Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

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

- and -

IN THE MATTER OF
A REQUEST FOR A HEARING AND REVIEW OF A DECISION OF
A HEARING PANEL OF MARKET REGULATION SERVICES INC.

- and -

IN THE MATTER OF
THE UNIVERSAL MARKET INTEGRITY RULES

- and -

IN THE MATTER OF
DAVID BERRY

REASONS FOR DECISION
(Section 21.7 of the *Securities Act*)

Hearing:	March 6, 2008	
Reasons:	May 21, 2008 (relating to the Order issued March 26, 2008)	
Panel:	Lawrence E. Ritchie	- Vice-Chair and Chair of the Panel
	James E. A. Turner	- Vice-Chair
Counsel:	Johanna Superina	- For the Ontario Securities Commission
	Charles Corlett	- For Market Regulation Services Inc.
	Linda L. Fuerst Usman Sheikh	- For David Berry

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REASONS FOR DECISION

I. Background

A. Introduction

[1] This is an application (the "Application") brought by David Berry ("Berry") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") for the Ontario Securities Commission (the "Commission") to conduct a hearing and review of a decision of Market Regulation Services Inc. ("RS"), dated November 8, 2007 (the "RS Disclosure Decision").

[2] The RS Disclosure Decision was made in the context of an RS proceeding (the "RS Proceeding") in which Berry is a respondent. The hearing on the merits was scheduled to commence on April 21, 2008. In the RS Disclosure Decision, the Chair of the RS Panel denied a motion by Berry for disclosure of:

1. all materials relating to prior investigations or reviews by RS Staff of Berry's trading practices while employed at Scotia Capital Inc. ("Scotia") (the "Other RS Files"); and

2. communications and documents relating to settlement negotiations (the "Settlement Materials") conducted by RS Staff with Scotia and Berry's former trading assistant, Marc McQuillen ("McQuillen").

[3] Berry takes the position that the Chair of the RS Panel erred in failing to order disclosure of the requested documents, and asked that the RS Disclosure Decision be set aside and that this Panel order that the requested disclosure be made.

[4] Prior to the Commission hearing, RS agreed to provide the Other RS Files to Berry. Accordingly, at the hearing before the Commission on March 6, 2008, Berry pursued only a review of the RS Disclosure Decision with respect to the Settlement Materials.

[5] Initially, RS brought a motion to quash Berry's Application (the "Motion to Quash") on the grounds that Berry's Application was premature and would fragment the RS Proceeding. Subsequently, RS withdrew the Motion to Quash, and instead, asserted the arguments regarding fragmentation and prematurity by way of a response to the Application.

[6] In light of the fact that the RS Proceeding was scheduled to commence on April 21, 2008, we issued our decision by order dated March 26, 2008 (the "Disclosure Order"). The Disclosure Order provides as follows:

1. Subject to clause 3 below, RS shall provide Berry's counsel access to the Settlement Materials and, if requested, copies thereof for purposes relating to Berry's defence in the RS Proceeding.

2. Disclosure and use of the Settlement Materials will be on the basis that:

    (a) Berry and his counsel will not use the Settlement Materials other than in connection with Berry making full answer and defence to the allegations against him in the RS Proceeding;

    (b) any use of the Settlement Materials other than in connection with Berry making full answer and defence to the allegations against him in the RS Proceeding will constitute a violation of this Order;

    (c) RS shall maintain custody and control over the Settlement Materials so that copies of the Settlement Materials are not disseminated for any purpose other than as contemplated in clause 1 above;

    (d) the Settlement Materials shall not be used for any collateral or ulterior purpose; and

    (e) Berry and his counsel shall, promptly after the completion of the RS Proceeding and any appeals, return all copies of the Settlement Materials to RS or confirm that they have been destroyed.

3. The foregoing Order is subject to any claim by RS of solicitor-client privilege, or litigation "work product" privilege, and if asserted, the particulars of such a claim shall be set out by RS in a written list and provided to Berry's counsel with the Settlement Materials.

[7] These are our reasons for the Order.

B. The Parties

[8] Counsel for RS, Berry and Staff of the Commission ("Staff") appeared on this Application, and all of the parties provided detailed written and oral submissions.

[9] RS is recognized under section 21.1 of the Act as a self-regulatory organization ("SRO"), and it is responsible for regulating trading on the Toronto Stock Exchange and other marketplaces. RS administers and enforces the Universal Market Integrity Rules ("UMIR") on behalf of the TSX Inc. (the "TSX").

[10] Berry was employed by Scotia from 1996 to 2005 as a trader (non-retail). In 1998, he was appointed Head of Preferred Trading, responsible for trading Scotia's proprietary book of preferred shares under the umbrella of Scotia's institutional equities business.

[11] The only investment dealer that Berry has ever worked for is Scotia. All of Berry's experience as a trader of preferred shares and knowledge of the securities industry rules was acquired from his training at, and work as an employee of, Scotia.

C. Chronology of Events

1. The RS Proceeding Against Berry

[12] In May 2005, a trade desk review (the "Trade Desk Review") was conducted by RS Staff which raised questions regarding various short positions held in Berry's inventory account for the Preferred Share Trading Desk. At that time, Berry was employed at Scotia as the Head of Preferred Trading. After the Trade Desk Review, RS initiated an investigation into the conduct of Scotia, Berry and McQuillen. McQuillen was a fully licensed agency trader who was Berry's assistant on the Preferred Desk at the relevant time.

[13] An RS Proceeding was commenced against Berry by a Notice of Hearing and appended Statement of Allegations on February 20, 2007. An Amended Notice of Hearing was issued by RS on June 12, 2007.

[14] In the Statement of Allegations, RS alleges that Berry solicited client orders during the distribution of new issues by Scotia contrary to UMIR 7.7(5) and conducted off-marketplace trades contrary to UMIR 6.4.

[15] Specifically, in paragraphs 1 and 2 of the Statement of Allegations, RS makes the following allegations with respect to Berry:

> RS alleges that between April 4, 2002 and April 18, 2005, [Berry]:
>
> (i) engaged in conduct which resulted in [Scotia] contravening UMIR 7.7(5) (pre-May 2005 version) on 39 occasions; and
>
> (ii) engaged in conduct which resulted in [Scotia] contravening UMIR 6.4 on 15 occasions.
>
> UMIR came into effect on April 1, 2002. Effective January 2004, UMIR was amended to add Section 10.3(4) which provides that an individual employed by a Participant contravening UMIR may be found liable for the conduct and sanctioned accordingly. As a result, from and after January 30, 2004, Berry can be found personally liable for causing [Scotia] to solicit the client orders and conduct the off-marketplace trades referred to herein. In respect of the solicitations, 11 took place after January 30, 2004. In respect of the off-marketplace trades, 10 took place after January 30, 2004.

[16] The allegations relate to conduct by Berry and McQuillen, and are summarized at paragraphs 10 and 11 of the Statement of Allegations as follows:

In the period April 4, 2002 to April 18, 2005 (the "Relevant Period"), Berry and McQuillen engaged in a pattern of trading […] which consisted of Berry and McQuillen:

(i) soliciting client orders during the distribution of new issues by [Scotia] contrary to UMIR 7.7(5) (as it existed prior to May 2005); and

(ii) conducting off-marketplace trades that were not printed on a marketplace or recognized exchange, contrary to UMIR 6.4.

The Trading involved 16 new issues of preferred shares and 20 different clients.

2. The Settlement Agreements with Scotia and McQuillen

[17] The Trade Desk Review and subsequent investigation also involved the conduct of Scotia and McQuillen in the trades referred to above.

