Court File No. 33718

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, dated May 26, 2010

FACTUM OF THE ATTORNEY GENERAL OF MANITOBA

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

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PART I
OVERVIEW AND STATEMENT OF FACTS

OVERVIEW OF MANITOBA'S POSITION

1. The Attorney General of Manitoba ("Manitoba") intervenes in this reference to argue that the proposed Canadian *Securities Act* ("the proposed *Act*") is a matter of property and civil rights under s. 92(13) of the *Constitution Act, 1867*, and therefore its enactment by Parliament would be *ultra vires*.

2. Manitoba will argue that the proposed *Act* is not a valid exercise of the general branch of the trade and commerce power in s. 91(2) of the *Constitution Act, 1867*. It fails the test of validity by reference to three of the indicators prescribed by this Court in the seminal case of *General Motors v. City National Leasing*.

> *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 [Canada's Book of Authorities, Volume 1, Tab 13]

3. The third indicator in *General Motors* asks whether the legislation is concerned with trade as a whole and not a particular industry. Manitoba's position is that the proposed *Act* would regulate the securities industry or business, as do the securities statutes currently in force in all ten provinces.

4. The fourth indicator in *General Motors* asks whether the provinces, acting alone or jointly, would be constitutionally incapable of enacting the legislation. Manitoba will argue that the existing security regime in Canada consists of a decentralized, but sophisticated and interlocking, national scheme involving all ten provinces. Far from being constitutionally incapable of regulating the securities industry, the provinces have successfully engaged in regulation for several decades and are fully capable of continuing to exercise their jurisdiction into the indefinite future.

5. The final indicator in *General Motors* asks whether the failure to include one or more provinces or localities in the legislative scheme would jeopardize the successful operation of the

scheme in other parts of the country. Manitoba will argue that the existence of effective securities regulation schemes in all ten provinces precludes any reliance by Canada on this indicator. Further, the proposed *Act* establishes an “opt-in” mechanism under which provinces may join or not join the federal scheme as they see fit. Manitoba’s position is that the opt-in approach *ipso facto* nullifies any claim by Canada that the proposed *Act* complies with the fifth *General Motors* indicator.

6. Manitoba recognizes that this Court in *General Motors* was careful not to make the five indicators a comprehensive test for compliance with the general trade and commerce power. A case-by-case assessment is necessary. Nonetheless, the indicators represent the evolution of an important balance in the division of powers under the *Constitution Act, 1867*. They provide a mechanism for differentiating between provincial jurisdiction under s. 92(13) and federal jurisdiction under s. 91(2) of the 1867 *Act*. Failure to establish compliance with the final three indicators would be a conclusive sign that enactment of the proposed *Act* by Parliament would be *ultra vires*.

7. The proposed *Act* duplicates existing provincial legislation both in form and substance. Manitoba will argue that there is no federal constitutional “matter” that can bring this proposed *Act* within the trade and commerce power. The double aspect doctrine does not apply to a proposed federal statute that simply replicates existing provincial laws, and in any event is not available to Parliament with respect to the exercise of the general trade and commerce power.

STATEMENT OF FACTS

8. An extensive record has been filed in this reference. Manitoba will be relying on parts of that record in support of its arguments. Apart from those specific references, Manitoba takes no position on the reference record as a whole.

PART II

REFERENCE QUESTION

9. The question referred to the Court is as follows:

> Is the annexed Proposed Canadian *Securities Act* within the legislative authority of the Parliament of Canada?

10. Manitoba's position is that, except as acknowledged below, the answer to this question is "no". The proposed *Act* deals with matters of property and civil rights and therefore comes within the authority of the provincial legislatures under s. 92(13) of the *Constitution Act, 1867*.

11. Manitoba acknowledges that sections 158 to 166 of the proposed *Act*, to the extent they are severable from the rest of the *Act*, are within the authority of Parliament pursuant to the criminal law power in s. 91(27) of the *Constitution Act, 1867*. Manitoba takes no position on the severability issue.

PART III
ARGUMENT

THE TEST FOR DETERMINING THE CONSTITUTIONALITY OF A LEGISLATIVE SCHEME

12. Manitoba agrees with Canada that the reference question invites the application of the two-stage test articulated by this Court for determination of a question under the division of powers:

a) What is the pith and substance, or "matter", of the law under scrutiny; and

b) Into which class of subject or subjects in the *Constitution Act, 1867* does that matter fall?

THE PITH AND SUBSTANCE OF THE PROPOSED CANADIAN *SECURITIES ACT*

13. Manitoba submits that the starting point for the pith and substance inquiry should be the recent observation of LeBel and Deschamps JJ (for four members of the Court) in *Reference re Assisted Human Reproduction Act*:

> It is important to identify the pith and substance of the impugned provisions as precisely as possible. A vague or general characterization of the pith and substance could have perverse effects on more than one level: first on the connection with an exclusive power and then on the extent of the overflow. For example, a finding that a provision is in pith and substance in relation to health or to the environment would be problematic. Those subjects are so vast and have so many aspects that, depending on the angle from which they are approached, they can support the exercise of legislative powers of either level of government. It is therefore necessary to take the analysis further and determine what aspect of the field in question is being addressed.
>
> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para. 190 [Manitoba's Book of Authorities, Tab 8]

14. This admonition applies with particular force to the present reference, where the term "capital markets" could replace "health" and "environment" in the above passage. Indeed, in the arguments of Canada and its supporting interveners, the expression "regulation of capital

markets" or some variant thereof assumes an importance far beyond its prominence in the proposed *Act* itself.

15. Canada creates a moving target on the pith and substance issue. It purports to identify "comprehensive national securities regulation" as the pith and substance of the proposed *Act*, but then lapses into vague notions of regulating capital market activity:

> The pith and substance of the *Securities Act* is <u>comprehensive national securities regulation</u>, i.e., regulation of a type that is beyond the ability of any single province or group of provinces to achieve. Importantly, the Canadian capital market does not respect provincial boundaries. Regulation of capital market activity in thirteen geographic areas of the country is not comprehensive regulation for the benefit of all Canadians [emphasis in original].
>
> Canada's factum at para. 71

16. Subsequent portions of Canada's argument rely almost exclusively on the concept of regulating capital markets as the justification for federal intervention into securities law.

> See, for example, the discussion of the third *General Motors* indicator (focusing on trade as a whole) at paras. 89–104 of Canada's factum

17. Ontario characterizes the pith and substance of the proposed *Act* as "the comprehensive regulation of capital markets activity across Canada, under the continuing oversight of a single market regulator applying a single set of laws and rules". This characterization permits Ontario to focus its submissions on capital markets concerns, with only passing references to the historical foundation for securities legislation - the protection of investors. The other interveners supporting Canada similarly emphasize the regulation of capital markets, or some like expression, as the object of the proposed *Act*.

> Ontario's factum at para. 42
>
> Affidavit of Donald G. Murray, Record [Manitoba], Vol. XXVII, at 6-12 (paras. 14-29)

18. For these reasons, Manitoba submits that identifying the pith and substance of the proposed *Act* as "the regulation of capital markets", or some variant thereof, is too imprecise

and not historically accurate for legislation of this nature. Furthermore, it is not factually accurate, because securities legislation does not cover the range of capital activity in a modern economy. It does not, for example, generally engage the vast assortment of privately-held companies, farmers, sole proprietors and other enterprises that finance their activities through private funding, trade credit arrangements, or debt financing in the form of loans from banks, credit unions and trust companies.

> Mark R. Gillen, *Securities Regulation in Canada*, 2d ed. (Scarborough: Carswell, 1998) at 2-3 [Manitoba's Book of Authorities, Tab 21]
>
> *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433 at 444-446 [Manitoba's Book of Authorities, Tab 4]

19. Small and medium-sized enterprises comprise a large and vital part of the Canadian economy. According to Industry Canada, small and medium-sized enterprises (those with fewer than 100 employees) comprise 98 percent of all businesses in Canada. In 2008, small businesses had more than 5.2 million employees – about 48 percent of the labour force. They accounted for the creation of over 100,000 jobs, or 40 percent of all jobs created that year. In the previous decade they accounted for 37 percent of all jobs created in the private sector. Yet in 2007 these enterprises obtained their financing almost exclusively from private sources rather than the public markets. Public equity does not even appear as a separate entry on a chart prepared by Industry Canada to depict the types of financing used by small and medium-sized enterprises in 2007. This chart confirms statistical data from 1996 showing public equity as a miniscule component of financing by smaller firms: 1.1 percent for firms with fewer than 20 employees and 2.8 percent for firms with fewer than 500 employees.

