IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED

and

IN RESPECT OF THE REASONS AND DECISION OF THE BOARD OF THE TORONTO STOCK EXCHANGE INC.

and

IN THE MATTER OF
TAYLOR SHAMBLEAU

Hearing: **January 30, 2002 and February 11, 2002**

Panel:	**Howard I. Wetston, Q.C.**	**-**	**Vice-Chair**
	R. Stephen Paddon, Q.C.	**-**	**Commissioner**
	H. Lorne Morphy, Q.C.	**-**	**Commissioner**
Counsel:	**Yvonne Chisholm**	**-**	**For the Staff of the Ontario Securities Commission**
	Jane Ratchford	**-**	**For the TSE Regulatory Services**
	Matthew Gottlieb **Brian Radnoff** **Heidi Rubin**	**-**	**For Taylor Shambleau**

REASONS FOR DECISION AND ORDER

This is an application for a hearing and review pursuant to section 21.7 of the *Securities Act* which provides the Commission with authority to review a decision made under the by-laws of a recognized stock exchange. Staff of TSE Regulation services Inc. ("RS") are requesting a review of a decision of the Board of the Toronto Stock Exchange (the "Board") which upheld a decision of a hearing panel of the Toronto Stock Exchange (the "Hearing Panel"). The Board and the Hearing Panel ordered RS to disclose an investigation report pertaining to disciplinary proceedings being brought against Mr. Taylor Shambleau. RS argues that the Board erred and that the investigation report is irrelevant.

Background

Mr. Shambleau is alleged to have committed an infraction of section 11.26(1) of the General By-Law of the Toronto Stock Exchange. Specifically it is alleged that, while an approved person employed by Sprott Securities, Mr. Shambleau made a bid and executed a trade for the account of a customer when there was reason to believe that the intended purpose of such an action was to establish an artificial price or quotation in a listed security, or to effect a high closing price or quotation in a listed security. The complaint arises out of the investigation with respect to RT Capital Management Inc.

The Hearing Panel found the report was relevant and not privileged; *Howe v. Institute of*

Chartered Accountants of Ontario (1994), 118 D.L.R. (4th) 129 (Ont. C.A.).

Privilege was not relied on in the application before us.

The Board was of the view that the Hearing Panel applied the wrong test in simply adopting the dissenting reasons of Laskin J.A. in *Howe,* supra. However, despite this error, it found that the Hearing Panel reached the correct result. The Board found that where an investigator is to give opinion evidence, the Investigation Report would be relevant to testing that opinion. It also decided that the investigation report was relevant since the accusations against Mr. Shambleau would appear to depend to some degree on what people in the securities industry would understand by instructions containing such phrases as "just before the close", "only if necessary" and "fairly late in the day". The Board stated:

> "Given that Ms. Stewart reviewed the logs and interviewed Mr. Shambleau and given that Ms. Stewart prepared the Investigation Report to enable the Exchange to decide whether to pursue proceedings against Mr. Shambleau, it appear [sic] to us reasonable to expect that the Investigation Report would contain some analysis of the significance of the words Shea used to instruct Shambleau. That analysis would be relevant to Mr. Shambleau's defence, including potentially assisting him to prepare for the cross-examination of Mr. Prior, who is to give expert opinion evidence on this subject for the Exchange."

SUBMISSIONS OF THE PARTIES

The Applicant

Ms. Ratchford, counsel for RS, submitted that the Board erred in law and proceeded on incorrect principles, and in some instances did not properly exercise its discretion. The

applicant submitted that the investigation report is not relevant. In particular, RS contends that the Board erred in the following four ways.

- In stating that RS was not taking the position that "investigation reports are almost never to be produced because they are not 'fruits of the investigation' in the sense of being real evidence or notes or transcriptions of witness interviews". According to Ms. Ratchford, this is clearly an error and as such the Board proceeded on an incorrect principle.

