Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e 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 UNIVERSAL MARKET INTEGRITY RULES

-and-

IN THE MATTER OF MARC MCQUILLEN

REASONS AND DECISION

Hearing:	August 21, 2014	
Decision:	September 12, 2014	
Panel:	James E. A. Turner	– Vice-Chair
Counsel:	Linda Fuerst	– For Marc McQuillen
	Andrew Werbowski	– For Staff of the Investment Industry Regulatory Organization of Canada
	Swapna Chandra	– For Staff of the Ontario Securities Commission

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REASONS AND DECISION

I. BACKGROUND

1. Introduction

[1] On August 21, 2014, the Ontario Securities Commission (the "**Commission**") held a hearing to consider an application (the "**Application**") brought by Marc McQuillen (the "**Applicant**" or "**McQuillen**") dated May 21, 2014 (and amended on June 30, 2014) under subsections 21.7(1) and 21.1(4) of the *Securities Act*, R.S.O. 1990, c. S.5 as amended (the "**Act**"), for a hearing and review of (i) a decision of a hearing panel of Market Regulation Services Inc. ("**RS**") dated February 27, 2007 (the "**Settlement Approval**") approving a settlement agreement entered into between McQuillen and RS dated February 8, 2007 (the "**Settlement Agreement**"); and (ii) a decision of the Investment Industry Regulatory Organization of Canada ("**IIROC**") on April 22, 2014 (the "**Refusal Decision**") not to reconsider the Settlement Approval and expunge all record of RS' approval of the Settlement Agreement.

[2] The Applicant requests the Commission to conduct a hearing and review of the Settlement Approval and/or the Refusal Decision and that the Commission set aside the Settlement Approval, vacate the Settlement Agreement and expunge McQuillen's disciplinary record arising out of the Settlement Approval. The Applicant also requests the Commission to grant an exemption under section 147 of the Act from the 30-day time limit for bringing the Application, or otherwise waive compliance with any such requirement.

[3] These are my reasons and decision relating to the Application.

2. Background Facts

[4] The following are the facts upon which the Application is based.

[5] RS alleged in its Statement of Allegations dated February 20, 2007 (the "**Statement of Allegations**") that both Berry and McQuillen breached Universal Market Integrity Rules ("**UMIR**") 6.4 and 7.7(5). In particular, RS alleged that:

(a) between April 4, 2002 and April 18, 2005, both Berry and McQuillen:

(i) were employed by Scotia Capital Inc. ("**Scotia Capital**"), an IIROC member;

(ii) solicited client orders during the distribution of new issues that resulted in Scotia Capital contravening UMIR 7.7(5) (as it existed prior to May 2005);

(iii) conducted off-marketplace trades that were not printed on a marketplace or recognized exchange which resulted in Scotia Capital contravening UMIR 6.4.; and

(iii) were personally liable for Scotia Capital's contraventions of UMIR pursuant to the extension of responsibility provision in UMIR 10.3(4).

[6] On February 8, 2007, McQuillen entered into the Settlement Agreement with RS. In the Settlement Agreement he acknowledged that his conduct in trading securities as alleged had breached UMIR 6.4 and 7.7(5).

[7] An RS hearing panel (the "**Settlement Panel**") approved the Settlement Agreement on February 28, 2007 and ordered that McQuillen pay a fine of $25,000 as contemplated by the Settlement Agreement. No other sanctions were imposed.

[8] Following the approval of the Settlement Agreement, RS published the Settlement Agreement and a Discipline Notice that stated that McQuillen had engaged in a pattern of trading consisting of soliciting client orders and conducting off-market trades contrary to UMIR 6.4 and 7.7(5).

[9] Approximately six years later, on January 14, 2013, after a seven-day contested hearing, an IIROC hearing panel (the "**Berry Panel**") concluded that Berry's trading did not contravene UMIR 6.4 and 7.7(5) (the "**Berry Decision**"). Accordingly, all of the allegations against Berry in the Statement of Allegations were dismissed.

[10] The trading referred to in paragraph 9 above was the identical trading upon which the Settlement Agreement was based.

[11] On March 19, 2014, McQuillen filed an application with IIROC seeking an order to set aside the Settlement Approval, vacate the Settlement Agreement and expunge his disciplinary record. McQuillen submitted that, in view of the Berry Decision, leaving the settlement standing would be manifestly unfair to him and contrary to the public interest.

[12] IIROC rejected McQuillen's application in an e-mail to McQuillen (the "**Harris E-mail**") dated April 22, 2014 from A. Douglas Harris, Vice-President and General Counsel of IIROC.

[13] The Harris E-mail stated that "[u]nfortunately, there is no jurisdiction in IIROC's Dealer Member Rules or otherwise for an IIROC Hearing Panel to reconsider or reverse an earlier decision. The Hearing Panel (and IIROC) are *functus officio* and cannot re-open the matter. As an IIROC Hearing Panel lacks jurisdiction to make the order you are requesting, I cannot act upon the material you have provided. … I am sorry that we cannot be of assistance." The Harris E-mail also indicated that "… the body with jurisdiction to review a decision of an IIROC Hearing Panel in Ontario is the Ontario Securities Commission … I suggest you begin your inquiries with the Office of the Secretary to the Commission."

[14] As a result, McQuillen brought the Application.

3. Positions of the Parties

[15] The following is a summary of the principal submissions of the parties.

(a) The Applicant

[16] McQuillen submits that he continues to suffer the stigma of (i) his acknowledgement in the Settlement Agreement that he breached UMIR, and (ii) the sanction by RS imposed under the Settlement Agreement. McQuillen submits that those breaches of UMIR have now been found by the Berry Panel not to have occurred. In these circumstances, he submits that the Settlement Approval should be set aside and his disciplinary record should be expunged. McQuillen submits that the Settlement Agreement should not stand and that permitting it to do so would be manifestly unfair to him.