> Industry Canada, *Canada Small Business Financing Act, Comprehensive Review Report 2004-2009* (Ottawa: Multimedia Services Section, 2009) at 3 and 6-7 [Manitoba's Book of Authorities, Tab 20]
>
> Canada, *SME Financing in Canada, 2002 — Executive Summary* online: Government of Canada <http://www.sme-fdi.gc.ca/eic/site/sme_fdi-prf_pme.nsf/eng/00618.html> [Manitoba's Book of Authorities, Tab 19]

20. Manitoba submits that the importance of small enterprises, funded by private capital, alone negates any suggestion by Canada and its supporters that the pith and substance of the proposed *Act* can be captured in a sweeping generality such as "regulation of capital markets" or "regulation of the national economy." This is not to say that the pith and substance of the proposed *Act* can be identified without regard for the notion of capital markets. But the term "capital markets" must be comprehended in a focused, precise manner. For example, because of the existence of the private capital market that services most small enterprises, it must necessarily be confined to the "public" pursuit of capital <u>through the process of issuing securities</u>. The public nature of this process, in turn, necessarily engages the consumer protection component of the proposed *Act* – a component that encompasses both current investors and the wider "investing public", namely those who will invest in securities in the future if they have confidence that the securities market is operating fairly. (The term "investor" will apply hereinafter to both investors and the "investing public".)

21. For characterization purposes, therefore, the notion of "capital markets" is inextricably intertwined with the protection of investors. The International Organization of Securities Commissions (IOSCO) has concisely described this relationship. IOSCO identifies the core objectives of securities regulation as follows: the protection of investors; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk. It then states as follows:

> The three objectives are closely related and, in some respects, overlap. Many of the requirements that help to ensure fair, efficient and transparent markets also provide investor protection and help to reduce systemic risk. Similarly, many of the measures that reduce systemic risk provide protection for investors.
>
> . . . .
>
> The regulator's approval of exchange and trading system operators and of trading rules helps to ensure fair markets.
>
> The fairness of the markets is closely linked to investor protection and, in particular, to the prevention of improper trading practices. Market structures should not unduly favour some market users over others. Regulation should detect, deter and penalize market manipulation and other unfair trading practices.
>
> IOSCO, *Objectives and Principles of Securities Regulation* (May 2003), Record [Barreau Du Québec], Volume XXX, at 13-14

22. Investor protection and the promotion of fair and efficient capital markets have been the guiding principles of provincial securities legislation for decades, regardless of whether they are explicit or implicit in such legislation.

> *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 41 [Canada's Book of Authorities, Volume I, Tab 10]
>
> Affidavit of Donald G. Murray, *supra* at 5-6 (paras. 12-13)

23. As in many other respects, the proposed Canadian *Securities Act* conforms with existing provincial schemes on this point. In section 9, the purposes of the legislation are stated as three–fold: to protect investors; to foster fair, efficient and competitive capital markets in which the public has confidence; and to contribute to the integrity and stability of the financial system.

24. The third purpose, sometimes generically described as "detecting systemic risk", does not replicate existing provincial securities laws. However, it is obvious that any regulatory system that deals with financial or economic issues would have the detection or avoidance of systemic risk as an overarching goal. No such purpose need be expressly articulated as a guiding principle for regulators under any statute, and there is nothing inherent in the term "systemic risk" that imparts a federal rather than a provincial aspect to the proposed *Act*. In any event, the IOSCO document notes that this principle, like the promotion of fair, efficient and transparent capital markets, relates back to the fundamental goal of investor protection.

> IOSCO, *Objectives and Principles of Securities Regulation*, *supra* at 13

25. The reference to capital markets in the purpose clause of the proposed *Act* is not generic, but rather specifically enumerates the goal of fostering capital markets that are "fair, efficient and competitive." The term "competitive" would probably encompass the ability of businesses to raise capital at the lowest possible cost and with a minimum regulatory burden. Subject to the evidence on this point, it might be seen to support the claim that the proposed *Act* would create financial advantages for issuers. Manitoba submits, however, that the terms "fair" and "efficient" capital markets simply reinforce the arguments presented above. They link the

capital markets component of the legislation to the investor protection component and identify them as a compendious whole.

26. For example, the term “efficient” capital markets arguably has two distinct meanings. First, it expresses the goal of creating a level playing field by ensuring that accurate investment information is available to investors for the purpose of making investment decisions:

> The *Securities Act* is remedial legislation and is to be given a broad interpretation: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. It protects investors from the risks of an unregulated market, and by its assurance of fair dealing and by the promotion of the integrity and efficiency of capital markets it enhances the pool of capital available to entrepreneurs. <u>The Act supplants the “buyer beware” mind set of the common law with compelled disclosure of relevant information.</u> At the same time, in compelling disclosure, the Act recognizes the burden it places on issuers and in Part XV sets the limits on what is required to be disclosed [emphasis added].
>
> *Kerr v. Danier Leather Inc*., [2007] 3 S.C.R. 331 at para. 32 [Manitoba’s Book of Authorities, Tab 7]

27. The second meaning reflects the ability of provincial regulators, with their understanding of local markets, to match available sources of capital with local enterprises needing capital, and to create specialized investment vehicles that benefit local communities. It thus supports the view that markets are often most efficient at the provincial rather than the national or international level. In light of this meaning, the fostering of “efficient” capital markets might be better served with the existing legislative schemes rather than the proposed *Act*.

> Affidavit of Donald G. Murray, *supra* at 16–17 (paras. 34–38)

28. Accordingly, Manitoba submits that for purposes of identifying the pith and substance of the proposed *Act*, a bare reference to “capital markets” or some variant thereof misses the mark. The pith and substance of the proposed *Act* must necessarily replicate that of existing provincial laws, since the proposed *Act* would replicate those provincial statutes in content. Further, the pith and substance cannot be identified without regard to the historical origins of securities legislation as a mechanism for protecting investors.

29. Manitoba submits that the pith and substance of the proposed *Act* is comprehensive regulation of the securities industry. This "matter" implicitly encompasses both the principles animating the legislation: investor protection and the promotion of fair and efficient capital markets.

30. Manitoba acknowledges that this identification of the pith and substance is relatively close to Canada's expression "comprehensive national securities regulation". There are, however, significant differences.

31. First, Manitoba's characterization drops the term "national". It is at best tautological to refer to legislation proposed by Parliament as "national" in scope. In the present circumstances, it is not even accurate. The "opt-in" mechanism in the proposed *Act* essentially delegates to the provinces the decision as to where in Canada the legislation will apply. A statute of this nature, by its own internal prescription, cannot be "national" in scope. Canada has *de jure* forfeited the authority to make that claim.

32. Manitoba's proposed terminology also refers to the securities "industry". The *Act* does not simply prescribe legal rules for the trading of securities. In fact, for the most part it delegates the enactment of such rules to the administrative bodies it creates or recognizes. The thrust of the *Act*, it is submitted, is to establish an administrative and penal mechanism to regulate the conduct of the underwriters, advisers, dealers and others who comprise the securities industry. Such regulation, of course, will necessarily also include issuers who utilize the industry's services to raise "public" capital through the issuing of securities and who, as a condition for accessing this type of financing, must have aspects of their governance and operations made subject to regulatory requirements. And, in turn, it will also incorporate, as a consumer protection device, the investors who provide that financing.

33. Characterizing the proposed *Act* in this manner would duplicate this Court's characterization of existing provincial securities laws. Again, this could hardly be a surprise in light of the fact that the proposed *Act* replicates those provincial laws.

> The general aim of the Act is to regulate the security business (there being a wide definition of 'security') and this is accomplished by the setting-up of The Ontario Securities Commission, with power to it to supervise the trading in securities by regulation and also power to supervise the trading in securities during a primary distribution by requiring the filing of a prospectus. (per Kerwin C.J. (for the majority) at 779 [emphasis added])
>
> The *Securities Act* exists to regulate the securities business. This is achieved through two main forms of control, the first of which is directed towards the persons or companies selling the securities and the second of which is directed to the securities being sold. (per Martland J. (for three judges) at 797 [emphasis added])
>
> *Smith v. The Queen*, [1960] S.C.R. 776 [Canada's Book of Authorities, Volume III, Tab 39]

The Double Aspect Doctrine

34. Canada defends the proposed *Act* by invoking the double aspect doctrine. The constitutional division of powers, it says, opens the door for both orders of government to enact similar laws. Canada points to previous examples where the courts have upheld overlapping federal and provincial laws relating to securities.

> *Smith v. The Queen, supra*
>
> *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161
> [Canada's Book of Authorities, Volume II, Tab 21]

35. The problem with this argument is that the validation of overlapping federal-provincial laws is the result, not the commencement, of the double aspect inquiry. The fact that overlapping laws have been upheld in the past does not mean that any proposed overlap between federal and provincial laws is automatically, or even presumptively, valid. The starting point remains the pith and substance inquiry, and the court examines each law independently to determine whether there is both a genuine "federal" matter and a genuine "provincial" matter that justify upholding each law.

36. In *Multiple Access*, the overlap involved individual statutory provisions that created a civil action for insider trading. The federal provisions were located in the *Canada Corporations Act*, which dealt with the incorporation and structuring of federal companies. The equivalent provincial provisions were located in *The Securities Act* of Ontario. In *Smith v. The Queen*, there was a single overlapping statutory prohibition: issuing a false prospectus violated both the *Criminal Code* (federal) and *The Securities Act* (provincial). It is obvious from the statute names alone that the overlap or duplication in these cases involved discrete provisions contained in otherwise divergent statutory schemes. Neither case involved an attempt by one order of government to superimpose an entire regulatory scheme upon a scheme that had already been enacted by the other.

