

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

**MEMORANDUM OF ARGUMENT OF THE
ONTARIO TEACHERS' PENSION PLAN BOARD**
(Motion under Rule 55 for Leave to Intervene)

PART I – STATEMENT OF FACTS

Overview

1. This is a motion by the Ontario Teachers' Pension Plan Board ("Teachers'") for an order:
 - (a) granting Teachers' leave to intervene in the within Reference;
 - (b) permitting Teachers' to file a factum of 20 pages on the Reference; and
 - (c) permitting Teachers' 20 minutes of oral argument at the hearing of this Reference.

2. Teachers' supports Canada's position that the proposed Canadian *Securities Act* is *intra vires* the federal government's legislative powers. If granted leave, Teachers' will submit that:
 - (a) Investors, whether sophisticated institutional investors or retail investors, make investment decisions based on a variety of factors that include the relative value and integrity of capital markets. The integrity of capital markets is affected by the adequacy and effectiveness of the regulatory system;
 - (b) The nature and functioning of our capital markets and the regulatory requirements is not contained within provincial boundaries. Capital flows without regard for such borders and an effective market and effective regulation require national regulation. New products are proliferating and being sold internationally and current provincial regulation does not

adequately address the regulatory and investor protection needs arising from today's complex markets; and

- (c) Canada's reputation has suffered internationally as a result of the multiplicity of provincial regimes. This directly affects decision making of investors and affects competitiveness generally.

3. Teachers' submissions for this Reference will be useful to the Court and different from those of the other parties. 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

4. Teachers' is a corporation without share capital 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.

Affidavit of John C. Sheedy sworn July 12, 2010 ("Sheedy Affidavit"), Motion Record, Tab 2, para. 3

5. 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. With approximately \$96.4 billion in net assets (as at December 31, 2009), Teachers' is the largest single professional pension plan in Canada.

Sheedy Affidavit, paras. 4-5

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. 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.

Sheedy Affidavit, para. 6

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.

Sheedy Affidavit, para. 7

8. The "Ontario Teachers' Pension Plan 2009 Investment Summary" provides a snapshot of Teachers' investments segmented by asset class as at December 31, 2009. In particular, public and private equity investment totalled \$41.2 billion and investment income in 2009 was \$10.9 billion.

Sheedy Affidavit, para. 8 and Exhibit "B"

9. 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 shows the vast extent of Teachers' investments in Canadian and foreign corporations.

Sheedy Affidavit, para. 10 and Exhibit "C" at 106-07

10. 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.

Sheedy Affidavit, para. 11

Teachers' Interest in a National Regulator

11. 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. 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.

Sheedy Affidavit, paras. 12 and 23

12. Investment decisions are 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.

Sheedy Affidavit, para. 23

13. As such, Teachers' has a history of advocacy on issues affecting the security of its investments and in securities regulation reform generally. 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.

Sheedy Affidavit, paras. 12-13.

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. Among other things, 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.

Sheedy Affidavit, paras. 14-15 and Exhibit “E”

15. Teachers’ also 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, stating: “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.”

Sheedy Affidavit, para. 17 and Exhibit “G”

16. More recently, Teachers’ provided submissions to the federal Expert Panel on Securities Regulation. 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:

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. ...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.]

Sheedy Affidavit, para. 18 and Exhibit “H”

17. 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. As noted in Teachers' submission to the Expert Panel,

...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. ... 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.

Sheedy Affidavit, para. 20 and Exhibit "H"

Teachers' Proposed Submissions on the Reference

18. If granted leave to intervene, Teachers' will be able to bring 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.

Sheedy Affidavit, para. 23

19. 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 criterion 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.

Sheedy Affidavit, para. 23

20. 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.

Sheedy Affidavit, para. 23

21. 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.

Sheedy Affidavit, para. 23

22. If granted leave to intervene, Teachers' expects to expand on the issues identified above and in paragraph 2 hereof. 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.

Sheedy Affidavit, para. 24

PART II – STATEMENT OF QUESTIONS IN ISSUE

23. The issue on this motion is whether Teachers' should be granted leave to intervene and, if so, on what terms.

PART III – ARGUMENT

Test for Granting Intervener Status

24. Any person interested in a reference may make a motion to a judge for intervention.

Rules of the Supreme Court of Canada, SOR/2002-156, r.55

25. In exercising its discretion to allow a person to intervene, the Court shall consider whether:

- (a) the party seeking intervention has an interest in the outcome of the proceeding, and
- (b) its submissions will be useful and different from those of other parties.

