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

AND

IN THE MATTER OF THE TSX INC., MARKET REGULATION SERVICES INC., NORTHERN SECURITIES INC., VIC ALBOINI, CHRISTOPHER SHAULE

AND

IN THE MATTER OF A HEARING AND REVIEW OF DECISIONS OF THE TSX AND THE DIRECTOR REGARDING THE APPROVAL OF CERTAIN AMENDMENTS TO THE RULES AND POLICIES OF THE TSX

AND

IN THE MATTER OF A MOTION TO QUASH THE REQUEST FOR HEARING AND REVIEW

AND

IN THE MATTER OF A MOTION BY THE REQUESTING PARTIES TO DISMISS THE MOTION TO QUASH

REASONS AND DECISION

Hearing:	July 19, 2007	
Decision:	October 23, 2007	
Panel:	Lawrence E. Ritchie	Vice-Chair and Chair of the Panel
	James E. A. Turner	Vice-Chair
	Harold P. Hands	Commissioner
Counsel:	Yvonne Chisholm Rossana Di Lieto	For the Ontario Securities Commission
	Jeffrey A. Kaufman David A. Hausman	For Northern Securities Inc., Vic Alboini and Christopher Shaule
	Peter Wardle Daniel Bernstein	For the TSX Group Inc.
	Brian Gover Brendan Van Niejenhuis	For Market Regulation Services Inc.

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REASONS AND DECISION

A. BACKGROUND

1. Introduction

[1] This matter arises out of an application (being an Amended Request for Hearing and Review) made to the Ontario Securities Commission (the "Commission") by parties to an ongoing proceeding (the "RS Proceeding") of a self-regulatory organization ("SRO") over which the Commission has oversight (the "Amended Request").

[2] Before us, are two (2) motions. A motion brought by Staff of Market Regulation Services Inc. ("RS Staff") to quash the pending Amended Request (the "RS Motion"), and a responding cross-motion (the "Requesting Parties' Motion") to quash the RS Motion. As described in more detail below, the issues raised require us to determine whether the Commission has the jurisdiction to hear the Amended Request brought by the Requesting Parties (as defined below) and, if yes, whether we should exercise our discretion to do so in the present circumstances. The determination of these issues will determine the outcome of both the RS Motion and the Requesting Parties' Motion.

[3] This matter has raised difficult issues for us. On the one hand, the Requesting Parties are taking steps to defend themselves against the allegations made by RS Staff in the RS Proceeding. They are clearly frustrated by the chain of events that have led them to our doorstep. On the other hand, we are very conscious of the ongoing RS Proceeding (described in further detail below), and our need to support, and not unduly interfere with, the processes of a recognized SRO. We are sympathetic to the Requesting Parties' desire to have the issues raised by the Amended Request dealt with by us. However, we are not prepared to interfere with the RS Proceeding to do so at this time, for the reasons that follow.

[4] This matter raises some rather novel issues regarding this Commission's oversight of the adjudicative process of an SRO. The background facts are complicated and they reflect a somewhat tortured history of the proceedings. In the course of their presentations before us, counsel did an excellent job of clarifying an otherwise opaque story. We try to replicate these efforts in our reasons and decision below.

2. The Parties

[5] The TSX is a stock exchange recognised by the Commission pursuant to subsection 21(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"). The Commission order recognizing the Toronto Stock Exchange, dated January 29, 2002 ((2002), 25 O.S.C.B. 929) (the "Recognition Order"), provides that the TSX shall comply with the *Protocol for Commission Oversight of Toronto Stock Exchange Rules Proposals*, dated October 23, 1997 ((1997), 23 O.S.C.B. 5683) (the "Protocol").

[6] RS exercises the delegated authority of the TSX Board of Directors (the "TSX Board of Directors") pursuant to subsections 13.0.8(1), (2) and (4) of the *Toronto Stock Exchange Act*, R.S.O. 1990, c. T.15 (the "*TSE Act*"). As the regulation services provider to the TSX, RS is required to administer and enforce the Universal Market Integrity Rules (the "UMIR") on behalf of the TSX (basically, RS performs the enforcement function that the TSX itself performed prior to its demutualization in the early part of this decade). RS's role as the agent of the TSX is specifically addressed in the TSX Recognition Order.

[7] RS exercises the delegated authority of the TSX Board of Directors to "govern and regulate" the parties involved in this matter, namely Northern Securities Inc. ("Northern"), Christopher Shaule ("Shaule") and Vic Alboini ("Alboini") (collectively, the "Requesting Parties"). Alboini is Northern's Chief Executive Officer and Shaule is Northern's Chief Financial Officer during the time material to the RS Proceeding.

[8] Northern is a party to a participating organization agreement with the TSX, dated May 1, 2000; this agreement obliges Northern to comply with and be bound by TSX requirements.

[9] Neither Northern nor the individual Requesting Parties are subject to any direct contractual relationship with RS. RS's regulatory mandate as it pertains to the Requesting Parties arises from a regulation services agreement that RS has entered into with the TSX. The Requesting Parties are not subject to RS regulation except to the extent that the TSX's Board of Directors has expressly delegated enforcement responsibilities to RS as its agent or adopted rules developed by RS as exchange requirements.

[10] Staff of the Commission ("Commission Staff") are also a party to the proceeding for the Amended Request before the Commission.

3. The TSX's Legislative Framework and the Effect of the UMIR Amendments

[11] Subsection 13.0.8(4) of the *TSE Act* grants the TSX the authority to delegate enforcement of exchange requirements to RS. RS is now responsible for enforcement matters on behalf of the TSX.

[12] Prior to the creation of RS, each exchange in Canada regulated trading in its own marketplace with its own set of trading rules, some of which were similar and some of which varied from exchange to exchange. To harmonize the different rules used by different exchanges, RS introduced the UMIR as a common set of equities trading rules in order to ensure fairness, maintain investor confidence and simplify the existing exchange rules.

[13] The UMIR create the framework for the integrated regulation of marketplace trading activity and allow for the competitive operation of exchanges, quotation and trade reporting systems and alternative trading systems in Canada. Basically, the purpose of the UMIR is to regulate various trading practices, including manipulative or deceptive methods of trading, short selling, frontrunning, best execution obligations, order entry and order exposure, as well as trading halts, delays and suspensions. With respect to the RS Proceeding, it is the adoption of the UMIR, specifically UMIR 7.1, with which the Requesting Parties take issue, and the Requesting

Parties challenge its validity in connection with the steps taken to adopt the UMIR in 2002 and to amend the UMIR in 2006.

[14] According to the Protocol, the TSX may adopt rules, that the TSX Board of Directors (note that prior to demutualization the TSX Board of Directors was referred to as the Board of Governors) classify as either "public interest" or "non-public interest" rules. The terms "public interest" and "non-public interest" are defined in section 2 of the Protocol:

> 2. *"Public Interest v. "Non-public Interest"*
>
> A "public interest" Rule would be any Rule that, in the opinion of the Exchange;
>
> a) impinges upon the application of Ontario securities law; or
>
> b) could have a material impact (either positive or negative) on public investors, listed or unlisted companies or non-member registrants.
>
> Any Rule falling outside of this definition would be categorized as a "non-public interest" Rule.
>
> Prior to proposing a Rule that is of a "public interest" nature, as defined above, the Board of Governors shall have determined that the entry into force of such "public interest" Rule would be in the best interests of the capital markets for Ontario. The material filed with the Commission in relation to "public interest" Rules shall be accompanied by a statement to that effect.

[15] According to section 1 of the Protocol, the TSX must file all TSX rules and amendments adopted by the TSX Board of Directors with the Commission for approval, whether they are classified as "public interest" or "non-public interest". However, the Protocol sets out a different process for adopting and amending "public interest" and "non-public interest" rules.

[16] For clarity, the relevant sections of the Protocol which establish the process for adopting "public interest" and "non-public interest" rules is set out in Schedule "A" attached to this decision.

[17] As mentioned above, the *TSE Act* provides the TSX with the power to regulate and govern market participants. The *TSE Act* also provides that the TSX can delegate this power, and the TSX has in fact delegated this power to RS. The relevant sections of the *TSE Act* are set out in Schedule "B" attached to this decision.

4. Chronology of Events Leading to the Motions before the Commission

[18] The following is a summary of the events that led to the RS Motion and the Requesting Parties' Motion.

i. UMIR Amendments in 2002

[19] On October 12, 2001, a notice was issued by the TSE (prior to July 10, 2002, the TSX was called the TSE) stating that regulators would be "reviewing and approving the final version of the UMIRs". The notice issued at the time indicated clearly that the TSE was treating the UMIR as being made in the public interest.

[20] On February 15, 2002, in its Notice of Approval, (2002), 25 O.S.C.B. 891, the Commission recognized RS as an SRO effective on January 29, 2002. The notice stated specifically that the recognising regulators, including the Commission, approved the UMIR and a copy of the UMIR and the accompanying policies was published.

[21] On March 7, 2002, a notice was issued by the TSX that the TSX would adopt UMIR. It stated that RS has adopted, "and the Recognizing Regulators have approved", the UMIR and that the effective date of the UMIR was April 1, 2002. The notice stated that existing rules and policies of the exchange would be amended with the adoption of the UMIR.

[22] On August 9, 2002, the TSX issued its Request for Comments regarding the amendments to the rules and policies of the exchange. The amendments were approved by the TSX Board of Directors on March 26, 2002. The notice provided that the amendments would be "effective upon approval by the OSC following public Notice and Comment".

[23] The TSX did not formally file the UMIR amendments (the "UMIR Amendments") with the Commission in accordance with the Protocol, after completion of the approval process. This omission is one of the matters with which the Requesting Parties take issue.

ii. The RS Proceeding: Notice of Hearing and Statement of Allegations

[24] On October 20, 2005, RS Staff issued a Statement of Allegations and a Notice of Hearing and commenced the RS Proceeding against Northern, Alboini and Shaule.

[25] The Statement of Allegations was subsequently amended on February 6, 2007. The RS Proceeding relates to alleged conduct and activities which took place in 2003, 2004 and 2005, and deals with the compliance standards of Northern in relation to Northern's supervision of trading practices, audit trail and order entry issues and grey-list trading. In the RS Proceeding, RS Staff allege, amongst other allegations, that the Requesting Parties did not comply with UMIR 7.1 and RS Policy 7.1.

[26] During the course of the RS Proceeding, the Requesting Parties identified and raised issues respecting the validity of amendments to the TSX rules and policies purporting to adopt the UMIR in 2002. Among other things, the Requesting Parties allege that the TSX was obliged under the Protocol to seek and obtain approval of the UMIR Amendments from the Commission but did not do so.

[27] The Requesting Parties take the position in the RS Proceeding that pursuant to the terms of the Recognition Order, the TSX cannot make or amend any of its rules without complying with the Protocol.

[28] The resolution of the TSX's Board of Governors regarding the adoption of the UMIR Amendments expressly provides that the UMIR Amendments will come into force only following any Commission approval. According to the Requesting Parties, therefore, the UMIR Amendments cannot be effective unless and until they are approved by the Commission. The Protocol establishes in section 4 that rules identified by the TSX Board of Directors as being made in the "public-interest" (as defined in section 2 of the Protocol) have to be subject to a request for public comment process, after which time, they can be approved by the Commission (subsection 8.2(1) of the Protocol). In contrast, rules designated as "non-public interest" rules (pursuant to section 2 of the Protocol) are not subject to a comment process. These "non-public interest" rules are deemed to be approved by the Commission upon being filed with the Commission pursuant to section 8.1 of the Protocol. For whatever reason, the 2006 UMIR Amendments were not filed with the Commission at the time the RS Proceeding commenced.

iii. The Superior Court Application and Justice Campbell's Decision

[29] On October 20, 2005, in response to RS Staff's Notice of Hearing, the Requesting Parties filed a Superior Court application (the "Superior Court Application") seeking to stay or terminate the RS Proceeding on the grounds that UMIR 7.1 and RS Policy 7.1 were impermissibly vague, among other things. The RS Proceeding was adjourned at that time so that the Superior Court Application could be heard first.

[30] On April 6, 2006, counsel for RS Staff and the TSX brought a motion to quash the Superior Court Application on the basis that it was premature. On May 4, 2006, Justice Campbell heard the motion to quash, and on May 24, 2006, held that the Requesting Parties were seeking to prematurely decide issues before the Superior Court that should go before the RS hearing panel in the RS Proceeding (the "RS Hearing Panel") in the first instance. Specifically, Justice Campbell stated that:

> Whether the issues raised in the discipline proceeding initiated fall entirely within the jurisdiction of the regulatory regime set out above should be determined by that body and then by the OSC, before review either in this Court or by the Divisional Court (*Northern Securities Inc., Vic Alboini and Christopher Shaule v. Market Regulation Services Inc. and the Toronto Stock Exchange Inc* (24 May 2006), Toronto 05-CV-298881PD1 (Ont. Sup. Ct.) at para. 25 ("Justice Campbell's Decision")).

[31] According to Justice Campbell, the challenges to the validity of the UMIR ought to be argued before the RS Hearing Panel and then, if any party wishes to appeal the decision of the RS Hearing Panel, appealed by way of hearing and review to this Commission, and only then, should it be taken to the courts.

[32] Justice Campbell also stated that "[t]he rule that premature applications for judicial review must be quashed applies to jurisdictional issues as well" (Justice Campbell's Decision, *supra* at para. 29).

