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

- AND -

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

- AND -

IN THE MATTER OF THE UNIVERSAL MARKET INTEGRITY RULES

- AND -

IN THE MATTER OF DAVID BERRY

REASONS FOR DECISION

(Section 21.7 of the *Securities Act*)

Hearing:	October 29, 2008	
Decision:	September 23, 2009	
Panel:	Lawrence E. Ritchie	- Vice-Chair and Chair of the Panel
	James E. A. Turner	- Vice-Chair
Counsel:	Johanna Superina Susan Kushneryk	- For the Ontario Securities Commission
	Brian Gover Brendan Van Niejenhuis	- For Market Regulation Services Inc.
	Peter C. Wardle Daniel Bernstein	- For TSX Inc.
	Linda Fuerst Usman Sheikh Yashoda Ranganathan	- For David Berry

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REASONS FOR DECISION

I. Background

[1] David Berry ("**Berry**") is a former employee of Scotia Capital Inc. ("**Scotia**"). Scotia is, and was at the relevant time, a participant ("**Participant**") of the Toronto Stock Exchange (the "**Exchange**", the "**TSX**" or the "**TSE**") within the meaning of Rule 1.1 of the Universal Market Integrity Rules ("**UMIR**"). This case involves a challenge to both the applicability of UMIR to, and to the jurisdiction of Market Regulation Services Inc. ("**RS**") to enforce UMIR against, Berry in the circumstances of this case. While counsel for Berry makes great effort to emphasize that the issues are framed as only affecting Berry, the implications of her primary argument are that UMIR were not properly implemented by the TSX, and therefore are unenforceable against all those within the TSX's jurisdiction.

A. Introduction

[2] Staff of RS ("**RS Staff**") commenced a proceeding against Berry on February 20, 2007 (the "**RS Proceeding**"). In the RS Proceeding, RS Staff alleges that between April 4, 2002 and April 18, 2005 (the "**Relevant Period**") Berry contravened certain provisions of UMIR while he was employed as a trader for Scotia; Berry had ceased to be an employee of Scotia by the time the RS Proceeding was commenced.

[3] Berry moved before the RS hearing panel (the "**RS Panel**") for a stay of the RS Proceeding on the basis that the TSX had repealed certain rules relating to the market conduct of Participants (the "**Former TSE Rules**") before the Relevant Period and purported to but did not validly adopt UMIR. In the alternative, Berry submits that UMIR does not apply to him because he is not now and was not, when RS commenced the RS Proceeding, a Participant or an employee of a Participant. The RS Panel dismissed Berry's stay motion in a decision dated February 29, 2008 (the "**RS Stay Decision**").

[4] On March 7, 2008, Berry commenced this application (the "**Application**") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") for a hearing and review of the RS Stay Decision by the Ontario Securities Commission (the "**Commission**"). He submits that the RS Panel erred in refusing to stay the RS Proceeding and asks the Commission to set aside the RS Stay Decision and permanently stay the RS Proceeding.

B. Our Decision

[5] For the reasons set out below, we dismiss this Application. We conclude that UMIR are rules of RS and are applicable to and enforceable against Participants and other persons within the jurisdiction of the TSX. We find that in early 2002:

(a) the TSX had authority to and properly retained RS as its regulation services provider ("**RSP**") and assigned and delegated its powers to enforce applicable rules against persons within its jurisdiction;

(b) the Commission recognized RS as a self-regulatory organization ("**SRO**") and approved UMIR as rules of RS; and

(c) the TSX validly amended its rules to require persons within its jurisdiction to comply with UMIR (among other requirements) as a matter of compliance with its own rules.

[6] Further, we conclude that:

(a) UMIR 10.3(4), which extends responsibility to an employee of a Participant for conduct that results in the Participant contravening a requirement, was validly adopted by RS;

(b) Berry was subject to UMIR when he was an employee of Scotia pursuant to that provision; and

(c) RS had jurisdiction to bring and continue the RS proceeding against Berry, being a former employee of a Participant, as RSP to the TSX.

C. The Parties

[7] As stated above, Berry is a former employee of Scotia, which is a Participant of the TSX.

