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 ANDREW RANKIN

REASONS AND DECISION

(Application under section 144 of the Act to revoke the decision of the Commission approving a settlement agreement)

Hearing date:	May 19, 2011	
Decision:	November 21, 2011	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Paulette L. Kennedy	- Commissioner
	Christopher Portner	- Commissioner
Counsel:	Scott K. Fenton	- For the Ontario Securities Commission
Applicant:	Andrew Rankin	- Representing himself

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REASONS AND DECISION

I. INTRODUCTION

(a) Background

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to section 144 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider the application (the "**Application**") made on September 15, 2010 of Andrew Netherwood Rankin ("**Rankin**") for a revocation of the order of the Commission dated February 21, 2008 approving and giving effect to the settlement agreement between Rankin and Staff of the Commission ("**Staff"**) dated February 19, 2008 (the "**Rankin Settlement Agreement**").

[2] In the Application, Rankin alleges that Staff failed to disclose directly to him, before he entered into the Rankin Settlement Agreement, the fact that Daniel Duic ("**Duic**") was the subject of a Staff investigation (the "**Duic Investigation**") of an alleged breach of a Commission cease trade order against him dated March 3, 2004 (the "**Duic Cease Trade Order**"). Rankin submits that Staff owed him a duty to disclose to him *directly* the fruits of their investigation regarding the alleged breach by Duic of the Duic Cease Trade Order prior to entering into the Rankin Settlement Agreement with him.

[3] Rankin further submits that Staff knew that full disclosure of the Duic Investigation to him would have been very prejudicial to the outcome of Staff's settlement negotiations with him.

[4] Rankin submits that, had he been informed of the Duic Investigation and the alleged breaches by Duic of the Duic Cease Trade Order, he would have discontinued settlement negotiations with Staff and would have continued to pursue exoneration by means of a new trial on the quasi-criminal charges outstanding against him and a hearing on the merits of the administrative proceeding being brought by the Commission against him. Rankin submits that the Duic Investigation and the breach by Duic of the Duic Cease Trade Order were facts that would have fatally undermined Duic's credibility as a witness against him in either proceeding.

[5] Staff submits that Rankin's Application is demonstrably without merit and should be dismissed for the reasons discussed below. Staff concedes that it had an obligation to disclose the existence of the Duic Investigation to Rankin and that Staff fulfilled that obligation by orally informing Rankin's legal counsel at the time, David M. Humphrey ("**Humphrey**"), of the Duic Investigation.

[6] These are our reasons and decision with respect to the Application.

[7] We have set out below the background facts related to the Application. A chronology of certain of the events relied on in the Application is provided in Schedule A. The chronology reflects the facts that we are prepared to accept and rely on for purposes of the Application.

(b) History of the Proceedings

1. Quasi-Criminal Charges Before the Ontario Court of Justice

[8] On February 2, 2004, Rankin was charged with ten counts of insider trading and ten counts of tipping contrary to subsections 76(1) and 76(2) of the Act (the "**Criminal Charges**"). The charges related to ten corporate acquisition transactions (the "**Corporate Transactions**") that took place between February 2000 and April 2001 during a period of time when Rankin was employed as a Managing Director in the Mergers and Acquisitions Department of RBC Dominion Securities Inc. ("**RBC DS**"), which had an advisory role in each of the Corporate Transactions.

[9] On February 4, 2004, Staff issued a statement of allegations alleging, amongst other things, that Duic had purchased securities of the companies that were the subject of the Corporate Transactions (the "**Companies**") in advance of the public announcement of the respective Corporate Transactions, based on material non-public information communicated by Rankin to Duic.

[10] Staff further alleged that (i) Rankin was a person in a special relationship with each of the Companies, as defined in subsection 76(5)(b) of the Act, given his role at RBC DS; (ii) because Duic learned of material facts or material changes from Rankin, Duic was also in a special relationship with each of the Companies, as defined in subsection 76(5)(e) of the Act; and (iii) as a person in a special relationship with each of the Companies, Duic purchased the relevant securities with knowledge of a material fact or a material change that had not been generally disclosed and, accordingly, Duic breached subsection 76(1) of the Act.

[11] On March 3, 2004, the Commission approved a settlement agreement with Duic (the "**Original Duic Settlement Agreement**") relating to the administrative proceeding commenced by the Commission against him. Pursuant to the Original Duic Settlement Agreement, Duic admitted to engaging in insider trading in securities of the Companies and agreed to cooperate with Staff which included acting as a witness for Staff in any proceeding before the Commission, the Ontario Court of Justice or the Ontario Superior Court arising out of the insider trading described in the Original Duic Settlement Agreement. The sanctions approved by the Commission included the issue of the Duic Cease Trade Order that required Duic to cease trading in securities permanently, with certain exceptions that are not germane to this matter (*Re Daniel Duic* (2004), 27 OSCB 2754; and *Re Daniel Duic* (2004), 31 OSCB 9531 at para. 5).

[12] Rankin's trial on the Criminal Charges took place before the Honourable Justice Khawly of the Ontario Court of Justice from May 2 to June 15, 2005. Duic testified at the trial as the key witness for Staff. In his decision dated July 15, 2005, Justice Khawly found Rankin guilty of ten counts of tipping and not guilty of ten counts of insider trading. On October 27, 2005, Rankin was sentenced to six months imprisonment (*R. v. Rankin*, [2005] O.J. No. 4871 at paras. 117 and 118).

[13] By Notice of Hearing dated December 20, 2005, the Commission commenced an administrative proceeding (the "**Rankin Administrative Proceeding**") to consider whether,

pursuant to sections 127 and 127.1 of the Act, it was in the public interest to make certain orders against Rankin arising from the matters that formed the basis of the Criminal Charges (*Notice of Hearing in the Matter of Andrew Rankin*, December 20, 2005 [2006], O.J. No. 4597; and *Statement of Allegations in the Matter of Andrew Rankin*, December 20, 2005).

[14] On November 9, 2006, the Honourable Justice Nordheimer of the Superior Court of Justice set aside the convictions of Rankin and ordered a new trial. Staff's application for leave to appeal Justice Nordheimer's decision to the Court of Appeal of Ontario was dismissed on February 7, 2007 (*R. v. Rankin*, [2006] , O.J. No. 4597 (S.C.J.); and *R. v. Rankin* [2007] O.J. No. 719 (Ont. C.A.)).

2. Rankin's Settlement with the Commission

i. The Settlement Agreement Between Rankin and Staff

[15] On February 19, 2008, Rankin entered into the Rankin Settlement Agreement with Staff resolving the Rankin Administrative Proceeding.

[16] In the Rankin Settlement Agreement, Rankin admitted the following facts:

> 6. Rankin was aware of the legal requirement not to disclose confidential material information and that he owed a duty of confidentiality to RBC DS and to the clients of RBC DS. Rankin was RBC DS' lead client advisor for the acquisitions by Shaw Communications Inc. and was a member of the deal team for the restructuring of Canadian Pacific, described above. As such, Rankin acquired confidential material information about these transactions through his direct client involvement. For the remaining transactions, Rankin acquired confidential material information based on the information available to him as Managing Director and as "staffer", the person responsible for assigning junior M&A staff to deal teams within the M&A Department.
>
> 7. Rankin met Dan Duic ("Duic") in grade 7 at Upper Canada College ("UCC"). They had become close friends by grade 11, spending time together every weekday at school. They graduated from UCC in 1983. They remained friends thereafter.
>
> 8. The contact between Rankin and Duic was frequent during the relevant time frame of the deals relating to the above-mentioned Corporate Transactions. In 1999-2001, Rankin and Duic telephoned and/or e-mailed each other daily, and scheduled get-togethers for coffee, breakfast, lunch, dinner, social events, and trips.
>
> 9. Rankin had office arrangements at his homes, and used his home computer extensively for RBC DS business purposes, including via the Internet, to accommodate the long hours of Mergers and Acquisitions work. He had physical records of RBC DS business activities at his home offices,

including records of staffing duties and project descriptions at his home office to permit after hours staffing for any new potential transactions, and work product pertaining to the deals he worked on directly.