[17] McQuillen submits that the Commission has jurisdiction to hear the Application and that in the circumstances the Commission should revoke the Settlement Approval. McQuillen also submits that IIROC erred in law in reaching the Refusal Decision.

[18] McQuillen also requests the Commission to exempt him from (or otherwise waive) the 30-day notice requirement for filing the Application under subsection 8(2) of the Act. McQuillen submits that the Commission has jurisdiction to do so under section 147 of the Act.

[19] McQuillen also made submissions regarding the common law contractual principles that apply to the Settlement Agreement. Given my conclusions in this matter, it is not necessary for me to address those matters.

(b) IIROC Staff

[20] IIROC Staff submits that UMIR does not expressly give IIROC hearing panels the jurisdiction to reconsider or reverse an earlier hearing panel decision. IIROC Staff submits that, as hearing panels are not courts of inherent jurisdiction and do not have implied powers, an IIROC panel's jurisdiction is circumscribed by the provisions set out in Part 10 of UMIR.

[21] Further, IIROC Staff submits that the Refusal Decision is not a "decision" that is reviewable by the Commission under subsection 21.7 of the Act. IIROC Staff says that the Harris E-mail is not an exercise of any power under UMIR and is simply a statement regarding the contents of UMIR. Accordingly, IIROC Staff submits that the Commission has no jurisdiction to review the Refusal Decision.

[22] IIROC Staff also submits that the Applicant is well out of time to bring the Application to the Commission with respect to the Settlement Approval (which occurred on February 28, 2007). Subsection 8(2) of the Act provides that a request for a hearing and review of a decision of a self-regulatory organization ("**SRO**") must be made within 30 days of the decision. The Applicant is also out of time to request a hearing and review of the Refusal Decision (which was made on April 22, 2014).

[23] If the Commission concludes that it has jurisdiction to conduct a hearing and review of the Settlement Approval, IIROC Staff submits that the Commission should not set aside the Settlement Approval or vacate the Settlement Agreement, which is irrevocable and binding on the Applicant.

[24] In any event, IIROC Staff submits that these circumstances are not unfair to McQuillen.

(c) OSC Staff

[25] Staff of the Commission ("**OSC Staff**") submits that the Commission has no jurisdiction under section 147 of the Act to waive the 30-day notice requirement under subsection 8(2) of the Act and that the Commission should dismiss the Application because it is out of time.

[26] OSC Staff also submits that, if the Commission concludes it does have jurisdiction to review the Settlement Approval, the Commission should do so by applying the principles in *Canada Malting* (*Re Canada Malting Co.* (1986), 9 OSCB 3565 ("***Canada Malting***")). OSC Staff submits that none of the principles in *Canada Malting* apply here.

[27] OSC Staff adopts IIROC Staff's submission that there was no suggestion that McQuillen entered into the Settlement Agreement other than on voluntary, informed and unequivocal basis. McQuillen was represented by experienced counsel, who would have made him aware of the nature of the allegations and the case against him, as well as both the risk of settlement and the risk of litigation. Accordingly, the Settlement Agreement should stand.

[28] In any event, OSC Staff submits that it would not be an appropriate exercise of the Commission's discretion under subsections 21.7(1) or 21.1(4) to set aside a settlement agreement of an SRO on these facts and that dismissing the Application is not unfair to McQuillen.

II. THE ISSUES

[29] In considering the Application, I will address the following issues:

(a) whether the Commission has jurisdiction to intervene in this matter and to set aside the Settlement Approval and vacate the Settlement Agreement;

(b) the appropriate standard of review under section 21.7 of the Act;

(c) whether the Applicant has satisfied any of the grounds established in *Canada Malting* upon which the Commission may intervene in the Settlement Approval; and

(d) if the Commission has jurisdiction to intervene, whether it is appropriate for the Commission to do so.

III. THE LAW

[30] The following is a discussion of the relevant law applicable to this matter.

1. Jurisdiction in this Matter

[31] IIROC Staff takes the position that IIROC has no jurisdiction to reconsider the Settlement Approval because there is no express IIROC rule permitting IIROC to do so. That is the position taken in the Harris E-mail. On the other hand, the Applicant takes the position that IIROC has inherent jurisdiction to re-open the Settlement Approval. Because of my conclusions discussed below, that is not a question I have to decide. I do note, however, that both IIROC and the Commission have the authority to impose substantial sanctions on market participants that can

have very far-reaching and negative consequences for the persons involved. It would seem to me that, if neither IIROC nor the Commission has jurisdiction to reconsider the Settlement Approval in any circumstances, that would be a material and unfortunate defect in our securities regulatory regime and one that could undermine confidence in that regime.

[32] In my view, however, the Commission does have jurisdiction to reconsider the Settlement Approval as a matter of our overriding supervisory jurisdiction over SROs such as IIROC under subsection 21.1(4) of the Act. In this respect, the Commission made the following comments in *TSX Inc. (Re)* (2007), 30 OSCB 8917 ("***TSX Inc.***"):