[33] The Requesting Parties initially appealed Justice Campbell's Decision, but later abandoned the appeal on January 8, 2007.

iv. The Original Motion before the RS Hearing Panel

[34] Following Justice Campbell's Decision, the Requesting Parties served a notice of motion on RS Staff on July 24, 2006 taking issue with the validity of the UMIR Amendments (the "Original Motion"). The Original Motion was the first time the Requesting Parties brought to the attention of RS Staff the issue of the proper process for adopting the UMIR Amendments and their validity.

v. The Adjournment Granted to RS Staff

[35] The Original Motion was initially scheduled to be heard by the RS Hearing Panel on September 11, 2006. However, during a conference call on September 6, 2006, RS Staff sought an adjournment of the Original Motion.

[36] RS Staff cited reasons for the requested adjournment, including the need for further time to properly respond to new and complex issues that were not previously raised, as well as the need to accommodate the vacation schedule of RS Staff.

[37] The adjournment was granted by the RS Hearing Panel and the new hearing date for the Original Motion was set down for October 10, 2006.

vi. The TSX Filing – 2006 Amendments

[38] On September 21, 2006, during the adjournment of the RS Proceeding, the TSX filed the UMIR Amendments with the Commission (the "TSX Filing"). The TSX Filing purported to facilitate retroactive approval of the UMIR Amendments (the "2006 UMIR Amendments"). The Requesting Parties were not given prior notice of the TSX Filing.

[39] According to the TSX, the 2006 UMIR Amendments were not classified as "public interest" rules because they were of an administrative nature. As explained by the TSX in a notice published in the Ontario Securities Commission Bulletin on September 29, 2006 (*TSX Inc. Notice – Filing of Housekeeping Amendment to the Rules of the Toronto Stock Exchange Relating to the Adoption of Universal Market Integrity Rules* (2006) 29 O.S.C.B. 7815):

> The Amendments are not considered to be a "public-interest" rule amendment. The Amendments are administrative in nature, as they merely reflect the adoption of UMIR, which were approved by the OSC and other applicable provincial securities commissions. The Amendments do not impact any Rules that are specific to the Exchange.

[40] The TSX Filing contained a representation to the Commission that "all market participants have operated under a common understanding that the Amendments [to the TSX Rules adopting UMIR] were effective April 1, 2002" as the basis for the TSX's request that the UMIR Amendments have retroactive effect.

[41] On September 29, 2006, after the TSX Filing, RS Staff filed responding materials to the Original Motion which included the TSX Filing.

[42] According to submission, when the Requesting Parties reviewed the motion materials, they discovered that the TSX had made a filing dated September 21, 2006 purporting to constitute retroactive approval of the TSX Filing/UMIR Amendments (the "2006 UMIR Amendments"). The Requesting Parties state that they received no advance notice of the TSX Filing. No other party appearing before us disputed these assertions.

[43] Upon being informed on October 5, 2006 by RS Staff that the Commission had published notice of approval of the 2006 UMIR Amendments in the OSC Bulletin, the Requesting Parties wrote to the Director, Capital Markets (the "Director"), on October 6, 2006, advising as to the circumstances giving rise to the TSX Filing and requesting, among other things, that the Director revoke the Commission's approval of the 2006 UMIR Amendments (the "Letter to the Director"). The Requesting Parties have received no response to this letter.

[44] In addition, in order to address the new circumstances arising from the TSX Filing, the Requesting Parties brought another motion to the RS Hearing Panel, returnable on October 10, 2006 (the "New RS Motion"). The New RS Motion seeks orders, among other things, to declare the 2006 UMIR Amendments to be invalid and to dismiss the RS Proceeding. The Original Motion, which questioned the validity of the UMIR Amendments in connection with the process of their adoption in 2002, is still outstanding.

vii. The Decision of the RS Hearing Panel to Adjourn

[45] On October 10, 2006, the Requesting Parties brought the Original Motion and the New RS Motion before the RS Hearing Panel. Following a lengthy exchange between the RS Hearing Panel and counsel for the parties, the RS Hearing Panel decided to adjourn the Original Motion and the New RS Motion (and other motions pertaining to particulars and disclosure issues) *sine die* (the "Adjournment"). A review of the transcript of that proceeding indicates that the Adjournment was granted in the context of the unanswered Letter to the Director.

[46] In its ruling, the Chair of the RS Hearing Panel stated the following:

> […] we have concluded that […] there is no valuable or pragmatic purpose to be achieved by proceeding with a matter that ultimately will be decided by the Ontario Securities Commission.
>
> Proceeding with the argument today will entail a great deal of expense to the respondents whether or not they are successful, and regardless of the ruling that this panel makes on either, both the motions, the ultimate decision lies with a higher authority, and in these circumstances the order of the panel is that this, motion and everything else, be adjourned sine die to be brought back on a date to be agreed by the parties […] (*RS Hearing Panel Transcript*, dated October 10, 2006 at 40:6-20).

[47] At the RS Hearing Panel's request, counsel for the Requesting Parties confirmed that it would proceed before the Commission promptly. RS Staff did not appeal, or seek judicial review of the Adjournment. As discussed further below, the Requesting Parties assert that the RS Motion is a collateral attack on the decision of the RS Hearing Panel to grant the Adjournment.

viii. The Request and RS Staff's Concession

[48] On October 20, 2006, the Requesting Parties brought a Request for Hearing and Review (the "Request") before the Commission.

[49] Specifically, the Request sought:

(1) An order declaring that the 2006 UMIR Amendments/TSX Filing are invalid;

(2) In the alternative, an order declaring that the 2006 UMIR Amendments do not have retroactive effect;

(3) A declaration that the 2006 UMIR Amendments are "public interest" rule amendments within the meaning of the Protocol;

(4) An order dismissing the RS Proceeding against the Requesting Parties; and

(5) Such further and other relief as is appropriate.

[50] According to the Requesting Parties, following receipt of the Request, RS Staff, the TSX and Commission Staff expressed no objection to the Request and these proceedings. They emphasize, in fact, that RS Staff was the first party to propose a schedule for the conduct of the hearing before the Commission with respect to the Request.

[51] By letter dated December 7, 2006, RS Staff advised the Requesting Parties that RS Staff would place no reliance on the TSX Filing with the Commission in the RS Proceeding (the "RS Concession"). However, RS Staff specifically maintained their position that the UMIR Amendments have applied to TSX participants since April 1, 2002.

[52] On January 29, 2007, the Requesting Parties notified the Commission that they intended to proceed with the Request before the Commission regardless of the fact that RS Staff had made the RS Concession.

ix. The Amended Request

[53] On February 5, 2007, RS Staff delivered an amended statement of allegations (the "Amended Statement of Allegations") in the RS Proceeding, alleging among other things, that the Requesting Parties are subject to two separate regulatory regimes: the UMIR and, if those rules are invalid, the old TSX rules that were in force before the UMIR. Accordingly, the Requesting Parties found themselves alleged to have contravened two different sets of TSX rules.

[54] As result, on February 9, 2007, the Requesting Parties filed the Amended Request (the "Amended Request") to take into account the Amended Statement of Allegations.

[55] Specifically, in the Amended Request, the Requesting Parties request a hearing and review of:

(1) the decision of the TSX to make the TSX Filing, including its intended retroactive approval of the 2006 UMIR Amendments under the Protocol and under the Recognition Order; and

(2) the decision of the Director (the "Director's Decision") approving the 2006 UMIR Amendments and/or accepting the TSX Filing for approval of the 2006 UMIR Amendments pursuant to the Protocol.

[56] In addition, the Requesting Parties seek remedies from the Commission such as: (1) a declaration that the 2006 UMIR Amendments are invalid; and (2) a declaration that the UMIR Amendments were not effective prior to the TSX Filing, and an order dismissing the RS Proceeding.

5. The Motions Before this Commission

[57] It is within this context that RS Staff brought the RS Motion on March 2, 2007, to quash the Amended Request. In response, the Requesting Parties' Motion to quash the RS Motion was brought on March 27, 2007.

i. The RS Motion to Quash

[58] The RS Motion to quash is for:

(1) an order quashing the Amended Request and/or refusing the Amended Request, and directing that any such issues as are raised in the Amended Request that may be necessary to be determined be remitted to the RS Hearing Panel; and

(2) such further and other relief as counsel may advise and the Commission may deem just.

[59] Counsel for RS Staff submits that it is inappropriate to hear the Amended Request for two reasons: (1) the issue relied on by the Requesting Parties to bring the Amended Request, i.e. the TSX Filing, no longer has any potential relevance to the Requesting Parties (because of the RS Concession) and, accordingly, the proceedings related to the Amended Request are moot; and (2) the Commission should not be used as a "motions court" to hear and determine issues in the middle of ongoing discipline proceedings (so called "interlocutory motions").

[60] In addition, counsel for RS Staff takes the following positions: (1) the UMIR Amendments are valid; and (2) the RS Hearing Panel has the power to hear and determine the issues raised by the Requesting Parties in their Amended Request, and should do so at first instance. With respect to the validity of the UMIR Amendments and the unique sequence of events in this matter, RS Staff states in its motion that:

(i) The TSX Board of Directors validly exercised its statutory power on November 27, 2001, and passed the UMIR Amendments, and in fact repeatedly published and referred to those amendments in the OSC Bulletin;

(ii) The TSX Board of Directors has an independent rule-making authority that does not require Commission pre-approval, pursuant to section 13.0.8 of the *TSE Act*;

(iii) The Commission's power in relation to the TSX rules is an oversight power that is not mandatory but permissive, arising from subsection 21(5)(e) of the Act;

(iv) The only source of any obligation of the TSX to file its rules with the Commission is the Protocol, which is simply a memorandum of understanding (an "MOU") that cannot override the TSX's statutory power;

(v) While the TSX is required to comply with the Protocol as a term of its Recognition Order (which is part of Ontario securities law), the only available remedy for a breach of a Recognition Order lies at the instance of the Commission, which could revoke the TSX's recognition, or amend the terms of recognition; and

(vi) Accordingly, the UMIR Amendments are legally operative and binding on TSX participants.

[61] To support the RS Motion, RS Staff relies on the facts and circumstances of this matter, as described above. The RS Motion indicates that the RS Proceeding was adjourned on October 10, 2006 in order to enable the Requesting Parties to bring the Request before the Commission to deal with the issue of the TSX Filing. However, RS Staff is of the view that the Amended Request should now be quashed because RS Staff has made the RS Concession that no reliance will be placed on the TSX Filing during the RS Proceeding. RS Staff takes the position that the TSX Filing is therefore irrelevant to any issue in the RS Proceeding and the reason to hold a hearing and review has thereby become moot.

[62] The RS Motion also emphasizes that Justice Campbell's Decision has already determined that the issues raised by the Requesting Parties should be addressed before the RS Hearing Panel, and by virtue of their abandonment of their appeal of Justice Campbell's Decision, the Requesting Parties have accepted this position.

[63] Furthermore, counsel for RS Staff asserts that SRO jurisdiction should be respected. Specifically, RS Staff takes the position that it is not in the public interest for the Commission to permit respondents to an ongoing proceeding before an SRO to bypass the appropriate relief before the SRO. In the view of RS Staff, permitting such a practice would preclude the meaningful discharge by SROs of their assigned responsibilities.

ii. The Requesting Parties' Motion

[64] In response to the RS Motion, the Requesting Parties brought the Requesting Parties' Motion on March 27, 2007 to quash the RS Motion.

[65] Specifically, the Requesting Parties' Motion seeks:

(1) a declaration that the motion by RS Staff dated March 2, 2007 to quash these hearing and review proceedings is *res judicata*, an abuse of process and constitutes

a collateral attack on the ruling of the RS Hearing Panel on October 10, 2006 to grant the Adjournment;

(2) further and in the alternative, a declaration that the RS Motion amounts to a request for hearing and review of the Adjournment under section 21.7 and section 8 of the Act and has not been brought within the time prescribed by section 8 of the Act;

(3) declarations under sections 21(5) and 21.1 of the Act that, in the conduct of the enforcement proceedings before the RS Hearing Panel and in the defence of these hearing and review proceedings culminating in the RS Motion, the TSX and RS Staff have engaged in practices that are abusive of the Requesting Parties' rights and contrary to the public interest;

(4) an order dismissing the proceedings before the RS Hearing Panel or alternatively dismissing the RS Motion; and

(5) an order under subsection 8(3) of the Act awarding the Requesting Parties their costs of this motion and of all or part of their costs of the proceedings before the RS Hearing Panel on a substantial indemnity basis.

[66] The Requesting Parties' Motion focuses on the fact that the Commission has an oversight function over RS and the TSX. In particular, the Requesting Parties emphasize that the Commission should exercise its oversight powers to address the following conduct referred to above:

(1) RS Staff sought an adjournment of the pending RS Proceeding against the Requesting Parties without disclosing that it intended to use the adjournment to enable the TSX to seek retroactive approval of the 2006 UMIR Amendments to the prejudice of the Requesting Parties;

(2) The TSX appears to have misled the Commission as to the facts and circumstances giving rise to the TSX Filing;

(3) RS Staff is now attempting to prosecute the Requesting Parties under two separate regulatory regimes, which amounts to a denial of natural justice because the Requesting Parties have a right, at a minimum, to certainty as to the regulatory regime under which they are being prosecuted;

(4) In the RS enforcement proceedings, RS Staff has acted in disregard of its own procedures and otherwise in a manner that is abusive of the Requesting Parties' rights. Specifically, RS Staff has failed to publish a full record of these proceedings on its website and has therefore not provided the public with a balanced understanding of all the issues in dispute. Moreover, RS Staff is obliged to deliver an offer to settle to potential respondents to an RS enforcement hearing before the proceedings are commenced. Since this is a mandatory requirement, RS Staff is obliged to make a reasonable offer to settle. RS Staff flouted this requirement by delivering an offer to settle requiring an aggregate payment from the Requesting

Parties in excess of $2 million, an amount which, to the knowledge of RS Staff, was not only completely disproportionate to the conduct complained of and the resolution of similar RS enforcement matters but, if paid, would have been in excess of Northern's risk adjusted capital; and

(5) RS Staff is attempting to shield these matters from the scrutiny of a Commission panel through the RS Motion to quash the Amended Request.