Reference re Workers' Compensation Act 1983 (Nfld.), [1989] 2 S.C.R. 335 at para. 8

R. v. Finta, [1993] 1 S.C.R. 1138 at paras. 5-8

26. With respect to the first criterion, “any interest is sufficient, subject always to the exercise of discretion.”

Reference re Workers' Compensation Act 1983 (Nfld.), [1989] 2 S.C.R. 335 at para. 10

27. The second criterion “is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter.”

Reference re Workers' Compensation Act 1983 (Nfld.), [1989] 2 S.C.R. 335 at para. 12

Teachers' Interest in the Outcome of the Reference

28. As set about above, 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. The creation of a national securities regulator will have a profound effect on the Canadian securities market, on the companies in which Teachers' invests,

and on the security of Teachers' investments generally. It is this direct interest in the regulation of Canadian securities that has compelled Teachers' to be an active participant in the long-standing national debate over the merits of a national securities regulator.

Teachers' Submissions are Useful and Different

29. The first step in judicial review of a law for the purpose of determining its constitutionality is to determine the "matter," "pith and substance" or "dominant" characteristic of the law. This is determined by examining both the purpose and effect of the law, and includes inquiry into the social or economic purposes the statute was enacted to achieve.

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supplement (Toronto: Thomson Carswell, 2007-) at § 15.5(a), (d) and (e)

***Starr v. Houlden*, [1990] 1 S.C.R. 1366 at para. 18**

30. The federal government has the power to pass laws for the "regulation of trade and commerce." Under the second of two branches of the power, the government may pass laws pursuant to a "power over general trade and commerce affecting Canada as a whole."

***The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3., s.91(2), reprinted in R.S.C. 1985, App. II, No. 5**

***General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641 at para. 23**

31. Teachers' submissions will assist the Court in understanding that the pith and substance of the proposed national *Securities Act* is the efficient regulation of a competitive national securities regime, which falls under the federal government's power to pass laws concerning general trade and commerce affecting Canada as a whole. Teachers' will bring to the Court's deliberations the unique perspective of a large institutional investor with direct knowledge, experience and perspective on the factors which impact the integrity and credibility of the Canadian capital markets.

***Sheedy Affidavit*, paras. 21 and 23**

Teachers' Will Suffer Prejudice if Leave to Intervene is Denied; No Parties Will Suffer Prejudice if Leave is Granted

32. 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.

Sheedy Affidavit, para. 27

33. 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.

Sheedy Affidavit, para. 28

34. Accordingly, Teachers' respectfully submits that it has satisfied all the criteria for leave to intervene and it will make useful and distinct submissions that will assist the Court in determining this important Reference.

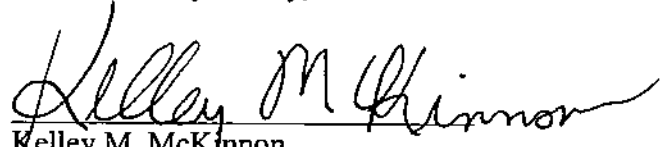
PART IV – SUBMISSIONS ON COSTS

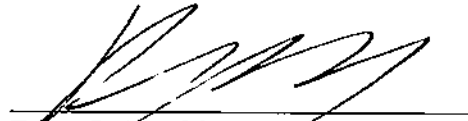
35. Teachers' requests that there be no costs of this motion.

PART V – ORDER SOUGHT

36. Teachers' respectfully requests that it be granted leave to intervene and to file a factum of no more than 20 pages, and that it be granted leave to make oral submissions on the hearing of the Reference for a maximum of 20 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2010.


Kelley M. McKinnon


Brent J. Arnold

Counsel for the Moving Party,
Ontario Teachers' Pension Plan

SCHEDULE "A"

TABLE OF AUTHORITIES

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Thomson Carswell, 2007-) at § 15.5(a), (d) and (e)

Starr v. Houlden, [1990] 1 S.C.R. 1366

Reference re Workers' Compensation Act 1983 (Nfld.), [1989] 2 S.C.R. 335

R. v. Finta, [1993] 1 S.C.R. 1138

General Motors of Canada Ltd. v. City National Leasing Ltd., [1989] 1 S.C.R. 641

SCHEDULE "B"

TABLE OF LEGISLATION

Rules of the Supreme Court of Canada, SOR/2002-156, r.55 and 57

The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3., s.91(2), reprinted in R.S.C. 1985, App. II, No. 5