37. The distinction is significant, as demonstrated by the decision of this Court in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*. In that case, the issue was whether a provincial occupational health and safety statute applied to Bell Canada, a federal undertaking that was already regulated by workplace safety provisions under the *Canada Labour Code*. Beetz J. (for the Court) held that the provincial scheme did not apply.

> *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail),* [1988] 1 S.C.R. 749 [Manitoba's Book of Authorities, Tab 1]

38. Among other things, the province had argued that the double aspect principle justified its imposition of a duplicate regulatory scheme on Bell Canada. In rejecting this argument, Justice Beetz quoted the similar purpose clauses in each statute and then observed that both legislative bodies were pursuing exactly the same objective by similar techniques and means. He stated as follows:

> The exact correspondence of these two objectives indicates that there are not two aspects and two purposes depending on whether the legislation is federal or provincial. In my opinion, the two legislators have legislated <u>for the same purpose and in the same aspect</u>. Yet they do not have concurrent legislative jurisdiction in the case at bar, but mutually exclusive jurisdictions [emphasis in original].
>
> *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), supra* at 765–766; 845–855, quoted passage at 853

39. Manitoba submits that these words precisely describe the situation in the current reference. Here, it is the federal authority that is superimposing a regulatory regime on existing provincial legislation. The federal minister himself has observed that the proposed *Act* seeks to harmonize existing provincial legislation in the form of a single federal statute. There is no independent federal "aspect" that justifies Canada's proposal to replicate existing provincial legislation.

> Canada, Department of Finance, *Backgrounder: A New Canadian Securities Regulatory Authority* (*May* 2010) online: Government of Canada <http://www.fin.gc.ca/n10/data/10-051_1-eng.asp>
> [Manitoba's Book of Authorities, Tab 17]
>
> Canada, Department of Finance, *Fact Sheet on Proposed Canadian Securities Act* (May 2010) online: Government of Canada <http://www.fin.gc.ca/n10/data/10-051_2-eng.asp>
> [Manitoba's Book of Authorities, Tab 18]

40. In fact, of all federal legislative powers, the general trade and commerce power is <u>least</u> amenable to the application of the double aspect doctrine. The object of Chief Justice Dickson's judgment in *General Motors* was to breathe life into the general trade and commerce power while at the same time respecting the historical jurisdiction of the provinces over matters of property and civil rights. The five indicators of the *General Motors* test confront the court with a <u>choice</u> in any case involving a matter that otherwise comes within property and civil rights: is there a sufficient basis to transform the matter into one of general trade and commerce and thereby remove it from s. 92(13)? This analytical process precludes recourse to the double aspect doctrine. In *Canadian Western Bank v. Alberta*, this Court made a similar point in essentially rejecting the application of the principle of interjurisdictional immunity to the trade and commerce power:

> For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism.
>
> *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 43
> [Manitoba's Book of Authorities, Tab 5]

41. In *Kirkbi AG v. Ritvik Holdings Inc.,* this Court stated as follows:

> In *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, the Judicial Committee of the Privy Council distinguished two branches of federal power under s. 91(2): (1) the power over international and interprovincial trade and commerce, and (2) the power over general trade and commerce affecting Canada as a whole ("general trade and commerce"). This interpretation of s. 91(2), which limits the scope of the federal trade and commerce power to these two branches, is intended to ensure a proper constitutional balance between the <u>otherwise overlapping</u> federal power over trade and commerce (s. 91(2)) and the provincial power over property and civil rights in the province (s. 92(13))…[emphasis added]
>
> *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 at para. 15
> [Canada's Book of Authorities, Volume I, Tab 16]

42. This passage encapsulates the relationship between s. 92(13) and 91(2) that has endured since the decision in *Parsons*. Trade and commerce has effectively been "read down" to ensure that it does not overwhelm property and civil rights. To accept that trade and commerce now offers an "otherwise overlapping" aspect that supports federal duplication of valid provincial legislation would mark a profound change in the division of powers - one that the courts have consciously eschewed for 130 years.

43. Accordingly, Manitoba submits that the double aspect doctrine does not furnish any independent federal "aspect" to characterize the proposed *Act*. If anything, examination of the double aspect doctrine supports the view that the proposed *Act* has the same aspect as existing provincial securities laws. It therefore reinforces Manitoba's position that the "matter" of the proposed *Act* is comprehensive regulation of the securities industry. Unlike Canada, however, Manitoba will consistently employ this terminology for purposes of determining whether the proposed *Act* comes within the general trade and commerce power. Manitoba will not lapse into the nebulous language of "capital markets" or its variants in the classification process, as Canada has done.

COMPREHENSIVE REGULATION OF THE SECURITIES INDUSTRY IS NOT A MATTER WITHIN THE GENERAL BRANCH OF THE TRADE AND COMMERCE POWER

The Standard of Proof

44. It is necessary to address a preliminary issue before Manitoba turns to the *General Motors* test. Both Canada and Ontario assert that only a “rational basis” is required to demonstrate the constitutional validity of the proposed *Act*.

> Canada’s factum at paras. 77–78
>
> Ontario’s factum at para. 32

45. The constitutional division of powers involves quintessential issues of law. To borrow from the administrative law context, questions of law are decided on a “correctness” standard. Yet Canada and Ontario assert that the question of law in this reference can be decided on a standard that is analogous to “reasonableness” in administrative law.

46. The source of their assertion is the decision of this Court in *Re Anti-Inflation Act.* It is certainly true that four judges of the Court used the term “rational basis” in upholding the legislation at issue in that case. But it is important to understand the context in which that expression was used.

> *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 423-425 [Canada’s Book of Authorities, Volume II, Tab 32]

47. The anti-inflation legislation was upheld on the basis that it was an emergency measure to deal with the economic crisis of inflation, and thereby came within the “emergency” branch of the peace, order and good government power. Chief Justice Laskin used the term “rational basis” in reference to Parliament’s decision that there was an economic crisis justifying the use of the emergency power, which itself is a <u>temporary</u> measure having only such duration as necessary to alleviate the emergency at hand. The Chief Justice’s conclusion on this issue

clearly demonstrates that the Court was deferring to Parliament's policy decision that there indeed existed an economic crisis warranting the use of the emergency power:

> In my opinion, this Court would be unjustified in concluding, on the submissions in this case and on all the material put before it, that the Parliament of Canada did not have a rational basis for regarding the *Anti-Inflation Act* as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole.
>
> *Re Anti-Inflation Act, supra* at 425

48. It is entirely understandable that the Court would defer to elected officials on a policy issue of this nature. Acceptance by the Court of a "rational basis" for temporarily invoking the emergency power is, however, a far cry from the permanent and profound alteration of the division of powers that is at stake in the present reference. In *Canadian Western Bank v. Alberta*, this Court acknowledged that the courts are the final arbiters of the division of powers. Manitoba submits that for purposes of discharging this function in the present reference, the Court should not rely on a "rational basis" standard that was grounded in a political judgment about the existence of an economic crisis.

Canadian Western Bank v. Alberta, supra at para. 23

49. In fact, the present context demands the application of a much higher standard to justify the proposed *Act*. As already noted, validation of the proposed *Act* would result in a permanent alteration of the constitutional division of powers, with potential consequences for other elements of federalism as well. It is not difficult to imagine that if the Court were to accept the argument for federal jurisdiction in this reference, the general trade and commerce power might be invoked in future to support further centralized control of other matters of economic regulation.

50. In these circumstances, Manitoba submits that the onus should be on Canada to demonstrate by <u>clear and convincing evidence</u> that it has met the *General Motors* test for invoking the general trade and commerce power. It is particularly noteworthy that development

of the *General Motors* test was an evolutionary process and that in *Canadian National Transportation*, Justice Dickson (as he then was) added the final two indicators on the basis that they were "even stronger indications of valid general regulation of trade and commerce…". Accepting that the five indicators as a whole are not an exhaustive test, Manitoba submits that this Court should pay particular attention to the issues raised by the final two indicators in light of Justice Dickson's emphasis on their analytical significance.

> *Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206 at 268 [Canada's Book of Authorities, Volume I, Tab 1]

The General Motors Test

51. Manitoba submits that Canada is unable to establish that comprehensive regulation of the securities industry comes within the general trade and commerce power in s. 91(2) of the *Constitution Act, 1867*. Manitoba accepts, however, that sections 158 to 166 of the proposed *Act* are supportable under the criminal law power in s. 91(27) and are therefore *intra vires* to the extent they can be severed from the remainder of the *Act*.

52. Manitoba also accepts that the five questions or indicators in the *General Motors* case should be the focal point for the inquiry into whether there has been a valid exercise of the general trade and commerce power.

> Canada's factum at para. 74
>
> *General Motors of Canada Ltd. v. City National Leasing*, *supra* at 661–663

53. The proposed *Act* satisfies the first two indicators of the *General Motors* test. The legislation establishes a regulatory scheme that is monitored by the continuing oversight of a regulatory agency. Manitoba submits, however, that the proposed *Act* fails to comply with the final three *General Motors* indicators and accordingly does not come within the general trade and commerce power.

Is the legislation concerned with trade as a whole rather than a particular industry?