[67] In addition, the Requesting Parties' Motion relies on paragraph 4 of section 2.1 of the Act, sections 8, 21(5), 21.1(4) and 21.7 of the Act and the Protocol, to support the position that the Commission has jurisdiction to conduct a hearing and review in this matter.

[68] According to the Requesting Parties, RS Staff has taken a tactical approach to prevent the Requesting Parties from pursuing their right to a hearing and review before the Commission. To support this position, the Requesting Parties rely on the unique facts and circumstances, described above, namely: (1) the TSX did not obtain the requisite approval of the UMIR Amendments from the Commission; (2) the Requesting Parties alerted RS Staff to the fact that the TSX had not obtained approval from the Commission for the UMIR Amendments; and (3) only after being alerted by the Requesting Parties, RS Staff sought an adjournment to give the TSX sufficient time to seek retroactive approval of the UMIR Amendments from the Commission and did not disclose this to the Requesting Parties or to the RS Hearing Panel.

[69] The Requesting Parties are content to pursue the proceedings related to the Amended Request before the Commission as permitted by the RS Hearing Panel when it granted the Adjournment. By contrast, the Requesting Parties submit that RS Staff was dissatisfied with the Adjournment, but nevertheless, RS Staff did not seek to appeal or review the decision to grant the Adjournment. The Requesting Parties maintain that by its conduct, RS Staff has acquiesced to the bringing of the Amended Request before the Commission. They point out that RS Staff moved to quash the Amended Request only at a much later stage.

[70] Further, the Requesting Parties submit that the Amended Request should be heard before the Commission because the RS Hearing Panel would not be able to disregard the TSX Filing even though RS Staff made the RS Concession not to rely on it for purposes of the RS Proceeding.

[71] The Requesting Parties also submit that the RS Hearing Panel does not have jurisdiction to adjudicate upon the validity of any TSX requirement including UMIR.

B. THE ISSUES

[72] In our view, there are three (3) principal questions for determination on these motions, as follows:

(1) What is the nature of the matter and the relief sought by the Requesting Parties in the Amended Request?

(2) Does the Commission have the jurisdiction to grant the relief sought by the Requesting Parties in the Amended Request?

(3) If yes, are there compelling reasons in all of the circumstances for the Commission to exercise its discretion to consider the Amended Request at this time, particularly in light of the pending RS Proceeding?

[73] In the course of his submissions, Mr. Wardle, on behalf of all parties, submitted that the following questions should be addressed by this Panel:

Issue #1 – (a) Is the TSX Filing under the Protocol moot for purposes of the regulatory proceeding between RS Staff and the Requesting Parties?

(b) Is it premature to raise issues regarding the TSX Filing and the validity of the TSX rule changes before the Commission?

Issue #2 – Is there a decision amenable to a hearing and review under sections 8 **or** 21.7 of the Act?

Issue #3 – Does the RS Hearing Panel have jurisdiction to hear the issues raised by the Requesting Parties in the Amended Request?

Issue #4 – Is RS Staff, in bringing its motion to quash, launching a collateral attack on a decision of the RS Hearing Panel?

[74] We believe that by answering the three (3) questions we have identified above, the issues from Mr. Wardle's list will be addressed as well. We summarize our responses to Mr. Wardle's list following our analysis of what we see as the three principal issues.

C. ANALYSIS

1. What is the Underlying Nature of the Matter and the Relief Sought by the Requesting Parties in the Amended Request?

[75] The Amended Request comes to us as an application to review certain decisions. However, if we were to address the issues underlying the Amended Request, it would be necessary to answer the following additional questions among others:

(i) does the TSX have the power to enact rules and policies that have retroactive effect?

(ii) has the TSX properly characterized the TSX Filing as being of an administrative nature (which pursuant to the Protocol is deemed to be approved by the Commission, and does not require formal approval by the Commission)?

(iii) did the TSX fail to properly disclose to the Commission the circumstances giving rise to the TSX Filing, and in so doing, act improperly? and

(iv) did the manner in which RS Staff sought and obtained an adjournment of the RS Proceeding and initiated the RS Motion to quash the Requesting Parties' Amended Request constitute an abuse of process, thereby affording the Requesting Parties an *in personam* remedy that the 2006 UMIR Amendments ought not to apply to them even if, by virtue of the TSX Filing, they apply to all other TSX participants?

[76] These questions are raised in the context of an existing administrative proceeding before a constituted RS Hearing Panel and are essentially raised as a defence to allegations made by RS Staff (although they have been brought as a preliminary matter). All of these issues are currently before the RS Hearing Panel pursuant to motions made by the Requesting Parties.

2. Does the Commission have the Jurisdiction to Address the Matter and to Grant the Relief Sought by the Requesting Parties in the Amended Request?

i. The Commission's Statutory Powers to Hear a Request for Hearing and Review

a. The Commission's Legislative Framework

[77] The Commission may hold a hearing and review of a decision of the Director, or a decision of a SRO such as RS. Section 8 of the Act deals with the review of decisions of the Director. That section provides:

> Review of Director's decision
>
> **8.** (1) Within 30 days after a decision of the Director, the Commission may notify the Director and any person or company directly affected of its intention to convene a hearing to review the decision.
>
> Same
>
> (2) Any person or company *directly affected* by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission. [emphasis added]
>
> Power on review
>
> (3) Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.
>
> Stay
>
> (4) Despite the fact that a person or company requests a hearing and review under subsection (2), the decision under review takes effect

immediately, but the Commission may grant a stay until disposition of the hearing and review.

[78] Section 21.7 of the Act provides the Commission with the authority to review decisions of SROs. That section reads as follows:

> Review of decisions
>
> **21.7** (1) The Executive Director or a person or company *directly affected* by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling. [emphasis added]
>
> Procedure
>
> (2) Section 8 applies to the hearing and review of the direction, decision, order or ruling in the same manner as it applies to a hearing and review of a decision of the Director.

[79] In addition, section 21 of the Act provides the Commission with the power to recognize and regulate stock exchanges. Section 21 of the Act provides as follows:

> Stock exchanges
>
> **21.** (1) No person or company shall carry on business as a stock exchange in Ontario unless recognized by the Commission under this section.
>
> Recognition
>
> (2) The Commission may, on the application of a person or company proposing to carry on business as a stock exchange in Ontario, recognize the person or company if the Commission is satisfied that to do so would be in the public interest.
>
> Same
>
> (3) A recognition under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose.
>
> Standards and conduct
>
> (4) A recognized stock exchange shall regulate the operations and the standards of practice and business conduct of its members and their

representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices.

Commission's powers

(5) The Commission may, if it appears to be in the public interest, make any decision with respect to,

(a) the manner in which a recognized stock exchange carries on business;

(b) the trading of securities on or through the facilities of a recognized stock exchange;

(c) any security listed or posted for trading on a recognized stock exchange;

(d) issuers, whose securities are listed or posted for trading on a recognized stock exchange, to ensure that they comply with Ontario securities law; and

(e) any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange.

ii. Parties Submissions

a. The Requesting Parties' Submissions

[80] The Requesting Parties submit that the Commission has the jurisdiction to hear the Amended Request because a reviewable decision does in fact exist. The Requesting Parties take the position that the decision of the TSX to make and the Director to accept the TSX Filing (respectively) is a procedural decision that is contemplated by section 21.7 of the Act because it relates to a "by-law, rule, regulation, policy, *procedure*, interpretation or *practice*" of the exchange [emphasis added].

[81] The Requesting Parties submit that a decision was in fact made by the Director to accept the TSX Filing and that this is evident from the notes and correspondence of Commission Staff which were obtained by the Requesting Parties pursuant to a Freedom of Information Request.

[82] Further, the Requesting Parties submit that the Commission has the mandate under paragraph 21(5)(e) of the Act to review the rule and policy-making by SROs. According to the Requesting Parties, the Director can exercise the Commission's oversight power contemplated under paragraph 21(5)(e) as a result of the blanket order which delegates power to the Director.

[83] The Requesting Parties submit that they are directly affected by the TSX's decision to make the TSX Filing and the Director's decision to accept the TSX Filing. The Requesting Parties rely on *Re Instinet* (1995), 18 O.S.C.B. 5439, as authority that a consideration of whether

a party is directly affected involves taking into account all the relevant circumstances and the nature of the decision made and the context in which it was made. The Requesting Parties submit that the question whether a party is directly affected by a decision is a highly specific inquiry, and in this matter, it is clear that the Requesting Parties were directly affected by the decision because the TSX Filing and the approval of the 2006 UMIR Amendments were specifically targeted at them.

[84] The Requesting Parties also submit that they brought their Amended Request before the Commission because they gave an undertaking to the RS Hearing Panel to do so. Thus, the Requesting Parties submit that if the Commission declined jurisdiction to hear the matter, the result would be "Kafkaesque": the Requesting Parties say, on the one hand, that the RS Hearing Panel told them to ask the Commission to address these concerns, yet, on the other, the other parties submit that the Commission should not, or can not, address these concerns.

[85] The Requesting Parties submit that the Commission is their only resort, since the RS Hearing Panel does not have the jurisdiction to adjudicate upon the validity of any exchange requirement including UMIR. The Requesting Parties say that under paragraph 13.0.8(4)(c) of the *TSE Act*, the TSX Board of Directors may only delegate the power to hold hearings to make a determination regarding discipline in matters relating to business conduct.

[86] The Requesting Parties refer us to UMIR 10.6(1), which, they argue, imposes restrictions on the jurisdiction of a RS Hearing Panel. Part 10 of UMIR, provides RS and thus RS hearing panels, jurisdiction to decide whether violations have occurred and to impose sanctions. There is no provision of UMIR requiring or permitting RS to make a determination other than determinations regarding discipline.

[87] The Requesting Parties also submit that the RS Hearing Panel is a creature of the UMIR themselves and it does not have any plenary jurisdiction. The Requesting Parties state that RS cannot declare the UMIR to be invalid because it is created by the UMIR rules and it doesn't have that power. For this reason, and in conformity with the jurisprudence, the Requesting Parties submit that the RS Hearing Panel was correct in granting the Adjournment of the RS Proceeding and to decline jurisdiction over issues respecting the validity of the UMIR Amendments including the matters that are the subject of these hearing and review proceedings. The Requesting Parties rely on *Re Taub*, [2006] I.D.A.D.C. No. 22 at paras. 22 to 24 and *Re Derivative Services Inc.*, [1999] I.D.A.D.C. No. 29 at pp. 17 and 18 ("*Re Derivative Services - IDA*") to support this position.

[88] According to the Requesting Parties, the only appropriate forum for the determination of all of these issues is the Commission or the court, and the court has already denied their application in Justice Campbell's Decision.

b. RS Staff's Submissions

[89] Counsel for RS Staff submits that the Commission does not have the jurisdiction to hear the Amended Request at this stage of the RS Proceeding. Counsel for RS Staff stresses that since the TSX Filing is not being relied upon in the RS Proceeding, the Requesting Parties are no longer "directly affected" within the meaning of section 21.7 of the Act. Essentially, counsel for RS

Staff submits that without a direct effect on the Requesting Parties, there is no statutory authority to continue the proceeding before the Commission because a "direct effect" is a requirement under subsection 21.7(1) of the Act.

[90] In support of the position that there must be a "direct effect" on the applicants for the Commission to conduct a hearing and review of an RS decision, counsel for RS Staff referred us to the case of *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*, [2005] O.J. No. 3875 (Div. Ct.). Specifically, counsel for RS Staff pointed out that in the dissent in that decision, which was endorsed by the Court of Appeal for Ontario ([2006] O.J. No. 4699 (C.A.)), Justice Cunningham held that the words "directly affected" indicate "a legislative intent to further circumscribe the right to appeal" (*Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services*, *supra* at para. 28) and in his view (and in the Court of Appeal's view), a personal and individual interest must exist. Based on that case, counsel for RS Staff submits that because there is no direct effect on the Requesting Parties since the TSX Filing is not now being relied upon, the Amended Request does not fall within the Commission's jurisdiction.

[91] In addition, RS Staff submits that the RS Hearing Panel has the jurisdiction to hear the matters raised by the Requesting Parties in the Amended Request, and that this is consistent with Justice Campbell's Decision. In support of this position, RS Staff cite a number of decisions in which an RS hearing panel did determine jurisdiction and legal issues, including *In the Matter of Jason Fediuk* (Decision on Preliminary Motion), August 24, 2005 (RS Hearing Panel), *In the Matter of Credit Suisse First Boston Inc.* (Decision on Preliminary Motion to remove counsel of record), February 9, 2004 (RS Hearing Panel), *In the Matter of Steven James Regoci et al.*, April 21, 2004 (RS Hearing Panel) and *In the Matter of Louis Anthony DeJong et al*., July 29, 2004 (RS Hearing Panel).

c. Commission Staff's Submissions

[92] Unlike RS Staff, Commission Staff does not take a position with respect to whether the Requesting Parties are "directly affected" by the TSX Filing. Instead, Commission Staff's main focus is whether a reviewable decision exists. Commission Staff takes the position that there is no decision which is properly amenable to review under section 21.7 and section 8 of the Act.

[93] Commission Staff submits that not every "decision" is an exercise of a statutory decision-making power which is subject to a hearing and review under the Act. Commission Staff say that about 450 employees work at the Commission and 550 employees work at the TSX, and they all take steps and make decisions every day. However, not all of these decisions are reviewable under section 21.7 or section 8 of the Act. In particular, Commission Staff submits that decisions made in Commission Staff's day-to-day duties are not reviewable in this manner.

