

**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

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THE CANADIAN COALITION FOR GOOD GOVERNANCE**

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# FACTUM OF THE INTERVENER, THE CANADIAN COALITION FOR GOOD GOVERNANCE (CCGG)

## PART I ~ OVERVIEW AND FACTS

### A. Overview

1. Capital market abuse knows no boundaries. Provincial securities regulators, on the other hand, do—the *Constitution Act, 1867* prohibits them from stepping outside their provincial boundaries. This asymmetry between multi-jurisdictional "crime" and jurisdictionally-limited "punishment" has serious implications for the enforcement of securities law in Canada. Offenders whose abuses can harm Canadians in multiple provinces are typically prosecuted and sanctioned in only one, as administrative prosecutions in one province are rarely co-ordinated with similar prosecutions in other provinces. Administrative prosecutions in a province are even less frequently co-ordinated with federal criminal prosecutions.

2. As a matter of constitutional capacity, only federal legislation<sup>1</sup> can extend the protections and benefits of both criminal and administrative sanctions in a co-ordinated manner to Canadians in all provinces. CCGG's submissions will focus specifically on why this legislation satisfies the fourth and fifth indicia of valid federal legislation under the general trade and commerce power established by this Court in *General Motors of Canada Ltd. v. City National Leasing*.<sup>2</sup>

3. CCGG accepts the facts set out in the factum of the Attorney General of Canada. CCGG will briefly emphasize particular facts relevant to the issue of enforcement.

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<sup>1</sup> Pursuant to the terms on which leave to intervene was granted to CCGG, these submissions are limited to the enforcement provisions of the proposed *Securities Act*.

<sup>2</sup> [1989] 1 S.C.R. 641 ("*General Motors*") [AGC Book of Authorities, Tab 13].

## B. CCGG

4. CCGG was formed to promote good governance practices in Canadian public companies. Its members include most of Canada's leading institutional investors. Coalition members in total manage close to \$1.5 trillion in assets as fiduciaries on behalf of Canadian investors from all walks of life. CCGG believes that improving the enforcement of Canada's securities laws will enhance Canadian public companies' ability to create value for their shareholders, reduce investment risk and lower the cost of capital. CCGG's submissions to the Expert Panel on Securities Regulation regarding the importance of enforcement were largely incorporated into the Panel's final recommendations, and many of the key CCGG concepts were incorporated into the proposed Securities Act itself.<sup>3</sup>

## C. The Nature of Provincial Securities Law Enforcement

5. Capital markets are national and international in scope,<sup>4</sup> but provincial securities regulators are restricted to enforcing provincial administrative securities laws only within their jurisdiction. As the Chair and Chief Executive Officer of the Alberta Securities Commission has phrased it, the "paramount or overriding purpose" of the Alberta securities laws is "protecting

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<sup>3</sup> Record (AGC), Vol. II, Tab 7, Expert Panel on Securities Regulation, *Final Report and Recommendations* (2009), at 52 ("**Hockin**"); *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at paras 38, 43 ("**Global Securities**"), [AGC Book of Authorities, Tab 14]; *General Motors*, *supra* note 2 at 679 [AGC Book of Authorities, Tab 13]; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 173-174 ("**McCutcheon**") [AGC Book of Authorities, Tab 21].

<sup>4</sup> Reference Record, Investment Industry Association of Canada Materials, Vol. XXXI, Tab 15, Affidavit of Ian C.W. Russell (sworn October 28, 2010), paras 7-8 at 71-72 ("**Russell Affidavit**"); Record (AGC), Vol. II, Tab 5, Committee to Review the Structure of Securities Regulation in Canada, *It's Time* (2003), at vii, 4-6 ("**WPC Report**"); Record (AGC), Vol. II, Tab 6, Crawford Panel on a Single Canadian Securities Regulator, *Blueprint for a Canadian Securities Commission* (2006), at 3; Hockin, *supra* note 3 at 5; Record (AGC), Vol. I, Tab 5, Report of Frank Milne (The Impact of Innovation and Evolution on the Regulation of Capital Markets), para 12.1 at 39; Record (AGC), Vol. I, Tab 6, Report of Michael J. Trebilcock (National Securities Regulator), para 7 at 5 ("**Trebilcock**"); Reference Record, Canadian Bankers Association Materials ("**Record (CBA)**"), Vol. XXVIII, Tab A, Affidavit of Marion G. Wrobel, at 4-6 ("**Wrobel**"); *Global Securities*, *supra* note 3 at 28; *McCutcheon*, *supra* note 3 at 15; *General Motors*, *supra* note 2 at 61, 64.

investors within the Province of Alberta".<sup>5</sup> The same is necessarily true for every other provincial or territorial regulator.

