

IN THE SUPREME COURT OF CANADA

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

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

AFFIDAVIT OF JOHN C. SHEEDY

(sworn July 12, 2010)

(Motion for Leave to Intervene pursuant to Rules 47 and 55 of
the *Rules of the Supreme Court of Canada*)

I, JOHN C. SHEEDY, of the City of Oakville, in the Province of Ontario,
MAKE OATH AND SAY:

1. I am Director, Public Equities for the Ontario Teachers' Pension Plan Board ("Teachers"), and as such have knowledge of the matters to which I depose. I am responsible for certain equity portfolios within the Public Equities Department and also for our Proxy Voting and Corporate Governance program. Where I do not have personal knowledge, I have indicated the source of my information, which I believe to be true.

2. I swear this affidavit in support of Teachers' motion for leave to intervene in the Reference by the Governor in Council in relation to the proposed Canadian *Securities Act* (the "Reference"). As set out below, Teachers' is a major institutional investor in the Canadian and international capital markets, charged with the responsibility to invest billions of dollars in pension assets for the teachers of Ontario. In addition to this direct knowledge about the national and international capital markets and the impact of securities regulation on the markets, Teachers' has historically participated in the debate about the current provincial securities regime

and the advantages of a single, national securities regulatory system. As such, Teachers' will bring a unique and relevant perspective to the issues in the Reference.

The Ontario Teachers' Pension Plan

3. Teachers' is a corporation continued under the *Teachers' Pension Act*, R.S.O. 1990, c. T.1, as amended, for the purposes of administering a pension fund for teachers in the province of Ontario. An independent organization, it invests the pension fund's assets and administers the pensions of 289,000 active and retired teachers in Ontario. Attached as Exhibit "A" is an excerpt from Teachers' website that describes Teachers' history and purpose.

4. A pension plan has existed for teachers in Ontario since 1917. Prior to 1990, the plan was administered by the Ontario government and all investments in the pension fund were restricted to non-marketable Province of Ontario debentures. In 1990, the government established the Teachers' Pension Plan Board as a corporation, overseen by a nine member board. Since that time, Teachers' has invested in a variety of assets, including public equities.

5. As noted in Exhibit "A," Teachers' members include approximately 175,000 teachers in elementary and secondary schools in Ontario, 114,000 pensioners, and 69,000 inactive members. With approximately \$96.4 billion in net assets (as at December 31, 2009), Teachers' is the largest single professional pension plan in Canada. The plan has one of Canada's largest payrolls with approximately \$4.4 billion in benefits paid to plan members.

Teachers' Involvement in the Capital Markets

6. Teachers' employs approximately 800 staff involved in the oversight and investment of the assets of the fund and administration of the pension plan. Teachers' has invested in the public capital markets since its inception in 1990 as noted above. From 1990 to 2010, the fund has grown from approximately \$19 billion to approximately \$96.4 billion, representing an average annual rate of return of 9.7% since 1990.

7. Teachers' is one of only a few pension plans in North America with a global reach. Approximately half of its investments are outside Canada. With 200 investment professionals, a wide range of investments are managed directly in-house. Teachers' has won

various awards, including being named Public Pension Fund Investor of the Year and Savviest Public Pension Plan.

8. Teachers' investments span several sectors of the global economy. A document from Teachers' website titled "Ontario Teachers' Pension Plan 2009 Investment Summary" (a copy of which is appended as Exhibit "B") provides a snapshot of Teachers' investments segmented by asset class as at December 31, 2009. In particular, public and private equity investment totaled \$41.2 billion and investment income in 2009 was \$10.9 billion. In terms of asset mix, 44% of the Teachers' portfolio was invested in equities. Of that 44%, 9% was invested in Canadian equities and 35% was invested in equities elsewhere in the world.