10. Duic had keys to Rankin's house on Russell Hill Road and may have had keys to Rankin's Lonsdale apartment. Duic was sometimes alone in Rankin's homes, with and without Rankin's knowledge. Over the relevant period, Duic was alone in Rankin's homes perhaps as many as ten times. *On occasion, Duic had access to confidential information pertaining to the RBC DS potential transactions (including the Corporate Transactions), when unsupervised in Rankin's home, as a result of Rankin's negligence. Duic engaged Rankin in conversation seeking confidential information or seeking to confirm information he had already acquired.*

11. Duic is an established computer expert. At U.C.C. he developed a computer program employed at the school for scheduling parents night. Duic followed financial markets intensely, was knowledgeable about the public companies within major Canadian business segments, and had research tools at his office consistent with many trading desks.

12. The contacts and communications between Rankin and Duic, referred to above, occurred during the time when the Corporate Transactions were being considered.

13. *Through Rankin's conduct as described above, Rankin informed Duic of confidential material facts with respect to each reporting issuer that had not been generally disclosed. The confidential material facts related to the potential Corporate Transactions, on which RBC DS was advising.* Rankin did not know and did not advert to Duic's use of confidential material information.

[Emphasis added]

(*Rankin Settlement Agreement*, *supra,* at paras. 6 to 13)

[17] Paragraph 21 of the Rankin Settlement Agreement provided that the settlement agreement constituted "the entirety of the agreed facts to be submitted at the settlement hearing regarding Rankin's conduct in this matter, unless the parties agree that further facts should be submitted at the Settlement Hearing" (*Rankin Settlement Agreement, supra,* at para. 21).

[18] Further, subject to the Commission's approval of the Rankin Settlement Agreement, Rankin agreed "to waive his rights to a full hearing, judicial review, or appeal of this matter under the Act" (*Rankin Settlement Agreement, supra,* at para. 22).

[19] Finally, Rankin agreed that he would not:

> …in any proceeding, refer to or rely upon this agreement or the negotiation or process of approval of this agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness or any other remedies or challenges that may otherwise be available.
>
> (*Rankin Settlement Agreement*, *supra,* at para. 24)

ii. Approval of the Rankin Settlement Agreement

[20] On February 21, 2008, Rankin and Staff appeared before a Commission hearing panel to seek approval of the Rankin Settlement Agreement. In accordance with the settlement process at the time, the settlement hearing was initially heard *in camera*. All members of the public, with the exception of Rankin's father, Dr. John T. Rankin, left the hearing room while counsel for Staff and counsel for Rankin made submissions. After hearing those submissions, the Rankin Settlement Agreement was approved by the Commission and the hearing was opened to the public (see *Notice of Hearing to Approve Settlement*, February 19, 2008; *Transcript of Settlement Hearing in the Matter of Andrew Rankin*, February 21, 2008 (the "***Rankin Settlement Transcript***"), at pp. 6 to 9; and *Reasons for Decision of the Commission in the Matter of Andrew Rankin*, March 17, 2008 (the "***Rankin Settlement Reasons***"), at paras. 2 and 3).

[21] During the hearing to approve the Rankin Settlement Agreement, counsel for Staff and counsel for Rankin jointly recommended that the Commission approve the settlement agreement. Counsel for Staff and counsel for Rankin emphasized that the Rankin Settlement Agreement had been "very carefully written" and that it was "the product of great effort over an extended period of time". In its reasons for decision approving the Rankin Settlement Agreement, the Commission noted that "a balancing of factors and interests" between the parties had occurred during the settlement negotiations and that the "language of the Settlement Agreement was obviously very carefully negotiated by the parties" (*Rankin Settlement Transcript, supra,* at pp. 26 and 52; and *Rankin Settlement Reasons, supra,* at para. 19).

[22] Counsel for Staff and counsel for Rankin also responded to questions from the hearing panel. In connection with the statement in the Rankin Settlement Agreement that Rankin did not know the use to which Duic had put the confidential material information regarding the Corporate Transactions, the hearing panel asked if Rankin had orally communicated material undisclosed information to Duic. The following exchanges between counsel for Staff, the hearing panel and counsel for Rankin took place:

> MS. MCKINNON: […] Yes, it is clear that Mr. Rankin knew Mr. Duic obtained confidential material information, and I'll explain it and Mr. Humphrey may wish to add further comments.
>
> The agreed facts before you make reference to the contacts and the communications between Mr. Rankin and Mr. Duic and the frequency of those

contacts over the period of time of the ten corporate transactions on which information was conveyed to Mr. Duic.

Those facts we are agreed for the purposes of greater clarity to be expressed that *Mr. Rankin admits that he made oral communications with Mr. Duic in which he communicated to Mr. Duic confidential material information,* and so I think the inference, the answer comes by inference to your question, therefore, that in orally communicating, in speaking words to Mr. Duic, which communicated confidential material information, yes, it would have been – *he would have been aware that Mr. Duic was now – that he had communicated it, that Mr. Duic was now possessed of confidential material information.*

COMMISSIONER KNIGHT: Thank you. You said that Mr. Humphrey might want to clarify.

Do you, Mr. Humphrey, want to add to that?

MR. HUMPHREY: Yes, I'm happy to try and assist to the answer to the question right now.

The settlement agreement contains the agreed facts. They have been very carefully written by staff and myself, and it is clear that it's the totality of the conduct of Mr. Rankin that constituted him informing his friend Mr. Duic. You see the paragraphs in the agreed statement of facts relating to Mr. Duic having unsupervised access to Mr. Rankin's home, where he had a computer with confidential information on it, where he had physical records from work that had confidential information on it.

It's acknowledged by both sides that Mr. Duic was engaging Mr. Rankin in conversation seeking to confirm information that he already acquired. But as well, the agreed statement of facts does emphasize the frequency of their contact, including personal contact, get-togethers, if you will. *There's reference to getting together for coffee and breakfast and lunch and dinner, and undoubtedly in all of that there were countless conversations between those two friends and it's acknowledged that in some of those conversations between them Mr. Rankin would have said things that amounted to imparting confidential material information to his friend.*

He would have been speaking intentionally. He knows he's talking. He knows he's talking to his friend and as he's doing so, he does impart in some conversations some confidential material information, but the real flaw here, the central fact here is that at the time he wasn't thinking about the fact that he was imparting this crucial information. He sort of let his guard slip. He was having conversations with his trusted personal friend he's been close to since high school.

> And *the position expressed by Ms. McKinnon is absolutely correct.* Did he know he was speaking to his friend? Yes. And did he know what he was saying to his friend? Of course he knew what he was saying to his friend. He wasn't in any instance so impaired by alcohol or anything like that that he didn't know what he was doing, but he never stopped to think of the problem created by this loose conversation. He did not know and he did not advert to his friend using the information.
>
> [Emphasis added]
>
> (*Rankin Settlement Transcript, supra,* at pp. 25 to 28)

[23] The hearing panel noted that the admission that Rankin orally communicated confidential material information to Duic went beyond the language of the Rankin Settlement Agreement:

> CHAIR: *But I guess I would say it goes a little bit beyond the words of the settlement agreement.*
>
> MS. McKINNON: And I think, to be clear, we had anticipated that if there was a need to clarify the manner of communicating, Mr. Humphrey and I are in agreement that it is agreed between us and it would be a factor which you could then refer and take account of and refer to in reasons, that Mr. Rankin did through oral communications inform Mr. Duic of confidential material information. It is the agreed fact in the document that when he did so he did not know the use Mr. Duic was making of the information, but *the offence which is being admitted to here includes oral communications.* There's no doubt about that from my perspective.
>
> [Emphasis added]
>
> (*Rankin Settlement Transcript, supra,* at pp. 28 and 29)

Accordingly, it is clear that counsel for Staff and counsel for Rankin anticipated that the hearing panel might raise this question.

