dealers, seek out investors worldwide. Non-Canadian issuers, conversely, seek out Canadian investors, with the aid of Canadian dealers. In the secondary equity market, the combination of three phenomena – the consolidation and specialization of Canadian stock exchanges, the advent of ATSs and the development of electronic trading systems – means that investors located not just anywhere in Canada, but anywhere in the world, can trade in securities of Canadian issuers on exchanges located in Calgary, Toronto or Montréal or through ATSs located outside Canada. As a result of the further phenomenon of inter-listing, Canadian dealers can execute trades on behalf of their clients in the securities of Canadian issuers on stock exchanges in other countries. In the secondary fixed income market, trades take place electronically between dealers across Canada. Investors located anywhere in the world have access to debt and derivative marketplaces.

³⁹ *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641 at 661-663 [AGC Book of Authorities, Tab 13], citing *AG of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 at 268 [AGC Book of Authorities, Tab 1]; *Kirkebi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 at paras. 16 and 17. [AGC Book of Authorities, Tab 16]

⁴⁰ Record (ACG), Vol. I, Proposed Act, preamble and s. 9 at Tab 4, pp. 17, 36.

⁴¹ Record (IIAC), Vol. XXXI, *Smith Affidavit*, paras. 9-10, 12-13 and Exhibits "A", "B" at Tab 2, pp. 4-5 and Tabs 3 and 4, pp. 14-21.

30. In *Kirkebi*, the fact that trade-marks apply across and between industries in different provinces was a key element in establishing federal jurisdiction.⁴² Capital market activities are similar in this respect – they take place across, between and beyond individual provinces. While no doubt some capital market activities are carried out within particular provinces or territories, this does not render the concern of the legislation local, any more that the fact that some trade-marks have meaning only in a particular locality makes the *Trade-marks Act* local in what it addresses.

The proposed Act regulates trade as whole

31. The proposed Act, like the *Trade-marks Act* and *Combines Investigation Act*, is “concerned with trade as a whole, as opposed to a particular industry.”⁴³ While certain provisions of the proposed Act – for example, the registration and market conduct provisions⁴⁴ – are directed to investment dealers (among others), other provisions – for example, the prospectus and disclosure provisions⁴⁵ – regulate issuers, and still other provisions⁴⁶ make remedies available to a wide class of market participants, including both institutional and retail investors. As the IIAC’s evidence indicates, issuers span the entire gamut of business activity. The proposed Act simply does not limit its regulatory reach to a single industry, commodity or area of the Canadian economy.

The provinces cannot jointly or severally achieve the aims of the proposed Act

32. From investment dealers’ perspective, their experience with the current regulatory system illustrates its vulnerability, and the fact that the provinces cannot jointly or severally achieve the aims of the proposed Act. The aims of the proposed Act are to protect investors, to foster a fair, efficient and competitive capital market, and contribute to the integrity and stability of the financial system. The current CSA system depends on the continued voluntary participation of the provinces, and their voluntary adoption of the rules and policies that it develops. Inherent in the system is the same vulnerability that the Court identified in *Kirkebi*:⁴⁷ any province is entitled to withdraw, and provincial law can be changed by any provincial legislature, at any time. In the face of a national (and

⁴² *Kirkebi* above, note 39 at para. 29. [AGC Book of Authorities, Tab 16]

⁴³ *Kirkebi*, above, note 39 at para. 29 [AGC Book of Authorities, Tab 16]; *General Motors*, above, note 39 at 678. [AGC Book of Authorities, Tab 13]

⁴⁴ Record (ACG), Vol. I, Proposed Act, Parts 5 and 10 at Tab 4, pp. 59-60, 72-80.

⁴⁵ Record (ACG), Vol. I, Proposed Act, Parts 6 and 8 at Tab 4, pp. 61-68.

⁴⁶ Record (ACG), Vol. I, Proposed Act, Parts 12 and 13 at Tab 4, pp. 105-146.

⁴⁷ *Kirkebi* above, note 39 at para. 29. [AGC Book of Authorities, Tab 16]

international) capital market, the provinces are constitutionally incapable of creating a binding national regulatory system.

33. From investment dealers' perspective, the voluntary nature of the current regulatory system, in which every participant effectively has a veto, inevitably leads to a search for consensus. The search for consensus in turn leaves the regulatory system lagging behind market developments, resulting in inefficiency and costs for all market participants. Investment dealers see the delay in satisfactorily addressing the advent of ATs as a telling example. A national securities regulator would not be bound to search for consensus among 13 participants; implementation of its decisions would not be continually subject to veto.

34. There is of course no guarantee that a single national regulator will be more responsive and efficient. But satisfying the fourth indicium of constitutional validity does not require a guarantee. It requires only that the federal legislation do something that the provinces constitutionally cannot do. The promise of a national securities regulator, fully empowered to regulate the Canadian capital market without concern for provincial boundaries, is one that only Parliament can fulfill.

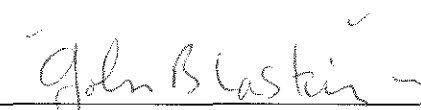
PART IV – SUBMISSIONS CONCERNING COSTS

35. The IIAC does not seek costs, and asks that it not be liable for costs.

PART V – ORDER SOUGHT

36. The IIAC requests that it be permitted to make oral submissions at the hearing of this reference, and submits that the reference question should be answered "yes."

ALL OF WHICH IS RESPECTFULLY SUBMITTED


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PART VI – TABLE OF AUTHORITIES

	Paragraph(s) in Part III
<i>AG of Canada v. Canadian National Transportation Ltd.</i> , [1983] 2 S.C.R. 206	27
<i>General Motors v. City National Leasing</i> , [1989] 1 S.C.R. 641	27, 31
<i>Kirkbi AG v. Ritvik Holdings Inc.</i> , [2005] 3 S.C.R. 302	27, 30, 31, 32