9. As at December 31, 2009, assets were invested in the following general categories:

- (a) Public equities: \$31.2 billion (e.g. Deutsche Telekom AG; Maple Leaf Foods Inc.);
- (b) Private equity: \$10 billion (direct private equity investments including GNC Corporation, Inc. and Maple Leaf Sports & Entertainment Ltd.);
- (c) Infrastructure and timberland: \$7.9 billion (direct investments in regulated utilities, airports and power systems);
- (d) Real estate: \$17.2 billion (a number of properties managed by a wholly owned subsidiary, The Cadillac Fairview Corporation Ltd., including the Toronto Eaton Centre, the Toronto-Dominion shopping centre and office complex, and the Pacific Centre shopping and office complex in Vancouver, British Columbia);
- (e) Fixed income: \$6.4 billion (long- and short-term government securities such as Government of Canada bonds and Canadian and international corporate bonds); and
- (f) Real-return products: \$18.9 billion (medium- and short-term government and corporate bonds).

10. The investment strategy of Teachers' requires a long term focus since the plan must pay pension benefits into the future for retired teachers. The plan relies heavily on the investment program to generate the returns required to pay pensions. All markets are explored to determine the best investment opportunities in order to earn the best returns at an appropriate level of risk. Teachers' 2009 Annual Report (excerpts of which are appended as Exhibit "C") describes Teachers' investments in greater detail and shows the vast extent of Teachers' investments in Canadian and foreign corporations (at pages 106-07).

11. With respect to foreign investments, Teachers' has billions of dollars invested in public equities in Australia, Japan, the United Kingdom, the United States, France, Germany and other European countries, and in other international and emerging world markets. In 2009, these investments totalled \$22.9 billion.

Teachers' Interest in a National Securities Regulator for Canada

12. As a very significant investor in Canadian and world markets, Teachers' is affected by the manner in which markets are regulated, and is thus affected by both the structure and operation of the securities regulation regime. As such, Teachers' has a history of advocacy on issues affecting the security of its investments and in securities regulation reform generally. This is reflected in the following public statement concerning its investment principles and public policy commitment (a copy of which is appended as Exhibit "D"): "We are diligent in seeking shareholder value. We are active in corporate governance initiatives and the development of public policy to make Canadian markets efficient and fair to all shareholders."

13. As part of its commitment to public policy and regulation, Teachers' has been active in the long-standing national debate about the structure of Canada's securities regulation regime, and in particular, Teachers' advocates the merits of a national securities regulator. A few examples of Teachers' many public submissions regarding securities regulation in Canada are set out below.

14. On June 20, 2003, Teachers' provided written submissions on the issue to the Wise Persons' Committee to Review the Structure of Securities Regulation in Canada. Teachers' stated that in the interests of ensuring truly competitive and well-regulated capital

markets in Canada, there should be only one Canadian securities regulator, and that any benefit of the multiplicity of provincial securities regimes is outweighed by the complexity and expense to issuers in complying with 13 different regulatory authorities. In particular, Teachers' stated:

We see the establishment of [one Canadian securities regulator] as critical for establishing and enforcing appropriate regulatory standards across Canada... We believe that this approach will allow for truly competitive and well-regulated capital markets in Canada.

15. Further, Teachers' identified the key weakness of the existing system of 13 provincial regulators as follows:

We believe that the key weakness of the current structure is that with 13 different sets of legislation applied by 13 different regulatory authorities there is no consistency, let alone uniformity, in the drafting, interpretation and application of securities legislation even in circumstances where the policy objectives and general legislative approaches in question are identical. This leaves issuers and investors alike in a confused state, and creates unnecessary inefficiencies in the securities regulatory process, increasing compliance costs for issuers and investors and decreasing the pool of resources otherwise available for surveillance and enforcement activities.

Attached as Exhibit "E" is a copy of Teachers' submission to the Wise Persons' Committee.

16. Teachers' also responded to a request for submissions by the Government of Alberta on the topic, arguing again that there should be only one Canadian securities regulator and that securities regulation should be a matter of federal jurisdiction. These submissions rejected the proposed "passport model" of securities regulation that, in Teachers' view, would not solve the problem of fragmented and inconsistent securities regulation in Canada, and would not mitigate the unnecessary expense of complying with multiple regimes. Teachers' submissions to the Government of Alberta dated July 15, 2003 are attached as Exhibit "F."