> Subsection 21(5) of the Act sets out the Commission's powers and oversight regarding stock exchanges. It is clear from paragraph 21(5)(e) of the Act [now subsection 21.1(4) of the Act] that the Commission has a supervisory power over "any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange". Therefore, in situations where sections 8 and 21.7 of the Act do not apply, the Commission nonetheless has the ability to exercise its oversight function of a recognized stock exchange under paragraph 21(5)(e).
>
> Although we have determined that there is no reviewable decision pursuant to sections 8 or 21.7 of the Act, we recognize that this Commission does have an overriding supervisory power with respect to SROs under paragraph 21(5)(e) of the Act. We agree with Commission Staff's characterization of the Commission's powers under this paragraph, which are discussed above at paragraph 100.
>
> In our view, it is within the jurisdiction of the Commission to exercise its supervisory power under paragraph 21(5)(e) of the Act to review the decision of the TSX to make the TSX Filing.
>
> The Commission clearly has oversight jurisdiction over SROs under that section. We must determine, however, whether there are circumstances in which the Commission should exercise its discretion to exercise its oversight powers.
>
> (*TSX Inc., supra* at paras. 134 to 137)

[33] Accordingly, the Commission has jurisdiction to conduct a hearing and review of the Settlement Approval pursuant to its overriding supervisory jurisdiction over IIROC under subsection 21.1(4) of the Act. I make no decision whether the Commission also has authority to address the Application pursuant to its inherent jurisdiction under the Act.

[34] Having said that, because of my conclusions discussed below, I will address the Application as a hearing and review of the Settlement Approval under section 21.7 and section 8 of the Act.

2. Jurisdiction under Section 21.7 of the Act

[35] The Commission has authority under section 21.7 of the Act to hold a hearing and review of any direction, decision, order or ruling of an SRO such as IIROC. That section provides as follows:

> **21.7 (1) Review of decisions –** 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 exchange, recognized self–regulatory organization, recognized quotation and trade reporting system, recognized clearing agency or designated trade repository may apply to the Commission for a hearing and review of the direction, decision, order or ruling.
>
> **(2) Procedure** – 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.

[36] Subsection 8(2) of the Act provides that:

> **(2) Review of Director's Decisions –** Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.

[37] There is no dispute that McQuillen is a person directly affected by the Settlement Approval and the Refusal Decision. Further, the Settlement Approval is a decision of an SRO for purposes of subsection 21.7(1) of the Act. It is not necessary for me to determine whether the Refusal Decision is a decision for that purpose (see paragraph 95 of these reasons).

[38] Subsection 8(3) of the Act provides that, upon a hearing and review, the Commission may confirm the decision or make such other decision as it considers proper. That section provides as follows:

> **8(3) Power on review –** 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.

3. Standard of Review and Grounds for Intervention

[39] In a section 21.7 hearing and review, the Commission exercises original jurisdiction akin to a trial *de novo* and may admit new evidence. A hearing and review is broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or the contravention of a principle of natural justice (*Investment Industry Regulatory Organization of Canada* v. *Vitug* (2010), 33 OSCB 3965 at para. 43; aff'd 2010 ONSC 4464 (Div. Ct.) ("***Re Vitug***"); and *Boulieris* v. *Investment Dealers Association of Canada*, (2004) 27 OSCB 1597 at paras. 29-30; aff'd (2005) 198 OAC 81 (Div. Ct.) ("***Re Boulieris***")).

[40] Although the broad scope of the Commission's authority on a hearing and review is well established, in practice the Commission takes a more restrained approach to applications under section 21.7 of the Act (*Re Boulieris*, *supra* at para. 31).

[41] The Commission will generally defer to an SRO decision that is central to the SRO's specialized expertise, such as interpreting and applying its own by-laws or making factual

determinations central to its expertise (*HudBay Minerals Inc. (Re)*, (2009), 32 OSCB 3733 at paras. 103-104 ("***HudBay***"); *Investment Dealers Association of Canada* v. *Kasman* (2009), 32 OSCB 5729 at para. 43 ("***Re Kasman***"); and *Re Vitug*, *supra* at paras. 45-47).

[42] Nonetheless, there are circumstances in which the Commission will intervene in a decision of an SRO. Those grounds were established in *Canada Malting* and are the following as they relate to the Application:

(a) the IIROC Hearing Panel proceeded on an incorrect principle;

(b) the IIROC Hearing Panel erred in law;

(c) the IIROC Hearing Panel overlooked material evidence;

(d) new and compelling evidence is presented to the Commission that was not before the IIROC Hearing Panel; or

(e) the IIROC Hearing Panel's perception of the public interest conflicts with that of the Commission.

(*Canada Malting*, *supra* at para. 24)

[43] The *Canada Malting* test for intervention has been applied in a number of subsequent Commission decisions, including *Boulieris*, *supra* at para. 31, *HudBay*, *supra* at para. 105 and *Kasman*, *supra* at para. 44. In *HudBay*, in discussing when the Commission may intervene in a decision of the TSX, the Commission panel described the burden on an applicant as follows:

> We recognize, however, that if the Commission is too interventionist in reviewing decisions made by an exchange, that would introduce an unacceptable degree of uncertainty in our regulatory regime and in capital markets. In *Canada Malting*, the Commission stated:
>
> > The TSE supported the Applicants in their request for standing. However, it went on to note the difficulty that would be created for listed companies if the TSE could be second–guessed by the OSC on the initiative of a company's shareholders every time a notice for filing is accepted under By–law 19.06 [the predecessor of section 604 of the TSX Manual].
> >
> > If the right of appeal meant that the OSC were to review every decision of the TSE on the merits, then companies issuing securities would be faced with the possibility of subsequently being forced to unwind the transaction or face delisting or trading sanctions on the basis that the Commission had decided to substitute its discretion for that of the TSE under By–law 19.06. In our view, this would introduce an unacceptable degree of uncertainty into the capital markets.

(*HudBay*, *supra* at para. 114)

[44] It is, therefore, only in rare circumstances that the Commission will intervene in an SRO decision. Before the Commission will do so, it must be satisfied that the applicant has met the "heavy burden" of demonstrating that its case fits within at least one of the five grounds for intervention identified in *Canada Malting*.