[24] Rankin was represented by legal counsel in connection with the negotiation and execution of the Rankin Settlement Agreement and there is no reason to believe that his decision to enter into the Rankin Settlement Agreement and to seek its approval were anything other than voluntary and unequivocal acts on his part.

[25] At the time of the settlement, Rankin had received full disclosure made by Staff with respect to both the Criminal Charges and the Rankin Administrative Proceeding. Further, he had participated in the first trial of the Criminal Charges before Justice Khawly. Rankin expressed no confusion, disagreement, uncertainty or lack of resolve in obtaining a final settlement of the Rankin Administrative Proceeding (*Rankin Settlement Transcript, supra*).

[26] It is also clear that a consequence of the Commission's approval of the Rankin Settlement Agreement was that Staff would attend the next day in the Ontario Court of Justice to withdraw the Criminal Charges under sections 76 and 122 of the Act:

> CHAIR: […] We understand completely that we are in an administrative hearing and under 127, and we're not suggesting for a moment that we would be looking at or taking into consideration what may be happening, what allegations are made in another forum.
>
> However, *it does seem to us to be relevant in approving this settlement that one effect of the approval of this settlement will be that those other proceedings are withdrawn* […]
>
> [Emphasis added]
>
> (*Rankin Settlement Transcript, supra,* at p. 42)

iii. Reasons for Decision of the Commission

[27] The hearing panel released its reasons for decision approving the Rankin Settlement Agreement on March 17, 2008. Rankin's admissions of wrongdoing were referred to in those reasons as follows:

> 7. The Settlement Agreement states that Rankin was aware of the legal requirement not to disclose confidential material information and that he owed a duty of confidentiality to RBC DS and to the clients of RBC DS.
>
> 8. Daniel Duic ("Duic") was a long time close friend of Rankin and had frequent contact with him during the relevant period. Rankin and Duic spoke on the telephone or emailed each other on a daily basis, and met for coffee, meals, social events and trips. Duic also had unsupervised access to Rankin's homes where Rankin often worked and kept confidential information in connection with RBC DS business activities. On occasion, Duic had access to confidential information pertaining to the Corporate Transactions when unsupervised in Rankin's home, as a result of Rankin's negligence.
>
> 9. Duic also engaged Rankin in conversation seeking confidential information or seeking to confirm confidential information he had already acquired. *It was acknowledged by counsel for Rankin at the hearing that Rankin informed Duic in certain conversations of confidential material information that had not been generally disclosed.*
>
> 10. *The Settlement Agreement states that, through Rankin's conduct as described in the Settlement Agreement, Rankin informed Duic of confidential material facts relating to each of the potential Corporate Transactions that had not been generally disclosed.*

> 11. According to the Settlement Agreement, Rankin did not know and did not advert to Duic's use of the confidential material information.
>
> 12. The Settlement Agreement states that over a 14-month period, on the basis of confidential material information, Duic earned profits of approximately $4.5 million by illegal insider trading, contrary to subsection 76(1) of the Act.
>
> 13. The Settlement Agreement states that, by engaging in the conduct described above, Rankin breached Ontario securities law by acting contrary to subsection 76(2) of the Act.
>
> 14. *Accordingly, Rankin has admitted that he breached subsection 76(2) of the Act by informing Duic of material facts with respect to the Corporate Transactions before those material facts had been generally disclosed. Subsection 76(2) is commonly referred to as the "tipping" prohibition.*
>
> [Emphasis added]
>
> (*Rankin Settlement Reasons, supra,* at paras. 7 to 14)

[28] In its reasons, the hearing panel also commented upon the seriousness of Rankin's conduct as follows:

> This case involved very serious market misconduct that constituted tipping of confidential material information by a senior investment banker…In our view, it is significant that Rankin's tipping of this information occurred over a period of 14 months and related to ten very high-profile transactions. He was a senior investment banker and knew he had an obligation to maintain the confidentiality of all sensitive non-public information. Rankin's behaviour was both illegal and unacceptable for an individual of his seniority and in his position of trust. For these reasons, this is an egregious case that warrants significant sanctions.
>
> (*Rankin Settlement Reasons, supra,* at para. 31)

(c) Investigation and Settlement of Allegations of Duic's Breach of the Duic Cease Trade Order

[29] The facts relevant to the Duic Investigation are set out in the Commission's *Reasons for Decision on Sanctions and Costs in the Matter of Daniel Duic* dated September 29, 2008 ((2008) 31 OSCB 9531 ("***Re Daniel Duic***")). Those facts are summarized in the following paragraphs.

[30] On December 12, 2007, TD Waterhouse Canada froze Duic's Toronto trading accounts, advising him that it wanted to consider his trading activity in those accounts in light of the Duic Cease Trade Order (*Re Daniel Duic*, *supra,* at para. 15).

[31] It became apparent that Duic had been trading in equity securities on the New York Stock Exchange and/or NASDAQ through his U.S. dollar margin account and RRSP accounts at TD

Waterhouse Canada in Toronto. Prior to engaging in the trading, Duic had received legal advice that the Duic Cease Trade Order did not prevent him from trading in securities listed on a U.S. exchange. At the time he received that advice, Duic was living in the U.S. (*Re Daniel Duic*, s*upra,* at paras. 12 and 13).

[32] Staff issued a statement of allegations on August 14, 2008 alleging that Duic had breached the terms of the Duic Cease Trade Order. The hearing related to those allegations was held on August 19, 2008.

[33] Staff and Duic jointly submitted an agreed statement of facts to the Commission hearing on sanctions and costs related to Duic's breach of the Duic Cease Trade Order. The agreed facts were that Duic contacted Staff immediately after his trading accounts were frozen, made no attempt to hide the transactions and waived solicitor-client privilege to permit Staff to question Duic's legal counsel with respect to the legal advice that was given to Duic. If Duic had traded through a brokerage account located in the U.S., instead of using his TD Waterhouse Canada accounts in Toronto, he would not have been in violation of the Duic Cease Trade Order (*Re Daniel Duic*, s*upra,* at paras. 19 and 56).

[34] On September 29, 2008, the Commission released its decision imposing sanctions on Duic for breaching the Duic Cease Trade Order. In its reasons for decision, the panel found as a mitigating factor that Duic thought he was "relying on legal advice" and that he "believed in good faith" that his trading was in compliance with the Duic Cease Trade Order (*Re Daniel Duic*, s*upra,* at para. 55).

[35] The Commission also found as follows:

> Based on the Agreed Statement of Facts, it is clear that Duic did not intentionally or knowingly breach the 2004 Order. Aside from the evidence that Duic thought he was relying on previous legal advice, we note that Staff has acknowledged that if Duic had traded the securities in question through a brokerage account in California, he would not have been in violation of the 2004 Order. Duic's trading in connection with this matter constitutes trading in Ontario and a breach of the 2004 Order because acts in furtherance of those trades occurred in Ontario; but the actual trades were all effected on stock exchanges located outside Canada. Trading in securities that occurs wholly outside Ontario (and that involves no act in furtherance of such trading in Ontario) is not prohibited by the 2004 Order.
>
> But for the fact that Duic was in breach of the 2004 Order, there is no suggestion that Duic's trading resulted in any harm to investors or was improper in any other way.
>
> (*Re Daniel Duic, supra,* at paras. 56 and 57)

(d) Disclosure of the Duic Investigation by Staff to Rankin's Counsel

[36] We understand that, on December 21, 2007, at the commencement of a meeting between legal counsel for Staff and legal counsel for Rankin to discuss settlement of the Criminal

Charges and the Rankin Administrative Proceeding, Staff counsel advised Rankin's counsel orally of the fact that Duic was being investigated for a possible technical breach of the Duic Cease Trade Order, and that there was no evidence of insider trading. This is acknowledged by Rankin in his correspondence with Staff (see paragraph 52 of these reasons).