[8] RS is the SRO that is responsible for enforcing UMIR in relation to the Exchange pursuant to the Commission's recognition order under subsection 21.1(1) of the Act. Effective March 17, 2008, RS was reorganized through a merger with the Investment Dealers Association ("**IDA**") to form the Investment Industry Regulatory Organization of Canada ("**IIROC**").

[9] TSX is a company incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B.16. TSX owns and operates the Exchange and the TSX Venture Exchange. The Exchange is a stock exchange created by the Toronto Stock Exchange Act, R.S.O. 1990, c. T.15 (the "***TSX Act***") and recognised by the Commission pursuant to subsection 21(2) of the Act.

[10] On August 8, 2008, TSX filed a Notice of Motion for standing to intervene in the Application (the "**TSX Motion**"). The TSX Motion was heard on September 29, 2008, and TSX was granted limited intervenor status by order dated September 30, 2008 ((2008), 31 O.S.C.B. 9520), with written reasons released on December 10, 2008 ((2008), 31 O.S.C.B. 12027).

[11] Staff of the Commission ("**OSC Staff**") is also a party to this Application under section 21.7 of the Act, but was not a party to the RS Proceeding, nor was it a party to the motion giving rise to the RS Stay Decision.

D. Chronology

[12] The resolution of the issues raised in this Application requires a careful examination of the history of the TSX, RS and UMIR.

[13] In April 2000, concurrent with the demutualization of the TSX, Regulatory Services was established as a separate division within the TSX ("**TSX-RS**") that was responsible, among other things, for enforcing TSX rules and policies against TSX Participants. The Commission approved the change in its April 3, 2000 order granting and continuing the recognition of the TSX ((2000), 23 O.S.C.B. 2495) (the "**April 2000 TSX Recognition Order**").

[14] In 2001, the TSX and the Canadian Venture Exchange (the "**CDNX**") jointly proposed rules designed to harmonize their trading rules, and to apply these rules to other Canadian marketplaces, including alternative trading systems ("**ATSs**").

[15] On April 20, 2001, the TSX and the Canadian Securities Administrators (the "**CSA**") published the first draft of UMIR and requested comment from the public on the draft rules (the "**April 2001 Regulatory Notice**"). The April 2001 Regulatory Notice and CSA Request for Comment stated that the draft rules were expected to become effective concurrent with National Instrument 21-101, *Marketplace Operation* ("**NI 21-101**"), at which time the rules and policies of the TSX and CDNX would be amended to delete any provisions where the subject matter is covered by UMIR. The April 2001 Regulatory Notice and the CSA Request for Comment also noted that the TSX and the IDA were considering creating RS as a stand alone market regulator to provide services to the TSX and CDNX ((2001), 24 O.S.C.B. 2555).

[16] On September 21, 2001, RS was incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as a separate entity independent of the TSX.

[17] On October 12, 2001, RS's application for recognition as an SRO was published for comment ((2001), 24 O.S.C.B. 6027) (the "**RS Application for Recognition and Request for Comment**"). The RS Application for Recognition and Request for Comment included a second version of UMIR and stated that the proposed criteria for recognition would include RS's adoption of UMIR, subject to approval by securities regulators in Alberta, British Columbia, Manitoba, Ontario and Quebec (the "**Recognizing Regulators**").

[18] Also on October 12, 2001, TSX-RS published a Regulatory Notice which stated that if the RS Application for Recognition was approved, RS would become the RSP for the TSX, UMIR, in the form approved by the Recognizing Regulators, would be adopted as the market integrity rules for the TSX, and the existing rules and policies of the TSX would be amended to delete any provisions where the subject matter is covered by UMIR (the "**October 2001 Regulatory Notice**").

[19] On October 16, 2001, the Ontario Minister of Finance approved NI 21-101, National Instrument 23-101, *Trading Rules* ("**NI 23-101**") and OSC Rule 23-501, *Designation as Market Participant* (the "**ATS Rules**"), which came into force on December 1, 2001 ((2001), 24 O.S.C.B. 10). Section 7.1 of the ATS Rules requires a recognized stock exchange to set requirements governing the trading activities of its members and to monitor and enforce the requirements either directly or indirectly through an RSP. If an RSP is used, section 7.2 states that the exchange shall enter into a written regulation services agreement that provides that the RSP will enforce the requirements set under section 7.1.