- In not applying the principles established in several decisions of the British Columbia Securities Commission relating to non-disclosure of investigative reports, particularly, the decision in *Re Cox*, [2001] B.C.S.D. No. 210. Ms. Ratchford submits that if the Board had included *Cox* in its analysis, it would have come to the conclusion that, where an investigator is being called as a witness, anything contained in an investigation report is irrelevant when all the underlying facts have been disclosed.

- In finding that Counsel for the Exchange conceded that where an investigator is to give opinion evidence, the Investigation Report is relevant to testing that opinion. Ms. Ratchford submits that the decision of the Board is inextricably related to its misunderstanding of an alleged concession made by RS on this point. The Board determined that this was one of the bases upon which the investigation report should be produced but, according to Ms. Ratchford, Ms. Stewart is not being qualified as

an expert, therefore, her opinion is not relevant and should not result in making the underlying report relevant.

- In finding that Ms. Stewart's evidence relating to "common industry practice" may be properly characterized as opinion evidence. It is the position of RS that any statement related to "common industry practice" is a statement of fact based upon information provided by RT Capital. Even if it could be construed as opinion evidence, it is irrelevant since it is not an expert opinion. RS will be relying on Mr. Michael Prior to provide expert evidence on industry practice.

RS acknowledges that there is a requirement and duty to be fair to Mr. Shambleau. It recognizes its obligation to provide adequate disclosure but it contends that the right to disclosure is not absolute or limitless. It is the underlying facts and documents that are relevant whereas the investigator's report, to the extent that it contains opinions, or recommendations or commentary of the investigator, is not. Since RS has already disclosed all facts underlying the allegations – the "fruits of the investigation" - it submits that its obligations with respect to disclosure have been fulfilled.

The Respondent

Mr. Gottlieb, counsel for Mr. Shambleau, ably represented his client in making the following three main submissions:

- The OSC should not interfere with the decision of the Hearing Panel and the Board regarding an issue relating to its own hearings or procedures. It is only in very limited circumstances that the OSC should interfere with the decision of the TSE Board; *Security Trading Inc. and the TSE* (1994), 17 OSCB 6097; *Re Canada Malting Co.* (1986), 9 OSCB 3565.

  Although the OSC exercises supervisory jurisdiction over the TSE, it should only interfere with the decision of the Board if there is a lack of evidentiary support for the conclusions reached. It is not enough to say that the OSC panel may have come to a different decision in the case. There was evidence to support the Hearing Panel and the Board's conclusions.

- Mr. Gottlieb's submitted that the Board did not proceed on an incorrect principle of law, did not err in law, and did not overlook any material evidence in arriving at its decision. In addition, the TSE Board properly considered all the relevant authorities, and based on those relevant principles, decided that the investigation report must be disclosed. Ultimately, the decision that was arrived at was based on the principles of natural justice and fairness.

  It is clear that, in proceedings where a respondent's career and reputation is at stake, an extremely high level of disclosure must be met. Material will be relevant if it might be of assistance to Mr. Shambleau in his defence of the complaint. Since

the investigation report contains the facts which form the basis of the TSE's complaint against Mr. Shambleau, it is prima facie relevant. Furthermore, given that Ms. Stewart is the only fact witness being put forward by the Exchange, the investigation report may be useful for impeachment purposes.

- Mr. Gottlieb's third submission relates to the grounds of appeal raised by RS, in particular, the allegation that the Board somehow misinterpreted the arguments of counsel for RS. He argues that, as a matter of law, appeals are made on the basis of the order, not the reasons for decision.

OSC Staff Submissions

OSC Staff took no position on the correctness of the Board's decision. Instead, counsel confined herself to considering the appropriate legal principles the Commission should apply in its review of the Board decision. Staff submitted that investigation reports typically consist of the investigator's views and opinions on the evidence gathered in the course of the investigation. For this reason, the report, in the normal course, is not relevant and therefore is not necessary in order for the respondent to make full answer and defence.

Staff conceded that there might be situations where the report could be relevant, for e.g., abuse of process, bad faith or bias. Ultimately, if the Commission finds that this investigation report to be relevant, the Commission should restrict the decision to the particular facts of this case so as to avoid a general requirement of the disclosure of

investigation reports in all instances.