4. Principles Governing Settlement Agreements

[45] The nature of RS' approval of the Settlement Agreement is a central issue in this matter.

[46] The Commission has described the exercise of its jurisdiction to approve a settlement agreement as follows:

> When considering the approval of a settlement agreement, the Commission must ensure that the settlement agreement is in the public interest and that it achieves the purposes of the Act which are to (a) provide protection to investors from unfair, improper or fraudulent practices; and (b) foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).
>
> The Commission's public interest role was explained in *Re Mithras Management Ltd.* (1990). 13 OSCB 1600 as follows:
>
> > … the role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily, as the circumstances may warrant - those whose conduct in the past leads us to concluded [*sic*] that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing, we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be… (at 1610 and 1611)
>
> In order to approve a settlement agreement, the Commission must conclude that doing so is in the public interest. The role of the Commission in considering a proposed settlement agreement has been articulated in several cases. For instance, in *Re Koonar et al.* (2002), 25 O.S.C.B. 2691, the Commission stated:
>
> The role of the panel in reviewing a settlement agreement is not to substitute the sanctions it would impose in a contested hearing for what is proposed in the settlement agreement, but rather to make sure the agreed sanctions are within acceptable parameters. *(Re Koonar et al., supra* at 2692. See also *Re Melnyk* (2007), 30

> O.S.C.B. 5253; *Re Pollitt* (2004), 27 O.S.C.B. 9643 at para. 33; and *Nortel Networks Corp.*, transcript of oral reasons of the Commission, May 22, 2007, p. 52.)
>
> Accordingly, the Commission must consider all of the circumstances of the particular case to determine whether the sanctions are in the "appropriate range" of acceptable sanctions. The Commission has in the past rejected settlement agreements on the basis that the sanctions agreed to did not fall within the "appropriate range". As stated in *Re Rankin* (at paragraph 19) *"[our] role in considering the settlement is not to renegotiate the terms of the Settlement Agreement or to suggest changes to the agreed facts, statements and sanctions set forth in the Settlement Agreement"*. Nevertheless, the Commission cannot approve a settlement agreement where, in its view, the sanctions agreed to fall short of the appropriate range of acceptable sanctions. [Emphasis added]

(Re Leung (2008), 31 OSCB 8764 at paras. 14 to 17)

[47] Similar principles apply to the approval by an IIROC hearing panel of a settlement agreement. Those principles have been described as follows:

> Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.
>
> This understanding is reflected in paragraph 20.26 of the By-laws which authorizes the District Council to "accept", rather than approve, a settlement agreement. In each case a District Council must determine appropriateness, *but the standards applicable to its doing so on a settlement hearing differ from those in a contested hearing*. Thus, the penalties imposed under settlement agreements, while relevant to a District Council exercising its discretion to penalize, provide only limited assistance in a hearing like this one. [Emphasis added]
>
> (*Re Milewski* [1999] I.D.A.C.D. No. 17 at p. 13-14, (adopted by the IIROC hearing panel in *Re Prodigy Wealth Management Corp.* 2009 IIROC 51 at para. 9)

[48] Accordingly, approving a settlement agreement requires the Commission or IIROC to determine whether the proposed sanctions fall within a range of reasonable sanctions or outcomes. The panel considering a settlement relies on the facts set forth in the settlement agreement and does not make an independent finding of the facts or that particular rules have been breached. The terms of a settlement agreement are negotiated and agreed to by staff of the regulatory authority and the respondent[s]. A settlement agreement will be approved as being in the public interest only where the sanctions imposed are appropriate based upon the uncontested facts and circumstances set forth in the settlement agreement.

[49] In *Re AiT Advanced Information Technologies Corp.* ("***AiT***"), the Commission concluded that a settlement agreement previously approved by the Commission should be revoked where the conclusion that a breach of securities law had occurred was found not to be the case. The Commission stated:

> First, let me say I commend Staff and the Executive Director for bringing this matter forward. The basis of the 'settlement agreements' was certain acts that occurred transgressed and violated section 75 of the Act. At a subsequent contested hearing, a learned panel, two members of whom are here with me today, Commissioner Wigle and Commissioner Perry, found on identical facts (there was never any difference in the facts upon which the original acknowledgments and orders were based and the subsequent facts), after a full hearing, that AiT was not in breach of section 75 of the Act and was not required to make timely disclosure of its negotiations with 3M for the purchase by 3M of all of the shares of AiT at the time specified in the allegations. That conclusion is found at paragraph 266 of the Reasons and Decision in *Re AiT Advanced Information Technologies Corp.* (2008), 31 O.S.C.B. 712 of the tribunal dated the 14th day of January, 2008. The subsequent paragraph, paragraph 267, repeats the conclusion in the sense that it says 'having reached the conclusion that AiT did not breach section 75 of the Act, the allegations against Weinstein must be dismissed'.
>
> There are many reasons why this matter - the earlier settlements - should be set aside, notwithstanding that they were settlements and not hearings. First and foremost, as Mr. Fabello submitted, is logic and fairness. One can never go wrong using logic and fairness. Logic and fairness certainly dictates that the settlement agreements entered into by AiT and by Mr. Ashe ought to be revoked pursuant to section 144 of the Act. Notwithstanding that everyone, in good faith, at the time believed it to be a violation of the Act, the basis for that conclusion has subsequently been found not to have been a violation.
>
> *The learned tribunal, having heard all of competing arguments* [*sic*] *on the issue, has determined there was not a 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.* So it is absolutely not contrary to the public interest and, in fact, it is very strongly in the public interest that the order go as requested. [Emphasis added]

(*Re AiT Advanced Information Technologies Corp.* (2008), 31 OSCB 10027 at paras. 2-4; *Re AiT Advanced Technologies*, (2008), 31 OSCB 8922 (section 144 order); and *Re Ashe* (2007), 30 OSCB 1864 (section 127 order))

[50] I have concluded that the matter before me is on all fours with *AiT* for the reasons discussed in paragraphs 90 to 92 of these reasons. In reaching that conclusion, I recognise that the application and remedy sought in *AiT* were consented to by all parties. That is not the case in respect of the Application.