[94] Commission Staff takes the position that the TSX Filing does not constitute a reviewable decision under section 21.7 of the Act because it was not made under a statutory power conferred by the Act. According to Commission Staff, section 21.7 of the Act limits the right to a hearing and review to a "decision" made by a recognized stock exchange under a "by-law, rule, regulation, policy, procedure, interpretation or practice of the exchange". Commission Staff points out that there is no mention of the Protocol in section 21.7 of the Act. As a result, section

21.7 of the Act does not apply to administrative steps/decisions taken in the rule making process under the Protocol.

[95] In addition, Commission Staff submits that the Commission's acceptance of the TSX Filing is not a decision that is contemplated under the *TSE Act* or article 12 of the TSX By-Law No. 1. This is because the Protocol does not relate to a "by-law, rule, regulation, policy, procedure, interpretation or practice of the TSX".

[96] With respect to the Director's decision to accept the TSX Filing, Commission Staff submits that it does not fulfill the definition of a decision which is set out in subsection (1) of the Act. Subsection 1(1) of the Act defines a "decision" as a "decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations". Further, Commission Staff submits that this is not a decision in the nature of registration or a decision whether to issue a prospectus receipt, which are both specifically referred to in the Act and are reviewable decisions of a Director.

[97] As well, Commission Staff submits that the Act does not contain any direct conferral of a decision-making authority on a Director with respect to the rules of a recognized stock exchange. As a result, Commission Staff contends that the Director has not exercised a statutory decision-making power which is subject to review under section 8 of the Act. The Commission has only exercised its authority under section 6 of the Act to assign the Director the power in relation to non-public interest by-laws, rules, regulations, policies and procedures, interpretations or practices of a recognized stock exchange.

[98] Commission Staff also relies on the language of Rule 7 of the *Commission Rules of Practice* (1997), 20 O.S.C.B. 1825, to support their position that a reviewable decision of a Director must be a decision made in an adjudicative context. Commission Staff argues that this is evident from the wording of Rule 7.3, which requires that the party who requests the hearing and review provide the Commission with the records, intermediate orders and the decision made …etc.

[99] While Commission Staff counsel advised that she is not aware of any cases which deal with the Commission reviewing decisions relating to a MOU, she did refer us to cases of the Alberta Securities Commission which considered the nature of staff decisions relating to whether to proceed with enforcement proceedings. (see *Re Simpson*, [2005] A.S.C.D. No. 1016 (Alta. Sec. Comm.) and *Re Ironside* [2002] A.S.C.D. No. 158 (Alta. Sec. Comm.)). These cases are discussed below.

[100] Commission Staff did acknowledge that paragraph 21(5)(e) of the Act gives the Commission residual power and overriding supervisory jurisdiction in respect of any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, and admitted in oral submissions that this subsection provides the Commission with overriding jurisdiction to consider the matters before it. Commission Staff also acknowledged that the Protocol itself refers to subsection 21(5) of the Act, and thus the Protocol does not oust the Commission's jurisdiction.

[101] In any event, Commission Staff also submits that the RS Hearing Panel does in fact have the jurisdiction to determine whether the 2006 UMIR Amendments were validly adopted. For example, Commission Staff refers to *Re Delmas* (VSE Hearing Panel Decision, dated June 30, 1994), where an exchange disciplinary panel heard and decided challenges to their jurisdiction. Staff also relies on the case of *Canadian Pacific Limited v. Matsqui Indian Band*, [1995] S.C.J. No. 1 (S.C.C.) as authority that administrative tribunals have the ability to examine the boundaries of their own jurisdiction.

d. The TSX's Submissions

[102] Counsel for the TSX submits that section 21.7 of the Act gives the Commission the jurisdiction to deal with supervision of rule enforcement. He cites, for example, decisions of the exchange such as a delisting decision, or a decision of the TSX Board of Directors which is made under a by-law, rule, regulation, policy, procedure, interpretation or practice of the TSX.

[103] However, counsel for the TSX argues that section 21.7 of the Act does not apply to decisions made in the rule-making process and that this is evident from the case-law dealing with section 21.7 of the Act. Specifically, counsel for the TSX referred us to the five grounds that permit the Commission to interfere with a decision of an exchange, which were articulated in *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3566. These five grounds include whether:

(i) the exchange proceeded on some incorrect principle,
(ii) the exchange erred in law,
(iii) the exchange overlooked material evidence,
(iv) the exchange's perception of the public interest conflicts with that of the Commission, and
(v) new and compelling evidence was presented to the Commission that was not presented to the exchange.

According to counsel for the TSX, these five grounds contemplate an underlying adjudicative proceeding.

[104] Thus, in this respect, counsel for the TSX agrees with Commission Staff that there is no reviewable decision for purposes of section 21.7 of the Act. Counsel also points out that in *Re Steinhoff* (2002), 25 O.S.C.B. 8280, this Commission held that in order for a decision to be reviewable, it must be "a formal decision made after a hearing and not simply an administrative decision by Staff […]" (at para. 10). Since there was no formal decision made after a formal hearing, counsel for the TSX submits, like Commission Staff, that there is no reviewable decision for the Commission to consider.

iii. Discussion

a. Is there a Reviewable Decision in this Matter?

[105] Three elements must be present to trigger the application of section 21.7 of the Act. First, there must be a "direction, decision, order or ruling". Secondly, the direction, decision, order or ruling must be "made under a by-law, rule, regulation, policy, procedure, interpretation or

practice" of the exchange. Finally, the hearing and review provision can only be invoked by a person or company "directly affected".

[106] There are also three required elements that trigger the application of section 8 of the Act. First, a person or company must be "directly affected." Second, there must be a "decision" and third, the decision must be made by a "Director."

[107] Not every decision is a statutory decision which is subject to a hearing and review under the Act. While section 21.7 limits the right to a hearing and review to a "decision" made pursuant to "any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange", section 8 limits the Commission's review to a "decision of the Director".

[108] The term "decision" is set out in subsection 1(1) of the Act, which states: a "decision means, in respect of a decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations."

[109] In *Re Steinhoff* (which related to consideration of sections 21.1(4) and 21.7 of the Act), the Commission held that in order for a decision to be reviewable, it must be "a formal decision made after a hearing and not simply an administrative decision by Staff […]" (*Re Steinhoff, supra* at para. 10). Notwithstanding that case, we are of the view that no decision after a formal hearing is necessary for there to be a decision that is reviewable by the Commission under these sections. At the same time, however, we agree that mere administrative decisions are not subject to review.

[110] In *Ironside*, the Alberta Securities Commission considered an appeal under section 35 of the *Alberta Securities Act* of a decision by the Executive Director not to take enforcement action. The language of section 35 is similar to section 8 of the *Act*. The Alberta Commission held that:

> […] the decision not to proceed with enforcement action in this case is not a decision as defined by the Act because it was not made "under a power or right conferred by this Act or the regulations (*Re Ironside, supra* at para. 59).

[111] In *Re Simpson*, the Alberta Securities Commission had to consider the scope of section 73.1 of the *Alberta Securities Act*, R.S.A. 2000, c. S-4, its appeal provision. In that case, the Investment Dealers Association ("IDA") decided not to conduct an investigation into a complaint filed by an investor about the conduct of his broker and the investor subsequently appealed that decision to the Alberta Securities Commission. The Alberta Commission concluded that the IDA's decision was not a "decision" subject to its review. The Alberta Securities Commission stated:

> However, subsection 1(n) is of some assistance, as it uses some of the same words as subsection 73(1). The four words "direction, decision, order, ruling" used in paragraph 1(n) are followed by the words "under a power or right conferred by this Act or the regulation". That phrasing indicates to us that each of the first four

> words share the concluding characteristic that it must be made "under a power or right conferred by this Act or the regulation". *Therefore, not every decision meets the definition of "decision" for purposes of the Act. Subsection 73(1) similarly limits the right of appeal to a "direction, decision, order or ruling" that is made under a "by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized self-regulatory organization. This indicates to us that the legislative intention, once again, was that not every decision made by a self-regulatory organization such as the IDA, as that term is understood in common parlance, is a "decision" that can be appealed* [emphasis added] **(***Simpson, supra*, at para. 40).

We are of the view that this reasoning is applicable in the context of sections 8 and 21.7 of the Act.

(1) The TSX Filing

[112] With respect to the TSX Filing, we find that there was no reviewable decision by the TSX within the meaning of section 21.7 of the Act.

[113] As described above, in order to be a reviewable "decision" under section 21.7 of the Act, the decision to make the TSX Filing must have been made under a power specifically given to the TSX pursuant to a by-law, rule, regulation, policy, procedure, interpretation or practice of the TSX. The TSX decision to make the TSX Filing was not under a "by-law, rule, regulation, policy, procedure, interpretation or practice" of the TSX. Rather, the TSX made the TSX Filing pursuant to the Protocol.

[114] The Protocol is a bilateral agreement between the Commission and the TSX which forms part of the TSX Recognition Order. The Protocol describes how the Commission will conduct its oversight of the TSX's rule-making process (See *Re Mercury Partners & Co.* [2002] B.C.S.C.D No 677 at paras. 40 and 45 and *Simpson, supra*, at para. 42).

[115] Article 12 of TSX By-law No. 1 relates to rules and regulations made by the TSX and provides that the board may also "issue, establish, adopt, amend, repeal and re-issue, re-establish and re-adopt interpretations, procedures and practices to supplement [its] Rules and Regulations." Thus, the "by-law, rule, regulation, policy, procedure, interpretation or practice" of the TSX under which a reviewable decision is made must be one specifically promulgated by the TSX pursuant to its powers. The Protocol does not fall within this category.

[116] The Protocol establishes two different procedures for the TSX to follow to facilitate the Commission's oversight of the TSX Rules. Where a rule change is regarded by the TSX as affecting the "public interest" (within the criteria set out in the Protocol), it is classified as a "public interest" rule. Where a rule change is of a technical or housekeeping nature, it is classified as a "non-public interest" rule. The TSX Board of Directors, and not the Commission, is responsible for determining whether a rule is "public interest" or "non-public interest".

[117] In the case of a "non-public interest" rule, the TSX is simply required to "file" a copy of the proposed rule with the Commission. In that case, the cover letter to the filing must indicate the date on which the rule change is effective.

[118] The TSX regularly makes decisions in the context of its rulemaking and policy-making initiatives. The TSX must routinely make determinations under the Protocol about whether a proposed TSX rule is a "public interest" or "non-public interest" rule. These types of decisions are not decisions made by the TSX under a by-law, rule, regulation, or policy of the TSX, nor are they decisions made by the TSX under a procedure, interpretation or practice of the TSX that supplement such rules and regulations. In our view, a decision to make a filing under the Protocol at the end of an extensive policy making process has been completed is not a decision subject to review under section 21.7 of the Act.

[119] We conclude that the decision of the TSX to make the TSX Filing, including the classification of the 2006 UMIR Amendments as "non-public interest" rules under the Protocol and the selection of the effective date of the TSX Filing, are not of the nature that would be subject to review under section 21.7 of the Act. While it may be that the Requesting Parties take issue with the TSX Board of Directors' decision to make the TSX Filing and to classify the TSX Filing as "non-public interest", and its implications, we find that decision is not reviewable by this Commission under section 21.7.

(2) The Commission Staff's Acceptance of the Filing

[120] A "Director" is defined in section 1(1) of the Act as "the Executive Director of the Commission, a Director or Deputy Director of the Commission, or a person employed by the Commission in a position designated by the Executive Director for the purpose of this definition."

[121] We note that the Requesting Parties have not been able to point to any statutory authority granted or assigned to the Director to classify TSX rules as "public interest" or "non-public interest" rules. The TSX classified the 2006 UMIR Amendments as "non-public interest" rules, not a Director of the Commission.

[122] The Act does not contain any direct conferral of decision-making authority on a "Director" with respect to the rules of a recognized stock exchange. Subsection 6(3) of the Act provides that a "quorum of the Commission may assign any of its powers and duties under this Act, except powers and duties under section 8 and Part VI, to the Executive Director or to another Director."

[123] The Commission has exercised its authority under section 6 of the Act by assigning to the Director its power with respect to recognized entities, including recognized exchanges, but only in respect of those by-laws, rules, regulations, policies and procedures, interpretations or practices that are identified by the recognized entity as being unlikely to raise public interest concerns.

[124] To determine the nature and scope of the decision-making power assigned to the Director by the Commission, one must consider the framework for the review and approval of the TSX rules by the Commission, which is set out in the Protocol. The Protocol contemplates that the TSX will file with the Commission all by-laws, rules, regulations and policy statements of general application, and amendments thereto, adopted by the TSX board. The extent to which a rule is subject to review, if any, by the Commission depends on whether the rule is treated as a "public interest" or a "non-public interest" rule, as discussed above.

[125] Non-public interest rules that are filed by the TSX with the Commission, "without Commission Staff review", are deemed to have been approved upon being filed and to be effective upon the date indicated by the TSX in the filing letter. There is no requirement that the Commission or the Director accept or approve that filing. Under the Protocol, the Director does not approve non-public interest rules and rule amendments of the TSX. Accordingly, the Director does not make a "decision" that is subject to review.

[126] We note that in *Re Meier*, [1999] LNBCSC 39 (B.C.S.C), the British Columbia Securities Commission found that the Vancouver Stock Exchange's decision to accept the filing of the technology transfer agreement (the "TTA") was subject to review as a decision made under a policy of the Exchange. The TTA was a contract between two companies made in the context of a going private transaction. The listed company agreed to sell assets that constituted all or substantially all of its property to a private company, Blackcomb Holdings Ltd.