Legal Principles

The scope of review of TSE decisions was considered in the case of *Re Canada Malting Co.,* supra. They are as follows:

> "i) the TSE proceeded on some incorrect principle;
> ii) the TSE erred in law;
> iii) the TSE overlooked material evidence;
> iv) new and compelling evidence was presented to the OSC that was not presented to the TSE; and
> v) the TSE's perception of the public interest conflicts with that of the OSC."

The fact that we might give a different decision on the facts is insufficient reason to substitute our decision for that of the Board.

The approach to disclosure by the OSC in the administrative law context is not dissimilar to a criminal trial. In disciplinary cases such as this one, the same principles generally should apply to the TSE; *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.); *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.). The law of disclosure is based upon the fundamental right to make full answer and defence. All relevant information must be disclosed whether TSE staff intends to introduce it or not or whether it is inculpatory or exculpatory. If the information is of some use it should be disclosed. Stated somewhat differently the "fruits of the investigation" are not the property of the staff; *Howe v. Institute of Chartered Accountants*, supra, *Re Glendale Securities Inc.* (1995), 18 OSCB 5975.

Analysis

Section 8(3) of the *Securities Act* provides that the Commission may confirm the decision under review or make such other decision as the Commission considers proper. We see no reason to depart from the scope of review outlined in *Re Canada Malting Co. Inc.*, supra.

Taking into account the tribunal's expertise, we agree that its decision should not be lightly set aside when it involves factual determinations, central to its specialized competence. However, we are satisfied that the Commission should interfere if it concludes that the Board proceeded on an incorrect principle or has made an error in law. *Canada Malting* and *Security Trading Inc.* were not disciplinary hearings but rather involved the interpretation and application of certain TSE By-Laws. This case is an enforcement action involving an alleged breach of the general by-law, S.11.26(1) and raises an important question of principle. The issue in this review is not the breach of the by-law but rather the production of a document, the investigation report.

In the absence of any privileges, relevance is the primary consideration regarding disclosure. Relevance must be considered from the perspective of the allegations, the case to be answered, and whether the requested information may assist in making a full answer and defence, including the opportunity for impeachment.

In *Howe*, supra, the investigation report formed the basis of the charges against Mr. Howe and was prepared by an investigator who was the key expert witness for the prosecution. Mr. Justice Laskin stated that the Professional Conduct Committee's "duty to act fairly requires disclosure of the expert report on which the charges were based when the author of the report is going to testify for the prosecution unless the report is privileged." In *Howe*, however, it was the report of an expert witness that was ordered disclosed. In the case before us, however, Ms. Stewart is not being called as an expert witness.

The issue of the disclosure of investigation reports was specifically dealt with by the British Columbia Securities Commission (the "BCSC") in *Re Cartaway Resources Corporation* (1999), 22 BCSC Weekly Summary 27. The respondent, Johnson, required disclosure by Commission staff of various documents and information including all of the notes, records, memos or other materials created by the investigator. In considering the application before it, the BCSC said:

> "In our view, disclosure and the demands for disclosure of materials must have some relevance to the proof or defence of allegations in the section 16(1) notice of hearing. By necessity this means that Commission staff counsel will have to exercise discretion and judgment in determining what materials fit within those parameters. In our view, if Commission staff counsel view materials as 'potentially relevant to the respondents' the materials would fit within the above parameters and should simply be disclosed as relevant materials but materials upon which Commission staff may not rely. In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not 'fruits of the investigation' as suggested by Johnson and

need not be disclosed."

In *Re Vancouver Street Exchange*, (O'Neill) (1999), BCSC Weekly Summary Edition 99:22, the BCSC used the *Cartaway* disclosure standard in the context of proceedings before the Canadian Venture Exchange. The BCSC found:

> "[i]t is the responsibility of the hearing panel to determine whether the allegations in the Citation have been met. The views of the Exchange staff, as expressed in internally generated documents, such as investigation reports, are of no relevance in this regard."

