

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

AND

**IN RESPECT OF A DECISION OF A HEARING PANEL OF
MARKET REGULATION SERVICES INC.**

AND

IN THE MATTER OF DAVID BERRY

NOTICE OF REQUEST FOR HEARING AND REVIEW

THE REQUESTING PARTY, DAVID BERRY (“BERRY”), REQUESTS A HEARING AND REVIEW by the Ontario Securities Commission (the “Commission”) of the Decision of The Honourable Fred Kaufman, Q.C., Chair of a Hearing Panel of Market Regulation Services Inc. (“RS”), dated November 8, 2007 (the “Decision”), pursuant to section 21.7 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended.

THE REQUESTING PARTY IS AFFECTED BY THE DECISION which denies his motion for disclosure of documents relating to a hearing into allegations by RS set out in a Notice of Hearing and Statement of Allegations dated February 20, 2007 (the “RS Allegations”).

THE REQUESTING PARTY ASKS:

1. That, as it relates to the following categories of documents, the Decision of RS denying the Requesting Party’s motion for further disclosure be set aside:
 - (a) all materials relating to any investigation or review of Berry’s trading practices by RS (the “Other RS Files”) other than the RS investigation of Berry’s trading practices between May 2, 2005 and February 2007 (the “2005 RS Investigation”);

- (b) all investigation reports prepared by staff of RS ("RS Staff") in connection with the 2005 RS Investigation (the "RS Investigation Reports");
 - (c) all materials relating to settlement negotiations between RS Staff and each of Marc McQuillen ("McQuillen") and Scotia Capital Inc. ("Scotia") (the "RS Settlement Documents"); and
 - (d) unredacted copies of any contracts and/or agreements between the Toronto Stock Exchange and RS relating to the provision of market regulation services by RS (the "RS Jurisdiction Documents").
2. For an order requiring RS to disclose and produce to the Requesting Party forthwith the documents described in paragraph 1 (a) to (d) of this Notice; and
 3. Such further and other relief as counsel may advise and the Commission deems just.

THE GROUNDS FOR REVIEW are as follows:

1. RS erred in law by applying an incorrect test for assessing the relevance of the documents sought by the Resquesting Party;
2. RS misapprehended the sworn and uncontradicted evidence submitted by the Requesting Party in support of the relevance of the documents sought by him;
3. RS misapprehended the significance of the Other RS Files as they relate to the defence pleaded by the Requesting Party in paragraphs 5 to 7 and 14 of his Reply to the RS Allegations (the "Scotia Defence");
4. RS erred in law in concluding that the RS Settlement Documents were protected from disclosure by virtue of privilege and not required to be disclosed;

5. RS erred in law in refusing to order disclosure of the RS Investigation Reports on the basis of the bald and unsworn assertions of RS Staff:
 - (a) that the fruits of the investigation had already been disclosed;
 - (b) that the Investigation Reports were irrelevant; and
 - (c) that the Investigation Reports were protected from disclosure by the “work product rule;”
4. RS erred in law in determining that RS Staff had provided the Requesting Party with all relevant jurisdictional documents without having reviewed the redactions in the RS Jurisdiction Documents;
5. RS erred in law in refusing to order disclosure of the RS Jurisdiction Documents based upon the bald and unsworn assertion of RS Staff that it had “now provided the [Requesting Party] with the relevant documents;”
6. RS erred in law by relying upon unsworn submissions of RS Staff concerning the relevance of the documents withheld by RS Staff, the scope of the disclosure made by RS Staff, and the contents of the documents sought by the Requesting Party, as if the submissions were evidence;
7. RS acted unfairly in treating the unsworn submissions of RS Staff as evidence on the motion, thereby denying the Requesting Party the ability to challenge those submissions either through cross-examination or the delivery of sworn evidence in response;
8. RS erred in failing to determine that the Other RS Files, the RS Investigation Reports, the RS Settlement Documents and the RS Jurisdiction Documents are relevant and are not protected from disclosure by any privilege;

9. RS erred in law in failing to order disclosure of the Other RS Files, the RS Investigation Reports, the RS Settlement Documents and the RS Jurisdiction Documents; and
10. Such further and other grounds as counsel may advise and this Commission may permit.

November 26, 2007

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600
130 Adelaide Street West
Toronto, Ontario
M5H 3P5

Peter H. Griffin (19527Q) 865-2921
Linda L. Fuerst (22718U) 865-3091
Usman Sheikh (52964H) 865-2972

Tel : (416) 865-9500
Fax: (416) 865-9010

Solicitors for Moving Party (Respondent),
David Berry

TO: ONTARIO SECURITIES COMMISSION
P.O. Box 56, Suite 1903
20 Queen Street West
Toronto, ON M5H 3S8

John Stevenson
Secretary to the Commission

Telephone: (416) 593-8145
Facsimile: (416) 593-2319

AND TO: MARKET REGULATION SERVICES INC.
145 King Street West, Suite 900
Toronto, ON M5H 1J8

Ms. Melissa Mackewn
Mr. Charles Corlett
Enforcement Counsel

Telephone: (416) 646-7216
Facsimile: (416) 646-7285

**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, as amended**

REQUEST FOR HEARING AND REVIEW

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600
130 Adelaide Street West
Toronto, Ontario
M5H 3P5

Peter H. Griffin (19527Q) 865-2921
Linda L. Fuerst (22718U) 865-3091
Usman Sheikh (52964H) 865-2972

Tel: (416) 865-9500
Fax: (416) 865-9010

Solicitors for Requesting Party (Respondent),
David Berry