54. Identifying the pith and substance of the proposed *Act* as regulation of the securities industry presumptively answers this question in the negative. But even if the Court adopts a more general characterization such as "securities regulation" or "regulation of trading in securities", Manitoba submits that the answer would be the same. A more general characterization would not change the reality that the *Act* is primarily structured to regulate market participants, and that it regulates customers of the industry, such as issuers, only incidentally and for limited purposes.

55. A simple but effective way to conduct the inquiry into the third indicator is to begin with the definitions in the proposed *Act.* The definitions identify the actors involved in various aspects of the securities business. For example, the terms "adviser", "dealer" and "investment fund manager" all reference persons whose "business" involves some aspect of buying or selling securities. Under s. 76 of the proposed *Act*, all these persons are *prima facie* required to register in order to conduct their business.

56. Other defined entities are brought into the system by recognition of the Chief Regulator rather than the process of registration. These include self-regulatory organizations, exchanges, clearing agencies and auditor oversight organizations (s. 64). A similar process applies for the designation of entities under s. 73, although the proposed *Act* does not define each of the entities referenced in that section.

57. These entitles collectively comprise the "securities industry". Once brought into the system through the process of registration, recognition or designation, they become subject to its regulatory obligations and disciplinary processes. For example, they have a statutory duty to provide information to regulatory agencies (ss. 68, 69 and 74). They are subject to various requirements and prohibitions in Part 10 of the proposed *Act* dealing with market conduct. They become subject to the reviews, procedures and remedies set out in Part 11 dealing with administration and enforcement.

58. The participants in the securities industry are a large and diverse group, and they are important to the economy. But they are a finite and ascertainable group because of their prior identification and the process of registration, recognition or designation that brings them within the regulatory system. Like banks, insurance companies and other industries, the securities industry provides services to a customer base: in its case, to issuers and investors.

> See, for comparison: *Canadian Western Bank v. Alberta*, *supra:* the "business of insurance in general" is a matter of property and civil rights (at para. 80) and "[t]he *Insurance Act* is clearly a law 'in pith and substance' about the regulation of the insurance industry within the province, and the particular provisions at issue are concerned with the licensing and regulation of insurance providers, promoters and agents." (at para. 116)

59. It is true that the regulatory scope of the proposed *Act*, like its provincial counterparts, extends beyond the securities industry itself by imposing various obligations on one component of its customer base, namely issuers. This factor, it is submitted, does not alter the "single industry" characterization. The intent behind regulating issuers is to protect investors, the vulnerable customers of the industry. Nonetheless, issuers remain customers as well, just as small enterprises that seek private capital financing through banks, credit unions and trust companies are customers of those institutions.

60. As customers of the securities industry, issuers are subject to significant regulatory requirements, but the requirements are partial and limited in scope and purpose. They are imposed only as a condition of seeking equity financing, and they are limited to forms of regulation (mainly disclosure requirements) considered necessary for ensuring a fair and efficient market for their securities and investor confidence in the value of those securities. And, of course, if a company ceases being an issuer, it is not subject to any regulatory requirements under securities legislation at all.

61. None of this analysis is novel, as similar issues of characterization have been addressed in relation to provincial securities legislation over the years. It is worth recalling that Justice Martland in *Smith v. The Queen, supra* described the regulation of the securities business as involving control of both the persons and companies selling the securities <u>and</u> "the securities being sold" (at 797).

62. In any event, statutory or administrative regulation of the customers does not disqualify a commercial activity from being characterized as a "business" or "industry". There is no doubt that insurance is regarded as a business or industry, but nonetheless regulatory burdens are imposed on its customers to ensure the integrity of the industry. For example, applicants for insurance are subject to the principle of *uberrima fides*, and contracts of insurance are subject to statutory conditions that impose obligations on insured persons as well as insurers.

> *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 at 636-638 and 642-645 [Manitoba's Book of Authorities, Tab 6]
>
> *The Insurance Act*, R.S.M. 1987, c. I40, s. 142 [Manitoba's Book of Authorities, Tab 14]

63. The profile is very different with respect to legislation that focuses on trade as a whole rather than a specific industry. The two operative examples are the *Combines Investigation Act*, upheld in *General Motors*, and the *Trade-marks Act*, upheld in *Kirkbi AG v. Ritvik Holdings Inc*.

> *Combines Investigation Act*, R.S.C. 1985, c. C-34 [Manitoba's Book of Authorities, Tab 11] [The *General Motors* case actually involved the R.S.C. 1970 version of this statute, as amended; the R.S.C. 1985 version fairly represents the updated consolidation of the *Combines Investigation Act* at the time the *General Motors* case worked its way through the courts.]
>
> *Trade-marks Act*, R.S.C. 1985, c. T-13 (Consolidation) [Manitoba's Book of Authorities, Tab 15] [Containing the updated on-line version of the *Act*, which fairly reflects its content at the time of the *Kirkbi AG* decision.]

64. In each of these statutes, the definitions section identifies no discrete classes of persons or entities that are subject to the regulatory scheme. The substantive rights and obligations in each statute are correspondingly directed to "the world at large". With one minor exception, there is no pre-defined group whose activities are supervised (for example, through registration and information-sharing requirements) regardless of whether of anti-competitive activities or trade-mark violations occur. In short, there is no "anti-combines industry" or "trade-marks industry" in the sense that there is a securities industry, a banking industry or an insurance industry.

65. The "minor exception" to the above characterization relates to the existence of trade-mark agents. Under s. 28(2) of the *Act*, the registrar is required to keep a list of agents entitled to represent the interests of trade-mark owners and applicants. The qualifications of agents are prescribed by regulation, but those qualifications relate only to competence in trade-mark law. Agents are not subject to the extensive regulatory oversight and disciplinary measures applicable to registrants under the proposed Canadian *Securities Act*. One probable reason is that many trade-mark agents are lawyers, whose conduct is regulated under <u>provincial</u> legislation.

> *Trade-marks Regulations*, SOR/96-195 (Consolidation), ss. 18–21
> [Manitoba's Book of Authorities, Tab 16]

66. The generic character of trade-mark legislation was emphasized in *Kirkbi AG*, where this Court held that unregistered trade-marks came within the protection of the *Act*. The pro-active process of registering trade-marks was insufficient to provide comprehensive protection. The notion of protecting "trade as a whole" required even businesses that had not availed themselves of the registration process to be covered by the *Act*. Again, this approach is in direct contrast to the proposed Canadian *Securities Act*, in which the regulation of the securities industry mandates a process of prior registration, recognition and designation to identify those persons and entities whose conduct will be regulated by the legislation.

67. It is noteworthy that Parliament itself apparently distinguishes between the regulation of trade as a whole and the securities industry as a particular business. Subsection 5(1) of the *Competition Act*, the current equivalent to the *Combines Investigation Act* that was under consideration in the *General Motors* case, provides that s. 45 of the *Act* (which prohibits conspiracies, agreements or arrangements between competitors) does not apply in respect of an agreement or arrangement between, among other persons, "persons who are members of <u>a class of persons who ordinarily engage in the business of dealing in securities</u>...if the agreement or arrangement has a reasonable relationship to the underwriting of a specific security."[emphasis added]

> *Competition Act*, R.S.C. 1985, c. C-34 (Consolidation), s. 5
> [Manitoba's Book of Authorities, Tab 12]

68. In the *Labatt Breweries* case, this Court found that prescribing the standards for light beer was not an exercise of the general trade and commerce power because those standards related to a single industry rather than trade as a whole. Accordingly, it is also instructive to examine the framework of the legislation under scrutiny in that case. The entire body of the legislation (including the regulations) is far too vast to reproduce here. Nonetheless, the definitions section of the applicable statute and regulation at the time of the *Labatt Breweries* case were structured far more generically than the definitions in the proposed *Canadian Securities Act*. They did not identify regulated persons or entities on an *a priori* basis. The fact that the Court in *Labatt Breweries* nonetheless proceeded to find that the legislative scheme implicated a single industry provides even stronger support for the proposition that the proposed Canadian *Securities Act* does likewise.

> *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914 [Canada's Book of Authorities, Volume I, Tab 18]
>
> *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 2; Food and Drug Regulations, *Consolidated Regulations of Canada 1978*, c. 870, Part A, Administration – "Interpretation" and Part B, Foods – "General" [Manitoba's Book of Authorities, Tab 13]

69. Among the provisions struck down in *Labatt Breweries* was s. 6 of the *Food and Drugs Act* (Canada), which provided that where a standard had been prescribed for a "food", no person could (*inter alia*) purport to package or sell such food without meeting the prescribed standard. On its face, this provision and the term "food" have a degree of generality at least as compelling as the detailed regulatory provisions for members of the securities industry contained in the proposed *Act*. Further, the decisive passage in the majority judgment of Estey J. provides as follows:

> In the end, the effort of the respondent here is simply to build into these regulations a validity essentially founded upon the embryonic definition of the application of the trade and commerce heading in the *Citizens Insurance* case, *supra*. That observation and the subsequent references thereto are all predicated upon the requirement that the purported trade and commerce legislation affected industry and commerce at large or in a sweeping, general sense. In the context of the *Food and Drugs Act*, it follows that even if this statute were to cover a substantial portion of Canadian economic activity, one industry or trade at a time, by a varying array of regulations or trade codes applicable to each individual sector, there would not, in the

> result, be at law a regulation of trade and commerce in the sweeping general sense contemplated in the *Citizens Insurance* case, *supra*.
>
> *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, *supra* at 943-944

70. Manitoba submits that the "sweeping general sense" that Justice Estey found to be lacking in *Labatt Breweries* is indeed present in the *Competition Act* and the *Trade-marks Act*, where (as already noted) the substantive rights and obligations are directed to the world at large. This is manifestly not the case with respect to the proposed Canadian *Securities Act*, in which the prescription and delegation of regulatory authority, in the words of Justice Estey, "purport to establish … a detailed single industry regulatory pattern."