6. The predictable result of applying provincial laws to a securities market that is national and international is disjointed enforcement. One of the predominant themes from the various independent commissions that have examined the regulation of Canadian capital markets is the challenge to enforcement posed by the lack of a national regulator. For example, the Wise Persons' Report found that "[c]oordination difficulties impede investigations and can lead to multiple proceedings that are inefficient and unfair. There are disparate priorities and a lack of uniform investor protection".<sup>6</sup> Given provincial regulators' constitutional inability to enforce securities laws beyond their borders, "[f]raudsters regularly engage in jurisdiction-hopping to avoid enforcement orders."<sup>7</sup> Even a working group of Canadian Securities Administrators and provincial officials acknowledged that the *status quo* has been subject to criticisms of "ineffectiveness in interprovincial investigations and enforcement".<sup>8</sup>

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<sup>5</sup> Reference Record, Attorney General of Alberta Materials ("**Record (AGA)**"), Vol. XVIII, at 8, Affidavit of William S. Rice, Q.C., dated June 29, 2010, at 8.

<sup>6</sup> WPC Report, *supra* note 4 at 11; see also Record (AGA), Vol. XXI, at 88, International Monetary Fund Report, "Canada, Financial System Stability Assessment—Update", January 15, 2008, at 7; Exhibit "X" to the Affidavit of Denis Gartner, sworn July 7, 2010.

<sup>7</sup> Wrobel, *supra* note 4 at 12; WPC Report, *supra* note 4 at 28.

<sup>8</sup> Record (AGA), Vol. XX, at 154, Working Group of Canadian Securities Administrators and Provincial Officials, "Issues and Alternatives in Securities Regulation", March 6, 1995, at 21; Exhibit "J" to the Affidavit of Dennis Gartner sworn July 7, 2010.

7. The multiplicity of regulators also means that Canada lacks a single, national voice on the international stage.<sup>9</sup> Foreign regulators, therefore, lack a single Canadian point of contact for policing increasingly international capital market abuses.

8. To decide the constitutional issues before this Court, it is not necessary to question the efficiency or effectiveness of provincial regulators in enforcing their own provincial, administrative securities laws. The point is that provincial regulators are just that – provincial. Only a national regulator can simultaneously impose criminal, administrative or civil penalties across Canada.

#### **D. Evidence of "Jurisdiction-Hopping"**

9. The problem of "jurisdiction-hopping" is well illustrated in the disciplinary decisions of the various provincial securities commissions. For example, in 2005 the British Columbia Securities Commission permanently removed Michael Mitton from the capital markets in British Columbia based on a series of securities law violations in that Province.<sup>10</sup> Mitton had "a long and egregious history of fraudulent and abusive trading" involving no less than "103 criminal convictions in Canada and an outstanding indictment for securities fraud in the US".<sup>11</sup> He had already been subjected to a 20-year ban from the British Columbia capital markets in 1988, which followed 90 criminal convictions for fraud, forgery or false pretence in Ontario and Quebec.<sup>12</sup> Mitton's long criminal history had left victims in at least British Columbia, Alberta,

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<sup>9</sup> Record (CBA) Vol. XXVIII, at 4, "Report of the Canadian Bankers' Association"; Exhibit 1 to the Affidavit of Marion G. Wrobel, sworn October 22, 2010 at 8-9, 18 ("**Wrobel Report**"); Trebilcock, *supra* note 4 paras 64-66.

<sup>10</sup> *Re H & R Enterprises Inc. et al.*, 2005 BCSECCOM 612 at para 184 ("**H & R**") [CCGG Book of Authorities, Tab 1].

<sup>11</sup> *H & R*, *supra* note 10 at para 184.