[51] The Commission was clear in *Rankin* (2011) 34 O.S.C.B. 11797 ("***Rankin***") that the threshold for re-opening a settlement agreement is a high one. The Commission stated that:

> 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.
>
> (*Rankin, supra* at para. 84)

[52] I note that, while *Rankin* articulated these principles, the decision of the Commission in *Rankin* was not to re-open the settlement agreement.

5. The Principle of Finality in Criminal Matters

[53] IIROC and OSC Staff submit that the Settlement Agreement is final and irrevocable regardless of the Berry Decision. They say that principle is not unique to the provisions of the

UMIR. It has been applied by the courts in the criminal context. The Supreme Court of Canada has held that:

> …
>
> The acquittal of Marshall determines nothing in respect of the conviction of the accused. *Remillard* v. *R.* (1921), 62 S.C.R. 21; 35 C.C.C. 227, 59 D.L.R. 340, makes it perfectly clear that the jury verdict is only conclusive as between the Crown and the accused at the trial. It follows then, that the majority's conclusion that the conviction cannot stand is erroneous.
>
> (*R.* v. *Hick* [1991] 3 SCR 383 at para. 6)

[54] Similarly in *Van Pham*, the British Columbia Provincial Court (Criminal Division) sentenced a person who had pled guilty despite his co-accused being acquitted:

> … In Mr. Pham's case, he entered a guilty plea prior to a trial taking place. Mr. Pham was prepared to risk his co-accused being acquitted and he still having to live with having to go through with his plea of guilty. As things turned out, of course, his co-accused were [*sic*] acquitted and he has continued on, as he was required to do, with sentencing on his guilty plea entered prior to his co-accused's trial. …
>
> (*R.* v. *Sang Van Pham* 2001 BCPC 0092 ("*Van Pham*") at para. 10)

[55] On the other hand, McQuillen submits that in criminal cases, courts have long accepted that they possess an inherent jurisdiction to set aside a guilty plea in the interests of justice, in some cases many years after the disposition of the matter on the basis of such a plea. This jurisdiction can be exercised where, owing to judicial developments after a guilty plea, it becomes apparent that the accused's conduct did not fall within the offence with which he was charged and for which he was ultimately found guilty and punished (*R.* v. *Hanemaayer* 2008 ONCA 580, at para. 20 and *R.* v. *Grainger* (1978), 42 CCC (2d) 119 (Ont. CA) at paras. 6-7).

[56] While criminal cases may not be of much assistance in this matter, it seems to me that those cases indicate that, in rare cases, there may be grounds for a guilty plea to be set aside where it subsequently becomes apparent that the accused's conduct did not constitute a criminal offence.

IV. ANALYSIS

1. The Settlement Agreement

[57] There is no doubt that the Settlement Agreement was entered into by McQuillen on an informed basis with legal advice and that it is binding on him. Accordingly, as IIROC Staff submits, the Settlement Agreement was voluntary, informed and unequivocal. There is equally no doubt that under UMIR a settlement agreement approved by a hearing panel "becomes final and no party to the Settlement Agreement may appeal or seek a review of the matter" (UMIR Part 10.8, section 3.6(b)). The Settlement Agreement was duly approved by the Settlement Panel

and McQuillen agreed not to appeal or seek a review of the Settlement Agreement. The governing principle is that a settlement agreement is binding and permanent and cannot be re-opened. The same principle applies to Commission settlements.

[58] The question is whether, notwithstanding that principle, McQuillen should be permitted to re-open the Settlement Approval and the Settlement Agreement based on the circumstances discussed in these reasons.

2. Jurisdiction to Intervene

[59] I have concluded that, subject to the comments below, I have jurisdiction in this matter to conduct a hearing and review of the Application. My reasons for that conclusion are discussed commencing at paragraph 31 of these reasons.

3. Exemption from 30-Day Notice Requirement

[60] Under subsection 8(2) of the Act, an application to the Commission for a hearing and review of an SRO decision must be brought within 30 days of the decision that is being appealed. McQuillen is clearly out of time in bringing the Application. The Settlement Agreement was entered into and approved by RS approximately seven years ago. Accordingly, in order to have jurisdiction under section 21.7 of the Act to hear the Application, I must have authority to exempt McQuillen from the 30-day notice requirement.

[61] Obviously, at the time the 30-day notice period expired, no decision had been made by the Berry Panel and, accordingly, there were no grounds for an application by McQuillen to the Commission based on that decision. The Settlement Agreement was entered into by RS and McQuillen on February 28, 2007. The Berry Decision was issued on January 14, 2013.

[62] Under section 147 of the Act, the Commission has broad discretion to grant exemptions where, in the Commission's opinion, doing so would not be prejudicial to the public interest. Such exemptions may be granted "from any requirement of Ontario securities law". OSC Staff submits that section 147 does not apply to matters of a procedural nature such as the 30-day notice requirement under subsection 8(2) of the Act. I do not agree with that submission.

[63] Section 147 of the Act on its face gives the Commission a very broad exempting power with respect to "requirements" of Ontario securities law. OSC Staff submits, however, that subsection 8(2) of the Act is a procedural provision that does not constitute a "requirement" of Ontario securities law. It makes little sense to me to interpret section 147 of the Act to permit the Commission to grant exemptions from the substantive provisions of the Act but not to permit the Commission to grant procedural exemptions. In the vernacular, subsection 8(2) imposes a "procedural requirement". I see no reason why section 147 should not be interpreted by its terms to apply to both substantive and procedural requirements of the Act. I recognize, in coming to this conclusion, that there appears to have been no previous Commission decisions addressing the application of section 147.