[18] On February 20, 2007, RS gave public notice that an RS Hearing Panel would consider separate settlement agreements between:

1. RS and Scotia on February 26, 2007; and

2. RS and McQuillen on February 28, 2007.

[19] The settlement agreements with Scotia and McQuillen were approved by RS Panels on February 26, 2007 and February 28, 2007, respectively (see: *Offer of Settlement in the Matter of Scotia Capital Inc.*, Market Regulation Services Inc., DN 2007-001, dated February 26, 2007; and *Offer of Settlement in the Matter of Marc McQuillen,* Market Regulation Services Inc., DN 2007-002, dated February 28, 2007).

[20] According to RS (as set out in its factum), during the settlement negotiations, Berry was kept apprised of the discussions and had knowledge of the following facts:

1. offers to settle with a uniform statement of allegations were sent to counsel for Berry, McQuillen and Scotia and were identified as "without prejudice" offers;

2. settlement negotiations between RS, Scotia, McQuillen and Berry took place with a view to establish an identical form of statement of allegations; it was only the matter of sanctions that varied among the respondents; and

3. Berry had all versions of the statement of allegations that accompanied the offers of settlement that were sent to Scotia and McQuillen, which enabled him to track all changes made by RS during the settlement discussions with the parties.

[21] Berry takes the position that he was not provided with notes made by RS enforcement counsel regarding the settlement discussions with counsel for Scotia and McQuillen. According to Berry, these notes may contain information regarding Berry's relationship with Scotia.

[22] In response, RS takes the position that Berry was given full disclosure of the *results* of the negotiations with Scotia and McQuillen through the provision of uniform drafts of the statement of allegations that were appended to the respective offers of settlement and the final settlement agreements that were entered into with Scotia and McQuillen.

[23] The settlements for McQuillen and Scotia were not identical. The McQuillen settlement agreement includes the following admitted facts that relate to Berry:

> (a) Berry's supervisor during the period 1999 to October 2002 has stated that he was aware of certain aspects of the Trading (as described in paragraph 22 of the Statement of Allegations), as follows, but he did not appreciate that it resulted in clients receiving secondary market shares in the new issue:
>
> i. Berry and/or McQuillen took orders from clients for shares in a new issue during the selling period and filled these orders through sales from the 08 account when the new issue began trading on the TSX.
>
> ii. In some instances, the 08 account would receive an allocation of new issue shares but ultimately incur a short position in the shares of the new issue through sales with clients.
>
> iii. In other cases, a swap transaction with a client's existing position was involved.
>
> (b) The supervisor has stated that he was not aware of instances in which the 08 account sold short shares in the new issue to clients without taking an allocation in the new issue.

[24] In addition, at paragraph 22 of his factum, Berry highlights the following from the evidentiary record:

> (a) Scotia agreed that between April 2002 and October 2003, it was liable under UMIR Rule 10.3(1) for contraventions by its former employees, Berry and McQuillen, of UMIR 7.7(5) (pre-May 2005 version) and UMIR 6.4. Scotia agreed to a fine of $571,167 and $67,000 in costs;

(b) McQuillen agreed that between June 2004 and April 2005, he engaged in conduct that resulted in Scotia contravening UMIR 7.7(5) (pre-May 2005 version) and UMIR 6.4. McQuillen was fined $25,000;

(c) RS Staff expressly indicated in the RS Discipline Notices related to Scotia that it was not seeking to hold Scotia liable for any contravention of Scotia's trading supervision obligations under UMIR Part 7.1 in respect of the purported conduct of its employees, Berry and McQuillen, and offered no explanation for this decision;

(d) None of the admitted facts in the Statement of Allegations against Scotia refer to any of Scotia's supervisory obligations, responsibility to appropriately train and educate its employees, or deficiencies relating thereto;

(e) Scotia's fine of $571,167 represented only what it acknowledged was the financial benefit to it on account of the impugned trades; and

(f) Ms. Maureen Jensen (Vice-President, RS, Eastern Region) subsequently commented in several news media reports that she was "pleased that Scotia Capital recognized in this settlement that, even though supervision was not an issue, it would not be appropriate to retain profits generated by the wrongdoing of its employees."

3. Berry's Reply

[25] Berry filed a reply to RS's Notice of Hearing and Statement of Allegations on March 14, 2007 (the "Reply"). The Reply sets out Berry's position and the defences that he will rely on in the RS Proceeding.

[26] Berry pleads in his Reply that, at all times, Scotia was:

1. responsible for supervising his trading and educating him about securities regulatory requirements;

2. directly aware of Berry's trading practices in general, and of the very trades at issue; and

3. expressly advised Berry that the impugned trading was not considered improper.

[27] The position taken in Berry's Reply is that his conduct did not result in Scotia contravening UMIR, but alternatively, that if breaches of UMIR occurred, they were the result of Scotia's own compliance failures (the "Scotia Defence").

[28] For instance, Berry points out in paragraph 9 of his Reply that Scotia was responsible for supervising and educating Berry regarding securities regulatory

requirements such as UMIR pursuant to UMIR 7.1 and UMIR Policy 7.1 – Trading Supervision Obligations, which includes the obligation to:

> Ensure that employees responsible for trading in securities are appropriately registered and trained and that they are knowledgeable about the Trading Requirements that apply to their responsibilities. Persons with supervisory responsibility must ensure that employees under their supervision are appropriately registered and trained. The Participant should provide a continuing training and education program to ensure that its employees remain informed of and knowledgeable about changes to the rules and regulations that apply to their responsibilities.

[29] In addition, Berry also explains in his Reply that his trading was fully open and disclosed to Scotia and that trade tickets for the trades were prepared and submitted to Scotia for processing and compliance review. Accordingly, Scotia was aware of Berry's trades and solicitations. Specifically, on this point, Berry's Reply states at paragraphs 10, 13 and 14:

> 10. […] Berry was assured by his supervisors that due to the large volume of trading that he was responsible for and the percentage of overall profits that his trading activities generated, Scotia was monitoring his trading closely for regulatory compliance and would alert him if his trading was in breach of any industry rules.
>
> […]
>
> 13. […] Berry's supervisor at Scotia knew that from time to time Berry sold new issues short to clients from his inventory account without those trades being executed on an exchange. The supervisor did not consider that to be improper. He so advised Berry. Berry was entitled to, and did, rely upon Scotia for such direction.
>
> 14. At no time prior to the RS trade desk review in the spring of 2005 did Scotia ever advise Berry that it considered that his trading in new issue shares may contravene UMIR or the TSX Rules, that such trading was inconsistent with industry practice, or that it may be in any other way improper.

[30] Berry's Reply also emphasizes that all his clients were sophisticated institutions, not retail investors. These clients were neither misled, nor were their interests unfairly disregarded. In particular, Berry states in paragraphs 15 and 16 of his Reply that:

> 15. [His clients] were aware that Berry may take a short position in the stock after listing. The clients received the shares at precisely the price that they bargained for. None ever requested a prospectus, nor would they have acted any differently if they had received one.

16. At all times Berry's purpose in selling short to clients from his inventory account was to support the new issue by having the ability to go long in the stock after trading commenced.

[31] These allegations are in addition to others pleaded in the Reply.

4. Disclosure in the RS Proceeding

[32] On April 4, 2007, RS provided Berry with 19 binders of documents representing RS's disclosure in the RS Proceeding.