The BCSC refused to order production of investigation reports and similar internal staff documents, drawing a distinction between evidence obtained in the course of an investigation and materials created by investigation staff. Unlike the case presently before us, both *Cartaway* and *O'Neill* involved situations where the person who prepared the investigation report was not going to be called as a witness.

In *Re Cox,* supra the BCSC refused to order production of an investigation report which was not ordered produced by the Canadian Venture Exchange.

In finding that the investigation report need not be disclosed, the BCSC found that all materials gathered in the course of the investigation, or "the fruits of the investigation" as they were characterized in *Cartaway*, had already been provided to Mr. Cox. In so doing the BCSC noted that the standard of disclosure is consistent with the high level of procedural fairness to which respondents are entitled in proceedings before the Commission and the Exchange. Moreover in *Cox* the BCSC characterized the *Cartaway* standard as "not far

removed from the *Stinchcombe* standard" as requiring disclosure of any relevant material gathered in the investigation." *Re Cox*, supra, at Para 30.

Recently the Ontario District Council of the Investment Dealers Association considered a motion for production of investigators reports; In *Re Mills*, (2000) I.D.A. C.D. No. 41.

The reports at issue were prepared by Douglas Lane who was no longer employed by the IDA and who recommended against taking disciplinary action. He was not going to give evidence. Instead, the IDA intended to call the Manager of Investigations in its Enforcement Division to provide expert testimony. The IDA provided the respondent with copies of a report prepared by Ms. Gardiner, transcripts of all interviews that were conducted and all documents obtained in the course of its investigation. In considering disclosure of Mr. Lane's investigation report, the Ontario District Council noted that relevant material should be disclosed. However, this should not include an investigators report which is prepared for the purposes of deciding to initiate proceedings. Moreover, it held that documents relating to internal deliberations related to the decision to initiate proceedings are not required by *Stinchcombe* to be produced or cases applying *Stinchcombe* in a regulatory context.

The Mills panel, however, noted that the obligation to disclose is ongoing. It required association counsel to review the report during the context of the hearing to determine if any issue arrises during the hearing that may cause information in the report to become relevant

and therefore to be produced in the hearing.

In the case before us the Board decided that the investigation report should be disclosed on two bases. It was relevant to certain evidence to be given by Ms. Stewart which the Board construed as opinion evidence. Secondly, it would be of assistance in the cross-examination of Michael Prior, the expert to be called by RS. In both these respects we find that the Board was in error.

Ms. Stewart is a fact witness and her opinions are irrelevant. Mr. Prior, a senior surveillance officer, will be called as an expert witness in relation to the interpretation and application of the rules of the Exchange as they relate to trading on the Exchange. The significance of expressions like “just before the close”, “only if necessary”, “fairly late in the day” will be up to Mr. Prior to explain. It is ultimately up to the Hearing Panel to make the final determinations on the issues in dispute and Ms. Stewart’s opinion or interpretation of the facts, as contained in the investigation report, is of no relevance for the purposes of disclosure.

Unlike in *Howe*, investigators are generally only called as fact witnesses. They introduce the documents, outline the investigation and introduce transcripts but they do not advance opinions on the ultimate issue. It is ultimately up to the Hearing Panel to determine whether, on the facts of the case, Mr. Shambleau executed a trade that was intended to establish an artificial price. Ms. Stewart’s opinions, which may or may not be contained in her report, are

not relevant to the Hearing Panel's determination.

On the second point, the Board stated that Ms. Stewart's report could potentially assist Mr. Shambleau to prepare for the cross-examination of Mr. Prior, who is to give expert opinion evidence on behalf of the Exchange. A similar argument was dealt with in *Mills* where it was argued that, since the investigating officer was not going to testify, the investigator's report should be disclosed to permit counsel for the respondent to cross-examine the IDA's expert witness. The Ontario District Council did not agree:

> "Ms. McManus stated that her intention is to call Ms. Gardiner and qualify her as an expert witness. Ms. Gardiner's opinion will be based on her review and analysis of facts to be presented in evidence, the Long and Catania accounts (Haldane Affidavit, para. 5). Although Mr. Lane's investigation report(s) was contained in the investigation file which she reviewed, there is no evidence before the District Council that she read it (although it is not unreasonable to infer that she did) or that the opinions contained in it influenced her own opinions. Mr. Mills will not be deprived of an opportunity to cross-examine Ms. Gardiner fairly and fully or of a fair hearing if he does not receive Mr. Lane's investigation report(s). The fact that another investigator two years earlier, or even in 1998, differed with her opinion is not relevant evidence.
>
> In principle the District Council is unable to distinguish the recommendations contained in an investigator's report of his investigation from any other internal staff opinion concerning a decision to initiate proceedings against an individual or a member firm. If Mr. Lane's recommendation is relevant, it would be difficult to exclude an internal memorandum accompanying his formal report and containing only his recommendation. It would also be difficult to exclude notes of discussions within the Association's Enforcement Division in which staff members may express differing views with respect to initiating proceedings. None of these is relevant evidence. To require disclosure of any one may in principle necessitate disclosure of all such deliberations. This is not the type of information addressed in *Stinchcombe* or in *Howe*, Nor is disclosure of such documents necessary to enable a respondent to address the allegations against him, except possibly in exceptional circumstances where there evidentiary relevance to a material issues is clear."

We are of the opinion that the adequacy of disclosure must be considered in the context of the nature of the regulatory proceeding and whether “the fruits of the investigation” have been disclosed to Mr. Shambleau. Such disclosure is paramount to achieving fairness in such proceedings as it permits the opportunity to make full answer and defence.

RS acknowledges that there is a requirement and duty to be fair to Mr. Shambleau and recognizes its obligation to provide adequate disclosure. Based upon the principles of natural justice, this would require disclosure of the following information:

a) the provisions alleged to have been violated;

b) particulars of the conduct that led to the alleged violation;

c) the documents RS intends to refer to or tender as evidence at the hearing;

d) any other materials gathered during the course of the investigation that may reasonably be used in meeting the case, advancing a defence, or in making a decision that would affect the conduct of the case; and

e) a list of witnesses and a summary of the evidence that those witnesses are expected to give.

In essence, this consists of all the facts that underpin the report. According to Ms. Stewart’s affidavit upon which she was cross-examined, these have already been produced. Mr. Shambleau has been provided with all the relevant material gathered in the course of the investigation. All of the documents referred to in the investigation report have been disclosed. A witness list has been provided and witness statements have also been

provided.

Mr. Gottlieb would add the investigation report to the list of materials that should be disclosed on the basis that one may reasonably expect there to be matters in Ms. Stewart's report which will be relevant and admissible to the issues at stake in the allegations being made against him. We disagree. Moreover we are not prepared to infer that the report may contain undisclosed facts. In *Re Mills*, it was submitted that the investigation report may contain facts of which the respondent is not aware, comments concerning the credibility of the Association's witnesses and opinions concerning the events that occurred. To this the Ontario District Council responded as follows:

> "In these circumstances, the District Council will not infer that additional undisclosed facts may be revealed by Mr. Lane's report (s).... Mr. Lane's views concerning credibility are beside the point. They will not provide a basis from cross-examination of Mr. Long; and the District Council must make its own assessment of credibility. The same applies to Mr. Lane's opinions of what occurred. The District Council must reach its own conclusions on the facts on the basis of the evidence presented at the hearing, not on the basis of opinions reached by Mr. Lane during his investigation."

In conclusion, for the reasons given, we find the investigation report not relevant. Accordingly, we disagree with the Boards decision and set aside the order of the Board.

As was pointed out in *Re Mills*, supra, we recognize that the obligation to disclose is ongoing. Should an issue arise at the hearing which results in some specific aspect of the "report" becoming relevant to a fact in issue, the panel may very well determine that it is relevant and therefore that it should be produced in part. Prior to making this decision, if

necessary, the panel should review the report, in accordance with these reasons and decision, to determine what part should be produced.

March , 2002

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