[37] Staff does not dispute Rankin's assertion that his legal counsel did not disclose the existence of the Duic Investigation to him.

[38] Staff submits, however, that it was self-evident that Rankin's counsel did not consider the information regarding the Duic Investigation to be sufficiently significant or relevant to justify interrupting the ongoing and complex negotiations between Staff and Rankin with the objective of achieving an overall settlement of the Criminal Charges and the Rankin Administrative Proceeding. The second trial of Rankin on the Criminal Charges was scheduled to begin on February 18, 2008.

[39] At the time the communication referred to in paragraph 36 of these reasons was made, it had been only approximately one week since Staff had become aware that there may have been a breach by Duic of the Duic Cease Trade Order. Staff had interviewed Duic on December 14, 2007 and conducted a second interview on January 25, 2008. The Rankin Settlement Agreement was approved by the Commission on February 21, 2008.

[40] Although Rankin has raised in this matter the failure of his former legal counsel to advise him of the existence of the Duic Investigation, Rankin has refused to waive solicitor-client privilege in order to permit his counsel to explain why he did not advise Rankin of the Duic Investigation. Staff submits that Rankin should not be permitted to complain of the conduct of his former counsel while relying on solicitor-client privilege as a shield to prevent such counsel from responding (see, for instance, *Harich v. Stamp* (1979), 27 O.R. (2d) 395 (Ont. C.A.) at para. 6; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.) at paras. 65 to 67; *R. v. Li*, [1993] B.C.J. No. 2312 (B.C.C.A.) at paras. 50 and 51; *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (S.C.J.) at para. 11, aff'd, [2000] O.J. No. 1137 (Div. Ct.); and *R. v. Hobbs,* [2009] N.S.J. No. 409 (N.S.C.A.) at paras. 14 to 21).

[41] Nevertheless, Staff submits, and we agree, that the primary thrust of Rankin's complaint does not relate to the conduct of his former legal counsel. Rather, Rankin submits that Staff owed him a duty to disclose the existence of the Duic Investigation directly to him, as well as the fruits of that investigation, prior to entering into the Rankin Settlement Agreement. Rankin submits that duty was a continuing duty that Staff breached by failing to make that disclosure to him.

II. PRELIMINARY ISSUES

(a) The Failure to Present Evidence

[42] In support of the Application, Rankin filed a number of documents and e-mails with the Secretary of the Commission on May 10, 2011. Those documents included a document entitled *Andrew Rankin Section 144 Hearing Factual and Legal Grounds*.

[43] Rankin did not file any affidavits or call any witnesses at the hearing of the Application. The documents he did file included hearsay statements of third parties and various documents and e-mails that were not validated by testimony. Based on this very limited record, Rankin made a number of unsubstantiated submissions including that (i) Staff's negotiating position with respect to the settlement of the proceedings against Rankin changed as a result of Staff's knowledge of the Duic Investigation; (ii) Staff's investigation of Duic may not have been as rigorous as it should have been given the implications of that investigation for the second trial of the Criminal Charges; and (iii) the trading by Duic in breach of the Duic Cease Trade Order may have been improper apart from the breach of the Duic Cease Trade Order.

[44] Based on the limited evidence before us, we have no ability to assess the validity of any of the submissions referred to in paragraph 43 of these reasons and, in any event, we are not prepared to embark on such a wide-ranging enquiry in considering the Application. We are prepared to consider Rankin's submission that the breach by Duic of the Duic Cease Trade Order would have totally undermined Duic's credibility as a witness against Rankin in the second trial of the Criminal Charges and in the Rankin Administrative Proceeding (see paragraph 53 of these reasons).

[45] Rankin also submits that his former legal counsel made admissions on his behalf during the settlement hearing that led to the approval of the Rankin Settlement Agreement that were "not authorized by Andrew Rankin and led to surprise and shock." Those are the admissions referred to in paragraphs 22 and 23 of these reasons. Rankin complains that the Commission did not ask him directly whether he agreed with those additional admissions made by his legal counsel. In our view, the Commission has no obligation to make any such inquiry, particularly when the respondent is present in the hearing room to hear the admissions made on his behalf by his legal counsel. If Rankin did not agree with the admissions made by his counsel, Rankin should have voiced those objections at the time or shortly thereafter. It seems to us, however, that nothing turns on this issue for purposes of the Application.

(b) Admission of Evidence

[46] We have very broad authority to admit as evidence any document or other thing relevant to the Application.

[47] Subsection 15(1) of the *Statutory Powers Procedure Act* ("**SPPA**") provides that:

> Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[48] Although subsection 15(1) of the SPPA gives us very broad authority to admit the documents and e-mails submitted by Rankin as evidence, we must determine the appropriate weight to be given to them. We must avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability (*Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 115; and *Sunwide Finance Inc.* (2009), 32 OSCB 4671, at para. 22).

[49] As noted above, Rankin submitted a number of uncorroborated documents and e-mails without validation by oral testimony of a witness or by affidavit. Staff has been given no opportunity to cross-examine any witness as to the validity or meaning of those documents and e-mails, and a number of the submissions made by Rankin have no real evidentiary support. They are mere speculation based on an inadequate record.

[50] In *Re ATI Technologies et al.* (November 26, 2004, unreported) at para. 19, the Commission stated that:

> As noted previously, no affidavit was filed in support of this application. Accordingly*, even if section 144 could be a jurisdictional basis for this application, it can be so only if appropriate facts or circumstances exist and are placed before the Panel for consideration.* That not having been done, no basis has been demonstrated for this Panel to make a section 144 order.
>
> [Emphasis added]

[51] If Rankin had been represented by legal counsel on the Application, we would likely have dismissed the Application because of the lack of reliable evidence supporting Rankin's submissions that was placed before us. However, because he is unrepresented, we will attempt to address what we consider to be the core of his complaint based on the evidence we are prepared to accept as having sufficient indicia of reliability.

[52] For this purpose, we are prepared to rely on the following factual conclusions:

(a) On October 4, 2007, Rankin's legal counsel initiated discussions with Staff in an attempt to resolve the Criminal Charges as well as the Rankin Administrative Proceeding;

(b) Rankin's second criminal trial was scheduled to begin on February 18, 2008;

(c) Around December 12 or 13, 2007, Staff learned of the possible breach by Duic of the Duic Cease Trade Order;

(d) On December 21, 2007, at the start of a meeting to discuss settlement matters, legal counsel for Staff orally informed Rankin's legal counsel that Duic was being investigated for a possible "technical breach" of the Duic Cease Trade Order. Rankin's counsel was also apparently told that there was "no evidence of insider trading". At that time, the Duic Investigation was at a relatively early stage, although Duic had already been interviewed once by Staff;

(e) The information referred to in clause (d) above was not communicated to Rankin by Rankin's legal counsel;

(f) The Rankin Settlement Agreement was approved by the Commission on February 21, 2008 and a sanctions order was issued against Rankin in accordance with the terms of that agreement. By that date, Staff had interviewed Duic on two separate occasions;

(g) As a result of the approval of the Rankin Settlement Agreement, the Criminal Charges against Rankin were withdrawn by Staff on February 22, 2008; and

(h) The Commission publicly announced its decision sanctioning Duic for his breach of the Duic Cease Trade Order on September 29, 2008. The Commission's reasons acknowledged that Duic had not intentionally or knowingly breached the Duic Cease Trade Order (see paragraph 35 of these reasons).