[33] On April 19, 2007, Berry's counsel wrote to RS requesting further disclosure. With respect to the Settlement Materials, the April 19, 2007 letter states that RS has failed to provide disclosure of:

> All communications with counsel for each of McQuillen and Scotia for the purpose of the settlement discussions now concluded between RS and each of them […]
>
> […] In particular, it appears that RS has not produced records of all communications with McQuillen, Scotia and their respective counsel, including notes and memoranda made by RS staff of such telephone calls, meetings, etc. […]

[34] By letter dated April 20, 2007, RS advised Berry's counsel of RS's position with respect to the Settlement Materials. Specifically, RS took the position that:

> […] settlement communications are conducted on a without prejudice basis. Our position with respect to those communications in relation to [McQuillen] and [Scotia], is twofold. First, any such communications are irrelevant to the case against [Berry]. Second, such communications are the subject of privilege;
>
> […]
>
> You refer in the body of your letter to communications between RS Staff and McQuillen and [Scotia]. Any such communications forming part of our investigation have been disclosed (with the exception of privileged discussions for the reasons described above).

5. Berry's Motion for Further Disclosure Before RS

[35] Further exchanges of correspondence on the issue of disclosure of the Settlement Materials (among other things) did not resolve the issue. Berry filed a Notice of Motion for further disclosure dated October 15, 2007, returnable November 2, 2007 (the "Motion for Further Disclosure"). In addition to requesting disclosure of the Settlement Materials, Berry's Motion for Further Disclosure also addressed the disclosure of the Other RS

Files; however, as stated above, disclosure of the Other RS Files was resolved prior to the hearing of the Application before the Commission.

[36] With respect to the Settlement Materials, in his Motion for Further Disclosure, Berry sought:

> All materials provided by or exchanged between RS Staff and each of [Scotia] and [McQuillen], but not limited to, settlement negotiations with RS Staff.

[37] Berry's Motion for Further Disclosure was brought on the grounds that disclosure is necessary to permit Berry to make full answer and defence in the RS Proceeding. Berry argued that RS must disclose any document or other materials (including the Settlement Materials) if they are relevant; that is, they may be of some use or have a reasonable possibility of assisting Berry to rebut the allegations, advance any possible defence, or make any tactical or other decision that could affect the conduct of the RS Proceeding. In particular, Berry requests disclosure of the Settlement Materials to permit him to:

> […] make tactical decisions, including, (i) deciding which individuals to interview, (ii) making decisions about who to call as witnesses, (iii) determining a strategy for impeachment of witnesses; and (iv) other strategic choices;
>
> […]
>
> [address] aggravating, mitigating and other factors, if the Allegations are ultimately proven true, for the purposes of lessening any sanction.

[38] Berry's factum also clarified at paragraph 23 that Berry requested disclosure of the Settlement Materials on the basis that:

> (a) Berry reasonably anticipates that McQuillen and representatives of Scotia will be key witnesses at the hearing;
>
> (b) All communications between Scotia and RS, and McQuillen and RS, including those relating to settlement, are clearly relevant to the Scotia Defence pleaded by Berry; and
>
> (c) Information in these documents may inform decisions made by Berry concerning the conduct of his defence, including the identification of witnesses and the conduct of cross-examination.

6. The RS Disclosure Decision

[39] On November 8, 2007, the RS Disclosure Decision was issued, dismissing Berry's Motion for Further Disclosure.

[40] At the outset of his decision, the Chair of the RS Panel stated that:

> […] both parties agree that RS has a duty to disclose all relevant facts to the Respondent. In any case, the law on this point is well settled, and I see no need to elaborate on this. What is disputed, however, is the relevance of certain documents, and whether or not the rules of disclosure require their production. That is the issue now before me. (*RS Disclosure Decision*, dated November 8, 2007 (unreported) at 1.)

[41] In canvassing the issue, the Chair of the RS Panel stated:

> Disclosure obligations are high. Fairness demands this, and the case law is clear on the point. *Stinchcombe*, [1991] 3 S.C.R. 326, is now regularly followed, but while the rule is clear, its application may, at times be difficult. For instance, as was pointed out by the British Columbia Securities Commission in *Fernback*, [2004] B.C.S.C.D. No. 809, October 29, 2004, "it is not possible to rule definitively that any category of documents is or is not disclosable. It depends on their content." (*RS Disclosure Decision, supra* at 3.)

[42] With respect to the Settlement Materials, the Chair of the RS Panel observed that Berry sought disclosure of all the files relevant to the Scotia and McQuillen settlement agreements and noted:

> […] the Respondent would like to be enlightened about information relating to the 2005 Scotia/[McQuillen] Investigation Material which RS Staff considered privileged. His position is that "[a]ny privileged documents exchanged by Scotia or [McQuillen] with RS Staff must be listed in the Undisclosed Documents List (Schedule A) along with the privilege asserted. Otherwise the document must be delivered. (*RS Disclosure Decision, supra* at 4 and 5.)

[43] The RS Disclosure Decision also sets out the general principle that settlement communications are not usually disclosed:

> RS submits that what was *not* provided to the Respondent were settlement communications between the parties which are privileged. I accept that assurance, and I agree that, according to well-established principles (as stated, for instance, in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed., Butterworths, 1999, pp. 807 & ff) such communications need not be disclosed. (*RS Disclosure Decision, supra* at 5.)

[44] The Chair of the RS Panel came to the following conclusion:

> Insofar as the Scotia/McQuillen materials are concerned, for reasons stated before, I do not consider them relevant. This will not, of course, prevent the Respondent from his right to fully cross-examine any witness about the possible benefits derived from a settlement agreement and which may have a bearing on his or her testimony. The results of the settlement agreements with Scotia and McQuillan are known to the Respondent.

> Whether or not discussions which preceded them can be brought out at the hearing will be a matter for the hearing panel. (*RS Disclosure Decision, supra* at 6.)

[45] In his reasons, the Chair of the RS Panel did not refer to Berry's Reply, and in particular, the position Berry takes in his defence that Scotia had greater knowledge of, and involvement in, the impugned activities than is suggested in the settlement agreements.

D. Berry's Application Before the Commission

[46] On November 26, 2007, Berry filed his Application before the Commission for a hearing and review of the RS Disclosure Decision pursuant to section 21.7 of the Act.

[47] The Application pertains to the disclosure of the following documents:

1. all materials relating to any investigation or review of Berry's trading practices by RS other than the RS investigation of Berry's trading practices between May 2, 2005 and February 2007;

2. all investigation reports prepared by RS Staff in connection with the 2005 RS Investigation;

3. all materials relating to settlement negotiations between RS Staff and each of McQuillen and Scotia; and

4. unredacted copies of any contracts and/or agreements between TSX and RS relating to the provision of market regulation services by RS.

[48] As stated earlier in these Reasons, Berry no longer seeks access to the materials referred to in items 2 and 4 listed above. In addition, RS provided Berry with the materials requested in item 1 above. Therefore, only the disclosure of the Settlement Materials is currently at issue.

[49] With respect to the Settlement Materials, in his Application Berry takes the position that the RS Disclosure Decision should be set aside for the following reasons:

1. RS failed to compel the disclosure of the Settlement Materials, which are highly relevant to the Scotia Defence pleaded in Berry's Reply. Disclosure is necessary to permit Berry to make full answer and defence;

2. RS erred in law by applying an incorrect and unduly onerous standard of disclosure;

3. RS erred in law in holding that privilege attached to the Settlement Materials;

4. RS further erred in holding that, even if privilege did apply, it should not be set aside in order to permit Berry to make full answer and defence.