[127] The agreement was filed, and accepted by the exchange, pursuant to Vancouver Stock Exchange Policy No. 18. "Under Policy 18, a listed company cannot complete a material transaction, as defined in the policy [such as a take-over or going private transaction], until the relevant documentation has been accepted for filing by the Exchange"(*Re Meier, supra* at p. 4 of 9).

[128] We note that the facts in *Re Meier* are different from those present before us. *Re Meir* dealt with a decision by the exchange to accept a filing made under its rules. There was clearly a decision required to be made by the exchange as to whether to accept that filing under its rules. In addition, that decision related to an agreement, the TTA, made between two companies. In contrast, in the present case we are dealing with the filing of an amendment to TSX rules made under an MOU, which is an agreement between the Commission and the TSX. For these reasons, we find that the case of *Re Meier* does not apply in present circumstances.

[129] We find therefore that there is no decision-making authority assigned to the Director with respect to the Protocol. Any determination made by Commission Staff in "accepting" the TSX Filing, if there was such a decision, does not constitute a reviewable decision of the Director under sections 8 or 21.7 of the Act.

(3) No "Decision" that "Directly Affects" the Parties

[130] As noted above, the term "decision" is set out in subsection 1(1) of the Act, which states that a "decision means, in respect of a decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations."

[131] The words “directly affected” are used to describe a reviewable decision in both sections 8 and 21.7 of the Act. This Commission has interpreted these words in *Re Instinet Corp.*, *supra*. In that case, the Commission stated that:

> The words "directly affected" in subsection 8(2) of the Act should be interpreted in light of all of the relevant circumstances. The interpretation to be given to the words in the context of a decision relating to a take-over bid may well be different than in the context of a registration decision. In each case under subsection 8(2), in determining standing, the Commission must look at the nature of the power that was exercised, the decision that was made, the nature of the complaint being made by the person requesting the hearing and review and the nature of that person's interest in the matter (*Re Instinet Corp.*, *supra* at 5446).

[132] Further, in *Re Reuters Information Services (Canada) Ltd.* (1997), 13 C.C.L.S. 66 (Ont. Sec. Comm.), the Commission emphasized that in order to be “directly affected”, there must be an “immediate or automatic effect on the applicant” (at para. 29).

[133] As indicated above, we have concluded that there is no decision of the TSX that is subject to review. Accordingly, it is not necessary for us to determine whether the Requesting Parties were “directly affected” by the TSX Filing. If we are wrong about that, however, we are of the view that the determination of whether a person is “directly affected” is a question of fact, best determined by the RS Hearing Panel within the evidentiary context of the RS Proceeding.

b. The Commission’s Overriding Supervisory Jurisdiction Applies

[134] Subsection 21(5) of the Act sets out the Commission’s powers and oversight regarding stock exchanges. It is clear from paragraph 21(5)(e) of the Act that the Commission has a supervisory power over “any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange”. Therefore, in situations where sections 8 and 21.7 of the Act do not apply, the Commission nonetheless has the ability to exercise its oversight function of a recognized stock exchange under paragraph 21(5)(e).

[135] Although we have determined that there is no reviewable decision pursuant to sections 8 or 21.7 of the Act, we recognize that this Commission does have an overriding supervisory power with respect to SROs under paragraph 21(5)(e) of the Act. We agree with Commission Staff’s characterization of the Commission’s powers under this paragraph, which are discussed above at paragraph 100.

[136] In our view, it is within the jurisdiction of the Commission to exercise its supervisory power under paragraph 21(5)(e) of the Act to review the decision of the TSX to make the TSX Filing.

[137] The Commission clearly has oversight jurisdiction over SROs under that section. We must determine, however, whether there are circumstances in which the Commission should exercise its discretion to exercise its oversight powers.

3. In all of the Circumstances, are there Compelling Reasons to Exercise our Discretion to Consider the Amended Request at this Time?

[138] Having found that we have the jurisdiction and the discretion to hear the Amended Request, we have to determine whether there are compelling reasons for us to exercise that discretion in all of the circumstances, at this time.

i. Are the Matters Raised in the Amended Request Moot Because of the RS Concession?

a. Is the RS Hearing Panel Bound by the RS Concession?

(1) Parties Submissions

[139] On December 7, 2006, RS Staff made the RS Concession that they would not rely on the TSX Filing for purposes of the RS Proceeding. The RS Concession was made in response to the Requesting Parties' vigorous objections regarding the TSX Filing.

[140] RS Staff takes the position that their agreement not to rely on the TSX Filing renders the Amended Request moot, so that the Commission does not have to deal with it. According to RS Staff, if there is no reliance on the TSX Filing, its effect on the validity of the UMIR Amendments is academic and hypothetical. RS Staff takes the position that the Requesting Parties have been restored to the position they were in prior to the TSX Filing.

[141] In light of the RS Concession, RS Staff takes issue with the fact that the Requesting Parties insist on continuing the process before the Commission rather than dealing with the legal issue of the validity of the UMIR Amendments before the RS Hearing Panel. In the words of counsel for RS Staff:

> […] there is no conceivable prejudice to [the Requesting Parties] if there was any to begin with arising from the filing or any of the surrounding circumstances such as the adjournment of the motion date and, in fact, [the Requesting Parties] effectively [have] been given what it asked for after it learned about the filing. [The Requesting Parties have] achieved the most success that it could really expect or hope to achieve based on the filing and that is getting the filing excluded, completely excluded, from consideration (*Commission Transcript in the matter of the TSX Inc., Market Regulations Services Inc, Northern Securities Inc., Vic Alboini, Christopher Shaule*, dated July 19, 2007 at 39:5-16).

[142] Counsel for RS Staff submits that the Requesting Parties have achieved all they wanted to achieve, that is, getting the TSX Filing excluded from consideration in determining the application of the UMIR Amendments. RS Staff submits that, by making its concession, the Requesting Parties are no longer "affected" by the TSX Filing, and that there is no longer a live controversy or a concrete dispute with respect to the TSX Filing.

[143] RS Staff submits that as a general rule, courts, as well as tribunals, should not hear matters where there is no live dispute to be settled. In support of this position, they referred us to cases where courts refused to hear matters that were held to be moot issues, including: *Coca-Cola Co. of Canada v. Matthews*, [1944] S.C.R. 385, *Moir v. Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363, and *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 177 (P.C.). They also pointed out that appeals from the Commission where the issues have become moot have been dismissed (see for example, *Ontario (Securities Commission) v. Crownbridge Industries Inc.*, [1990] O.J. No. 2299 (Gen. Div.)). These cases are discussed below.

[144] Counsel for the TSX supports the position of RS Staff on the issue of mootness, and observes that it is unclear whether the Requesting Parties' allegations of "abusive regulation" are intended to form some sort of free standing basis for relief. If so, then the TSX submits that these issues must be addressed in the first instance by the RS Hearing Panel, in accordance with Justice Campbell's Decision. If not, these issues are also moot, since they are tied to the circumstances that gave rise to, and were meant to be addressed by, the RS Concession.

[145] Commission Staff did not take any position regarding the RS Concession and the issue of mootness.

[146] The Requesting Parties maintain that there continues to be a live issue relating to whether RS Staff can actually bind the RS Hearing Panel to ignore the 2006 UMIR Amendments and the fact that the TSX made the TSX Filing. According to the Requesting Parties, the RS Hearing Panel would have a positive legal obligation to consider the TSX Filing in any event.

(2) Discussion

[147] All parties agree that *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 ("*Borowski*") is the leading case with respect to the principle of mootness. The general principle is that when there is no longer a concrete issue in dispute between the parties, then the matter becomes moot. Therefore, absent exceptional circumstances, courts and tribunals only exercise their power to resolve live disputes:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. *Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.* The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice [emphasis added] (*Borowski*, *supra* at para. 15).

[148] Essentially, courts and tribunals should not be called upon to decide abstract issues. For example, in *Coca-Cola Co. of Canada v. Matthews*, *supra*, the Supreme Court of Canada dismissed an appeal on the basis that the issue was moot. In that case, the Court of Appeal for Ontario directed that the respondent, Matthews, recover $350 in damages and costs. Leave to appeal to the Supreme Court of Canada was granted on the basis that the appellant, Coca-Cola, made an undertaking to pay the respondent in any event the amount of the judgment and costs: The Supreme Court explained that the undertaking had the following effect: "no further *lis* exists between the parties and [this leaves] nothing for the respondent to fight over" (at p. 2 of 5). As a result, the Supreme Court determined that the matter was moot and emphasized that courts should "not decide abstract propositions of the law" (at p. 4 of 5).

[149] This principle was also articulated by the Privy Council in *Alberta v. Attorney-General for Canada*, *supra*. The Privy Council stated that it is a long-established practice not "to entertain appeals which have no relation to existing rights […]" (at p. 3 of 7).

[150] This also occurred in the case of *Moir v. Huntingdon (Village)*, *supra*. In that case, a by-law central to the matter was repealed by the Village of Huntingdon. The Supreme Court of Canada determined that if a legislative instrument upon which the dispute is based is repealed, this is a new circumstance that will resolve the dispute and make the issues moot. As a result, the Supreme Court dismissed the appeal.

[151] Further, in *Ontario (Securities Commission) v. Crownbridge Industries Inc*., *surpa*, the issue of mootness was addressed by the Divisional Court in the context of securities regulation. That case involved a dispute over the production of documents, however, the Commission's counsel rendered the issue moot by providing the other party disclosure of the relevant documents. Thus, a new circumstance (i.e., disclosure of the documents) had the effect of rendering the issue moot.

[152] In order to determine whether an issue has become moot, a two step analysis needs to be undertaken. The first step requires a consideration of whether there remains a live, concrete dispute between the parties. If the first step is answered in the affirmative, then the second step involves determining whether it is necessary for the court or tribunal to exercise its discretion to hear the case in any event (*Borowski*, *supra* at para. 16).

[153] In applying the two step analysis test articulated in *Borowski*, we have determined that there continues to be a live concrete issue between the parties, that is, the validity of the 2006 UMIR Amendments.

[154] In our view, the RS Concession does not necessarily bind the RS Hearing Panel. The RS Hearing Panel has the ability to apply and enforce the 2006 UMIR Amendments. The TSX has specifically delegated this task to RS. Since the TSX has done so, we do not agree that RS Staff can prevent the RS Hearing Panel from considering the validity of the 2006 UMIR Amendments if the RS Hearing Panel wishes to do so. RS Staff cannot on its own volition curtail and restrict the jurisdiction of the RS Hearing Panel.

[155] It is also well established that parties by agreement cannot confer jurisdiction on a tribunal that the tribunal does not possess. Similarly, in our view, a party, by concession, cannot

deprive a tribunal of its jurisdiction to hear and determine an issue. This principle is fundamental to the rule of law and to the exercise of independent decision-making authority. A court's inherent power to control its own process does not justify it in ignoring the law. In fact, a hearing panel is under an obligation to apply the law. A panel's decision on a matter requires that it be made independently and impartially and not subject to parameters established in advance by anyone, including RS Staff. As stated in *Re ATI Technologies Inc.* (2004), 27 O.S.C.B. 6859, by the Commission:

> *We must rely on the hearing panel to do its job, to do its duty, to conduct a fair hearing, to apply the law, including the rules of natural justice* that are required because of subsection 4 of section 127 of the Act. *We leave it to that panel to come to the opinion that it has to come to*; […] [emphasis added] (*Re ATI Technologies Inc*., *supra* at para. 104).

[156] A similar principle has been articulated by the Ontario Court of Appeal for Ontario in the context of juries; "[…]the jury has no right not to apply the law that the trail judge has instructed them to apply"(*R. v. Morgentaler* (1985), 52 O.R. (2d) 353 at 434-435 (C.A.) reversed on other grounds (1998), 44 D.L.R. 385 (S.C.C.)). In the same way, a judge cannot decide to ignore the law when deciding a case.

[157] The Alberta Securities Commission noted in *Re Capital Alternatives*, 2006 ABSC 1441, that a hearing panel is obliged to decide an issue based on all of the material before it, and is not bound by the position of staff counsel. It stated that the "[…] panel is not bound to share Staff's assessment of relevance" (*Re Capital Alternatives Inc*., *supra* at para. 19). This is of significant importance where, as in the case of an RS Hearing Panel, the adjudicative body has a public interest mandate that goes beyond the interests of the parties. It is a fundamental principle of procedural fairness in securities regulation and enforcement that the investigatory and adjudicative functions of regulatory bodies be kept separate.

[158] The RS Concession cannot bind and set the legal rules that apply during the proceeding before the RS Hearing Panel. As a result, the RS Hearing Panel may be faced with the question of the validity of the 2006 UMIR Amendments and the effect of the TSX Filing even though RS Commission Staff take the position that it will not rely on that filing. As a result, the Requesting Parties are still potentially affected by the TSX Filing and the issues raised by the Requesting Parties are not moot.

[159] We also emphasize that securities regulators exercise a public interest jurisdiction which transcends the interests of the parties. As such, even if a matter would be "moot" for a traditional court, we at least question whether it could still be appropriate for a regulator to consider an issue raised by a party from a public interest perspective.

[160] Nothing we say here is intended to require the RS Hearing Panel to consider the TSX Filing and the 2006 UMIR Amendments. The RS Hearing Panel is entitled to consider those issues that it considers relevant to the proceeding before it. For instance, the RS Hearing Panel would render this issue moot if it concludes that the UMIR Amendments are in force, in any event. All we are saying here is that RS Staff cannot by means of the RS Concession render the issue before us moot.

b. Does the RS Hearing Panel have the Jurisdiction to Deal with the Matter?