> *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, *supra* at 935

Would the provinces be constitutionally incapable of acting in the absence of federal legislation?

71. The formulation of this test, originating in the *Canadian National Transportation* case, is illuminating in itself: is this legislation that the provinces jointly or severally would be constitutionally incapable of passing?

> *Attorney General of Canada v. Canadian National Transportation Ltd.*, *supra* at 268

72. The term "jointly or severally" comprehends an attempt at coordinated provincial action. The implication is that if the provinces <u>do</u> act collectively to create a functioning system that is national in scope, the proponents of federal legislation cannot meet the provincial incapability test. Indeed, any other conclusion would be inconsistent with the principle of federalism and would undermine cooperation among the provinces as an important component of the larger principle of cooperative federalism.

73. At the least, the notion of joint and several provincial action should put to rest the argument of those who assert that the enactment of "national" securities legislation is beyond the scope of the provinces because only Parliament can act on a national basis. Manitoba

submits that the provincial incapability test imposes a much stricter burden on the proponents of the proposed *Act*.

74. Canada indentifies five limitations on provincial power that it claims determine the “provincial incapability” test in its favour.

Canada’s factum at paras. 109-119

75. The last three of those alleged limitations can be disposed of quickly. The third, relating to the status and capacity of federally-incorporated companies, can no longer be seriously entertained since this Court decided in the *Canadian Indemnity* case that federally-incorporated companies are not exempt from provincial regulation.

Canadian Indemnity Company v. Attorney-General of British Columbia, [1977] 2 S.C.R. 504 at 519 [Manitoba’s Book of Authorities, Tab 3]

76. The fourth alleged limitation suggests that the criminal law power can somehow “bootstrap” securities regulation into the federal domain. Canada provides no explanation as to why the existence of the federal criminal law power is incompatible with provincial securities regulation. The two have co-existed for decades, in the same way that criminal law can complement provincial regulation of other matters. In any event, Canada’s assertion on this point undermines the principle of federalism and fails to acknowledge that existing provincial securities schemes themselves contain significant penal provisions.

Affidavit of Donald G. Murray, *supra* at 10 (paras. 22–23)

77. Moreover, to the extent individuals who commit fraud are free and may continue to commit fraud in various parts of the country, a point raised by certain interveners (discussed below), criminal prosecutions are an available tool of “nationwide enforcement.” Assuming this tool has not been used to the fullest extent, this shortcoming cannot be attributed to any alleged constitutional incapability on the part of the provinces or administrative incapability on the part of provincial securities regulators.

78. The fifth alleged limitation, regarding international relationships and the monitoring of systemic risk, speaks to administrative rather than legislative issues. It simply has no relevance to the process of classifying proposed legislation under the division of powers. In any case, Canada has ample legislative tools at its disposal to deal with systemic risk and economic crises, including jurisdiction over the banking system and the "emergency" and "national dimension" powers under peace, order and good government.

79. The first alleged limitation cites the provincial inability to regulate interprovincial and international trade. The problem with Canada's assertion on this point is that interprovincial and international trade is a distinct branch of the trade and commerce power, separate and apart from general trade and commerce. It raises completely different issues, and involves completely different authorities in relation to the catalogue of provincial powers than does general trade and commerce. The case law on interprovincial and international trade relates to the movement of tangible goods across borders, and it is a false analogy for Canada to argue that this case law can somehow enhance its argument for taking over the regulation of a business, industry or profession that operates with incidental extraprovincial effects.

80. In *Gregory & Co. v. Quebec Securities Commission et al.*, this Court recognized the distinction in the clearest possible terms:

> Nor is this conclusion affected by the decisions rendered in a group of cases referred to by counsel for appellant, where the incidence of export trade of farm products on the validity of certain provincial marketing acts was considered. … These decisions are also irrelevant. The *Act Respecting Securities*, 3-4 Elizabeth II, c. 11, is not marketing legislation within the meaning attending the legislation considered in these cases. In order to protect the public against fraud, it provides for the establishment and operation of a control and supervision over the conduct, in the Province of Quebec, of persons engaged, therein, in carrying on the business of trading in securities or acting as investment counsel. [citations omitted]
>
> *Gregory & Co. Inc. v. Quebec Securities Commission et al*., [1961] S.C.R. 584 at 590 [Canada's Book of Authorities, Volume I, Tab 15]

81. Canada asserts that the cases of *Gregory*, *McKenzie Securities* and *Bennett* "recognized that interprovincial and international trades in securities were outside provincial competence, but held that there was enough intraprovincial activity in each case to found provincial jurisdiction" (Canada's factum at para. 109). Manitoba submits that these cases reached no conclusion whatsoever about provincial competence over interprovincial and international trades in securities. Indeed, the very concept of "international" or "interprovincial" securities trades is problematic, as discussed below. In fact, to the extent that these cases addressed any such issue at all, they stand for the proposition that incidental extraprovincial effects do not transform valid provincial securities legislation into an exercise of interprovincial or international trade and commerce. They therefore implicitly reinforce Manitoba's position that the first branch of s. 91(2) is irrelevant to the analysis of provincial incapability for purposes of the second branch, the general trade and commerce power.

> *Gregory & Co. v. Quebec Securities Commission et al. supra*
>
> *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56 (Man. C.A.) at 62–63 [Canada's Book of Authorities, Volume II, Tab 30]
>
> *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339 (B.C. C.A.) [Canada's Book of Authorities, Volume I, Tab 4]

82. The issue of interprovincial and international trade and commerce came before this Court again in the *Canadian Indemnity* case. The appellant insurance companies argued that the creation of a government-run compulsory automobile insurance plan was an unconstitutional regulation of trade and commerce. Martland J. (for the Court) paraphrased their position as follows:

> The argument of the appellants on this point is fully reviewed in the judgment at trial. It can be summarized briefly as follows. On the evidence submitted by the appellants the business of automobile insurance is, today, interprovincial and, indeed, international in scope. As an example, Canadian Indemnity Company has its head office in Winnipeg and its executive office in Toronto. It has branch offices in the various provinces. Premiums paid pass through the branch offices to the head office. There is a steady flow of money passing from the branch offices to the head office and the executive office, and a lesser flow from thence to the provincial branches. The company is able to carry on business by the creation of a reservoir or pool

> of capital which enables the company to carry on its nation-wide business and to serve the requirements of policy-holders in all parts of Canada.
>
> *Canadian Indemnity Company v. Attorney-General of British Columbia*, *supra* at 510 – 511

83. The Court rejected that argument in the following terms:

> The impact of the legislation upon the appellants' automobile insurance business in British Columbia could not be more drastic. However, that effect of the legislation upon companies whose operations are interprovincial in scope does not mean that the legislation is in relation to interprovincial trade and commerce. The aim of the legislation relates to a matter of provincial concern within the Province and to property and civil rights within the Province. (at 512)

84. Canada's references to interprovincial and international trade do, however, perform a valuable analytical function. They bring squarely before the Court the claim that the increasingly national and international character of capital markets is fundamental to classifying the proposed *Act* as an exercise of the general trade and commerce power. This claim must be closely examined.

85. This first point is this: how does the cross-border flow of capital bear on the pith and substance of the proposed *Act*, which is comprehensive regulation of the securities industry? From the perspective of provincial securities laws, it is apparent that incidental extraterritorial effects do not interfere with the validity of legislation the pith and substance of which comes within s. 92(13): *Gregory & Co. v. Quebec Securities Commission et al., McKenzie Securities* and *Bennett v. British Columbia (Securities Commission), supra.*

86. Canada argues that the trade in securities has an international and interprovincial character that invites the application of the trade and commerce power under s. 91(2). Canada rejects the evidence presented by Alberta that securities transactions are simply a chain of intraprovincial transactions and insists that the purchase or sale of a security "through an exchange or automated system is an economic transaction between persons who could be located in anywhere in the world" (Canada's factum at para. 110).

87. Even on an intuitive level, Canada's attempt to impart a cross-border character to securities transactions does not succeed. The hypothetical "economic transaction" set out above assumes that purchases and sales of securities occur in multiples of one. But share transactions on public exchanges involve thousands, in some cases hundreds of thousands, of shares on a daily basis. It is true that an investor in Manitoba might sell shares in Company X on the same day that someone in Brazil buys shares in Company X. But on what basis can the Manitoban be said to sell to the Brazilian as opposed to, say, another Manitoban who also buys shares in Company X on the same day?