[64] Accordingly, I find that I have authority under section 147 of the Act to grant an exemption from the 30-day notice requirement under subsection 8(2) of the Act with respect to the Application. In the circumstances, I exempt McQuillen from that procedural requirement. I

note in this respect that I do not need to rely on the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, in order to grant that exemption.

4. The Principles from *Canada Malting*

[65] In a hearing and review under section 21.7 of the Act, the Commission applies the principles set forth in *Canada Malting* (see paragraph 42 of these reasons). It is clear that the only *Canada Malting* factor that is relevant to this hearing and review is that new and compelling evidence has been presented to me that was not before the Settlement Panel.

[66] The Commission has accepted that a hearing and review under section 21.7 of the Act is not limited to considering only the information and evidence that was before the panel that made the decision appealed from. In *HudBay*, the Commission stated that:

> Accordingly, it is well established that in a hearing and review under section 21.7 of the Act the Commission exercises original jurisdiction and the hearing and review can be conducted as a trial *de novo* (*Boulieris, supra* at para. 29 and *Re Taub, supra* at para. 30). As a result, the Commission has original jurisdiction to make a decision and can, in its discretion, admit new evidence that was not before the TSX. That general statement is subject to the Commission concluding that it has grounds to intervene based on one of the five grounds for intervention set out in *Canada Malting* (see paragraph 105 of these Reasons).
>
> Our review is not, however, a review only of the information record that was before the TSX when it made its decision. The question we must decide is not whether we would have come to the same conclusion as the TSX based on the information record that was before it. The question is whether, given all of the information and evidence that is now before us, we have grounds to interfere with the TSX Decision. In our view, we are entitled to consider not only the information and documents that were before the TSX in making its decision but also the additional information and evidence before us on this Application (recognizing, however, that the Commission has the discretion to determine the evidence that it is prepared to admit in a review under section 21.7 of the Act). It is important to note that we have concluded that we have before us more extensive information, documents and evidence with respect to HudBay, Lundin and the Transaction than the TSX had before it in making the TSX Decision.
>
> If any additional support for that conclusion is necessary, it can be found in the grounds established by *Canada Malting* for intervention in a decision of the TSX. One of the grounds for intervention established in *Canada Malting* is whether the Commission has received new and compelling evidence that was not before the TSX. In the matter before us, we have received what we consider to be new and compelling evidence with respect to HudBay's governance practices relating to the approval of the Transaction that was not before the TSX. In addition, we are entitled to intervene where our perception of the public interest differs from that of the TSX. The exercise of our public interest jurisdiction requires us to consider

> all of the relevant evidence before us, not only the information record that was before the TSX at the time it made the TSX Decision.
>
> (*HudBay*, *supra* at paras. 111 to 113)

[67] In this case, the new and potentially compelling evidence before me is the Berry Decision. That decision was not, and could not have been, before the Settlement Panel when it approved the Settlement Agreement. Accordingly, the Berry Decision is new evidence; the question is whether that evidence is compelling. The following are the most important considerations in answering that question.

5. The Berry Decision

[68] The Statement of Allegations alleged that the conduct of Berry and McQuillen breached UMIR 6.4 and 7.7(5). The allegations were identical with respect to Berry and McQuillen and were based on the same trading and factual circumstances. There were no separate or different allegations made against McQuillen.

[69] McQuillen was Berry's administrative assistant, hired to assist Berry in the administration of his trading activities, including the preparation of trade tickets. Berry supervised McQuillen's activities and all of McQuillen's trading activities were carried out by him on behalf of Berry. The following comments were made by the Berry Panel in this respect:

> Berry was McQuillen's immediate supervisor. McQuillen assisted Berry in all aspects of his trading activities, including speaking with clients, completing trade tickets, entering both client trades and inventory trades and assisting with the administrative responsibilities on the Preferred Desk.
>
> Both Berry and McQuillen traded for the 08 account each under their own individual identification number.
>
> *Berry approved all trades entered by McQuillen for the 08 account*. When Berry was away from the office, McQuillen entered orders and kept Berry advised of such orders while he was away or upon his return to the office.
>
> McQuillen prepared the trade tickets related to the solicitations of client orders and off-marketplace trades in question. An audit trail of the Trading exists at Scotia, stemming from the tickets. [Emphasis added]
>
> (Berry Decision, *supra* at paras. 13 to 16)

[70] That means that exactly the same trading was the basis of the allegations against each of Berry and McQuillen. IIROC Staff submits, however, that it was McQuillen's job to complete trade tickets and that the Berry Panel made the following comments with respect to that role:

> The particulars set out above indicate solicitations by Berry and MacQuillen [*sic*], with tickets time-stamped by MacQuillen [*sic*]. The evidence shows that Berry, by his own admission, was a poor ticket writer, so MacQuillen [*sic*] was hired to

> relieve him of that task. In time, they became a team, and while tickets continued to be made out by MacQuillen [*sic*], he also did some trades and substituted for Berry on days when the latter was away. The evidence also shows, however, that even though MacQuillen [*sic*] was originally hired to do Berry's ticketing (for which he had received some training), *he was somewhat erratic at times and didn't always enter appropriate trade dates*. [Emphasis added]
>
> (Berry Decision, at para. 43)

[71] Accordingly, IIROC Staff submits that McQuillen carried on activities that Berry did not (i.e., the preparation of trade tickets) and those activities meant that, by implication, the Berry Panel could have made a different finding against McQuillen (had he been a respondent before the Berry Panel) than the finding against Berry. I do not accept that submission.