[53] In these circumstances, Rankin submits that he would not have entered into the Rankin Settlement Agreement if he had been aware of the Duic Investigation. Duic was the key witness against him in connection with the Criminal Charges and the Rankin Administrative Proceeding. In Rankin's submission, the breach by Duic of the Duic Cease Trade Order totally undermined Duic's credibility as a witness. As a result, Rankin submits that Duic was fatally tainted as a witness against him. Rankin submits that Staff had an obligation to make full disclosure to him of the Duic Investigation before the Rankin Settlement Agreement was entered into and that Staff failed in that obligation. Rankin also submits that the oral communication to his former legal counsel of the existence of the Duic Investigation was misleading and incomplete. Rankin submits that, in any event, if he had been aware of the Duic Investigation he would have taken steps to delay the second criminal trial. Further, as noted above, Rankin submits that his former legal counsel had no authority to acknowledge in the hearing to approve the Rankin Settlement Agreement that Rankin had orally communicated material undisclosed information to Duic. Rankin submits that, in the circumstances, he was deprived of his right to make an informed decision regarding the Rankin Settlement Agreement and that led to grave prejudice and unfairness to him. As a result, he asks the Commission to revoke its order approving and giving effect to the Rankin Settlement Agreement.

III. THE ISSUES

[54] This matter raises the following issues for our consideration:

(a) Does the Commission have jurisdiction under section 144 of the Act to hear the Application?

(b) If so, has Rankin established that there are sufficient grounds for us to set aside the Commission's order approving and giving effect to the Rankin Settlement Agreement?

IV. ANALYSIS OF THE ISSUES

(a) Does the Commission have jurisdiction under section 144 of the Act to hear the Application?

[55] At the outset of the hearing, Staff brought a motion requesting that we find that the Commission does not have jurisdiction under section 144 of the Act to hear the Application.

1. Submissions

Staff Submissions

[56] Staff submitted that section 144 was not intended to be a substitute for or an alternative to an appeal of a Commission decision or order. Staff submitted that if Rankin wished to appeal the order giving effect to the Rankin Settlement Agreement, he had to do so by applying to the Ontario Divisional Court in accordance with section 9 of the Act. Staff submitted that prior decisions of the Commission are clear that if a section 144 application is, in effect, simply an appeal, it should be rejected as contrary to the intention of the Act and contrary to the public interest.

[57] Further, Staff submitted that if Rankin takes the position that he did not learn of the full details of the Duic Investigation until *after* the Commission sanctioned Duic on September 29, 2008, Rankin should have sought an extension of time within which to file an appeal. Staff submitted that Rankin did not attempt to appeal the approval of the Rankin Settlement Agreement. Instead, more than two years after the Commission's decision to sanction Duic for breach of the Duic Cease Trade Order, Rankin has brought a section 144 application to revoke the order approving the Rankin Settlement Agreement. Staff submitted that should not be permitted.

Rankin Submissions

[58] Rankin submitted that the Commission has authority to hear the Application and that, if he had known of the Duic Investigation at the time of his negotiations with Staff, he would not have entered into the Rankin Settlement Agreement. Accordingly, Rankin submitted that the Duic Investigation and the subsequent Commission sanctions order related to Duic's breach of the Duic Cease Trade Order constituted new facts and events that were not known to Rankin at the time of the Rankin Settlement Agreement. Rankin submitted that the Application was not in the nature of an appeal and that the Application should be permitted in these circumstances under section 144 of the Act.

2. Review of the Law

[59] Subsection 144(1) of the Act provides as follows:

> The Commission may make an order revoking or varying a decision of the Commission, on the application of the Executive Director or a person or company

> affected by the decision, if in the Commission's opinion the order would not be prejudicial to the public interest.
>
> (*Act, supra,* subsection 144(1))

The order of the Commission approving and giving effect to the Rankin Settlement Agreement is a decision of the Commission for purposes of subsection 144(1) and the Application.

[60] The "public interest" is not expressly defined in the Act. In *Pezim v. British Columbia*, the Supreme Court of Canada considered the public interest mandate of securities regulators and found that such regulators have wide discretion to determine what is in the public interest:

> … it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest.
>
> (*Pezim v. British Columbia (Superintendent of Brokers*) [1994] 2 S.C.R. 557 at para. 71).

That discretion must, however, be exercised for appropriate regulatory purposes.

[61] Accordingly, in determining what constitutes the "public interest", the Commission considers the purposes and principles reflected in the Act. Section 1.1 of the Act provides that the purposes of the Act are:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.
>
> (*Act*, *supra,* section 1.1)

Prior Decisions under Section 144

[62] There have been a number of Commission decisions under section 144 of the Act that may be relevant to this proceeding. Those decisions have dealt with a number of different circumstances.

[63] In *Re Ultramar PLC* (1991), 14 OSCB 5221 ("***Re Ultramar***"), the Commission dealt with circumstances in which a third party was applying to rescind or vary a discretionary order previously granted to an issuer on an application. The Commission held that its jurisdiction under section 144 to vary or revoke a prior order of the Commission will rarely be exercised:

> After hearing the submissions of all counsel, we concluded that when an application is brought under the provisions of section 140 [now s.144] of the Act, for an Order revoking or varying a decision made by the Commission, and that application is disputed by the part[y] that applied for and received the Order or Ruling, we should, except in the most unusual circumstances, before we consider

> rescinding or varying the Order or Ruling, find that the original applicant had either misrepresented a fact to the Commission or omitted to state a material fact, or alternatively that there was, unknown to that applicant, a material fact which was not therefore brought to the attention of the original panel. We should also consider whether or not the knowledge of such a material fact by the original panel would in our opinion *have been likely to have affected* the Order or Ruling made.
>
> [Emphasis added]
>
> (*Re Ultramar, supra,* at para. 4)

The Application is not being made in circumstances comparable to those in *Re Ultramar*.

[64] In *Re Universal Settlements International Inc.* (2003), 26 OSCB 2345 ("***Re Universal Settlements***"), the Commission addressed an application under section 144 to challenge the issue of a section 11 investigation order. The Commission held that:

> Section 144 is appropriate to be used to vary or revoke a decision of the Commission when new facts come to light, or new law is enacted, making it desirable to change the decision that has been rendered. *I am not aware of a section 144 proceeding being used to review and second-guess a decision of another panel of the Commission, although there is nothing in section 144 that would prevent us from doing that if we decided it was the right thing to do.*
>
> [Emphasis added]
>
> (*Re Universal Settlements, supra,* at p. 2)

Rankin submits that the Application is not being used simply to review or second-guess the Commission's approval of the Rankin Settlement Agreement. Rather, Rankin submits that new facts have come to light, and events have occurred, subsequent to the Rankin Settlement Agreement that permit an application under section 144.

[65] In *Re X Inc.* (2010), 33 OSCB 11380 ("***Re X***"), Staff applied to vary a decision made by a hearing panel. The Commission qualified the principle referred to in *Re Universal Settlements* that the Commission can intervene under section 144 if it "decided it was the right thing to do". The Commission stated that:

> With respect, the statement [from *Re Universal Settlements*] on its face is wrong in law. Only if the words "in accordance with applicable law" are added following the words "the right thing to do" can any useful meaning be ascribed to the statement. We do not say there can never be a situation where the Executive Director can apply under s. 144 to revoke or vary a Panel decision that went against Staff. We do say that only in the rarest of circumstances should such an application be considered. If the s. 144 application is, in effect, simply an appeal,

it should be rejected as contrary to the intention of the *Act* and contrary to the public interest.