88. This simple example demonstrates that, far from "masking" the true nature of securities transactions, Alberta's expert describes the situation correctly. It is a fundamental premise of securities law that the activities of market intermediaries such as dealers, exchanges and clearing agencies eliminate even <u>notional</u> exchanges of economic or property rights between individual investors. Rather, each investor, whether buying or selling, has a relationship with an intermediary (often a broker) that involves the transfer of security entitlements rather than shares or share certificates.

> Gillen, *Securities Regulation in Canada, supra* at 24-40
>
> Expert Report of Eric Spink, Q.C., June 28, 2010: "Securities Regulation as Property Law", Record [Alberta], Volume XIX at 22-25 (paras. 51-65)

89. Canada curiously asserts that Alberta and Quebec ignore the actual regulation of the secondary market. The basis for this assertion is unstated, but it is important to note that the concept of the security entitlement, as opposed to an actual exchange of shares, is an integral part of the secondary market. For example, the extract from Gillen's text noted in the previous paragraph is clearly a discussion of secondary market activity. This is important because, contrary to what Canada appears to assert in paragraphs 111 and 112 of its factum, the regulatory pattern of provincial securities legislation tracks the concept of the security entitlement. For example, an investor who is aggrieved by perceived irregularities in a transaction will normally seek redress from the market participant with whom he has a relationship of privity, such as his/her broker, and not from some mythical "other investor" allegedly involved in the transaction.

90. Securities legislation provides the mechanism for redress by giving the relevant commission the authority to supervise the conduct of market participants such as issuers and brokers (who are included within the definition of "dealer" in the proposed *Act*). Such legislation is not structured to deal with "cross-border trades" or any other specific transactions involving securities themselves. For that reason, assertions by Canada and its supporters that securities markets have become international, or that exchanges may be situated in different jurisdictions than the "parties" to a share transaction, are meaningless in themselves. The real question is whether provincial securities laws are capable of regulating the conduct of issuers and market intermediaries, wherever situated. This bring us to the issue of territoriality, the final "limitation" Canada identifies on the capability of the provinces to regulate the securities industry effectively.

91. It is important to note at the outset of the discussion that this issue is not new. The cases of *Gregory*, *McKenzie Securities*, and *Bennett*, discussed earlier, all involve the territoriality principle. In *McKenzie Securities*, for example, the extra-provincial flow of capital from the Manitoba investor to the Ontario broker did not preclude the Manitoba commission from exercising jurisdiction. The broker's solicitation of business inside Manitoba was sufficient to meet the "in the province" requirement.

92. The territoriality principle has also been considered in other contexts. The courts have consistently demonstrated a flexible and accommodating approach so as not to stifle the robust exercise by provinces of their constitutionally-assigned powers. For example, professional disciplinary bodies have been recognized as having jurisdiction to discipline their members for professional misconduct or transactions occurring outside the province.

> *Underwood, McLellan & Associates Ltd. v. Association of Professional Engineers of Saskatchewan et al.* (1979), 103 D.L.R (3d) 268 (Sask. C.A.) at paras. 7 and 24–27 [Manitoba's Book of Authorities, Tab 10]
>
> *Thorpe v. College of Pharmacists of British Columbia* (1992), 97 D.L.R. (4^{th}) 634 (B.C. C.A.) at paras. 18–21 [Manitoba's Book of Authorities, Tab 9]

93. This Court addressed the territoriality issue most recently in *British Columbia v. Imperial Tobacco Canada Ltd.* The B.C. legislature had enacted legislation authorizing the provincial government to sue tobacco manufacturers for the costs of providing health care to smokers who had contracted tobacco-related diseases. The tobacco manufacturers, citing their international business presence and the worldwide consumption of their products, argued that the legislation went beyond the territorial limits on provincial legislative jurisdiction.

> *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 [Manitoba's Book of Authorities, Tab 2]

94. This Court rejected the territoriality argument, and in so doing established a template for the application of the territoriality principle in <u>all</u> matters of provincial jurisdiction. Major J. (for the Court) summarized the analytical steps in the template as follows:

> From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on provincial legislative competence. The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall. Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e., whether it is in the province. If the pith and substance is tangible, whether it is in the province is simply a question of its physical location. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province. (at para. 36)

95. Regulation of the securities industry involves the "intangible" relationships of contract, property and agency law described in the expert evidence in this reference. For example, the relationship of "security entitlement" between investor and broker offers *prima facie* jurisdiction for regulatory intervention by the province in which <u>either</u> party is located. In cases where the actions of an issuer are implicated, an investor's province of residence may validly

claim regulatory jurisdiction even if (to analogize to *Imperial Tobacco*) the issuer is located in a foreign jurisdiction or claims an international commercial presence.

96. The *Imperial Tobacco* template culminates an evolving view of provincial jurisdiction that takes into account the globalization of commercial activity. It ensures that provincial jurisdiction means something more than bare "local" authority. For example, provincial consumer protection, business protection and professional regulation legislation would essentially be eviscerated if interpreted not to apply to products manufactured outside the province or to business relationships having extraprovincial dimensions. Under *Imperial Tobacco,* a meaningful provincial connection, such as the sale of a product inside the province, is *prima facie* sufficient to establish regulatory jurisdiction.

97. The result of this evolutionary interpretation of provincial jurisdiction is that provincial capacity to regulate should not be called into question by vague generalities such as "the internationalization of securities markets" or "the cross-border trade in securities". This is particularly true in light of the evidence that provincial jurisdiction over the securities industry has been firmly established for decades, and that provincial regulators have demonstrated both the capacity to evolve (for example, through the harmonization process) and a sophisticated ability to coordinate enforcement practices.

> Expert Report of Eric Spink, Q.C., October 27, 2010: "Report in Reply to the Reports of Michael J. Trebilcock dated May 20 and August 23, 2010," Record [Alberta], Volume XXII at 135-136 (paras. 3-9)
>
> Affidavit of Donald G. Murray, *supra* at 7 and 9 (paras. 17 and 20)

98. In the end, Canada cannot point to any significant shortcomings in provincial legislation or administration that meet the "provincial incapability" test, other than the tautological observation that only Parliament can enact legislation that is "national" in scope. Canada states, for example, that no provincial commission can make an order (such as a cease trade order) that operates outside the province (Canada's factum at para. 113). This observation discloses no <u>constitutional</u> incapability as required by the fourth *General Motors* indicator. Provincial

securities legislation does provide authority for the issuance of reciprocal orders, authority that is utilized as circumstances require.

Affidavit of Donald G. Murray, *supra* at 8 (para. 19)

99. In the same vein, Canada argues that territorial limits on provincial jurisdiction create problems in ensuring the equal treatment of shareholders across the country in the context of take-over bids, suggesting that there is only a national policy to "encourage" provincial regulators to take action in these situations (Canada's factum at para. 115). In fact, nine provinces have implemented identical, binding regulations (or Rules) providing for the equal treatment of shareholders in a take-over bid, and Ontario has included substantively the same provision in its legislation. The National Policy referred to by Canada is an agreement concluded by the nine aforementioned provinces, under the aegis of the Canadian Securities Administrators, confirming a common approach to the interpretation of the regulations and Rules in force in their respective jurisdictions. Canada's argument ignores the existence and binding nature of the rules and regulations in force across the country and the high degree of harmonization achieved in interpreting and applying those rules.

CSA National Policy 62-203: "Take-Over Bids and Issuer Bids," s. 1.1 [Canada's Book of Authorities, Vol. III, Tab 54]

100. Canada also invokes alleged shortcomings in the availability of civil remedies within a given province for misrepresentations made by issuers outside that province as a supposed example of an extraterritorial limit on provincial legislative authority. However, the decision in *Pearson v. Boliden Limited* did not address the territorial reach of provincial securities legislation at all, but rather considered, in a choice of law context, which provincial securities legislation governed claims of misrepresentation made by certain members of a plaintiff class in a class proceeding. The fact that there may be discrepancies between provincial laws with respect to the availability of certain statutory causes of action, or the duration of limitation periods, may be unfortunate in specific cases, but it is normal in a federal system and hardly an

example of the constitutional incapacity of the provinces to regulate securities.

> *Pearson v. Boliden Limited* (2002), 222 D.L.R. (4th) 453 (B.C. C.A.) [Canada's Book of Authorities, Tab 24]

101. One of the interveners, the Canadian Coalition for Good Governance, has put forward various examples of "jurisdiction-hopping" by alleged fraudsters as "anecdotal evidence" of the shortcomings in the enforcement of provincial securities laws. It points to the alleged fact that some individuals have been barred from the capital markets in certain provinces but that reciprocal orders were issued only in some, but not all, other provinces. Quite apart from the fact that "anecdotal evidence" about market-related individual misconduct is patently irrelevant to the question of determining legislative jurisdiction in the context of a reference, there may be reasons for the non-reciprocal enforcement of these orders in certain provinces that this Court cannot possibly or properly canvass in a hearing of this nature. This Court ought to disregard these claims in considering the issues raised in this reference.