[20] At a meeting of the TSX Board of Directors (the "**TSX Board**") on November 27, 2001 (the "**November 27, 2001 Meeting**"), the TSX Board approved a third version of UMIR, which contained amendments to the October 12, 2001 version in response to the public comments received.

[21] The TSX Board also amended the TSX rules at the November 27, 2001 Meeting. The relevant changes for purposes of this Application included the following:

(a) Rule 1-101 was amended to define "RS Inc." to mean "Market Regulation Services Inc." and "UMIR" as "the Universal Market Integrity Rules as adopted by RS Inc. and approved by the applicable securities regulatory authorities and in effect from time to time";

(b) Rule 4-201 was added, which states:

> Each Participating Organization and each person under the jurisdiction of the Exchange shall comply with all applicable:
>
> (a) securities legislation;
>
> (b) Exchange Requirements; and
>
> (c) provisions of UMIR; and

(c) a number of provisions of the existing TSX rules and policies were repealed to avoid duplication or inconsistency with UMIR.

[22] The Minutes of the November 27, 2001 Meeting (the "**November 27, 2001 Minutes**") state the following about the amendments:

> THIS RULE AMENDMENT MADE the 27th day of November, 2001 to be effective following the approval of the Ontario Securities Commission on the date determined by the Exchange that RS Inc. shall commence to be the regulation service provider for the Exchange in accordance with requirements of National Instrument 23-101.

[23] The November 27, 2001 Minutes also state:

> With the recognition of RS Inc. as a regulation service provider, the UMI Rules will be approved by the securities regulatory authorities in Alberta, British Columbia, Manitoba, Ontario and Quebec. It is proposed that these rules then be incorporated into the rules of the TSE. Upon incorporation, a number of provisions of the existing rules and policies of the TSE would be repealed to avoid duplication or inconsistency.

[24] On January 29, 2002, in accordance with the ATS Rules, TSX transferred its market regulation function to RS pursuant to a regulation services agreement. The Commission amended its April 2000 TSX Recognition Order and continued the recognition of TSX under section 21 of the Act while adding certain terms and conditions, including that TSX "shall retain RS Inc. as an RSP to provide, as agent for the TSE, certain regulation services which have been approved by the Commission" ((2002), 25 O.S.C.B. 929) (the "**TSX Recognition Order**").

[25] Also on January 29, 2002, the Commission, under section 21.1 of the Act, recognized RS as an SRO responsible for administering and enforcing UMIR in the marketplaces that retain its services ((2002), 25 O.S.C.B. 929) (the "**RS Recognition Order**"). The RS Recognition Order stated that RS would provide regulation services as an agent for the TSX and, in this capacity, would "administer the exchanges' market conduct and trading requirements and monitor and enforce compliance with these requirements by the exchanges' members, their directors, officers, employees, affiliates and representatives".

[26] On February 15, 2002, the Commission published its Notice of Approval of RS, which indicated that Alberta, British Columbia, Manitoba and Quebec had also recognized RS as an SRO and approved UMIR (*Recognition of Market Regulation Services Inc. – Notice of Approval* (2002), 25 O.S.C.B. 891) (the "**RS Notice of Approval**")). The version of UMIR published as part of the RS Notice of Approval included the amendments to UMIR that were presented to the TSX Board at the November 27, 2001 Meeting.

[27] On March 7, 2002, TSX issued a Notice to Participating Organizations stating that the TSX had retained RS as its RSP effective March 1, 2002, and that effective April 1, 2002, the TSX would adopt UMIR as the trading rules for its Participating Organizations, and amend its existing rules and policies to delete or vary any provisions where the subject matter is covered by UMIR.

[28] On September 30, 2002, RS issued a Request for Comment on certain "Administrative and Editorial Amendments" to UMIR, which were approved by the RS Board of Directors on June 11, 2002. The Request for Comment notes that "the most substantive amendment extends responsibility for conduct of a Participant to the officer or employee of a Participant or Access Person that engages in conduct that results in the contravention of a requirement under UMIR". This amendment was effected by adding UMIR 10.3(4), which provides as follows:

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

[29] On January 30, 2004, the Commission issued a Notice of Commission Approval of the UMIR amendments, including the amendment to UMIR 10.3 ((2004), 27 O.S.C.B. 1333). On the same day, RS issued a Notice of Amendment Approval indicating that the amendments had been approved by the Recognizing Regulators.