17. Teachers' participated in the Crawford Panel on a Single Canadian Securities Regulator, on which Teachers' then-President and Chief Executive Officer Claude Lamoureux sat as a member. Mr. Lamoureux noted the importance of proper regulation of capital markets at the release of the Crawford Panel's report endorsing a national regulator. Mr. Lamoureux stated:

“We think globally. We look for opportunities where the expected returns justify the risks. One risk we look at is whether capital markets are regulated fairly and our rights as an investor are properly protected.” Mr. Lamoureux’s comments are contained in the Crawford Panel news conference record dated June 7, 2006, a copy of which is appended as Exhibit “G.”

18. More recently, Teachers’ provided submissions to the federal Expert Panel on Securities Regulation (known as the “Hockin Panel”). Teachers’ submitted that a national regulator would be better able than the current regime to respond quickly to emerging regulatory and enforcement concerns and to respond to investor concerns in a timely manner. Teachers’ submissions to the Expert Panel dated July 28, 2008 are attached as Exhibit “H.” In part, Teachers’ stated:

In relation to enforcement matters, it is apparent to us that securities markets in Canada are primarily (if not exclusively) national (or even international) in scope. Many enforcement matters must cross provincial and territorial boundaries...A national body of securities legislation, developed and applied by a national regulator, should also permit a faster response to emerging regulatory and enforcement concerns. [Emphasis added.]

19. In its submissions to the Hockin Panel, Teachers’ repeated its concerns regarding the existing passport system which endeavours to harmonize provincial policy and regulation. While acknowledging that the passport system had somewhat reduced complexity and costs, Teachers’ noted the passport system has failed to lead to consistency in policy and legislation and has therefore continued to create unnecessary costs and inefficiencies in the regulatory process.

20. Another critical issue addressed by Teachers’ in this submission is the fast pace of development of new products traded in the capital markets that may not be regulated adequately, or at all, in the current regulatory regime. To a considerable extent, new and complex products that were poorly understood and not adequately regulated played a significant role in the recent credit crisis affecting markets and economies worldwide. In Teachers’ submission to the Hockin Panel, we also stated:

...the range of investment products being issued and traded in capital markets now goes well beyond what is captured by the

concept of securities, and many spheres are now left unaddressed by legislation. For example, the derivatives market is to a large degree unaddressed by securities legislation in Canada. ... Tribunals are increasingly faced with attempting to adjudicate market conduct in synthetic instruments by applying securities legislation that has not adequately contemplated the rapid development of investment products and techniques.....[A] fully-integrated legislative approach, dealing with securities, derivatives and other investment products in a consistent manner (in terms of principles and, where appropriate, in terms of rules) would be preferable.

This rapid development of new products affects markets and investors internationally. It cannot, in Teachers' view, be adequately assessed and regulated on a provincial basis.

Teachers' Proposed Submissions on the Reference

21. The proposed *Securities Act* would replace the fragmented provincially-based regime with a consistent and more competitive federal regime. Teachers' direct knowledge of and participation in the capital markets and regulatory impacts will assist the Court in understanding the pith and substance of the proposed national *Securities Act*. Teachers' can address the intent and effect of such legislation from a sophisticated investor's experience under the current system.

22. Teachers' submissions will deal with, and bring a unique perspective to, the following general issues:

- (a) The extent to which reporting issuers and institutional investors are negatively affected by the lack of a comprehensive, national securities regulatory regime in Canada;
- (b) The legal uncertainties and inefficiencies in the capital markets in Canada by virtue of multiple, different provincial regulatory regimes;
- (c) The economic and investment impact of the current regime on investors, particularly large institutional investors which are significant participants in capital markets; and

- (d) The reputation of Canada's capital markets in the international capital markets and how that reputation may affect investment in Canada.