<sup>12</sup> *Ibid* at para 12.

Ontario, Quebec, Florida and other North American jurisdictions.<sup>13</sup> Nonetheless, to date the BCSC's order barring him from that province's capital markets has only been reciprocated in Alberta and Ontario.<sup>14</sup>

10. A similar example is Richard John Smith.<sup>15</sup> In December 1997, he pled guilty to 22 counts of theft over \$5,000 and 10 counts of fraud arising out of a fraudulent investment scheme in Ontario. The following year, the Ontario Securities Commission issued an order banning him from the capital markets of that province. However, not until 2004 did the British Columbia Securities Commission ban him for separate events in that Province in 1996 and 1997. There are no orders against him in Canada's remaining eight provinces and three territories.

11. Most recently, in November 2010, Vernon Smith was barred from Ontario's capital markets based on his role in a fraudulent scheme that was "structured [as] a sophisticated multi-jurisdictional scheme in order to avoid regulatory oversight".<sup>16</sup> Five years earlier, Smith had been sanctioned in Alberta for engaging in a similar scheme.<sup>17</sup> There remain no restrictions on his activities in other provinces or territories.

12. The foregoing cases are not unusual. Albert Budai,<sup>18</sup> Robert DiIanni,<sup>19</sup> Philip Wong;<sup>20</sup> Hal McLeod, David Vaughan, Kenneth McMordie and Dianne Rosiek;<sup>21</sup> and Malcolm

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<sup>13</sup> *Ibid* at paras 12, 14, 15, 34, 69.

<sup>14</sup> *Re Mitton*, 2006 LNABASC 234 at para 28 [CCGG Book of Authorities, Tab 2]; *Re Firestar Capital Management Corp.*, 2010 LNONOSC 8 at para 22 [CCGG Book of Authorities, Tab 3].

<sup>15</sup> *Re Smith*, 2004 BCSECCOM 441 at para 31 [CCGG Book of Authorities, Tab 4].

<sup>16</sup> *Re XI Biofuels Inc.*, 2010 LNONOSC 866 at para 34 [CCGG Book of Authorities, Tab 5]; *Re XI Biofuels*, 2010 LNONOSC 217 at para 216 [CCGG Book of Authorities, Tab 6].

<sup>17</sup> *Re InstaDial Technologies Corp.*, 2005 LNABASC 808 at para 262 [CCGG Book of Authorities, Tab 7].

<sup>18</sup> *Re Stock Depot Information Services Corp.*, 2007 BCSECCOM 610 at paras 1.1, 1.2, 2 [CCGG Book of Authorities, Tab 8].

<sup>19</sup> *Re DiIanni*, 2001 BCSECCOM 918 at para 27 [CCGG Book of Authorities, Tab 9].

Stevenson, Daniel Byer and Preston Pinkett II,<sup>22</sup> are all further examples of individuals who engaged in securities fraud affecting investors in multiple jurisdictions, but faced no sanctions in the majority of Canadian jurisdictions. Even when reciprocal orders are pursued, they are plagued by "delays, administrative inconsistency, and complexity".<sup>23</sup>

13. Broader statistics support the foregoing anecdotal evidence that sanctions are rarely applied across multiple jurisdictions, let alone nationally. From 2007 to 2009, provincial securities regulators concluded an average of 131 enforcement cases annually.<sup>24</sup> Over the same period, however, an average of only 61 reciprocal enforcement orders were made.<sup>25</sup> Twelve reciprocal enforcement orders are needed to achieve national coverage. In other words, 1572 reciprocal enforcement orders (131 cases multiplied by 12 jurisdictions) would be needed for national enforcement of 131 enforcement cases. The actual number of 61 is less than 4% of 1572. Even though capital markets are interprovincial and a given scheme can harm investors nationwide, sanctioned individuals typically face no restrictions on participating in Canadian capital markets outside their home province.

14. It is not surprising that provincial regulators focus on capital market abuses based in their own respective jurisdictions, rather than seeking reciprocal orders based on proceedings in other jurisdictions. Resources must be prioritized. The evidence of how rarely reciprocal

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<sup>20</sup> *Re Wong*, 2010 BCSECCOM 64 at para 3 [CCGG Book of Authorities, Tab 10].