(1) The Parties' Submissions

[161] As summarized above at paragraphs 80 to 88, the Requesting Parties take the position that the RS Hearing Panel does not have the jurisdiction to consider the issues raised in the Amended Request. Accordingly, if it does not have the jurisdiction, they say that the Commission should exercise its discretion to hear the matter at this time, since they would otherwise be denied an avenue to redress the matters raised. In contrast, as set out in paragraphs 89 to 101, RS Staff and Commission Staff submit that the RS Hearing Panel has the jurisdiction, and therefore can and should deal with the matters raised in the Amended Request, in the course of the RS Proceeding.

[162] In our view, the RS Hearing Panel has the jurisdiction to deal with the issues raised in the Amended Request, in particular, the validity of the UMIR Amendments. Further, in our view, the RS Hearing Panel is the best and most appropriate forum in which to address all of these matters, at least at first instance.

[163] *Canadian Pacific Limited v. Matsqui Indian Band* [1995] 1 S.C.R. 3 ("*Matsqui*"), the Supreme Court of Canada considered the question whether administrative appeal tribunals may entertain questions relating to their jurisdiction**.** In *Matsqui,* the respondents argued that jurisdictional issues can only be determined by superior courts and not by administrative bodies. At issue was whether the motions judge properly exercised his discretion to strike the respondents' application for judicial review, thereby requiring the respondents to pursue their jurisdictional challenge through the appeal procedures established by the appellant bands (i.e. pursue their application before the administrative tribunal and follow the appropriate appeal route before coming before the courts).

[164] The majority in *Matsqui* found that administrative tribunals can examine the boundaries of their jurisdiction although their decisions in this regard lack the force of *res judicata* (i.e. a decision of an administrative tribunal regarding jurisdiction is only binding on the parties to the dispute; it does not have the force of precedent). Decisions pertaining to jurisdiction made by administrative tribunals are reviewable on a correctness standard and will generally be afforded little deference *(Matsqui*, *supra* at para. 23).

[165] Also, in *Chalmers v. Toronto Stock Exchange*, [1989] O.J. No. 1839 (C.A.), (leave to appeal to the Supreme Court of Canada dismissed February 22, 1990, S.C.C. File No. 21710), the Ontario Court of Appeal held that a stock exchange is a domestic tribunal. As such, it is a tribunal subject to administrative law principles established in the case-law (such as *Matsqui*) and established in legislation (such as the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22).

[166] Further, in *Delmas v. Vancouver Stock Exchange* (1995), 130 D.L.R. (4th) 136 (B.C.C.A.), it was alleged that a respondent, a registered representative, committed four infractions of Vancouver Stock Exchange ("VSE") By-law 5.01. Before a VSE hearing panel convened to deal with the alleged infractions, the respondent argued that the VSE hearing panel was without jurisdiction because VSE By-Law 5.01 was void for vagueness. The VSE hearing

panel dismissed the respondent's arguments and the respondent applied to the courts for judicial review of the VSE hearing panel's decision. The British Columbia Supreme Court concluded that VSE By-law 5.01, which defines infractions, was not void for vagueness and that the respondent's conduct fell within the ambit of that by-law. The British Columbia Supreme Court also determined that VSE members had the power to enact by-laws defining infractions which incorporated rules passed by the VSE Board of Governors, and that such incorporation did not amount to a wrongful subdelegation of the VSE members' powers. The respondent then appealed to the British Columbia Court of Appeal, and on the issue of jurisdiction, the Court of Appeal relied on the authority of *Matsqui* that administrative tribunals do in fact have the authority to consider jurisdictional matters. As a result, the Court of Appeal rejected the respondent's arguments and dismissed the appeal.

[167] Counsel for the TSX observes that the RS Hearing Panel is established under a statutory scheme. Specifically, section 13.0.8 of the *TSE Act* gives the TSX Board of Directors the power to govern and regulate its members. As well, subsection 13.0.8(4) of the *TSE Act* permits the TSX to delegate the power to hold disciplinary hearings. The TSX's disciplinary powers have been delegated to RS through the Recognition Order.

[168] Therefore, the *TSE Act* grants RS the power to hold hearings and make determinations regarding disciplinary matters. In addition, UMIR 10.6 sets out the RS Hearing Panel's authority and states that an RS hearing panel shall "make any determination, hold any hearing and make any order or interim order required" [emphasis added]. The inclusion of the word "any" implies that an RS Hearing Panel may make "any" determination and order, including one that deals with its own jurisdiction.

[169] We note that RS hearing panels have addressed issues relating to their jurisdiction in the past. Examples of such cases include: *In the Matter of Jason Fediuk, supra, In the Matter of Credit Suisse First Boston Inc., supra, In the Matter of Steven James Regoci et al., supra* and *In the Matter of Louis Anthony DeJong et al., supra*.

[170] In summary, in our view, the RS Hearing Panel has the jurisdiction to determine the issues raised in the Amended Request.

c. Is the Amended Request Premature and Will it Fragment the RS Proceeding?

(1) Parties' Submissions

[171] Counsel for RS Staff takes the position that the issues raised in the Amended Request are premature. According to RS Staff, the RS Proceeding should be concluded before attempts are made to seek Commission review on the issues, in order to have the benefit of a full factual record from the RS Proceeding. Further, counsel for RS Staff submits that when appeals or reviews are taken in the midst of an incomplete tribunal proceeding, this fragments and delays the whole proceeding and increases the costs to the parties.

[172] RS Staff also submits that the Commission should not be used as a "motions court" to hear and determine on an interlocutory basis issues in the midst of ongoing discipline proceedings.

[173] Counsel for RS Staff also emphasized that Justice Campbell's Decision highlighted the applicable law regarding prematurity, and submitted that the Requesting Parties' application to the Superior Court was premature (Justice Campbell's Decision, *supra* at para. 37).

[174] Counsel for RS Staff pointed out that in the past, this Commission has declined to proceed with hearing a matter where premature issues were raised. Such was the case in *Re Derivative Services Inc*. (1999), 22 O.S.C.B. 6441 ("*Re Derivative Services - OSC*"). Counsel for RS Staff submitted that in that case, the Commission dismissed the application as being premature because there were no exceptional or extraordinary circumstances present that required the Commission to deal with the motion.

[175] Commission Staff supports RS Staff's position on this issue and also relies on *Universal Settlements International Inc. v. Ontario (Superintendent of Financial Services)*, [2001] O.J. No. 4301 (Sup. Ct.) as support for a finding of prematurity because a full factual record is not yet available.

[176] Counsel for the TSX agrees with RS Staff, and emphasizes the findings made in Justice Campbell's Decision regarding fragmentation and prematurity.

[177] Needless to say, the Requesting Parties do not agree that the matters raised in the Amended Request are being raised prematurely. They submit that RS Staff misplaces reliance on Justice Campbell's Decision which, they submit, merely directed that they seek a ruling from the RS Hearing Panel regarding its jurisdiction. The Requesting Parties submit that they have complied with Justice Campbell's Decision, but find themselves now in the "Kafkaesque" position of being criticized for taking the very steps they were directed to take by the RS Hearing Panel.

[178] The Requesting Parties further submit that they are not attempting to fragment the RS Proceeding, nor are they attempting to have the Commission resolve an issue that is premature. They argue that the issues stated in the Amended Request are "ripe for determination", since the RS Hearing Panel has made a decision not to proceed until the Requesting Parties' issues are dealt with by the Commission. They add that the RS Hearing Panel was perfectly entitled, in the exercise of its discretion, to control its own process, and to defer to the Commission on these preliminary issues that pertain to its jurisdiction.

[179] The Requesting Parties submit that an application for review is not premature when the issue raised is jurisdictional in nature. Where there is a fundamental dispute about the source of the RS Hearing Panel's jurisdiction, immediate judicial review is entirely appropriate (see *Glendale Securities Inc. v. Ontario (Securities Commission)* (1996), 11 C.C.L.S. 216 (Ont. Gen. Div.). They say that it is costly, duplicative and wasteful to compel the parties to proceed with the RS Proceeding before a determination of the validity of the 2006 UMIR Amendments is made.

(2) Discussion

(i) Prematurity and Fragmentation

[180] *Ontario College of Art et al. v. Ontario Human Rights* (1993), 99 D.L.R. (4th) 738 (Ont. Gen. Div.) sets out general legal principles regarding prematurity that are applicable in this case:

> [A Court has] a discretion to exercise in matters of this nature. It can refuse to hear the merits of such an application if it considers it appropriate to do so. Where the application is brought prematurely, as alleged by the Attorney General in these proceedings, it has been the approach of the Court to quash the application, absent the showing of exceptional or extraordinary circumstances demonstrating that the application must be heard (*Ontario College of Art et al. v. Ontario Human Rights*, *supra* at page 2 of 3).

[181] Essentially, premature attempts to review tribunal decisions are routinely rejected because interrupting the proceedings prevents the first instance tribunal from properly and effectively performing its function.

[182] The Divisional Court also approved this principle in *Coady v. Law Society of* Upper *Canada* (2003), 171 O.A.C. 51 (Div. Ct.):

> When litigants before administrative tribunals seek the court's intervention in the midst of the litigation, the court is reluctant to do so except in very extraordinary circumstances. Experience has shown that the best course is to permit the hearings to be completed and then review the entire matter. Many apparent problems disappear in the light of further evidence, sometimes the result makes the application unnecessary (*Coady v. Law Society of Upper Canada*, *supra* at para. 9).

[183] The rationale behind not dealing with premature applications is that:

> […] it is preferable to consider issues […] against the backdrop of a full record, including a reasoned decision by the board of the tribunal. Obviously, this is usually available to the court only after the administrative body has conducted a full hearing (*Ontario College of Art et al. v. Ontario Human Rights*, *supra* at page 3 of 3).

[184] For these reasons, only in exceptional circumstances should a reviewing court or tribunal hear an application in the midst of a hearing before the first instance tribunal.

[185] We have considered the general legal principles regarding prematurity, and in this matter, we find that the issues raised by the Requesting Parties in connection with the 2006 TSX Filing are premature in the circumstances of this case.

[186] We rely on *Mitchell v. Ontario (Securities Commission)*, [1998] O.J. No. 1537 (Ont. Gen. Div.), where the Court stressed that there is a need to avoid a piecemeal approach to judicial review of administrative action. In that case, the Court held that reviewing a tribunal decision on

an interlocutory motion, prior to the conclusion of the tribunal proceeding on the merits, would unduly fragment the underlying administrative proceeding, and as a result, the applications were dismissed on the basis that they were premature.

[187] We also agree that *Universal Settlements International Inc. v. Ontario (Superintendent of Financial Services), supra*, is instructive. That case emphasizes the importance of deference to regulatory tribunals and the importance of having a full background consideration by the tribunal. In that case, the court stated:

> Except in the most extraordinary circumstances a court should not grant declaratory relief where the regulatory authority has not been fully engaged and does have a process for doing so. There is a danger that a court which would make a pronouncement on hypothetical facts might well undermine the policy direction of a regulatory tribunal which has not only a particular case before it, but many policy factors to consider in determining the scope and extent of appropriate regulation (*Universal Settlements International Inc. v. Ontario (Superintendent of Financial Services), supra* at para. 41).

[188] We conclude that we should avoid further fragmentation of this matter and have the RS Hearing Panel address the concerns of the Requesting Parties before the matter comes to us (if at all). We note that all of the issues before us have been raised by the Requesting Parties before the RS Hearing Panel. We recognize that it is not in the public interest to fragment proceedings in general. As observed in *Re Belteco Holdings Inc.* (1997), 20 O.S.C.B. 2921, (at paragraph 1.10) often "preliminary motions can take on a life of their own", especially when the parties seek to challenge motion decisions in the courts. In those circumstances, the hearing on the merits cannot continue until the interlocutory matters have run their course. The result can be a substantial delay in having a matter heard on the merits. In our view, that result is inconsistent with conducting matters on a timely basis.

[189] Moreover, *In the Matter of A, B, C, D, E, F, G and H* (2007), 30 O.S.C.B. 6921, the Commission recently reaffirmed its position on premature applications. While that case dealt with the issue of constitutional motions, we find that the same reasoning applies in the present case – a full factual record is desirable, and often necessary, to assess the arguments raised by the parties (*In the Matter of A, B, C, D, E, F, G and H, supra* at para. 63).

[190] In the present circumstances, the Commission is very mindful of the fact that it should not cause further delay or fragment the RS Proceeding any further. As a result, we have determined that hearing the Amended Request is premature and it should be remitted to the RS Hearing Panel and dealt with there. We note that the Commission does have the ability to hear an application such as this under our broad oversight power of SROs under paragraph 21(5)(e) of the Act. However, we are of the view that we should not micromanage or unduly interfere with the SRO adjudicative process, especially if this could contribute to the fragmentation of this proceeding. It is our view that the issues relating to the UMIR Amendments, both in 2002 and 2006, should be addressed together before the RS Hearing Panel. Only after a determination of RS Hearing Panel is made, should a hearing and review be brought before the Commission, with the benefit of a full factual record to aid us in our determination.

[191] We are also influenced in this conclusion by the fact that, if the RS Hearing Panel concludes that the UMIR Amendments are valid and in force, it becomes unnecessary to consider the impact of the TSX Filing and the 2006 UMIR Amendments. The question of the validity of the UMIR Amendments is not before us on this application. This illustrates the desirability of dealing with all matters at one time, in the context of a full factual record.

(ii) Limited Scope

[192] Although we have concluded that we have discretion to hear the discreet and narrow issue of the validity of the 2006 UMIR Amendments pursuant to the Commission's oversight power under paragraph 21(5)(e) of the Act, we find that it would be preferable if the RS Hearing Panel were to hear the entire matter in the first instance. The fact that we have a narrow issue before us (i.e., the validity of the 2006 UMIR Amendments), and that broader interrelated issues would remain unresolved only emphasizes our view that all matters ought to be addressed at one time, in the context of the RS Hearing. As noted above, if the UMIR Amendments are validly in force, the TSX Filing and the 2006 UMIR Amendments become irrelevant.