[50] According to Berry, RS's refusal to provide disclosure of the Settlement Materials is unfair to Berry and is contrary to the principles of natural justice.

[51] RS and Staff of the Commission submit that there is no reason to interfere with the RS Decision and, in any event, that the Request for Hearing and Review is premature.

II. The Issues

[52] The following issues arise from the Application and the responses thereto:

(a) What is the Commission's role under section 21.7 of the Act and what approach should be taken by the Commission when asked to review a preliminary decision of an SRO, in the context of an ongoing SRO proceeding?

(b) Are there good and sufficient reasons to set aside the RS Disclosure Decision in response to the Application?

(i) In particular, are the Settlement Materials relevant to the RS Proceeding?

(ii) Are the Settlement Materials privileged?

(iii) Are there compelling reasons to override any asserted privilege to ensure fairness to Berry in all of the circumstances?

III. Analysis

A. What is the Commission's Role under Section 21.7 of the Act and What Approach Should be Taken by the Commission when Asked to Review a Preliminary Decision of an SRO, in the Context of an Ongoing SRO Proceeding?

1. Legislative Authority

[53] A hearing and review of a decision of an SRO such as RS is governed by section 21.7 of the Act. That section provides 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.
>
> **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. [Emphasis added]

[54] Subsection 8(3) of the Act sets out the Commission's powers on review as follows: "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."

2. The Approach to be Taken by the Commission

[55] All of the parties agreed that in exercising its powers of review, the Commission exercises original jurisdiction (as opposed to a limited appellate jurisdiction) and is free to substitute its judgment for that of the SRO. (*Re Investment Dealers Assn. of Canada* (2007), 30 O.S.C.B. 4739 at paras. 29 and 30.)

[56] As stated in the recent Commission decision in *Re Investment Dealers Assn. of Canada*:

> In this regard, such a hearing and review may be considered broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or whether a rule of natural justice has been contravened. (*Re Investment Dealers Assn. of Canada, supra* at para. 31.)

[57] Berry's written submissions emphasize that pursuant to sections 21.7 and 8(3) of the Act, the Commission has supervisory jurisdiction over SROs such as RS, and that the Commission has the power to review, confirm or make other decisions. As a result, in exercising its jurisdiction under these sections, the Commission is free to substitute its judgment for that of the SRO. Berry's written submissions point out that the Commission's review powers are broader in scope than an appeal, which is restricted to determining whether there has been an error in law or whether a rule of natural justice has been contravened.

[58] On the other hand, RS and Staff submit that in practice, the Commission should take a "restrained approach", whereby the Commission should not substitute its own view just because it might have reached a different conclusion on the particular facts at issue, and will only interfere in very limited circumstances. (*Re Investment Dealers Assn. of Canada, supra* at para. 33.) Statements made in a number of cases support this principle. For example, in *Re Shambleau* (2002), 25 O.S.C.B. 1850 at 1852 and in *Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105, the Commission emphasized that the fact that the Commission might disagree or render a different decision on the facts is an insufficient reason to substitute its decision for that of the

Board or Exchange. (See also: *Re Malting* (1986) 9 O.S.C.B. 3565 at 3587, and *Re Boulieris* (2004), 27 O.S.C.B. 1597 at para. 31.)

[59] These cases suggest that the Commission should only interfere with a decision of an SRO if one of the following grounds is present:

1. the SRO has proceeded on an incorrect principle;

2. the SRO has erred in law;

3. the SRO has overlooked some material evidence;

4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or

5. the SRO's perception of the public interest conflicts with that of the Commission.

(*Re Investment Dealers Assn. of Canada*, *supra* at para. 32.)

[60] Berry argues that while deference is often afforded to factual determinations made by an SRO, the Commission will nevertheless intervene if the SRO acts unfairly. We note that the Commission has indicated that it would intervene in respect of an SRO's decision if the SRO's discretion was not exercised fairly; for example, where the Commission finds there was no evidence upon which the SRO's conclusions could be supported. (*Security Trading Inc. and the Toronto Stock Exchange*, *supra* at 6105.)

[61] In this case, Berry submits that little deference should be afforded to any findings of fact by RS, for a number of reasons including that the Commission has the expertise to make findings of fact regarding disclosure.

[62] In our view, the positions of RS and Berry are both correct. Although the statute provides the Commission with broad powers of review, the Commission has repeatedly emphasized the "restrained approach" urged upon us by Staff and RS. Such restraint is desirable to ensure that SROs have adequate control and direction over their own processes and procedures, and that they are not unduly hampered by interruptions caused by parties seeking a "second opinion" in the midst of an ongoing SRO regulatory proceeding. On the other hand, when approaching matters such as the one before us, the Commission can, and should, as Berry has submitted, consider the impact the reviewed decision has on the fairness to the applicant and whether the Commission's intervention would facilitate rather than interfere with the SRO process.

[63] We also agree with Berry that the nature and characteristics of the specific issue in dispute is relevant to this analysis. It is true that an RS Panel ought to be master of its own process and procedures, in a manner similar to this Commission in regard to its own proceedings. However, RS does not have unique or special expertise or jurisdiction with respect to disclosure issues and it is appropriate for the Commission to exercise its oversight powers to ensure procedural fairness in the RS Proceeding. Assessments and

reviews of those matters should be measured against practices and principles articulated in law. In situations where the decision under review deals specifically with an issue squarely within an SRO's expertise or jurisdiction, higher deference should be accorded to the SRO.

B. Are There Good and Sufficient Reasons to Set Aside the RS Disclosure Decision in Response to the Application?

[64] The relevant issue before the Chair of the RS Panel related to disclosure of the Settlement Materials. As the Chair of the RS Panel noted, "RS has a duty to disclose all relevant facts to the Respondent. […] What is disputed, however, is the relevance of certain documents, and whether or not rules of disclosure require their production."

[65] Full, fair and timely disclosure is key to ensuring procedural fairness to respondents in regulatory enforcement proceedings. As stated in *Re Ironside*, [2005] A.S.C.D. No. 910 at para. 29:

> Allegations of inadequate disclosure, when raised, strike at one of the core principles of natural justice – ensuring that a respondent has an adequate opportunity to be heard. In the securities regulatory context, that includes knowing the case to be met and being able to make full answer and defence.

[66] It is no longer disputed that in disciplinary proceedings where the consequences of the outcome can be severe to a respondent, such as those before RS, principles of natural justice and fairness require a high standard of disclosure akin to that required in criminal trials. Accordingly, principles articulated by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe*"), have been applied in securities regulatory proceedings. (See for example: *Re Fernback*, [2004] B.C.S.C.D. No. 966; *Ontario (Securities Commission) v. Shambleau*, [2003] O.J. No. 4089 (Ont. Div. Crt.); *Re Ironside*, *supra*; and *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2002] S.C.J. No. 62.)

[67] It is important that a high duty of procedural fairness be accorded to a respondent in disciplinary and other enforcement proceedings where the allegations are serious and the outcome has significant consequences for an individual. In his dissent in *Howe v. Institute of Chartered Accountants of Ontario*, 19 O.R. (3d) 483, Laskin, J.A. emphasized at 495:

> Discipline proceedings are near the judicial end of the spectrum of administrative decision-making. Therefore they call for disclosure that exceeds the minimum requirements of s. 8 of the Statutory Powers Procedure Act and that approaches the kind of disclosure applicable in court proceedings. To use Dickson J.'s phrase in Kane v. Board of Governors of the University of British Columbia, supra, at p. 1113, discipline proceedings require a "high standard of justice". The reason is obvious. Discipline proceedings may have serious consequences on a person's livelihood, reputation and professional career. For some

> professionals, a finding of professional misconduct is more serious than a criminal conviction: see Re Emerson and Law Society of Upper Canada (1983), 44 O.R. (2d) 729 at p. 744, 5 D.L.R (4th) 294 (H.C.J.).