[Emphasis added]

(*Re X, supra,* at para. 35)

[66] The Commission concluded in *Re X* that Staff was attempting to use section 144 as a means to appeal the decision of a Commission panel. Staff does not have a right of appeal under the Act. As a result, the Commission refused to permit Staff's application under section 144. The Application is not being made by Staff and is not made in circumstances comparable to those in *Re X*.

[67] In two cases, applications have been brought under section 144 by a person subject to a Commission sanctions order to revoke or vary that order. In *Re Orsini* (1997), 20 OSCB 6068 ("***Re Orsini***"), a registrant who was the subject of a sanctions order by the Commission with a term lasting many years, applied under section 144 to modify that order. The grounds for doing so were the passage of time, a material change in circumstances and an expression of remorse by the applicant. In rejecting the application, the Commission adopted the following six criteria as appropriate in determining whether a section 144 order should be granted in such a case:

1. As a general rule, an order such as the 1991 OSC order is intended to run its course. Varying or rescinding the order should be the exception rather than the rule.

2. The applicant must show by a sufficient course of conduct he is a person to be trusted.

3. The applicant must show that his conduct is unimpeached and unimpeachable which can be best established by evidence of trustworthy persons, especially persons with whom the applicant has been associated since the 1991 OSC order.

4. A sufficient period of time must have elapsed.

5. The applicant must show by substantial and satisfactory evidence that it is highly unlikely that the applicant will misconduct himself in future if the applicable order is revoked or rescinded.

6. The applicant must show that his or her past conduct has been entirely purged.

(*Re Orsini, supra,* at p. 4)

[68] Similarly, in *Re Friesen* (1999), 22 OSCB 2427 ("***Re Friesen***"), the Commission considered an application under section 144 of the Act for an order modifying a sanctions order made by the Commission ten years earlier. The applicant submitted there had been a "material change in circumstances", that he was "remorseful" and had "learned from his previous experience" and, therefore, it would not be prejudicial to the public interest for the Commission

to vary one of the terms of the order. Based on the facts and evidence presented, and applying the criteria from *Re Orsini*, the Commission was satisfied that it was appropriate to vary one condition of the Commission's prior order (*Re Friesen*, *supra.*).

[69] While the Application is to revoke a previous sanctions order of the Commission, it is not made based on the lapse of time or subsequent purging of past conduct by a respondent, such as was the case in *Re Friesen* and *Re Orsini*.

[70] In *AiT Advanced Information Technologies Corporation* (2008) 31 OSCB 10027 ("***Re AiT***"), the Commission dealt with rather unique circumstances. The Commission had approved settlement agreements with certain respondents on the basis that they were parties to a breach of section 75 of the Act by the issuer. The Commission issued sanctions orders under those settlement agreements. One of the respondents proceeded to a hearing on the merits. A panel of the Commission concluded that there had been no breach of section 75 of the Act by the issuer. An application was then brought by Staff under section 144 to revoke the sanctions orders issued under the settlements on the basis that they were inconsistent with the Commission decision on the merits. The Commission revoked the orders on the following grounds:

> Logic and fairness certainly dictates that the settlement agreements entered into … ought to be revoked pursuant to section 144 of the Act. … The learned tribunal, having heard all of [*sic*] competing arguments on the issue, has determined there was no violation of the Act. Mr. Ashe therefore could not be a party to AiT's being in violation of the Act because there was no violation of the Act.
>
> (*Re AiT, supra,* at paras. 3 and 4)

3. Conclusion on the Motion

[71] In our view, Rankin's Application is not at its core an appeal because it is based on facts not known to Rankin at the time of the Rankin Settlement Agreement and on certain events that occurred subsequent to that agreement. While the Duic Investigation had been commenced at the time of the Rankin Settlement Agreement, that fact was not known to Rankin (although it was known to his counsel at the time) and the outcome of that investigation was not resolved until approximately six months later. Accordingly, the circumstances before us are more similar to those in *Re AiT* than the other section 144 decisions referred to above. That is to say that the application relates to events that, to a significant extent, occurred after the Rankin Settlement Agreement was entered into and approved. Those events include the completion of the Duic Investigation and the decision of the Commission sanctioning Duic for his breach of the Duic Cease Trade Order.

[72] We concluded that the circumstances raised by the Application fall within our jurisdiction under section 144 of the Act. Further, in the circumstances, we do not consider the terms of the Rankin Settlement Agreement to be a bar to Rankin making the Application (see paragraphs 18 and 19 of these reasons).

[73] Accordingly, we dismissed Staff's motion and allowed Rankin to proceed with the Application.

(b) Are there sufficient grounds to set aside the Commission's Decision approving the Rankin Settlement Agreement?

[74] We will now address whether Rankin has established sufficient grounds to set aside the Commission's order approving and giving effect to the Rankin Settlement Agreement.

1. Submissions

Rankin Submissions

[75] Rankin's submissions in this respect are set out in paragraphs 4 and 53 of these reasons.

Staff Submissions

[76] Staff submits that the Application is demonstrably without merit and should be dismissed on a number of grounds.

[77] Staff submits that Rankin's decision to enter into the Rankin Settlement Agreement and his consent to the settlement were voluntary, unequivocal and informed acts. At all material times, Rankin was assisted by experienced legal counsel. Further, Rankin admitted in the Rankin Settlement Agreement to the tipping of confidential material information contrary to subsection 76(2) of the Act.

[78] As a direct and immediate consequence of Rankin entering into the Rankin Settlement Agreement, Staff withdrew the Criminal Charges laid against him under the Act. Staff submits that it would be prejudicial to the public interest to allow Rankin to revoke the Rankin Settlement Agreement while retaining the benefits of that agreement, namely, the withdrawal of the Criminal Charges and the resolution of the Rankin Administrative Proceeding. Rankin would retain those benefits because the Commission could not commence new proceedings against Rankin because of the limitation period set out in the Act (see paragraph 113 of these reasons).

[79] Further, Staff submits that there is no merit to Rankin's position that he was deprived of "crucial information" regarding Duic prior to entering into the Rankin Settlement Agreement. Throughout all of the proceedings, Duic's credibility was centrally in issue. Rankin voluntarily entered into the Rankin Settlement Agreement with full knowledge of the strengths and weaknesses of the Criminal Charges and the administrative proceeding he faced. The further information regarding the Duic Investigation, which Rankin complains was "crucial", pertained, at the time of the Rankin Settlement Agreement, to an incomplete but on-going investigation into an alleged breach of a cease trade order that the Commission later determined was not intentional. At the very highest, the subsequent sanctions against Duic for breach of the Duic Cease Trade Order would have been marginally relevant to Duic's credibility as a witness against Rankin.

[80] Staff also submits that, on December 21, 2007, Staff's legal counsel advised Rankin's legal counsel of the fact that Staff was investigating whether Duic had violated the Duic Cease Trade Order. Staff submits that Rankin's counsel correctly assessed that the further information regarding a possible breach by Duic of the Duic Cease Trade Order was not sufficiently serious or relevant to Duic's credibility as a witness at any future trial or proceeding to justify interrupting the ongoing negotiations between Staff and Rankin that ultimately resulted in the Rankin Settlement Agreement.

[81] Finally, Staff submits that by bringing the Application, Rankin has breached the terms of the Rankin Settlement Agreement referred to in paragraphs 18 and 19 of these reasons.

[82] Staff submits that, for all of these reasons, it would be prejudicial to the public interest for the Commission to revoke the order approving and giving effect to the Rankin Settlement Agreement.

2. When will the Commission Intervene under Section 144?

[83] We will address first the legal tests we will apply in deciding whether to intervene under section 144 of the Act in the circumstances before us.