(3) Conclusion

[193] We have concluded that to hear the matters raised by the Amended Request at this time would have the effect of fragmenting the RS Proceeding. We have decided to avoid this fragmentation by referring the matter back to the RS Hearing Panel, so that the RS Hearing Panel has the opportunity to address all issues surrounding the UMIR Amendments (in both 2002 and 2006) as a whole, in the context of all of the facts in this matter. We have found no reason to conclude that the RS Hearing Panel does not have the jurisdiction to address issues like the validity of the 2002 and 2006 UMIR Amendments (as discussed above in these reasons), and in the interest of a more efficient and timely resolution of this matter, we believe that it is appropriate to send this matter back to the RS Hearing Panel to have them consider the motions before it related to the validity of the TSX Filing and the 2002 UMIR Amendments in the context of all the issues and facts in this matter.

[194] We emphasize, however, that how the RS Hearing Panel wishes to deal with all these matters is in their discretion.

d. What Impact would the Commission's Intervention at this Time have on the Integrity of the SRO System?

(1) Parties' Submissions

[195] We recognize that the functioning of the SRO regime should not be interfered with lightly. Counsel for RS Staff argued that if the Requesting Parties succeed on the Amended Request, there is a danger that litigants will become increasingly inventive in characterizing their issues as "jurisdictional" to escape the SRO process in order to come directly to the Commission.

[196] Attempts to avoid the SRO process in order to come directly to the Commission will broaden the scope of the hearing and review process before the Commission beyond what is contemplated by the Act, and will undermine the integrity of the SRO process. According to

counsel for RS Staff, this is not in the interest of efficient regulation nor is it in the public interest. We agree with that submission.

[197] Counsel for RS Staff pointed out that the Commission has chosen to permit the regulation of trading on the TSX through the vehicle of an SRO. In doing so, the Commission has concluded that it is in the public interest for such regulation (including the hearing of discipline proceedings and preliminary motions associated with them) to occur through the SRO process. Accordingly, RS Staff submits that it is not in the public interest to entertain attempts to bypass the RS process by proceeding directly to the Commission. In the words of counsel for RS Staff, "there is simply no point in having SROs if that practice is going to be permitted."

[198] It is Commission Staff's position that the Commission should have regard to and reinforce the proper functioning of the SRO regulatory regime. Specifically, Commission Staff point out that this is enshrined in paragraph 4 of section 2.1 of the Act, which states:

> 2.1 […]
>
> 4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.
>
> […]

[199] According to Commission Staff, the recognition of SROs by the Commission is designed to utilize the expertise of SROs in achieving the goals of the Act, and this is important to the integrity of the securities regulation scheme as a whole. Commission Staff also referred us to the relevant case-law that addresses the expertise and roles of SROs.

[200] Thus, according to Commission Staff, while the Commission has an oversight function with respect to decisions of the RS Hearing Panel, it is appropriate to permit the RS Hearing Panel to carry out its adjudicative functions, and this is consistent with paragraph 4 of section 2.1 of the Act.

[201] Counsel for the TSX and the Requesting Parties did not directly address the issue regarding the integrity of the SRO process.

(2) Discussion

[202] We agree that consideration should be given to the importance of and impact upon the SRO system in making our decision. The Commission has long recognized and supported an effective SRO regime as provided under the Act, as a matter of policy.

[203] The importance of the role of SROs was explained in *Re Derivative Services – IDA*, *supra*. It was stated that:

> […] the statutory scheme is designed to harness the self-regulatory authority of the [IDA] in order to reduce the need for and avoid the costs of governmental involvement in the day-to-day regulations of the industry. Recognition as an

> [SRO] is premised on the expertise of an industry organization like the [IDA] which can establish standards of business conduct for its members, frequently higher than those that would be imposed by the OSC, and which may bring to bear on technical issues and other matters a deeper understanding of industry practices, both in its rulemaking and in disciplinary and approval proceedings. The legislative scheme is also premised on a greater likelihood of compliance by members and their personnel with rules established and enforced by the private sector through its self-regulatory activities, but subject to regulatory supervision by the OSC. The theory is that the industry through SROs like the [IDA], will carry on the necessary regulatory activities with the government riding shotgun to ensure that they remain on the correct path (*Re Derivative Services- IDA, supra* at pp. 13-14 of 23).

[204] This quote recognizes that SROs, such as the IDA, Mutual Fund Dealers Association and RS have an important role to play as a specialized entities to regulate the activities of their members. The expertise of SROs was also recognized by the Commission in *Re Security Trading Inc.* (1994), 17 O.S.C.B. 3188. In that matter, the Commission stated that:

> *While the Act does not require that the Commission defer to the Exchange, there are reasons for doing so* in a case such as this involving the suitability of a firm for membership, particularly when the suitability relates to compliance with the capital rules of the Exchange [emphasis added] (*Re Security Trading Inc., supra* at para. 40).

[205] Clearly, SROs have an essential role to play in the regulation of the capital markets. Consequently, the mandate of SROs and the manner in which they pursue it, should be respected and supported. SROs are often best suited to deal with the issues put before them, and unnecessary appeals and motions to other tribunals should not be permitted to bypass the SRO jurisdiction.

[206] As we have said above, the Commission should not lightly interfere with or interject itself (or be interjected) into an SRO adjudicative matter. In particular, we are of the view that we should do so prior to the conclusion of an SRO adjudicative process, only in the rarest of occasions. In our view, the circumstances before us do not warrant doing so.

e. Would the Commission's Involvement Assist in Advancing Matters?

[207] In considering all of the events that led up this hearing before the Commission, we are very concerned with the delays that have occurred and the length of time it is taking to have the hearing on the merits in this matter proceed.

[208] We note that the RS Proceeding deals with conduct which took place between January 2003 and August 2005. The Statement of Allegations of RS Staff was issued in August 20, 2005, and subsequently amended on February 6, 2007. We are now in the autumn of 2007 and a date has not yet been set for the hearing on the merits before the RS Hearing Panel.

[209] The RS Proceeding has been the subject of delays and adjournments. First, there was the application to the Superior Court before Mr. Justice Campbell. Once that matter was settled and the parties returned to the RS Hearing Panel, then there was the adjournment to deal with the Requesting Parties motion regarding the validity of the UMIR. Then, when faced with the issues of the validity of the TSX Filing and the 2006 UMIR Amendments, the RS Hearing Panel adjourned the RS Proceeding *sine die* in order to give the Requesting Parties the opportunity to bring the Amended Request.

[210] Since the matter has come before the Commission, there have been additional delays. We have not considered the substance of the Amended Request because RS Staff has asked us to quash it. Given the complexity of the issues raised, further delays have ensued as a result of our need to consider the matter and to write and publish these reasons.

[211] If we were to agree to hear the substance of the Amended Request, further delays would ensue to allow parties to schedule the hearing, to finalize written material, to argue the application and for us to consider a decision and written reasons. Given the seriousness of the issues at stake, and the potential consequences to the parties, an appeal or judicial review could very well be sought by one of the affected parties. All in the absence of any hearing on the merits.

[212] It is in the public interest to conduct proceedings in a timely manner. This sends a message to the public and market participants that securities laws are being appropriately and effectively enforced. The Commission has the mandate to protect the public and foster confidence in the capital markets and this is achieved in part by ensuring that the regulatory process, is conducted in an efficient and timely manner both by it and within the SRO system.

[213] We are of the view that the Commission's intervention in this matter at this time would not advance matters. In fact, it would likely have the effect of giving rise to further delay and compromise the integrity of the SRO adjudicative process.

[214] This is another reason why we are of the view that this matter should be remitted back in its entirety to the RS Hearing Panel before this Commission considers any of the issues raised in the Amended Request. This will prevent further fragmentation of this matter and will ensure that if any decision by the RS Hearing Panel is appealed in the future, there will be a full factual record from that tribunal available to the Commission or court.

f. Is Intervention Necessary to Prevent Abuse?

[215] The Requesting Parties assert that the Commission's intervention is necessary to remedy and prevent abuse by RS Staff. The Requesting Parties submit that RS Staff advised neither the RS Hearing Panel nor the Requesting Parties of the intended TSX Filing before it was made. They claim they were misled in this regard and that the result is an abuse of process.

[216] The Requesting Parties also submit that the RS Motion is a collateral attack on the Adjournment, because it was not appealed within the time limit prescribed in subsection 8(1) of the Act. According to the Requesting Parties, limitation periods for appeals must be strictly

adhered to. They rely on the Commission's decision in *Re Derivative Services – OSC*, *supra*, in support of this position, where the Commission stated, "Canadian courts have frequently recognized that administrative bodies must strictly adhere to the limitation periods provided in their empowering legislation where there is no express power to extend the same" (at para 35).

[217] Further, the Requesting Parties take the position that RS Staff is essentially relitigating the questions which the RS Hearing Panel determined, and reflected in the Adjournment. The Requesting Parties take the position that the relief requested in the RS Motion contradicts the findings of the RS Hearing Panel reflected in the Adjournment, which was not appealed or contested. In their view, the RS Motion seeks relief that is inconsistent with a previous disposition by a competent tribunal (i.e. the RS Hearing Panel).

[218] In RS Staff's view, the Requesting Parties' characterization of the RS Motion as a collateral attack on the Adjournment is incorrect as a matter of law. RS Staff maintains that because of the RS Concession, the TSX Filing is not being relied upon and the reason for the Amended Request before this Commission is moot. Thus, there is no collateral attack on the decision of the RS Hearing Panel.

[219] Counsel for RS Staff referred us to a number of cases that address the concept of collateral attack and support the position that collateral attack also applies to orders and rulings from administrative tribunals (see for example, *R. v. Consolidated Mayburn Mines Ltd.* (1998), 158 D.L.R. (4th) 193 at 217 (S.C.C.)).

[220] With respect to the TSX Filing, while maintaining that RS Staff's actions were not abusive, counsel for RS Staff admits that RS Staff was aware of the TSX Filing, and RS Staff was kept generally apprised of the status of the TSX Filing. Specifically, counsel for RS Staff stated:

> We do not dispute that RS was aware that the TSX intended to do the filing. We do not dispute that in fact RS fully expected that it would rely on the filing if it was in fact completed by the time the then pending motion before the RS hearing panel was heard, and we do not dispute that the original motion before the RS hearing panel was adjourned for a month on consent at RS's request when RS was aware of those facts and [the Requesting Parties were] not (*Commission Transcript*, dated July 19, 2007 at 7:13-21).

[221] Further, counsel for RS Staff made the following admission during the hearing:

> Now, in hindsight and with the benefit of knowing the steps that have been taken since then, I have no difficulty in saying that it would have been preferable had [the Requesting Parties] been made aware of those developments, and we wish in fact that we kept [the Requesting Parties] more fully apprised at that time. We do, however, dispute that there was anything misleading or untoward that was done (*Commission Transcript*, dated July 19, 2007 at 7:22 to 8:3).

[222] Counsel for RS Staff explained that it originally requested an adjournment before the RS Hearing Panel because further time was legitimately required to properly respond to the new and

complex legal issues raised in this matter. In particular, the Requesting Parties Original Motion before the RS Hearing Panel raised six issues, one of which dealt with the RS Hearing Panel's jurisdiction to enforce the UMIR even though the TSX allegedly did not adopt the UMIR in accordance with the Protocol. RS Staff required additional time to deal with this specific issue. Therefore, in RS Staff's view, the purpose of the Adjournment was not primarily to deal with the TSX Filing. In addition, the Adjournment was sought to accommodate RS counsel's vacation.

[223] Counsel for RS Staff also takes the position that the circumstances surrounding the TSX Filing are not abusive. Counsel for RS Staff points out that the Requesting Parties' allegations of abuse mainly take the form of submissions in a factum, and are not evidence. As a result, there is no complete record upon which to base any finding of abuse, and it would be a serious error at this time to make any such finding regarding abuse. Further, counsel for RS Staff emphasized that the RS Hearing Panel would be the proper tribunal to deal with the Requesting Parties' allegations of abuse.

[224] We agree that if the Requesting Parties wish to advance the allegations of abuse surrounding the TSX Filing, that is best dealt with by the RS Hearing Panel in the context of all of the facts which will come out at the RS Proceeding.

[225] With respect to the Adjournment, in reviewing the transcript of the motion before the RS Hearing Panel, we note that the Chair expressed concern whether the RS Hearing Panel could make a ruling that binds the Commission (*RS Hearing Panel Transcript*, dated October 10, 2006 at 14:12). Specifically, the Chair of the RS Hearing Panel expressed the following concern:

> But what we decide or don't decide isn't going to have any effect whatever on the right of the Ontario Securities Commission to make its own decision. […] I don't think that we have any persuasive, legally persuasive right or jurisdiction that would justify us saying, well, this is our opinion and – which could by the way, be adverse to you (*RS Hearing Panel Transcript*, dated October 10, 2006 at 32:3-10).

[226] In response to the parties' arguments on the issue of retroactivity of the 2006 UMIR Amendments, the Chair of the RS Hearing Panel stated that, "those are challenges I think you have to make to the [Commission]" (*RS Hearing Panel Transcript*, dated October 10, 2006 at 16:8).

[227] Further, the Chair of the RS Hearing Panel also stated:

> In the final analysis it's [a Commission] decision which, of course, may go on to the Divisional Court, etcetera, but it relieves us of the burden and everyone else if the time involved in going through a hearing and making a decision that somebody else has the final authority to make, regardless of what we do or whether or not we do anything (*RS Hearing Panel Transcript*, dated October 10, 2006 at 25:24 to 26:5).