[68] Laskin, J.A.'s opinion in *Howe* is often referred to when considering the standard of disclosure in regulatory enforcement proceedings. (See for example: *Ontario (Securities Commission) v. Shambleau*, *supra*, and *Re Glendale Securities Inc*. (1995), 18 O.S.C.B. 5975.) It is clear from the case law, and agreed upon by all parties in their submissions, that a "*Stinchcombe*"-like standard is applicable to disciplinary and other regulatory enforcement proceedings.

[69] In *R. v. Taillefer*, [2003] 3 S.C.R. 307, the Supreme Court of Canada summarized the *Stinchcombe* standard as originally articulated by the Court and as interpreted and applied in subsequent decisions at paras. 59-60:

> After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
>
> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – *Stinchcombe* [at page 345]. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
>
> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in [*R. v. Dixon*, [1998] 1 S.C.R. 244], 'the threshold requirement for disclosure is set quite low.... The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information

> being useful to the accused in making full answer and defence.' (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). 'While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant' (*Stinchcombe* [at page 339]).

[70] In *Re Ironside*, the Alberta Securities Commission noted that the low threshold for relevance affords a broad right to disclosure and encompasses information that "may appear to have only limited value to the issues for determination" in the proceeding (at para. 35). For instance, documents which might appear irrelevant to staff may have considerable relevance for the purposes of defending allegations when viewed in light of other information possessed by the respondent. (*Re Fernback*, *supra* at para. 35.) Relevant information for the purposes of making full answer and defence includes material that the respondents could use to rebut the case presented by staff, material they could use to advance a defence, and material that may assist them in making tactical decisions. (See *Deloitte & Touche LLP v. Ontario (Securities Commission),* [2002] O.J. No. 2350 (Ont. C.A.) ("*Deloitte CA*") at para. 40.)

[71] In *Deloitte CA*, the Court further noted that relevance is to be considered by reference to the allegations against the respondent, such that "relevance occurs where the nature of the allegations and the contents of the material in possession of Staff intersect" (at para. 44).

[72] Practically, the determination of relevance in the context of a criminal proceeding is made by reference to the allegations set out in the information or indictment; and, in a Commission proceeding commenced pursuant to section 127 of the Act, it is made by reference to Staff's statement of allegations and the issues raised by it. In the context of civil litigation in Ontario, a defendant's statement of defence can also clearly raise issues that relate to relevance. As is the case in civil proceedings, relevance in RS proceedings can be more readily assessed by reference to the issues raised in both RS's statement of allegations *and* the respondent's reply, and due regard to those documents should be had when assessing relevance for disclosure purposes.

1. Relevance of Settlement Materials

[73] Berry submits that the Chair of the RS Panel erred in law by not applying the *Stinchcombe* standard correctly and by concluding that the Settlement Materials were not relevant. He argues that had the Chair of the RS Panel turned his mind to the allegations and his pleadings, the Settlement Materials would clearly have been found relevant. RS agrees with Berry's counsel that *Stinchcombe* was the correct standard, but argues that the Chair of the RS Panel met the standard in concluding that the requested materials were not relevant in light of the pleadings.

[74] RS's Statement of Allegations claims that Berry engaged in a pattern of trading over a three-year period that resulted in Scotia violating UMIR. The basis upon which Berry is personally liable is set out in paragraph 2 of the Statement of Allegations:

> UMIR came into effect on April 1, 2002. Effective January 30, 2004, UMIR was amended to add Section 10.3(4) which provides that an

> individual employed by a Participant who engages in conduct resulting in the Participant contravening UMIR may be found liable for the conduct and sanctioned accordingly. *As a result, from and after January 30, 2004, Berry can be found personally liable for causing Scotia Capital to solicit the client orders and conduct the off-marketplace trades referred to herein.* In respect of the solicitations, 11 took place after January 30, 2004. In respect of the off-marketplace trades, 10 took place after January 30, 2004. [Emphasis added.]

[75] In Berry's Reply to the Statement of Allegations, Berry claimed that the contraventions of UMIR were actually a result of Scotia's own compliance failures. The Reply outlined Berry's position that the trading at issue was conducted in a manner that was consistent with his training and experience with Scotia, that any knowledge he had of securities regulations would have been solely acquired from Scotia, and that Scotia had obligations under UMIR 7.1 to supervise and educate him about regulatory requirements. Further, Berry pleaded that Scotia was monitoring his trading and knew of the very trades at issue. He claimed that he was never advised that his trading contravened UMIR, but rather relied on his supervisor's advice that his trading practices were not improper.

[76] Based on the Statement of Allegations and Berry's Reply, it is clear that issues about Scotia's knowledge of Berry's trading and what Berry was advised about its propriety will be raised in the RS Proceeding. Berry's position that the breaches of UMIR resulted from Scotia's failure to properly supervise him would also raise issues about the adequacy of Scotia's supervision and training of Berry and how closely Scotia was monitoring compliance with UMIR.

[77] On the basis of the allegations, Berry submits that he could only be held liable if it was found that he *caused* Scotia to breach UMIR. Since section 10.3(4) enables an individual to be held responsible for contraventions of UMIR in place of the employing firm, the nature of the provision allows the firm to shift blame onto the individual. Specifically, section 10.3(4) of the UMIR states:

> Any officer or employee of a Participant or Access Person or any individual holding a similar position with a Participant or Access Person who engages in conduct that results in the Participant or Access Person contravening a Requirement may be found liable by the Market Regulator for the conduct and be subject to any penalty or remedy as if such person was the Participant or Access Person.

[78] A central question therefore in the RS Proceeding, directly raised by the "pleadings", is whether it was Berry's conduct that caused Scotia to breach UMIR, or whether there was some other cause.

[79] Berry further submits that the Settlement Materials are relevant and necessary for him to make full answer and defence, in light of the following:

- The RS Discipline Notices accompanying the settlement agreement between RS and Scotia explicitly states that proceedings in respect of

Scotia's supervision of Berry and McQuillen were not taken by RS. There is no information, however, that addresses why Scotia was not held responsible for failing to supervise Berry under UMIR.

- The agreed facts in the settlement agreement entered into between RS and Scotia do not refer to Scotia's supervisory obligations, and the agreed sanctions represent a simple disgorgement of financial benefits obtained by Scotia through Berry's trading. The penalties do not seem to reflect any liability for the trading that occurred after UMIR 10.3(4) came into effect, when Berry could be held personally liable for the contraventions.

- McQuillen's settlement agreement had a provision not mentioned in the settlement agreement between RS and Scotia regarding some knowledge of supervisors at Scotia of the trading conducted by McQuillen and Berry.

- There were comments in the news media by RS expressing that Scotia's supervisory obligations were not at issue. It further indicated that the types of trades engaged by McQuillen were known by Scotia and his supervisor.

[80] RS submits that the materials sought by Berry are not relevant because they are not necessary for Berry to make full answer and defence. It is claimed that the "fruits of the investigation" have already been disclosed, including any information regarding what Scotia and McQuillen told RS about the allegations against Berry and against themselves. Berry was provided with drafts of the offers of settlement and all the versions of the accompanying statement of allegations. The only information not disclosed regarding the settlement agreements were the notes made by RS enforcement counsel during their discussions with counsel for Scotia and McQuillen.