[84] Because of the diverse circumstances in which a section 144 application can be brought, it is not practical to articulate all of the principles and criteria that should apply to all such applications. Based on the Commission decisions discussed in paragraphs 62 to 70 of these reasons, for purposes of the Application, we will apply the following principles:

(a) it is not generally in the public interest for the Commission to re-open settlements previously entered into and approved, or to revoke administrative sanctions previously imposed;

(b) accordingly, a revocation or variation of a Commission sanctions order under section 144 of the Act should be granted only in the most unusual or rarest of circumstances;

(c) the Commission should revoke or vary a previous sanctions order where:

  (i) there is manifest unfairness to a respondent; or

  (ii) the facts and circumstances clearly demonstrate that the relevant sanctions order cannot be permitted to stand (such as in *Re AiT*);

(d) in determining whether to revoke or vary a sanctions order, we must consider all of the facts and circumstances; and

(e) the onus is on the applicant to show that the revocation or variation of the sanctions order is justified and not prejudicial to the public interest.

[85] In our view, in determining whether there was manifest unfairness to Rankin, we should consider whether facts not known to Rankin, or subsequent events, make it reasonable to conclude that the outcome of the Rankin Administrative Proceeding would likely have been affected if those facts or events had been known (see paragraph 63 of these reasons for the test applied in *Re Ultramar*).

Test for Setting Aside a Guilty Plea in a Criminal Matter

[86] In these circumstances, it is relevant to consider when a court would set aside a negotiated guilty plea in a criminal matter.

[87] In *Adgey v. R.*, [1975] 2 S.C.R. 426 ("***Adgey***"), the Supreme Court of Canada held that an appellate court will permit the withdrawal of a guilty plea and quash a conviction where there are "valid grounds" for doing so.

[88] In the leading case of *R. v. T.(R.)*, [1992] O.J. No. 1914 ("***T. (R)***"), the Court of Appeal of Ontario held that, to constitute a valid guilty plea, the plea must be "voluntary and unequivocal". The plea must also be "informed", which was interpreted to mean that the accused must be "aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea" (*Adgey, supra,* at p. 431).

[89] In *T.(R.)*, the Court of Appeal indicated that a "voluntary" plea refers to the "conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate". A guilty plea entered in open court is "presumed to be voluntary".

[90] In *T.(R.)*, the Court of Appeal held that the accused's guilty plea was informed. The accused was aware of the nature of the allegations. When the facts were read into the record, the accused "expressed no uncertainty about the nature of the charges or the allegations and said nothing which would suggest any confusion in his mind". The Court of Appeal did not suggest that the accused had to be informed of every conceivable fact or evidentiary development, however tangential to the case, *before* his plea could be considered voluntary, unequivocal and informed. Nor did the Court of Appeal hold that no accused can ever plead guilty until full disclosure is provided. Indeed, the plea of guilty in *T.(R.)* took place shortly after the accused's arrest (*T.(R.), supra,* at paras. 24 to 30).

[91] More recently, in *R. v. M.A.W.*, [2008] O.J. No. 2738, at para. 23, the Court of Appeal of Ontario reaffirmed the principles in *T.(R.)* and held that a "guilty plea is valid if it is voluntary, informed and unequivocal; conversely a plea that is either not voluntary, not informed, or not unequivocal is invalid and may be set aside on appeal. An appellant has the onus of showing invalidity on a balance of probability".

3. Analysis

[92] We note that, in considering the principles derived from the criminal cases, Rankin is not in the position of having pleaded guilty to any criminal charge and having had penal sanctions imposed on him. To the contrary, the quasi-criminal charges against Rankin were unconditionally withdrawn by Staff as a result of the approval by the Commission of the Rankin

Settlement Agreement. The point is that, if Rankin had proceeded with a second trial on the merits of the Criminal Charges, it is unlikely that he would have obtained a better outcome than he obtained under the terms of the Rankin Settlement Agreement (i.e., the withdrawal of the Criminal Charges without the imposition of any penal sanctions). Further, the Application is to set aside the Commission order approving the Rankin Settlement Agreement. That agreement addressed only the administrative proceeding against Rankin and not the Criminal Charges.

[93] We recognize, however, that resolving the Criminal Charges would have been a very important consideration to Rankin in negotiating and entering into the Rankin Settlement Agreement. While that agreement did not refer to the Criminal Charges, the panel considering the Rankin settlement was advised that the Criminal Charges would be withdrawn if the settlement was approved (see paragraph 26 of these reasons).

[94] At the time of the Rankin Settlement Agreement, Rankin was represented by experienced legal counsel. He had received extensive disclosure by Staff relevant to both the Criminal Charges and the Rankin Administrative Proceeding. He had already been through one criminal trial during which his counsel vigorously contested Staff's case and Duic's credibility. By any measure, Rankin had a full appreciation of the nature of the allegations against him, the strengths and weaknesses of the case and the nature and quality of the evidence.

[95] Accordingly, we find that Rankin's agreement to the terms of the Rankin Settlement Agreement was "voluntary, unequivocal and informed" within the meaning of *T.(R)* (see paragraphs 87 to 91 of these reasons).

Staff's Obligation to Disclose

[96] Rankin submits, however, that Staff had an obligation to fully disclose the Duic Investigation directly to him before he entered into the Rankin Settlement Agreement. Rankin submits that Staff breached that obligation.

[97] There is no question that Staff has an obligation to make full disclosure of relevant information to a respondent in a quasi-criminal or administrative proceeding under the Act. In an administrative proceeding before the Commission, that disclosure obligation has been described as a "Stinchcombe-like" obligation (see *R. v. Stinchcombe* [1991] 3 S.C.R. 326 ("***Stinchcombe***")). It also seems to us that Staff's obligation to disclose relevant information to a respondent also applies prior to entering into a settlement agreement with that respondent.

[98] However, we note in this respect that under *Stinchcombe*, where an accused is represented by counsel, "the obligation to disclose will be triggered by a request by or on behalf of the accused" (*Stinchcombe, supra,* at p. 7). In this case, disclosure of the existence of the Duic Investigation was made to counsel for Rankin as more fully discussed below. No request was made by Rankin's counsel on behalf of Rankin for further disclosure related to that matter.

[99] We also note that the test referred to in paragraph 85 of these reasons may be a slightly higher standard than was applied in *Stinchcombe*. *Stinchcombe* was, however, a criminal proceeding addressing whether sufficient disclosure was made to an accused to permit him to

make full answer and defence. We are considering here the standard for interfering with a voluntary settlement of a Commission administrative proceeding.

Disclosure to Rankin's Counsel

[100] On December 21, 2007, legal counsel for Staff advised Rankin's legal counsel orally of the fact that Staff was investigating whether Duic had technically breached the Duic Cease Trade Order (see paragraph 52 of these reasons).

[101] It is surprising that Rankin's legal counsel did not communicate the information related to the Duic Investigation to Rankin, but Staff is not disputing Rankin's assertion that he did not do so. That failure is, however, consistent with the view that Rankin's counsel did not consider the information with respect to the Duic Investigation material to the negotiation and entering into of the Rankin Settlement Agreement. In our view, the oral disclosure to Rankin's counsel of the Duic Investigation was sufficient disclosure to Rankin of that investigation. While it would have been preferable for Staff to have communicated that information to Rankin's counsel in writing, it was not obligated to do so. Once that communication was made, it was up to Rankin's counsel to make further enquiry if he considered that relevant or appropriate in the circumstances (in accordance with the principle in *Stinchcombe* referred to in paragraph 98 of these reasons).

[102] We note in this respect that, pursuant to Rule 6.03(7) of the *Rules of Professional Conduct* of the Law Society of Upper Canada, because Rankin was represented by counsel, it would have been improper for Staff to have communicated the information related to the Duic Investigation directly to Rankin (*Rules of Professional Conduct,* R. 6.03(7). Accordingly, Staff could not disclose the existence of the Duic Investigation *directly* to Rankin.