> Factum of the Canadian Coalition for Good Governance at paras. 9-14 (para. 13 describes the examples given as "anecdotal evidence")

102. Apart from Canada's failure to meet the standard of proving "provincial incapability," Manitoba submits that in the course of assessing the fourth indicator from *General Motors,* this Court should take into account the proven advantages of decentralized regulation of the securities industry. There is voluminous expert evidence on this point, and Manitoba anticipates that both Quebec and Alberta will address this issue at length in their facta. From its perspective, Manitoba can point to at least three distinct advantages of the decentralized system.

103. First, as already argued, provincial securities regulators have a unique understanding of local markets that enables them to match available sources of capital with local enterprises and to create special investment vehicles that benefit local communities. Similarly, the presence of a provincial commission within the community facilitates efforts to detect securities market irregularities and to undertake swift remedial measures.

> Affidavit of Donald G. Murray, *supra* at 8 (para. 19) and at 16–17 (paras. 34–38)

104. Secondly, provincial regulatory jurisdiction promotes the development of specialized expertise having roots in the history and economic profile of a particular province or region. The grain trade has been integral to the growth and development of Manitoba as a province. The Manitoba Securities Commission now oversees the operations of ICE Futures Canada, Inc. and its clearinghouse ICE Clear Canada through recognition orders issued under *The Commodity Futures Act*, a provincial statute. ICE Futures is the only agricultural commodities exchange in Canada and has participants from around the world.

> *The Commodity Futures Act*, S.M. 1996, c. 73 (C152)
>
> Affidavit of Donald G. Murray, *supra* at 17-18 (paras. 40-41)

105. Thirdly, provincial jurisdiction gives latitude for experiment and innovation to improve regulatory processes. In Manitoba, the legislature has amended *The Securities Act* to provide the Securities Commission with an innovative administrative remedy called a “compensation order.” This is an order for repayment to an investor of his or her financial losses arising from illegal or improper conduct in the trading of securities. The availability of a compensation order gives Manitoba investors an attractive, inexpensive alternative to a civil action for the recovery of lost investment funds.

> Affidavit of Donald G. Murray, *supra* at 10-12 (paras. 24-29)
>
> *The Securities Act*, R.S.M. 1988, c. S50, s. 148.2
> (reproduced in Appendix 1)

106. Since the inception of the compensation order model in Manitoba, the securities legislation of Saskatchewan, New Brunswick and Nova Scotia has been amended to provide for compensation orders (although the Nova Scotia amendments have yet to be proclaimed). The proposed Canadian *Securities Act* contains no compensation order provisions comparable to the Manitoba legislation.

107. Canada takes exception to such evidence on the basis that it “has very limited utility” (Canada’s factum at para. 48). The apparent source of this claim is the interpretative principle that questions of the efficacy of legislation have no relevance to a pith and substance analysis.

Whatever the merits of this approach in other division of powers cases, Manitoba submits that it is totally unsuited to the analysis under the fourth indicator of the *General Motors* test. The question of whether the provinces are constitutionally incapable of acting in the absence of federal legislation, like any other constitutional question, should not be decided in a factual vacuum. This point is especially significant in the present reference, where Canada and its supporters have themselves presented considerable evidence, much of which can fairly be characterized as supporting the proposed *Act* as desirable legislative policy rather than constitutional imperative.

108. Manitoba has one final submission on the provincial incapability issue. In the *General Motors* case, Chief Justice Dickson grounded his finding of provincial incapability in part on the fact that the provinces themselves might be implicated in potential violations of competition policy. This is a powerful reason to support a finding that only the national government can effectively regulate competition law. No such consideration should inform the Court's evaluation of the fourth *General Motors* indicator for the purposes of this reference.

> *General Motors of Canada Ltd. v. City National Leasing, supra* at 679-680, quoting a study prepared for the Government of Canada

Would failure to include one or more provinces or localities in the scheme jeopardize the operation of the scheme in other parts of the country?

109. There are two reasons for the Court to decide that Canada has failed to prove this indicator. First, the existence of effective regulatory schemes in all the provinces eliminates the potential application of this indicator on a simple factual basis. It is obvious that Chief Justice Dickson crafted this question without foreseeing that Canada would someday attempt to simply replicate ten provincial statutes that had already established a pan-Canadian regulatory regime.

110. The second reason is that by adopting an "opt-in" approach, the proposed *Act* forfeits any claim that Canada must act in order to ensure that the scheme operates successfully by including all the provinces. Canada and its supporters point to cooperative federalism as justification for their position that the opt-in approach is consistent with this indicator. They argue, in effect, that the failure to include one or more provinces in the federal scheme cannot be fatal if the

provinces themselves are given the choice to stay out. The Canadian Bankers Association takes this point to its logical conclusion by asserting that the popularity of the scheme among the provinces (measured by the number of opt-ins) cannot determine its constitutional validity (CBA factum at para. 23*).*

111. Manitoba submits that the CBA's position is correct but beside the point. The opt-in scheme is essentially a declaration by Parliament that it has jurisdiction over securities regulation whether its legislation ultimately binds the entire country or not. Conversely, the fifth *General Motors* indicator contemplates that Parliament cannot assert jurisdiction over a matter unless its legislative scheme includes every province. The creation of an "all-in" scheme is necessary to transform the proposed *Act* into an exercise of the general trade and commerce power, particularly given that it essentially replicates existing provincial securities laws. The failure to enact a binding national scheme *ipso facto* undermines any constitutional basis for Parliament to supplant the existing jurisdiction of the individual provinces over securities regulation under s. 92(13). Indeed, Canada is effectively asking this Court to take the step that Canada itself has declined to take – to declare (in accordance with *General Motors*) that the creation of a centralized regime is of such compelling importance that the failure to include any province would jeopardize its successful operation.

CONCLUSION

112. In the final analysis, much of the claim for federal legislative jurisdiction under the general trade and commerce power rests on certain hypothetical advantages, largely in the form of reduced regulatory costs and streamlined regulatory approvals, that would allegedly result from the establishment of a single national regulator under the proposed *Act*. These, it is suggested, would make Canada's capital markets more competitive internationally.

113. Even if these hypothetical advantages would materialize – a point on which the evidence is not clear - they cannot form the basis for meeting the *General Motors* test because they fail the key indicators of that test. At root, Canada and its supporters complain that the federal system creates financial disadvantages for companies that issue securities. Given the high degree of consistency and harmonization achieved by the provinces in regulating the securities

industry, not only are any alleged disadvantages relatively modest, they are, more importantly, the necessary consequence of having a federal system in the first place. Any matter or activity subject to provincial regulation creates the possibility of administrative inconvenience and extra costs. However, this possibility is tolerated to achieve the goal of having meaningful legislative and regulatory powers exercisable at the provincial level as a key component for ensuring the strength and longevity of the Canadian federation.

PART IV

ORDER SOUGHT CONCERNING COSTS

114. Manitoba is not requesting costs in this reference.

PART V

ORDER SOUGHT

115. Manitoba requests that the question posed on this reference be answered "no." In light of the importance of the question for the constitutional division of powers, Manitoba requests permission to make oral submissions of 20 minutes' duration at the hearing of the reference.

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

EUGENE SZACH Counsel for the Intervener The Attorney General of Manitoba	**NATHANIEL CARNEGIE** Counsel for the Intervener The Attorney General of Manitoba

PART VI

TABLE OF AUTHORITIES

STATUTES / REGULATIONS

SECONDARY SOURCES

APPENDIX '1'

CHAPTER S50

THE SECURITIES ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions
1(1) In this Act,

"adviser" means a person or company that engages in or holds himself, herself or itself out as engaging in the business of advising others with respect to buying, selling or investing in securities; (« conseiller »)

"associate" where used to indicate a relationship with any person or company, means

(a) any other company of which that person or the company first mentioned beneficially owns, directly or indirectly, equity shares carrying more than 10% of the voting rights attached to all equity shares of that other company for the time being outstanding; or

(b) any trust or estate in which that person or company has a substantial beneficial interest or as to which that person or company serves as trustee or in a similar capacity; or

CHAPITRE S50

LOI SUR LES VALEURS MOBILIÈRES

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Définitions
1(1) Les définitions qui suivent s'appliquent à la présente loi.

« action participante » Action d'une catégorie quelconque d'actions d'une compagnie conférant des droits de vote dans toutes les circonstances, et action d'une catégorie quelconque d'actions conférant des droits de vote en raison de la réalisation continue d'une condition. ("equity share")

« administrateur » Administrateur d'une compagnie ou particulier exerçant des fonctions comparables pour une compagnie ou une autre personne ou occupant un poste semblable chez elle. ("director")

« cadre » Le président, le vice-président, le secrétaire, le trésorier ou le directeur général d'une compagnie. ("official")

« caisse populaire » Caisse populaire exploitée en application de la *Loi sur les caisses populaires et les credit unions*. La présente définition vise la Fédération des caisses populaires du Manitoba inc. et la Co-operative Credit Society of Manitoba Limited. ("credit union")

Administrative penalties against others
148.1(1.1) If after a hearing the commission

(a) determines that

(i) a company or a person other than an individual has committed a contravention or failure referred to in clause (1)(a), and

(ii) a director or officer of the person or company, or another person other than an individual, authorized, permitted or acquiesced in the contravention or failure; and

(b) considers that the order is in the public interest;

the commission may order the director or officer or the other person to pay an administrative penalty of not more than $100,000. in the case of an individual, or not more than $500,000. in any other case.