[81] RS further submits that the issues raised by Berry with respect to Scotia's supervisory obligations would not absolve him of any liability, but at best may mitigate any sanctions that might be imposed. Further, RS submits that Berry admitted to the trades at issue, and Scotia and McQuillen are not necessary to prove the allegations. RS also submits that if they were not called as witnesses at the hearing, then their settlement communications with RS could not possibly be relevant and this would also eliminate any issues of credibility.

[82] It is apparent that Scotia's role and knowledge of the trading at issue were at least considered by RS, but there is no additional information as to why there was no reference to those issues in the settlement agreements. It is reasonable to expect that those types of issues and facts would have been discussed during the negotiation discussions between RS and Scotia and between RS and McQuillen in reaching a settlement. It is also possible that there may be issues of credibility as to their positions.

[83] Counsel for Berry submits that employees of Scotia will be witnesses at the hearing, and at a minimum, that Berry would be calling McQuillen as a witness if RS does not. Further, Berry's purpose in seeking disclosure of the Settlement Materials is to assess the positions that Scotia and McQuillen advanced in their settlement discussions with RS. This would assist Berry in making decisions about whether to call representatives of Scotia to testify. For example, the changes to settlement documents proposed by Scotia that RS did not accept in the final agreement would be outside what was already disclosed regarding the offers of settlement.

[84] In our view, any information given by Scotia and McQuillen to RS about the allegations against Berry and against themselves will be relevant to Berry's defence. We accept, at the very least, that the communications between RS and Scotia and McQuillen may be helpful to Berry in making strategic and informed decisions regarding which witnesses to call and how to conduct his defence.

[85] The Chair of the RS Panel concluded that the Settlement Materials were not relevant; however, he made no reference to Berry's Reply or how it related to the nature of the allegations. We recognize that critical issues in the RS Proceeding will include whether Berry caused Scotia's violation of UMIR and if Berry did so, whether it was a result of Scotia's failure to fulfill its supervisory obligations. Given the nature of UMIR 10.3(4) and the fact that an individual can be held personally liable under that provision, any discussions of the parties with RS relating to the violations would be relevant. Even if the Settlement Materials are not clearly relevant, at the very least, we are of the view that they are not "plainly irrelevant", as emphasized in *Taillefer, supra* at 59. Further, to paraphrase the words of the Supreme Court in *Eggers, supra* at 467, we are satisfied that the information requested can reasonably be used by Berry to meet the case RS presents, advance his defence, or to otherwise make decisions which may affect the conduct of his defence.

[86] As stated above, disclosure goes to the root of fairness to a respondent, and a failure to provide the respondent with relevant information and material in advance of the commencement of the proceeding, could undermine the fairness of the RS Proceeding.

[87] Having reached that conclusion, the issue that remains to be considered is whether there is any valid reason why the Settlement Materials should not be disclosed to Berry.

2. Settlement Privilege

[88] Communications in the course of negotiations toward a settlement are generally privileged and protected from disclosure and admissibility into evidence. As stated by Sopinka et al. in *The Law of Evidence in Canada*:

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a compromise without resort to trial…

> In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming… (John Sopinka, Sidney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (2nd edition) (Markham: Butterworths, 1999) at 807 and 808.)

[89] Such a privilege, however, is not absolute and it is often set aside to address other concerns such as procedural fairness. Berry's position is that in this case, the right to make full answer and defence requires that disclosure of the Settlement Materials be made notwithstanding the general principle that such material is privileged.

[90] A number of decisions in the criminal, civil and administrative contexts have made exceptions to settlement privilege in certain circumstances. Generally, courts will attempt to balance all of the interests at stake. This may include balancing the right of an accused to a fair hearing or the right to make full answer and defence, with the encouragement of settlement. In this balancing approach, all of the relevant circumstances must be considered.

[91] A relevant circumstance considered by courts and tribunals is whether a plea bargain or settlement information relates to an individual who would likely be an important witness at the hearing of the matter. Berry's counsel relied on a number of criminal cases. While a number of these cases were decided in their own particular, and perhaps unique, factual circumstances, the underlying approach is informative.

[92] In the context of a criminal proceeding, the Court in *R. v. Bernardo*, [1994] O.J. No. 1718 (Ont. Gen. Div.), set aside settlement privilege attached to plea negotiations with the Crown in order to allow the accused to make full answer and defence. In that case, the accused was charged with murder and sought disclosure of the Crown's files regarding the plea negotiations with Karla Homolka, who had pleaded guilty to manslaughter for her participation in the same crimes. It was anticipated that Homolka would be a key witness in Bernardo's trial and the accused submitted that the information requested was necessary for his defence:

> […] those discussions form an integral part of her decision to supply the Crown with information and to testify as she is expected to do at the accused's trial. Further that they are entitled to cross-examine her not only on the agreement arrived at, but the discussions that led up to the agreement so that the jury will be in a position to assess her credibility by having a complete and thorough knowledge of discussions that may have motivated her to enter into that agreement. (*R. v. Bernardo*, *supra* at para. 6.)

[93] In *R. v. Delorme*, [2005] N.W.T.J. No. 51 (N.W.T. Sup. Ct.), another criminal case, the accused was one of four individuals originally charged with murder. The accused sought production of documents relating to the negotiations of the three other accused

who had pleaded guilty and negotiated plea bargains with the Crown. The Court in that case ordered disclosure of the information relating to the plea negotiations of the two witnesses who were likely to testify on the basis that the information would be potentially useful for testing the credibility of those witnesses and their motivations for entering into the plea bargain. On the other hand, the documents relating to the individual whom there was no intention to call as a witness remained privileged. The Court also viewed it important that the protected information had some potential to provide the accused with added information not already or otherwise available to the defence, or had some potential impeachment value. (*R. v. Delorme, supra* at para. 46.)

[94] In the securities context, the Commission in *Re Glendale Securities Inc., supra*, came to a similar conclusion in ordering disclosure of settlement discussions between a respondent and Commission staff. The fact that the witness in question was a respondent who settled and that this respondent was expected to be a critical witness against the remaining respondents who did not settle, was an important consideration in concluding that the balance favoured disclosure. The Commission stated in that decision:

> […] it was a fair inference that this may well be a case where someone who was vulnerable to a significant penalty was attempting to obtain immunity or a lesser penalty by trying to shift the blame to someone else, that this clearly would be important to Mr. Parr's credibility, and that Mr. Parr, from the material produced by the Commission staff to the Respondents, appears to be a critical witness to [Staff's] case. (*Re Glendale Securities Inc., supra* at 5980.)

[95] In *Glendale, supra,* in the Commission's view, it was possible that credibility might be at issue. Accordingly, what took place in settlement discussions might be relevant, and fairness required allowing the respondent to test the evidence by cross-examination. Quoting from *R. v. Ross*, [1995] O.J. No. 2582 (Ont. Gen. Div.), the Commission accepted that:

> If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it. (*Re Glendale Securities Inc., supra* at 5983.)