[103] In our view, the disclosure made by Staff to counsel for Rankin of the existence of the Duic Investigation satisfied Staff's disclosure obligation to Rankin. Further, we have no evidence before us that would lead us to believe that disclosure was misleading at the time and in the circumstances in which it was made.

[104] While that conclusion may be the end of the matter, we will nonetheless address whether, in all of the circumstances, that result is manifestly unfair to Rankin.

Was Rankin deprived of "crucial information" regarding the Duic Investigation prior to agreeing to the Rankin Settlement Agreement?

[105] Rankin submits that, in the circumstances, he was deprived of "crucial information" relating to Duic's credibility as a witness before he entered into the Rankin Settlement Agreement.

[106] In our view, that submission is greatly exaggerated. The facts related to Duic's breach of the Duic Cease Trade Order are referred to in paragraphs 29 to 35 of these reasons (all of which are set out in the decision of the Commission in *Re Daniel Duic, supra*).

[107] The Commission imposed sanctions on Duic pursuant to an agreed statement of facts which indicated that the trading by Duic constituted an unintentional breach of the Duic Cease

Trade Order in circumstances in which there would have been no breach if the trading had been carried out through Duic's U.S. brokerage accounts and not through his Toronto brokerage accounts. That is hardly crucial information going fundamentally to Duic's credibility as a witness against Rankin.

[108] In approving the settlement of the Rankin Administrative Proceeding, the Commission panel had to be satisfied that the administrative sanctions imposed under the Rankin Settlement Agreement were, in all the circumstances, within a reasonable range. The panel came to that conclusion. The fact that Duic had unintentionally breached the Duic Cease Trade Order would not, in our view, have had any significant effect on a Commission panel in assessing Duic's credibility in the Rankin Administrative Proceeding. Duic's credibility was a key issue in the first trial of the Criminal Charges. Duic has acknowledged that he committed insider trading based on information he obtained from Rankin. It is hard to see how Duic's unintentional breach of the Duic Cease Trade Order could have further substantially impaired his credibility in either the Rankin Administrative Proceeding or in the second trial of the Criminal Charges.

[109] We note in this respect that Rankin had originally been convicted on the Criminal Charges based on the criminal standard of proof (that is, proof beyond a reasonable doubt). Had the Rankin Administrative Proceeding gone to a hearing on the merits, it would have been decided on the lower standard of the balance of probabilities.

[110] It is also important to note that, while Duic's testimony was important to Staff in directly incriminating Rankin, there was also substantial circumstantial evidence related to Rankin's alleged breaches of the Act. That circumstantial evidence may have been more compelling in an administrative rather than a criminal proceeding.

[111] At the time of the Rankin Settlement Agreement, Rankin was approaching the date set for his re-trial on the Criminal Charges. Rankin had been found guilty at his first trial. Without diminishing the severity of the sanctions imposed by the Commission under the Rankin Settlement Agreement, it was clearly a significant benefit to Rankin to settle the Criminal Charges by agreeing only to administrative sanctions and avoiding the possibility of criminal penalties. That settlement eliminated any risk to Rankin as to the outcome of the Criminal Charges.

[112] In our view, the information that Duic had unintentionally breached the Duic Cease Trade Order**,** and the sanctions imposed on him by the Commission for doing so, was not crucial information in connection with the negotiation of the Rankin Settlement Agreement. Further, in our view, it was not information that would likely have affected the outcome of the Rankin Administrative Proceeding. It is not sufficient for this purpose that Rankin simply says he was denied the opportunity to make an informed choice. The question is whether, objectively, it is reasonable to conclude that such information would likely have affected the outcome of the Rankin Administrative Proceeding. In our view, the information relating to the unintentional breach by Duic of the Duic Cease Trade Order, including the sanctions ultimately imposed on him by the Commission, would not have had that effect. Further, we question whether that information would likely have affected the outcome of the second trial of the Criminal Charges.

[113] We also note that granting the Application would lead to a perverse outcome. The Commission cannot bring new quasi-criminal charges or a new administrative proceeding against Rankin under the Act because of the six-year limitation period set out in section 129.1 of the Act. In our view, such an outcome in the circumstances is a relevant consideration in determining whether granting the relief requested in the Application is prejudicial to the public interest. We note in this respect that the Application was not brought by Rankin until almost two years after the public announcement of the sanctions imposed by the Commission on Duic as a result of his breach of the Duic Cease Trade Order.

[114] Accordingly, in our view, dismissing the Application in these circumstances is not manifestly unfair to Rankin.

4. Conclusion

[115] For all of these reasons, we find that Rankin has not satisfied the onus of establishing sufficient grounds for us to revoke the Commission order approving and giving effect to the Rankin Settlement Agreement. In our opinion, to order a revocation of the Rankin Settlement Agreement in these circumstances would be prejudicial to the public interest.

[116] Accordingly, the Application is dismissed.

Dated at Toronto this 21st day of November, 2011.

"James E. A. Turner"

James E. A. Turner

"Paulette L. Kennedy"

Paulette L. Kennedy

"Christopher Portner"

Christopher Portner

Schedule A

CHRONOLOGY OF EVENTS

Date	Event
February 2, 2004	Rankin is charged with 10 counts of insider trading and 10 counts of tipping contrary to subsections 76(1) and 76(2) of the Act.
February 4, 2004	Statement of Allegations is issued by Staff against Duic.
March 3, 2004	Original Settlement Agreement with Duic is approved by the Commission and the Duic Cease Trade Order is issued.
May 2, 2005 to June 15, 2005	Rankin's trial on the quasi-criminal charges takes place.
July 15, 2005	Mr. Justice Khawly of the Ontario Court of Justice convicts Rankin of 10 counts of insider tipping, contrary to subsection 76(2) and section 122 of the Act, and dismisses the charges under subsection 76(1) of the Act.
October 27, 2005	A six month jail sentence is imposed on Rankin on each of the 10 counts of insider tipping, to be served concurrently.
December 20, 2005	Notice of Hearing and Statement of Allegations is issued by the Commission commencing administrative proceedings against Rankin.
November 9, 2006	Justice Nordheimer of the Ontario Superior Court of Justice sets aside Rankin's convictions on the quasi-criminal charges and orders a new trial.
February 7, 2007	Staff's application for leave to appeal to the Ontario Court of Appeal is dismissed.
October 4, 2007	Settlement discussions are proposed by Rankin's counsel.
December 12, 2007	TD Waterhouse Canada freezes Duic's Toronto trading accounts.
December 14, 2007	First Staff interview of Duic in connection with the alleged breach of the Duic Cease Trade Order.
December 21, 2007	Counsel for Rankin and counsel for Staff meet to discuss settlement. Oral disclosure of the Duic Investigation is made by Staff's counsel to Rankin's counsel.
January 25, 2008	Second Staff interview of Duic.
February 18, 2008	Date for the new trial of Rankin on the quasi-criminal charges.
February 19, 2008	The date of the Rankin Settlement Agreement.

Date	Event
February 21, 2008	Rankin Settlement Agreement is approved by order of the Commission.
February 22, 2008	Withdrawal by the Commission of the quasi-criminal charges against Rankin.
March 17, 2008	Reasons for decision issued in connection with approval of the Rankin Settlement Agreement.
August 14, 2008	Notice of Hearing and Statement of Allegations is issued alleging breach by Duic of the Duic Cease Trade Order.
August 19, 2008	Settlement hearing related to the breach by Duic of the Duic Cease Trade Order.
September 29, 2008	Commission decision is issued approving the settlement related to Duic's breach of the Duic Cease Trade Order.
September 15, 2010	Application is made by Rankin to the Commission to set aside the approval of the Rankin Settlement Agreement.