[72] There was no allegation in the Statement of Allegations with respect to McQuillen's completion of trade tickets. The Berry Panel understood that issue was not before them. The Panel stated that:

> … This is not to say, of course, that accurate ticketing is of a minor concern, but we are not dealing here with violations of the Universal Market Integrity Rules or with breaches of ticketing rules and regulations.
>
> (Berry Decision, at para. 47)

[73] I would also note that the Berry Panel commented on Berry's activities in running a parallel trading book:

> … We agree – and have already said so – that in so doing Berry ran a parallel book, an undertaking that may have been in contravention of syndication rules and practices. But, we repeat, that is not what he is charged with, and it would, therefore, be inappropriate to make any further comment on this aspect.
>
> (Berry Decision, at para. 56)

[74] Neither the completion of trade tickets nor the running of a parallel trading book were matters that were before the Berry Panel because they were not alleged in the Statement of Allegations. The Berry Panel clearly understood that. The only relevant question was whether Berry breached UMIR 6.4 and/or 7.7(5). Accordingly, the passing comment by the Berry Panel with respect to the completion by McQuillen of trade tickets is not relevant on this hearing and review.

6. The Berry Panel's Findings

[75] The Berry Panel found that Berry's trading did not contravene UMIR 6.4 or 7.7(5). The Berry Panel stated that:

> … It is our view that the Respondent traded in a new, unlisted security and he did not, therefore, cause Scotia Capital to contravene UMIR 6.4.

(Berry Decision, at para. 53)

[76] The Panel also stated with respect to UMIR 7.7(5) that:

> We agree with this view. We also agree that Rule 7.7(5), as it existed at the time, can, without doing violence to the wording, be interpreted in a manner consistent with the evil designed to be cured by its predecessor, that is to say manipulation of the price of existing shares.
>
> (Berry Decision, at para. 60)

[77] The Berry Panel concluded based on this analysis that there was no contravention of UMIR 7.7(5).

[78] As a result, Berry's trading was found by the Berry Panel not to have contravened UMIR 6.4 or 7.7(5). That finding was, in the case of UMIR 6.4, based upon the legal conclusion as to when the trades occurred, and, in the case of UMIR 7.7(5), based upon the policy rationale for that rule.

[79] The Berry Panel concluded on substantive grounds, after a contested hearing, that Berry's trading did not contravene UMIR. That conclusion put an end to IIROC's allegations against Berry and the Berry Panel dismissed the allegations against him.

[80] As a result, it logically follows that, had McQuillen continued to be a respondent in the Berry proceeding, the alleged breaches by McQuillen of UMIR would have been dismissed on the same basis as they were dismissed against Berry. That follows as a matter of logic and I do not need any evidence to prove that conclusion. The converse is also true: if the Berry Decision had been before the Settlement Panel, the Settlement Panel would not have approved the Settlement Agreement and imposed any sanction on McQuillen.

[81] I find that the Berry Decision is new and compelling evidence before me that was not before the Settlement Panel. The fundamental assumption reflected in the Settlement Agreement was that McQuillen's trading had breached UMIR 6.4 and 7.7(5). The Berry Decision concluded that the same trading did not breach UMIR. Had the Berry Decision been before the Settlement Panel, that Panel would have realized that the findings of the Berry Panel completely undermined and were dispositive of the Settlement Agreement.

7. Different Facts Before the Panels

[82] IIROC Staff in their submissions made much of the circumstance that the facts before the Settlement Panel were different than the facts determined by the Berry Panel. IIROC Staff submits that there was no suggestion in the Settlement Agreement that the dates of the relevant trades were anything other than the first day of trading (in contrast to the conclusion of the Berry Panel as to when the trading occurred). Both those submissions are true. But the Settlement Panel was not called upon to determine the facts or reach the substantive conclusions set forth in the Settlement Agreement. Those facts and conclusions were based on the negotiated agreement between RS Staff and McQuillen. The Settlement Panel assumed that those facts and the substantive conclusions were true for purposes of considering and approving the Settlement

Agreement. (The role of the Commission and an SRO in approving a settlement agreement is described commencing at paragraph 45 of these reasons.) The important point is that the panel considering a settlement relies on the facts set forth in the settlement agreement and does not make an independent finding as to the facts or that particular rules have been breached.

[83] The assumption made by an SRO hearing panel that the facts and substantive conclusions set forth in a settlement agreement are true is completely appropriate (and is consistent with the assumptions made by a Commission hearing panel in approving a settlement agreement between OSC Staff and a respondent). The Berry Panel determined the facts and came to substantive conclusions after a contested hearing. That is not what the Settlement Panel determined.

[84] Accordingly, different facts were before the Settlement Panel and the Berry Panel and different conclusions were reached with respect to the contravention of UMIR. That is what gives rise to the matter before me.

8. Other Considerations

[85] IIROC Staff also submits that there would be great harm and an "opening of the floodgates" if we permit McQuillen to re-open the Settlement Approval and the Settlement Agreement in these circumstances. I do not accept that submission.

[86] It is clear that the Commission will interfere in an SRO decision only in the rarest of circumstances (see paragraph 44 of these reasons). Further, the governing principle with respect to settlements is that a settlement agreement is binding and permanent and cannot be re-opened. That principle is reflected in the terms of a settlement agreement. I have reached the conclusion that the Settlement Approval should be revoked and the Settlement Agreement vacated only after a careful consideration of (i) the specific allegations against Berry and McQuillen made in the Statement of Allegations; (ii) the identical nature of the trading by Berry and McQuillen that formed the basis for those allegations; and (iii) the reasons of the Berry Panel and the precise legal basis upon which that Panel dismissed the allegations against Berry. I have concluded in the circumstances that there is no basis upon which the Berry Panel could have dismissed the allegations against Berry and not against McQuillen. Accordingly, these reasons recognize that the Commission will re-open a settlement only in unique and the rarest of circumstances; in circumstances such as those in which McQuillen now finds himself.