[96] Further, courts and tribunals have found that the policy rationale behind settlement privilege may not apply in circumstances where the individual who entered into a settlement is a key witness in proceedings related to a third party, and the witness is no longer at risk of prejudice from disclosure of the privileged information. For example, in *R. v. Bernardo, supra,* while it was recognized that there is a public interest in protecting plea negotiations between an accused and the Crown to encourage full, frank and private negotiations and to encourage the resolution of cases, the privilege is usually applied so that the information disclosed will not be used against the person who has entered into the plea bargain. The Court in that case made a distinction where the information being sought was for use in the defence of another person:

> […] Although I readily accept the Crown's position that a privilege ought to exist in the sense that the information should not be used against her in

> a subsequent prosecution, I do not conclude that the "privilege" ought to extend when that person, i.e. Ms. Homolka, is not an accused nor is at any risk of prejudice. In this circumstance, it is intended that she testify on behalf of the Crown, putting another at penal risk.
>
> Assuming that a privilege does attach to these negotiations, that privilege ought not to extend to an agreement that requires the person to be a witness against another when, as here, she will be a witness for the Crown. (*R. v. Bernardo, supra* at paras. 17-18.)

[97] The Court in *R. v. Delorme* also considered it important that the party who successfully negotiated the plea bargain was no longer at risk of prejudice from the disclosure (at para. 30).

[98] In *R. v. Murray* (2000), W.C.B.J. 514773 (Ont. S.C.J.) (QL) ("*Murray*"), the Court considered whether solicitor-client privilege should be set aside. This was another case arising from the Bernardo prosecution where his first counsel was charged with obstruction of justice as a result of his conduct in that case. At the time of the trial, Bernardo had already been convicted of murder and had failed in his appeals. The Court therefore concluded that any prejudice Bernardo might suffer by way of invasion of his privilege would be "largely theoretical". On the other hand:

> […] Mr. Murray's ability to defend himself on this serious charge is threatened and indeed his very liberty is at stake. There is no doubt that Mr. Bernardo's privilege must give way to the overwhelming importance of Mr. Murray's right to full answer and defence. (*R. v. Murray*, *supra* at 3.)

[99] Even though solicitor-client privilege is considered the "highest privilege recognized by the courts", the Court found that this right was not absolute and in certain circumstances must yield to another person's right to make full answer and defence.

[100] Berry's counsel also submits that there is a lower expectation of privacy in regulatory proceedings such that the right to make full answer and defence outweighs a witness' right to keep details regarding the settlement agreement confidential. As support for this proposition, it is submitted that settlement agreements in connection with regulatory proceedings are usually made public once they are approved, whereas in civil proceedings, terms of settlement are generally not made public.

3. Are there Compelling Reasons to Override any Asserted Privilege to Ensure Fairness to Berry in all the Circumstances?

[101] We find that the principles described above, as articulated in these cases are relevant to the case before us. Although we recognize that this is an administrative proceeding, we accept that broad principles from the criminal context assist in our analysis. In these circumstances, Scotia and McQuillen entered into settlement agreements with RS and are likely to be witnesses against Berry in connection with the

same conduct. As stated in the Statement of Allegations at paragraph 3, "[o]nly Scotia can be found liable for conduct occurring prior to January 30, 2004 which resulted in a breach of UMIR 6.4 or 7.7(5)". The effect is that after January 30, 2004, Berry and McQuillen can be held personally liable for causing the conduct contravening UMIR pursuant to UMIR 10.3(4). Essentially, blame shifted from Scotia to Berry and McQuillen. The positions advanced by Scotia in the negotiations are necessarily at issue, and concerns of credibility and motivation for entering into a settlement agreement cannot be ignored. In these circumstances where Berry intends to challenge the allegations against him, such information may be helpful in preparing his cross-examination or conducting his defence.

[102] RS submits that *Bernardo* was a case where Homolka was agreeing to be a witness against Bernardo in exchange for her testimony and was negotiating a deal based on the strength of that testimony. In our view, while the circumstances here may be different, we find that the allegations against Berry are so closely tied to the substance of the settlement agreements (the allegations are almost identical) that, on balance, any settlement privilege must give way to Berry's right to make full answer and defence.

[103] RS also submits that the circumstances of this case do not justify overriding the strong policy rationale behind settlement privilege. RS submits, for example, that it could cause a chilling effect on the ability of RS to conclude settlements with multiple respondents. Although we recognize that there is a strong public interest in protecting settlement privilege, we also accept that the underlying policy considerations are not necessarily the same for proceedings involving third parties. The settlement agreements are already concluded between RS and Scotia, and RS and McQuillen. There is no evidence before us that Scotia or McQuillen would be prejudiced in subsequent proceedings by disclosure, especially since Berry was ordered to use the Settlement Materials only for the purposes of the RS Proceeding and no other proceeding. We agree with the Court in *Murray, supra,* that any prejudice to Scotia or McQuillen would be "largely theoretical" and must yield to the overwhelming importance of Berry's right to a fair hearing and a proper opportunity to defend himself.

[104] It should also be noted that the test for disclosure is not whether the information or documents would be ultimately admissible at a trial, but whether they are relevant (or even, not clearly irrelevant):

> Whether they would be admissible during the course of a trial is a matter upon which I choose not to speculate at this point. But whether or not they are admissible in evidence is not necessarily determinative of whether or not that information is relevant […]
>
> Whilst I agree with all of [the] submissions by the Crown, I am of the view that those inherent weaknesses and frailties of the information not to preclude the defence from having access to them in pursuit of their right to make full answer and defence. Even if it never becomes evidence, it is relevant. (*R. v. Bernardo, supra* at paras. 8, 11 and 14.)

[105] We accept that although there may be information produced that may not be admissible in the RS Proceeding, this information might still be helpful in informing Berry of the best strategy to be taken in the defence of the allegations against him.

C. Is the Application Premature?

1. Prematurity and Fragmentation

[106] RS and Staff both made submissions with respect to prematurity and fragmentation. In fact, RS initially brought a motion to quash Berry's Application on the grounds that it was premature and would fragment the proceeding, as the RS Panel has not had an opportunity to properly and effectively perform its function, and the Application could potentially protract and delay the hearing process. Subsequently however, RS asserted these submissions by way of a response to the Application.

[107] The general legal principles regarding prematurity are set out in *Ontario College of Art et al. v. Ontario Human Rights* (1992), 11 O.R. (3d) 798 (Div. Ct.) at 799-800:

> [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: see *Latif v. Ontario (Hospital Resources Commission)* (an unreported decision of this court of March 11, 1992; leave to appeal was denied on June 8, 1992 by the Ontario Court of Appeal) and *Hancock v. Ontario (Human Rights Commission)* (an unreported decision of this court of November 10, 1992).
>
> These decisions follow a long line of authority which has indicated the need to avoid a piecemeal approach to judicial review of administrative action. The board of inquiry in this case has jurisdiction to entertain and determine any of the issues that have been so ably advanced …
>
> For some time now the Divisional Court has, as I have indicated, taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion.

[108] The Divisional Court in *Coady v. Law Society of Upper Canada* (2003), O.A.C. 51 (Div. Ct.) further stated:

> 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 mater. 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 paras. 9-11.)

[109] The Commission has recognized these concerns. The recent Commission decision of *Re TSX Inc.* (2007), 30 O.S.C.B. 8917, noted that premature attempts to review tribunal decisions are rejected because the interruption would hinder the first instance tribunal from properly and effectively performing its function (at para. 181).

[110] Nonetheless, the Court of Appeal has recognized:

> [The general rule] is not absolute and should not be applied rigidly if there is a prospect of real unfairness through, for example, the denial of natural justice. In these circumstances, which will arise infrequently, the courts will intervene before completion of an administrative hearing and prior to the exhaustion of all alternative remedies. (*Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd., supra* at para. 43.)