23. If granted leave to intervene, Teachers' will be able to bring the following unique direct knowledge, experience and perspective to its submissions which is not offered by the parties to the Reference. As one of the largest institutional investors in Canada, Teachers' understands the factors which impact the integrity and credibility of the Canadian capital markets. Teachers' makes investment decisions every day and has to factor into its decision making the value and credibility of Canadian investments versus those from other jurisdictions. Secondly, as an active investor in Canadian equities and other complex products such as derivatives, Teachers' understands the actual impact of effective securities regulation (or lack thereof) as a criteria in investment decision-making. Effective regulation ought to be considered from both from a legislative and policy perspective and from an operational effectiveness and cost perspective. Thirdly, as a major institutional investor in multiple global markets, interacting with other institutional investors around the world, Teachers' understands the negative impact on Canada's reputation and economy of a lack of credible, consistent securities regulation. Finally, Teachers' has a long and transparent commitment to good governance and public policy and to advocating for more effective securities regulation. As a result of the above, Teachers' has taken the position that a national securities regime is necessary and can assist the court in considering the constitutionality of the proposed *Securities Act* in those respects.

24. If granted leave to intervene, Teachers' expects to expand on the issues identified in paragraph 22 above. In particular, Teachers' can assist this Court in assessing the substance and purpose of the proposed national *Securities Act* through its knowledge and experience with the capital markets in Canada. These markets function on a national basis, rather than a provincial basis. Provincial boundaries and rules are artificial in the modern capital markets era where the flow of capital and investment has no regard for such borders. In effect, the Canadian economy and Canadian investors are competing globally for capital and for investment opportunities. Any boundaries which are unduly restrictive or costly (and not legally necessary) have a negative effect on flow of investment and therefore competitiveness. Internationally, the uncertainty and inconsistency of the Canadian securities regulatory regime has a negative impact on the reputation of Canadian capital markets and this affects our competitiveness.

25. As a practical matter, investment decisions are also affected by perceptions of the integrity of a marketplace (is it safe and are the rules enforced adequately?) and by the cost-effectiveness and resource efficiency of the compliance and regulatory process. Duplication, inconsistency and lack of clarity and certainty in regulatory process (legislation, policy, rules and their application) all factor into choices about where to invest. Both institutional investors like Teachers' and retail investors are negatively affected by a regime that lacks clarity, consistency, credibility and efficiency.

26. Teachers' will expand on these submissions and we will not duplicate the submissions of others if granted leave to intervene in this matter.

Prejudice Issues

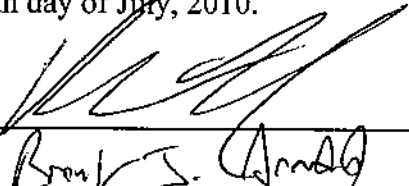
27. Two academic reports on the securities markets are proposed by Canada for the record on the Reference. Teachers' can address the above-described issues from the perspective of a major institutional investor and participant in the Canadian and international securities markets. Granting Teachers' leave to intervene will ensure that the perspective of investors and the impact on investment from the regulatory system in Canada is heard. Moreover, granting leave will provide the Court with the perspective of a large, sophisticated investor with a direct interest in the outcome of this Reference and a history of engagement with these issues. If leave is denied, Teachers' will be prejudiced in that its interests described above will not be represented in the Court's deliberations.

28. Teachers' intervention will not prejudice or delay the determination of the rights of the parties to the Reference. Teachers' will abide by the existing hearing date and any timetable established by this Court.

Costs

29. Teachers' will not seek costs, and asks that it not be liable for costs to any other party.

SWORN BEFORE ME at)
the City of Oakville, in the)
Province of Ontario, this)
12th day of July, 2010.)


_____)
Bryan S. Arnold
A Commissioner, etc.



JOHN C. SHEEDY

TOR_LAW 7419975\20

DRAFT

THIS IS EXHIBIT "A" TO THE AFFIDAVIT OF
JOHN C. SHEEDY, SWORN BEFORE ME ON
July 12, 2010

A handwritten signature in black ink, appearing to read "Brent J. Arnold", written over a horizontal line.

BRENT J. ARNOLD
COMMISSIONER FOR TAKING AFFIDAVITS

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JOHN C. SHEEDY, SWORN BEFORE ME ON
July 12, 2010

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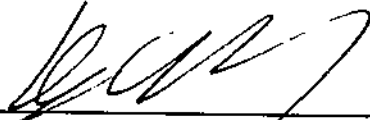
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July 12, 2010




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July 12, 2010



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July 12, 2010



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