<sup>21</sup> *Re Manna Trading Corp. Ltd.*, 2009 BCSECCOM 595 at paras 8, 13 [CCGG Book of Authorities, Tab 11]; *Re Manna Trading Corp. Ltd.*, 2010 ABASC 229 at para 58 [CCGG Book of Authorities, Tab 12].

<sup>22</sup> *Re International Fiduciary Corp SA*, 2008 BCSECCOM 107 at paras 14, 209 [CCGG Book of Authorities, Tab 13]; *Re International Fiduciary Corp SA*, 2009 LNABASC 50 at para 11 [CCGG Book of Authorities, Tab 14].

<sup>23</sup> Wrobel Report, *supra* note 9 at 17-18.

<sup>24</sup> Report (AGA), Vol. XVIII, at 213, Canadian Securities Administrators, "2009 CSA Enforcement Report", at 4; Document 8 of Documents referred to by William S. Rice, sworn June 29, 2010.

<sup>25</sup> *Ibid* at 7.

orders are obtained emphasizes the importance of a national regulator, which alone can issue administrative penalties that would immediately be enforceable nation-wide.

## **PART II ~ POSITION ON QUESTIONS IN ISSUE**

15. CCGG was granted leave to intervene on the issue of enforcement. Recognizing that limitation, CCGG respectfully submits that the proposed Canadian Securities Act is within the legislative authority of the Parliament of Canada.

## **PART III ~ ARGUMENT**

16. CCGG's submissions will focus on the constitutionality of the enforcement provisions in the proposed national *Securities Act*. As there is no dispute that Parliament has jurisdiction over criminal law remedies, particular emphasis will be on administrative sanctions.

17. CCGG adopts the submissions of the Attorney General of Canada that the "pith and substance" of the *Securities Act* is "comprehensive national securities regulation", and that the central issue is, therefore, whether the administrative enforcement provisions of the *Securities Act* fall within the "general" branch of the trade and commerce power under s. 91(2).<sup>26</sup> Applying the test that Chief Justice Dickson described for the Court in *General Motors*, CCGG will focus on the fourth and fifth "hallmarks of a valid exercise of Parliament's general trade and commerce power", namely:

(iv) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and

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<sup>26</sup> *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96 (P.C.) [AGC Book of Authorities, Tab 9].

(v) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.<sup>27</sup>

#### A. Provincial Incapacity

18. The Attorneys General of Alberta and Québec both repeatedly assert that this factor is not satisfied because the proposed national *Securities Act* is substantially similar to existing provincial legislation—it just applies nation-wide. From an enforcement perspective, however, it is precisely the *Securities Act's* national scope, and integration of administrative and criminal sanctions, that matters.

19. The provinces are constitutionally restricted to passing legislation concerning property and civil rights "in the Province".<sup>28</sup> Only federal legislation would permit an order that simultaneously bars offenders like Michael Mitton or Richard John Smith from the capital markets of Canada, and not just from one particular province. Only federal legislation can prevent "jurisdiction-hopping" and protect all Canadians from abuses that are rarely confined to the boundaries of one jurisdiction.

20. In this regard, the proposed *Securities Act* is very similar to the *Combines Investigations Act*, various aspects of which had been upheld in a line of cases culminating in *General Motors*. In that case, this Court noted that individuals or corporations in Canada could "'walk across' provincial boundaries in order to buy or sell, lend or borrow, hire or fire."<sup>29</sup> Given this interprovincial mobility, "competition cannot be effectively regulated unless it is regulated

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<sup>27</sup> *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 at para 17 [AGC Book of Authorities, Tab 16].

<sup>28</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, App II, No 5.

<sup>29</sup> *General Motors*, *supra* note 3 at para 59, quoting Peter Hogg & Warren Grover, "The Constitutionality of the Competition Bill" (1976) 1 *Can. Bus. L.J.* 197 at 200.



nationally."<sup>30</sup> The same is true for administrative securities law enforcement precisely because market participants and securities transactions themselves can and do "walk across provincial boundaries".