[111] For example, this exception may be invoked in circumstances where the information sought by a party is so material to the central issue before the tribunal that non-disclosure taints the very fairness of the hearing itself. In *LCBO, supra,* the Court stated:

> [The] evidence sought to be introduced by [the respondent] through [the investigator] is "material" to the central issue on the stay motion, that is, whether improper interference with the evidence of the LCBO witnesses occurred. In the view of the Divisional Court, the effect of the Board's decision to deny [the respondent] the opportunity to explore this evidence impaired the fairness of the hearing on the stay motion, thereby resulting in a denial of natural justice. (*LCBO, supra* at para. 37.)

[112] Further, in *Waxman v. Ontario (Racing Commission),* [2006] O.J. No. 4226 (Ont. Div. Ct.) at para. 11, it was stated:

> […] if the hearing presently scheduled for Monday next were to commence without proper disclosure having been made in a timely way, it would be irretrievably tainted with unfairness from the outset. It does not offend this court's policy of not fragmenting proceedings before administrative tribunals to act to prevent a hearing already tainted from beginning without correcting the unfairness.

[113] As counsel for Berry submits, the relief sought is necessary now to enable Berry and his counsel to prepare for the RS hearing. In *People First of Ontario v. Ontario (Niagara Regional Coroner)* (1992), 87 D.L.R. (4th) 765 (Ont. C.A.) at 768, the Court of Appeal noted that refusing disclosure before the hearing would be unfair because it would prevent effective participation at the hearing. The Court of Appeal emphasized that while it is generally undesirable to interrupt a proceeding with applications for

judicial review, in some cases, correcting an error already made at an earlier time would actually advance the hearing and its resolution.

[114] It is not premature for a reviewing court or tribunal to address an appeal/review of a lower decision when the appeal/review of the lower decision would avoid delay and promote the advancement of the proceeding on a timely basis.

[115] While we are always concerned about fragmenting proceedings, we do not see granting this Application at this time as causing delay. In fact, in these circumstances, we are of the view that the effect is the opposite (i.e. to avoid delay and promote advancement of the proceeding on a timely basis).

[116] RS submits that it is too early to tell whether the disclosure requested is material to the RS Proceeding and this should be left for determination by the RS Panel at the RS Proceeding. According to RS, the Chair of the RS Panel simply concluded that the settlement communications should not be disclosed based on privilege but that their relevance could be assessed in the context of the RS Proceeding. Staff also takes the position that a review of the RS Disclosure Decision would be premature and would fragment the RS Proceeding. At paragraph 19 of their factum, Staff emphasized that:

> It is too early to tell whether the evidence is sufficiently important to the fairness of the hearing. The RS Panel is best suited to determine whether natural justice demands disclosure of the Settlement Communications in the context of the hearing. The RS Panel ought to be given the chance to rule on the relevance in the context of the case presented by RS.

[117] For the reasons stated above and on the basis of the Statement of Allegations, Berry's Reply and his counsel's representation that the issue of Scotia's conduct and discussions about its conduct are central to the RS Proceeding, we are satisfied that the Settlement Materials should be disclosed to Berry so that he can decide whether they are relevant to his defence. In our view, it is paramount that the disclosure of the Settlement Materials be dealt with now so that the RS Proceeding can proceed expeditiously. In our view, all of the pertinent information is before us and there would be no benefit or advantage to referring the matter back to the RS Panel for disposition at the commencement of the hearing on the merits. To the contrary, doing so would potentially delay the RS Proceeding.

[118] We are mindful that we should not cause further delay, fragment the RS Proceeding or open the floodgates to applications to override settlement privilege. However, this case relates to a very narrow range of information and documents and is based on unique allegations and positions of the parties.

2. The Importance of the SRO Regime

[119] As stated in *Re TSX* (2007), 30 O.S.C.B. 8917, "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" (at para. 199).

[120] In addition, section 2.1 of the Act states that, "[the] Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations".

[121] The functioning of the SRO regime should not be interfered with lightly. As explained by the Commission in *Re TSX*:

> 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. (*Re TSX, supra* at para. 205.)

[122] Notwithstanding the importance of recognizing the jurisdiction of SROs and avoiding undue interference with the SRO process, in some circumstances it may be preferable for the Commission to intervene in order to avoid delay and ensure that fairness is obtained.

[123] The present case is one such example. In our view, it is appropriate for the Commission to address the Application to review the RS Disclosure Decision at this time. The hearing on the merits for the RS Proceeding is scheduled to commence on April 21, 2008, and it is essential that Berry be able to make full answer and defence. As a result, dealing with the RS Disclosure Decision now is not premature and will not fragment the RS Proceeding. Instead, dealing with an issue that affects the fairness of the RS Proceeding in advance of the commencement of the hearing will prevent delay and the need for Berry to bring further disclosure motions before the RS Hearing Panel, which could delay the RS Proceeding as a whole.

IV. Conclusion

[124] Given the nature of the allegations and the positions of the parties, we have concluded that the Settlement Materials are relevant to Berry's defence.

[125] Although settlement privilege generally applies to settlement discussions, the concerns that normally arise around disclosing settlement discussions are absent here, as the settlement agreements between RS and Scotia, and RS and McQuillen, have already been approved and there is little risk of future prejudice to Scotia and McQuillen in the context of the RS Proceeding. The issues in the RS Proceeding are closely linked to the settlement information sought by Berry and non-disclosure could potentially have a significant impact on Berry's ability to prepare his case and make full answer and defence. After balancing the benefits to be gained from the protection of such information from disclosure, with Berry's right to a fair hearing and the opportunity to make full answer and defence, we conclude that the circumstances of this case warrant setting aside the settlement privilege and granting Berry's Application.

[126] Where one individual enters into a settlement agreement and subsequently becomes a witness against another in relation to the same conduct, issues of credibility may arise. We are not saying that disclosure must always be ordered of settlement discussions when a respondent who enters into a settlement agreement subsequently becomes a witness against another. Rather, we believe that this case is an exceptional one that focuses on a very narrow issue under UMIR 10.3(4) where an employee can be held personally liable for contraventions he has caused to his employer. We find that in this unique circumstance, settlement discussions pertaining to the employer are relevant to the key issues facing the employee.

[127] As stated above, we recognize the concern that applications such as this should not be dealt with prematurely and that generally we should not interrupt proceedings of SROs or interfere with the adjudicative function of RS. As noted above, however, the RS Proceeding has not yet commenced and our review of the RS Disclosure Decision will not raise concerns of prematurity or fragmentation. Rather, it is essential that Berry be able to make full answer and defence, and dealing with the RS Disclosure Decision in advance of the commencement of the RS Proceeding will prevent delay of the RS Proceeding as a whole.

[128] Notwithstanding our ruling, it is still open to RS to assert solicitor-client privilege, or litigation privilege, where appropriate, for the communications between each party and their counsel.

[129] Given that third parties are affected, the Disclosure Order restricts Berry to use the Settlement Materials only for the purposes of the RS Proceeding. The Settlement Materials may not be used for any other purposes, for example, in civil proceedings. In order to ensure compliance with the Disclosure Order, the Settlement Materials must be returned to RS or be destroyed by Berry upon the conclusion of the RS Proceeding and any appeals.

[130] Accordingly, for these reasons, we granted the Application and issued the Disclosure Order.

Dated at Toronto on this 21st day of May, 2008.

"*Lawrence E. Ritchie*"	"*James E. A. Turner*"
Lawrence E. Ritchie	James E. A. Turner