Autres pénalités administratives
148.1(1.1) Après une audience, la Commission peut ordonner à un administrateur, à un dirigeant d'une compagnie ou d'une personne qui n'est pas un particulier ou à une autre personne qu'un particulier de verser une pénalité administrative maximale de 100 000 $ dans le cas d'un particulier et de 500 000 $ dans les autres cas si :

a) elle détermine que la compagnie ou la personne qui n'est pas un particulier a commis une infraction ou un manquement visé à l'alinéa (1)a) et qu'un de ses administrateurs ou dirigeants ou que l'autre personne a autorisé l'infraction ou le manquement ou y a consenti;

b) elle considère qu'il est dans l'intérêt public de rendre l'ordonnance.

Administrative penalties are in addition to other sanctions
148.1(2) The commission may make an order under subsection (1) despite the imposition of any other penalty or sanction on the person or company, or the making of any other order by the commission, related to the same matter.

S.M. 2001, c. 26, s. 64; S.M. 2007, c. 12, s. 3 and 46.

Pénalité administrative en plus des autres sanctions
148.1(2) La Commission peut rendre une ordonnance en vertu du paragraphe (1) malgré toute autre pénalité ou sanction que la personne ou la compagnie peut se voir imposer à l'égard de la même question et malgré les autres ordonnances qu'elle peut rendre à l'égard de cette question.

L.M. 2001, c. 26, art. 64; L.M. 2007, c. 12, art. 46.

Compensation for financial losses
148.2(1) On the application of a claimant, the Director may, when the commission holds a hearing about a person or company, request it to make an order that the person or company pay the claimant compensation for financial loss.

Indemnisation en cas de perte financière
148.2(1) Si l'auteur d'une demande d'indemnisation lui en fait la demande, le directeur peut demander à la Commission, si celle-ci tient une audience au sujet d'une personne ou d'une compagnie, d'ordonner à cette personne ou à cette compagnie d'indemniser l'auteur de la demande pour la perte financière qu'il a subie.

Director's decision not reviewable
148.2(2) Despite subsection 29(1), the Director's decision whether to make a request is not reviewable.

Recours en révision
148.2(2) Malgré le paragraphe 29(1), la décision du directeur de présenter ou non une demande à la Commission ne peut faire l'objet d'aucun recours en révision.

Order by commission
148.2(3) When so requested by the director, the commission may order the person or company to pay the claimant compensation of not more than $250,000. for the claimant's financial loss, if after the hearing the commission

(a) determines that the person or company has contravened or failed to comply with

Ordonnance de la Commission
148.2(3) Lorsque le directeur le lui demande, la Commission peut ordonner à la personne ou à la compagnie de verser à l'auteur de la demande d'indemnisation une indemnité maximale de 250 000 $ pour la perte financière qu'il a subie si, après l'audience :

a) elle détermine que la personne ou la compagnie a contrevenu ou a omis de se conformer :

(i) a provision of this Act or the regulations,

(ii) a direction, decision, order or ruling of the commission, or a rule made under subsection 149.1(1),

(iii) a written undertaking made by the person or company to the commission or the Director, or

(iv) a term or condition of the person or company's registration;

(b) is able to determine the amount of the financial loss on the evidence; and

(c) finds that the person or company's contravention or failure caused the financial loss in whole or in part.

(i) à la présente loi ou aux règlements,

(ii) à une de ses directives, de ses décisions ou de ses ordonnances ou à une règle prise en vertu du paragraphe 149.1(1),

(iii) à un engagement écrit pris envers elle ou le directeur,

(iv) à une condition de l'inscription de la personne ou de la compagnie;

b) elle peut déterminer le montant de la perte financière en se fondant sur la preuve;

c) elle conclut que la contravention ou l'omission a entraîné tout ou partie de la perte financière.

Compensation orders against employers and others
148.2(4) If the contravention or failure occurs in the course of the person or company's employment by another person or company, or while the person or company is acting on behalf of the other in any other capacity, the commission may order the other person or company to jointly and severally pay the claimant the financial compensation ordered under subsection (3).

Ordonnance d'indemnisation rendue contre l'employeur
148.2(4) Si la contravention ou l'omission survient au cours de l'emploi de la personne ou de la compagnie par une autre personne ou compagnie ou pendant que la personne ou la compagnie agit à tout autre titre pour le compte de l'autre personne ou compagnie, la Commission peut également ordonner à cette autre personne ou compagnie de verser conjointement et individuellement, à l'auteur de la demande d'indemnisation, l'indemnité prévue au paragraphe (3).

Meaning of "employment"
148.2(5) For the purposes of subsection (4), a person or company is employed by another person or company when

(a) an employer–employee relationship exists; or

(b) the first person or company is registered under this Act through the second person or company.

Sens de « emploi »
148.2(5) Pour l'application du paragraphe (4), une personne ou une compagnie est employée par une autre personne ou compagnie dans les cas suivants :

a) il existe une relation employeur-employé;

b) la première personne ou compagnie est inscrite sous le régime de la présente loi par l'intermédiaire de la seconde.

Compensation order is in addition to other sanctions
148.2(6) The commission may make an order despite the imposition of any other penalty or sanction on the person or company, or the making of any other order by the commission, related to the same matter.

Ordonnance et autres sanctions
148.2(6) La Commission peut rendre une ordonnance d'indemnisation malgré toute autre pénalité ou sanction que la personne ou la compagnie s'est vu imposer à l'égard de la même question ou malgré les autres ordonnances qu'elle a rendues à l'égard de cette question.

Court proceedings take precedence
148.2(7) The commission shall not make an order if the claimant has commenced a civil court proceeding for compensation for the same loss.

Claimant to inform commission about action
148.2(8) A claimant shall inform the commission without delay after commencing a civil court proceeding for the same loss.

No right of action after hearing begins
148.2(9) Once the commission opens a hearing where a claim for compensation for financial loss is one of the matters before it, the claimant is not entitled to commence a civil court proceeding for compensation for the same loss or any unclaimed loss arising out of the same transaction.

Enforcement of order
148.2(10) Despite subsection (9), a claimant in whose favour the commission makes an order may file a certified copy in the Court of Queen's Bench. The filed order is enforceable as a judgment of the court in favour of the claimant and against the person or company the commission ordered to pay the compensation.

S.M. 2002, c. 32, s. 6; S.M. 2007, c. 12, s. 47; S.M. 2009, c. 16, s. 26.

Orders respecting directors and officers
148.3(1) If the commission considers it to be in the public interest, the commission may, after a hearing, make one or more of the following orders:

(a) an order that a person must resign as a director or officer of an issuer;

(b) an order that a person is prohibited from being a director or officer of an issuer;

(c) an order that a person be appointed as a director or officer of an issuer.

Order may be subject to conditions
148.3(2) In making an order, the commission may impose any conditions that it considers appropriate.

S.M. 2006, c. 11, s. 31.

Poursuite civile
148.2(7) La Commission ne peut rendre une ordonnance d'indemnisation si l'auteur de la demande d'indemnisation a introduit une instance civile en vue d'être indemnisé pour la même perte.

Obligation d'informer la Commission
148.2(8) L'auteur d'une demande d'indemnisation qui introduit une instance civile à l'égard de la même perte est tenu d'en informer la Commission sans tarder.

Interdiction d'introduire une instance civile après le début de l'audience
148.2(9) Dès que débute l'audience de la Commission au cours de laquelle doit notamment être examinée sa demande d'indemnisation pour la perte financière qu'il a subie, l'auteur de la demande ne peut introduire une instance civile en vue d'obtenir une indemnité pour la même perte ni pour toute autre perte découlant de la même opération.

Exécution de l'ordonnance
148.2(10) Malgré le paragraphe (9), si la Commission rend une ordonnance d'indemnisation en sa faveur, l'auteur de la demande d'indemnisation peut en déposer une copie certifiée conforme auprès de la Cour du Banc de la Reine. Cette ordonnance peut alors être exécutée au même titre qu'un jugement de ce tribunal rendu en faveur de l'auteur de la demande et contre la personne ou la compagnie tenue de verser l'indemnité.

L.M. 2002, c. 32, art. 6; L.M. 2009, c. 16, art. 26.

Ordonnances concernant les administrateurs et dirigeants
148.3(1) Dans les cas où elle juge que l'intérêt public le justifie, la Commission peut, après audience, prendre, par ordonnance, l'une ou l'autre des mesures suivantes :

a) ordonner à une personne de démissionner de son poste d'administrateur ou de dirigeant d'un émetteur;

b) interdire à une personne d'occuper un poste d'administrateur ou de dirigeant d'un émetteur;

c) ordonner qu'une personne désignée occupe un poste d'administrateur ou de dirigeant d'un émetteur.

Modalités
148.3(2) La Commission peut assortir l'ordonnance des modalités qu'elle juge indiquées.

L.M. 2006, c. 11, art. 31.