[228] Essentially, the Chair of the RS Hearing Panel appears to have been of the view that the issues raised by the Requesting Parties would be best determined by the Commission as a supervisory body.

[229] Our understanding from the RS Hearing Panel transcript and from submissions made to us, is that the Adjournment was the result of a request by the Requesting Parties to allow them to follow up on the Letter to the Director, sent to the Commission's Director of Capital Markets, and, if necessary, to take proceedings before the Commission.

[230] As a result, the RS Hearing Panel concluded in its oral ruling, that:

> […] there is no valuable or pragmatic purpose to be achieved by proceeding with matters that ultimately will be decided by the Ontario Securities Commission.
>
> Proceeding with the argument today will entail a great deal of expense to the respondents, whether or not they are successful, and regardless of the ruling that this panel makes on either, both the motions, the ultimate decision lies with a higher authority, and in these circumstances the order of the panel is that this matter, motions and everything else, be adjourned sine die […] (*RS Hearing Panel Transcript*, dated October 10, 2006 at 40:6-19).

[231] Overall, the exchange and comments of the RS Hearing Panel surrounding the Adjournment indicates that it was concerned about deciding an issue that would ultimately have to be decided by the Commission. The Adjournment was given in the context of the pending request by the Requesting Parties for intervention from the Commission's Director of Capital Markets.

[232] In all of the circumstances, we do not agree that the matters being raised in the Amended Request should be brought before the Commission before a review of those matters before the RS Hearing Panel. We are of that view for the reasons discussed above.

[233] The case law clearly establishes that a collateral attack should not be permitted where the legislature has clearly prescribed an appeal process and the party seeking to attack the decision refuses to make use of that appeal process. The applicable legal principle is that the relitigation of issues in another forum should be avoided when an appeal process is available (*Toronto (City) v. Canadian Union of Public employees (C.U.P.E), Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.) at para. 52).

[234] This principle was also articulated in *R. v. Wilson*, (1983) 4 D.L.R. (4th) 577:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist.

> Without attempting a complete list, such grounds would include fraud or the discovery of new evidence (*R. v. Wilson*, *supra* at 597).

[235] When a statute provides an appeal route, that route must be followed. In the present case, the Act does provide an appeal or review process route; pursuant to sections 8 and 21.7 of the Act, decisions of the Director or SROs can be brought before the Commission for a hearing and review. This appeal/review structure provided by the Act should be adhered to.

[236] We agree with the Requesting Parties, that if RS Staff was challenging the Adjournment, then RS Staff should have brought an application for review of that decision within the statutory framework, prior to the expiration of the limitation period. In other words, if the only issue argued by RS Staff was that the RS Hearing Panel was wrong to grant the adjournment, then the RS Motion would be a collateral attack on the decision to grant the Adjournment.

[237] However, this is not what we understand RS Staff is arguing before us. RS Staff recognizes, and urges us to recognize that the RS Hearing Panel's decision to grant the Adjournment is independent of the question whether the Commission should hear or decline to hear the Amended Request. The position taken in the RS Motion is that we, as the Commission, should not hear the matter for jurisdictional and other reasons. This is not the same thing as challenging the Adjournment. To the extent that RS Staff's arguments are directed at other issues, including our jurisdiction, mootness, fragmentation, … etc., we do not see the RS Motion as a collateral attack on the Adjournment. RS Staff counsel is not challenging the Adjournment; they are challenging the appropriateness of our consideration of the Amended Request.

D. CONCLUSION

[238] Based on our discussion and analysis above, we answer Mr. Wardle's list of questions as follows:

Issue #1 – (a) Is the filing by the TSX under the Protocol moot for purposes of the regulatory proceeding between RS and the Requesting Parties?

Ans: No, the issues are not moot. We have concluded that the issues raised in the Requesting Parties' Amended Request are potentially live issues. A court or tribunal cannot be bound by an agreement of legal counsel not to advance a relevant legal issue.

(b) Is it premature to raise issues regarding the filing and the validity of the TSX rule changes before the Commission?

Ans: Yes, it is premature to raise issues regarding the 2006 UMIR Amendments before the Commission in the absence of a consideration of the relevant issues by the RS Hearing Panel. Accordingly, the matter should be remitted back to the RS Hearing Panel.

Issue #2 – Is there a decision amenable to a hearing and review under sections 8 and 21.7 of the Act?

Ans: We conclude that no reviewable decisions were made by the TSX for the purposes of sections 8 or 21.7 of the Act. However, we recognize that the Commission has a general oversight power pursuant to paragraph 21(5)(e) of the Act, but we have chosen not to exercise our oversight powers in the circumstances, at this time.

Issue #3 - Does the RS Hearing Panel have jurisdiction to hear the issues raised by the Requesting Parties on this hearing and review?

Ans: Yes, in our view, the RS Hearing Panel has the jurisdiction to deal with the jurisdictional issues regarding the adoption and validity of the 2002 and 2006 UMIR Amendments, in the context of the RS Hearing.

Issue #4 – Is RS, in bringing its motion to quash, launching a collateral attack on a decision of the RS Hearing Panel?

Ans: No, the RS Motion does not constitute a collateral attack on the decision of the RS Hearing Panel to grant the Adjournment. The RS Motion is directed at the Commission's jurisdiction and discretion as opposed to the Adjournment itself.

[239] In view of the circumstances, we do not find that it is appropriate for us to exercise our overriding supervisory powers pursuant to paragraph 21(5)(e) of the Act to hear the discreet and narrow issue of the validity of the TSX Filing and the retroactive application of the 2006 UMIR Amendments. Instead, but without in any way interfering with the RS Hearing Panel's discretion to control its own process and to deal with the matters on the basis it considers appropriate, we are of the view that the issues raised by the Amended Request would best be addressed in the first instance by the RS Hearing Panel.

[240] Therefore, we are strongly of the view that it would be preferable that the issues raised by the Requesting Parties in the Amended Request be heard in one proceeding before the RS Hearing Panel. If any of the issues raised in the Amended Request remain after the conclusion of the RS Hearing, the Commission is at liberty to consider them at that time.

Dated at Toronto on this 23rd day of October 2007.

"*Lawrence E. Ritchie*"
Lawrence E. Ritchie

"*James E. A. Turner*"
James E. A. Turner

"*Harold P. Hands*"
Harold P. Hands

SCHEDULE "A" – Excerpts from the Protocol (1997), 23 O.S.C.B. 5683

3. *Prior Notice of Significant "Public Interest" Rules*

Where the Exchange is developing a "pubic interest" Rule that the Exchange anticipates will result in a significant change in Exchange policy, amendments to a significant number of Exchange Rules or may be the subject of significant public comment as a result of publication, the Exchange shall notify Commission staff in advance in writing. The purpose of such prior notification is to prepare Commission staff so that they can react in a timely way to the proposal upon filing. Prior notification shall not be interpreted by Commission staff as an opportunity to participate in Exchange policy development.

4. *Publication of "Public Interest" Rules for Comment*

All "public interest" Rules approved by the Exchange's Board of Governors shall be published for comment in the OSC Bulletin for a 30-day comment period. Commission staff shall use their best efforts to ensure publication of "public interest" Rules in the issue of the OSC Bulletin immediately following filing of the "public interest" Rule with the Commission. The Exchange shall also publish a Regulatory Notice regarding the "public interest" Rule.

Responses to all requests for comments shall be directed to the Exchange, with copies to the Commission. The Exchange shall provide the Commission with a summary of all comments and the Exchange's responses to same, which summary shall be published in accordance with sections 5 and 6.

5. *Material Revisions to "Public Interest" Rules*

Any "public interest" Rule which is revised subsequent to its publication for comment in a way that has a material effect on the Rule's substance and/or effect shall be published in the OSC Bulletin and in an Exchange Regulatory Notice for a second 30-day comment period. The request for comment shall include the Exchange's summary of comments and responses thereto together with an explanation of the revision to the Rule and the supporting rationale for the amendment.

6. *Publication of Notice of Approval*

Notice of Approval of both "public interest" and "non-public interest" Rules shall be published in the OSC Bulletin, in addition to Exchange Notices. The Notice of Approval shall provide a short summary of the essence of the Rule prepared by the Exchange. All such notices relating to "public interest" Rules shall also include the Exchange's summary of comments and responses thereto.

7. *Timing of Commission Staff Review of "Public Interest" Rules*

Commission staff shall use their best efforts to conduct their initial internal review of all "public interest" Rules during the 30-day request for comment period. (This section does not, in any way, restrict the amount of time that may be necessary for Commission staff to consider any comments received during the comment period or effect the effective date of "public interest" Rules under subsection 8.2.)

[…]

8.1 *Effective Date – "Non-Public Interest" Rules*

"Non-public interest" Rules shall be filed with the Commission and, without Commission staff review, shall be deemed to have been approved upon being so filed and will be effective upon the date indicated by the Exchange in the filing letter. Commission staff may periodically review "non-public interest" filings of the Exchange to audit the appropriateness of the categorization of such filings. The Exchange shall be notified in writing of the Commission's findings on any such audit.

8.2 *Effective Date - "public interest"*

(1) "public interest" Rules shall be effective upon the earlier of:

(a) notification from the Commission that the Rule has been approved; and

(b) (i) if no comments are received, 20 business days after the end of the public comment period,

(ii) if comments are received, 30 business days after delivery to the Commission of the Exchange's summary of comments and responses thereto, or

(iii) if a Rule is published for further comments under section 5, 30 business days after delivery to the Commission of the Exchange's summary of those further comments and responses thereto,

unless the responsible staff person at the Commission has notified the Exchange within that period that further information regarding the nature, purpose or effect of the Rule is required in order for the Commission to form a reasoned judgment concerning the matter.

(2) The Exchange may make "public interest" Rules effective immediately upon adoption by the Board of Governors where the Board determines that:

(a) confidentiality prior to introduction is necessary to protect proprietary commercial information such as new product or service design; or

(b) there is an urgent need to implement the Rule forthwith because of a substantial risk of material harm to investors, members, the Canadian Investor Protection Fund or the Exchange itself.

Should the Exchange believe that immediate implementation is appropriate, Exchange staff shall so advise Commission staff in advance of the Exchange publishing the Rule and filing it with the Commission. Such notice shall be in writing and shall include analysis in support of the need for immediate implementation.

Any such Rules shall be effective until such time as the Commission makes its decision with respect to approval. Although effective immediately, such "public interest" Rules shall still be published for comment, and subsequently be reviewed and considered for approval by the Commission. If the Commission decides not to approve any such Rule in a form agreeable to the Exchange, the Exchange shall forthwith amend the Rule, in a manner satisfactory to the Commission, or repeal it.

SCHEDULE "B" – Excerpts from the *TSE Act,* R.S.O. 1990, c. T.15

Powers of the board

13.0.8 (1) The board of directors has the power to govern and regulate,

(a) the exchange;

(b) the partnership and corporate arrangements of the members of the continued Corporation and other persons or companies authorized to trade by the exchange, including requirements as to financial condition;

(c) the business conduct of members of the continued Corporation and other persons or companies authorized to trade by the exchange and of their current and former directors, officers, employees and agents and other persons or companies currently or formerly associated with them in the conduct of business, but only in respect of their business conduct while employed or associated with a member of the continued Corporation; and

(d) the business conduct of former members of the continued Corporation and other persons or companies formerly authorized to trade by the exchange and of their current and former directors, officers, employees and agents and other persons or companies currently or formerly associated with them in the conduct of business, but only in respect of their business conduct while a member of the continued Corporation or while employed or associated with a member of the continued Corporation.

By-laws, etc.

(2) In the exercise of the powers set out in subsection (1) and in addition to its power to pass by-laws under the *Business Corporations Act*, the board of directors may pass by-laws, make or adopt rulings, policies, rules and regulations and issue orders and directions as it considers necessary, including the imposition of penalties and forfeitures for the breach of any such by-law, ruling, policy, rule, regulation, order or direction.

Immediate restriction or suspension

(3) If the board of directors orders the restriction or suspension of the privileges of any person or company before a hearing of the matter is held, the order shall provide that the restriction or suspension shall be imposed only where the board of directors considers it necessary for the protection of the public interest and that the restriction or suspension shall expire 15 days after the date on which the order was made unless a hearing is held within that period of time to confirm or set aside the order.

Delegation of powers

(4) The board of directors may by order delegate to one or more persons, companies or committees the power of the board of directors,

(a) to consider, hold hearings and make determinations regarding applications for any acceptance, approval, registration or authorization and to impose terms and conditions on any such acceptance, approval, registration or authorization;

(b) to investigate and examine the business conduct of members of the continued Corporation, former members of the continued Corporation and other persons or companies referred to in clauses (1) (c) and (d); and

(c) to hold hearings, make determinations and discipline members of the continued Corporation, former members of the continued Corporation and other persons or companies referred to in clauses (1) (c) and (d) in matters related to business conduct.

Same

(5) A delegation made under subsection (4) may provide that it is subject to specified limitations, restrictions, conditions and requirements.

Transition

(6) Any by-laws or rulings made, policies, rules or regulations adopted and orders or directions issued by the Corporation under section 10 of this Act, as it reads on the day before the *More Tax Cuts for Jobs, Growth and Prosperity Act, 1999* receives Royal Assent, continue in force, with necessary modifications, until amended or repealed or revoked by the continued Corporation.

Same

(7) Any consideration, hearing, investigation or examination begun under section 10 of this Act, as it reads on the day before the *More Tax Cuts for Jobs, Growth and Prosperity Act, 1999* receives Royal Assent, may be continued under this section and the continued Corporation stands in the place of the Corporation with respect to such matter.