9. Manifest Unfairness

[87] I am applying the principles established in *Rankin* in re-opening the Settlement Approval and the Settlement Agreement (see paragraph 51 of these reasons).

[88] I find that there is manifest unfairness to McQuillen if the Settlement Agreement is permitted to stand. In the circumstances, it would be manifestly unfair for the sanction under the Settlement Agreement to be imposed (i) on an administrative assistant who was acting throughout under the supervision of Berry; (ii) who did not directly profit from the trading involved (as did Berry and Scotia Capital); (iii) whose actual trading did not, in fact, breach UMIR as alleged; (iv) where no sanctions were imposed on Berry in respect of exactly the same trading; and (v) who realistically had little choice but to agree to a settlement rather than contest IIROC Staff's position at a hearing on the merits with the time and expense that would have

entailed. I do not accept the submissions of IIROC Staff and OSC Staff that these circumstances are not manifestly unfair to McQuillen. McQuillen continues to suffer damage to his reputation and career as a result of the Settlement Agreement that he should not suffer.

[89] As noted above, the Commission stated in *AiT* that:

> There are many reasons why this matter – the earlier settlements – should be set aside, notwithstanding that they were settlements and not hearings. First and foremost, as Mr. Fabello submitted, is logic and fairness. One can never go wrong using logic and fairness. Logic and fairness certainly dictates that the settlement agreements entered into by AiT and by Mr. Ashe ought to be revoked pursuant to section 144 of the Act. Notwithstanding that everyone, in good faith, at the time believed it to be a violation of the Act, the basis for that conclusion has subsequently been found not to have been a violation.
>
> (*AiT, supra* at para. 3)

[90] *AiT* was a Commission decision in which parties to settlement agreements were permitted to re-open the settlements as a result of a subsequent adjudicative decision of the Commission negating the conclusion upon which the settlement agreements were based that a breach of Ontario securities law had occurred. In my view, that decision was based on circumstances comparable to the facts and circumstances before me in this matter.

[91] IIROC Staff submits, however, that *AiT* is distinguishable because it was a decision made under section 144 of the Act that permits the Commission to make an order revoking or varying a decision of the Commission if in the Commission's opinion doing so is not prejudicial to the public interest. I do not accept that submission. Once I have concluded that I have jurisdiction to hear and grant the relief requested in the Application, that distinction becomes irrelevant.

[92] IIROC Staff also submits that the respondents under the *AiT* settlements were the issuer itself and Mr. Ashe ("**Ashe**"), who was the CEO and a director of the issuer. Once the underlying conduct was held not to have been a breach of Ontario securities law, the issuer and Ashe could not be derivatively liable in respect of that conduct. While that may be true, Berry and McQuillen engaged in identical trading that was found by the Berry Panel not to have breached UMIR. That puts McQuillen in a comparable position to that of the issuer and Ashe in *AiT*.

[93] IIROC Staff also submits that McQuillen has had the benefit of his settlement for seven years and should not now be permitted to re-open it to also have the benefit of the Berry Decision. A deal is a deal, they say. In response, I would only say that McQuillen appears to have suffered negative consequences to his reputation and career from the Settlement Agreement which, at the end of the day, he should not have suffered. McQuillen would not have brought the Application unless he was convinced that he has been significantly and adversely affected by the settlement.

[94] Similarly, OSC Staff says, in effect, that McQuillen did not "pay for" the benefits of the Berry Decision by participating in the lengthy litigation that led to it. I would say two things in response to that submission. First, it was a realistic and reasonable decision for McQuillen to have reached a settlement with IIROC rather than engaging in expensive and lengthy litigation

with an uncertain outcome. (I note in passing that the Berry litigation has extended over a period of approximately six years.) Second, that submission ignores the manifest unfairness to McQuillen of the circumstances in which he now finds himself.

[95] IIROC Staff also submits that the Harris E-mail simply communicated information to McQuillen and was not a decision of IIROC that was subject to review by the Commission. Because of my conclusions in this matter, it is not necessary for me to address that matter; nor have I found it necessary to address the submissions made with respect to the contract law principles that may apply to the Settlement Agreement.

[96] I want to be clear that I intend by these reasons no criticism whatsoever of the Settlement Panel in addressing and approving the Settlement Agreement. The Settlement Panel acted in good faith and its approval of the Settlement Agreement was completely justified in the circumstances.

VI. CONCLUSION

[97] I have authority under subsection 8(3) of the Act to confirm the Settlement Approval or to make such other decision as I consider proper.

[98] Based on the considerations discussed in these reasons, I have concluded that it is manifestly unfair to McQuillen to allow the Settlement Approval and the Settlement Agreement to stand. Accordingly, it is in the public interest to grant the relief requested in the Application.

[99] I order that:

1. The Settlement Approval is set aside and the Settlement Agreement is vacated;

2. IIROC shall expunge McQuillen's disciplinary record as a result of the Settlement Agreement, or if that is not practicable, IIROC shall include a prominent statement to that effect in conjunction with any future reference by IIROC to the Settlement Agreement or to McQuillen having breached UMIR;

3. IIROC shall repay $25,000 to McQuillen; and

4. Any party may apply to the Commission for directions as to the interpretation or application of this order.

DATED at Toronto this 12th day of September, 2014.

"James E. A. Turner"

James E. A. Turner