21. The provinces are capable of enforcing their own provincial securities laws and it is not necessarily the case that enforcement under the proposed *Securities Act* will be more effective than the existing patchwork of provincial securities and federal criminal legislation (though CCGG does believe that it will be the case). CCGG accepts this Court's admonition in *Reference re. Firearms Act* that "[w]ithin its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis".<sup>31</sup>

22. CCGG's argument does not rest on efficaciousness. Instead, it is that provincial enforcement is just that—provincial. Just as the national threat posed by competition law abuses demanded a national solution, so too does the national threat posed by capital market abuses.

23. The provinces are incapable of co-ordinating both administrative and criminal enforcement in one body, under one Act. Parliament's national reach, and exclusive jurisdiction over criminal law, gives it a unique ability to create an integrated, national enforcement regime.

#### **B. Failure to Include all Provinces Would Jeopardize the Legislation**

24. The Attorneys General of Alberta and Québec attack the proposed *Securities Act* under this factor principally on the basis that the Act is not mandatory, and therefore a failure to

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<sup>30</sup> *Ibid* at para 60.

<sup>31</sup> [2000] 1 S.C.R. 783 at para 18 [AGC Book of Authorities, Tab 37].

include all provinces would not jeopardize the legislation. The implication of this argument, however, is that if the legislation were to be mandatory, it would satisfy this factor.

25. As Chief Justice Dickson noted in *General Motors*, when interpreting s. 91(2) "the court must consider the degree to which the provision intrudes on provincial powers."<sup>32</sup> It would be an odd approach to cooperative federalism<sup>33</sup> to hold federal legislation unconstitutional on a subject of national importance because it gives provinces the choice to opt out.

26. At its core, the fifth factor is concerned with legislation being essentially national in character, as opposed to provincial. As described above, co-ordinated enforcement of securities laws across multiple jurisdictions is a distinctively national issue. Whether only two provinces or territories opt-in or all 13, the Act will ensure integrated enforcement of criminal and administrative penalties across multiple jurisdictions, which the provinces are constitutionally incapable of doing.

#### **PART IV ~ COSTS**

27. CCGG seeks no costs and asks that no costs be awarded against it.

#### **PART V ~ ORDER REQUESTED**

28. CCGG seeks permission to present oral argument not exceeding 15 minutes, and submits that (subject to the limited basis on which CCGG was granted leave to intervene) the answer to the question posed on this Reference should be "yes", for the reasons given above.

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<sup>32</sup> *General Motors*, *supra* note 3 at para 44.

<sup>33</sup> *NIL/TUO Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 17 at para 42 [AGC Book of Authorities, Tab 22]; *Quebec (Attorney General) v. Moses* 2010 SCC 17 at paras 13, 29 (majority), and 84 (dissent) [AGC Book of Authorities, Tab 25]; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para 24 [AGC Book of Authorities, Tab 7].

January 10, 2010

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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LUIS SARABIA



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MATTHEW MILNE-SMITH

Lawyers for The Canadian Coalition for Good Governance

**PART VI ~ LIST OF AUTHORITIES**

1. *Re H & R Enterprises Inc. et al.*, 2005 BCSECCOM 612
2. *Re Mitton*, 2006 LNABASC 234
3. *Re Firestar Capital Management Corp.*, 2010 LNONOSC 8
4. *Re Smith*, 2004 BCSECCOM 441
5. *Re XI Biofuels*, 2010 LNONOSC 866
6. *Re XI Biofuels*, 2010 LNONOSC 217
7. *Re InstaDial Technologies Corp.*, 2005 LNABASC 808
8. *Re Stockpot Information Services Corp.*, 2007 BCSECCOM 610
9. *Re DiIanni*, 2001 BCSECCOM 918
10. *Re Wong*, 2010 BCSECCOM 64
11. *Re Manna Trading Corp. Ltd.*, 2009 BCSECCOM 595
12. *Re Manna Trading Corp. Ltd.*, 2010 ABASC 229
13. *Re International Fiduciary Corp SA*, 2008 BCSECCOM 107
14. *Re International Fiduciary Corp SA*, 2009 LNABASC 50

**PART VII ~ LIST OF LEGISLATION AND CONSTITUTIONAL PROVISIONS**

1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, App II, No 5
2. Peter Hogg & Warren Grover, "The Constitutionality of the Competition Bill" (1976) 1 *Can. Bus. L.J.* 197