[30] On September 29, 2006, the Commission published the following Notice of Approval:

> In November 2001, TSX Inc. (TSX) adopted certain amendments (Amendments) relating to the Universal Market Integrity Rules (UMIR) to be effective on the date determined by TSX that Market Regulation Services Inc. (RS) was to commence to be the regulation services provider for TSX. That date was determined to be April 1, 2002. The Amendments delete or vary the provisions of the Rules of the Toronto Stock Exchange, including its Policies, where the subject matter is covered by UMIR. The Amendments have now been filed with the Commission as "non-public interest" amendments and approved by the Commission pursuant to the Protocol for Commission Oversight of Toronto Stock Exchange Rule Proposals. A TSX Notice and the Amendments are being published in Chapter 13 of this Bulletin.
>
> (*Notice of Approval -- Amendments to the Rules of the Toronto Stock Exchange Relating to the Adoption of Universal Market Integrity Rules* (2006), 29 O.S.C.B. 7694)

E. The RS Proceeding

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

[32] UMIR came into effect on April 1, 2002. As stated above, effective January 30, 2004, UMIR were amended to add UMIR 10.3(4), which provides that an employee of a Participant who engages in conduct that results in the Participant contravening UMIR may be found liable for the conduct and sanctioned accordingly. As a result, from and after January 30, 2004, as a prima facie matter Berry can be found personally liable for causing Scotia to solicit the client orders and conduct the off-marketplace trades referred to above. In respect of the solicitations, 11 took place after January 30, 2004. In respect of the off-marketplace trades, 10 took place after January 30, 2004.

[33] RS Staff seeks the following sanctions in the RS Proceeding:

(a) a reprimand;

(b) a fine not to exceed the greater of

(i) $100,000 per contravention of a Requirement; and

(ii) an amount equal to triple the financial benefit which accrued to [Berry] as a result of committing each contravention;

(c) a restriction, suspension or revocation of access to the marketplace for such period and upon such terms and conditions, if any, considered appropriate; and

(d) any other remedy determined to be appropriate under the circumstances.

[34] On or around June 30, 2005, prior to the commencement of the RS Proceeding, Berry's employment with Scotia ended. Berry was an employee of Scotia at the time the alleged breaches of UMIR occurred.

(i) The RS Stay Decision

[35] The RS Panel heard Berry's motion on December 10, 2007 and dismissed it with written reasons in a decision dated February 29, 2008.

[36] With regard to the validity of UMIR, the RS Panel began by quoting the excerpt from the November 27, 2001 Minutes that is quoted at paragraph 23 of these reasons.

[37] The RS Panel continued as follows:

> The proposed changes were considered administrative in nature, and as such they were considered as approved upon being filed with the OSC. They were to take effect on the date on which RS became the TSE's regulation service provider, which it did on March 1, 2002.
>
> The Respondent submits that no formal adoption was ever recorded. As the extract from the minutes shows, it was proposed and adopted that the UMI Rules be incorporated into the rules of the TSE once the regulators had given their approval. While, with hindsight, it might have been better had the Board held a further meeting after the UMI Rules were approved by the regulatory authorities, we are not prepared to say that the actions taken on November 27, 2001 were in any way deficient. The rules were published, comments were received, changes were made, and a final version was presented to the Board, which it approved. In our view, this was akin to "adoption".
>
> (*RS Stay Decision, supra*, at p. 13)

[38] Moreover, the RS Panel concluded that the Commission had exercised its overriding supervisory authority and validated the applicability of UMIR to TSX Participants by approving UMIR:

> As we noted earlier, the Respondent also urged upon us that the "adoption" of UMIR was invalid because certain other rules had not been observed. That may be so, but in the final analysis we agree with counsel for RS that "[t]he Commission's approval of UMIR, of RS, and of TSX's transfer of regulatory power to RS, all demonstrate that the Commission has exercised [its over-riding statutory power] and given its blessing to UMIR's applicability to TSX participants." [citation deleted]
>
> This power finds its source in section 21(5)(e) of [the Act], which authorizes the Commission to "make any decision with respect to … any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange." Similarly, with respect [to] a self-regulatory organization such as RS, the Commission is entitled to "make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice." (Section 21.1(4))
>
> As RS points out [citation deleted], the *TSE Act* specifically provides (in section 14) that "[n]othing in this Act shall be construed to derogate from the powers of the Ontario Securities Commission and the *Securities Act* or any other Act." The Commission therefore had a free hand. It published drafts of UMIR in 2001, and it approved UMIR and recognized RS. On February 15, 2002, it published a Notice of Approval, which included a copy of UMIRs and the policies under them.
>
> By the same Notice, the Commission also approved the transfer of the market regulation function from TSX to RS, and the establishment, by TSX, of all the necessary rules. It is clear from the context that these "rules" are the UMI Rules.
>
> (*RS Stay Decision*, *supra*, at pp. 14-15)

[39] The RS Panel also dismissed Berry's alternative argument that the UMIR do not apply to him in any event because, as a former employee, he is not a "Participant" within the meaning of UMIR 6.4 and 7.7(5), and UMIR 10.3(4) does not extend to former employees. The RS Panel held that:

> The problem vis-à-vis former employees was corrected by the Legislature following the decision of the Ontario Court of Appeal in *Chalmers v. Toronto Stock Exchange* (70 O.R. (2d) 532), which held that former employees of members were not subject to the disciplinary powers of the Exchange since the relevant statute did not authorize such proceedings. The

amendment, passed to cure this effect (s. 13.0.8(1) of the *TSE Act*), now gives the Board the power to "govern and regulate . . . the business conduct of members . . . and of their current and former . . . employees and agents."

(*RS Stay Decision, supra*, at p. 11)

[40] With respect to UMIR 10.3(4), the RS Panel ruled:

UMI Rule 1.1 defines a "participant" as "… a person who has been granted trading access to a marketplace and who performs the functions of a derivative market trader." In our view, the use of the present tense is, by itself, insufficient to remove the Respondent from the outreach of the Rules under which he is charged. We agree with RS that the legislative amendment cited above gave ample authority to the Exchange to discipline former employees and members, and this authority was included in the delegation [of] its market regulation function to RS.

We are satisfied that the Rules cover ex-employees, and the Respondent cannot succeed on this point.

(*RS Stay Decision*, *supra*, at pp. 12-13)

[41] The RS Panel concluded its ruling by stating:

We are therefore of the view that we have the necessary jurisdiction to hear and decide the case brought by RS against the Respondent. It follows that the Motion to Stay the proceedings should be, and hereby is, dismissed.

(*RS Stay Decision*, *supra*, at p. 15)

(ii) The Section 21.7 Application

[42] Berry filed this Application on March 7, 2008. He submits that:

(a) RS is attempting to enforce UMIR, which were never validly adopted by the TSX or it is attempting to enforce the Former TSE Rules, which were expressly repealed by the TSX; and

(b) in the alternative, even if UMIR were validly adopted, RS does not have jurisdiction to enforce them against Berry given that Berry is not a Participant or an employee of a Participant.

[43] Berry seeks:

(a) an order pursuant to section 21.7 of the Act that the RS Proceedings are permanently stayed as being without jurisdiction. Section 21.7 provides that:

> The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling;

(b) in the alternative, an order pursuant to subsection 21.1(4) of the Act prohibiting RS from enforcing UMIR against Berry. Subsection 21.1(4) provides that:

> The Commission may, if it is satisfied that to do so would be in the public interest, make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized self-regulatory organization; and

(c) such further and other relief as counsel may advise and the Commission deems just.

II. The Issues

[44] The essential question raised in this Application is:

> Are UMIR enforceable against Berry, and does RS have jurisdiction to enforce them against Berry, given that he is no longer an employee of a Participant?

[45] As stated above, this Application raises a number of issues, the resolution of which could have an impact upon the applicability of rules of conduct governing market participants subject to the regulatory oversight of SROs.

[46] Berry's Application frames the issues for the Commission to determine as follows:

(a) Did TSX "make or adopt" UMIR and require persons within its jurisdiction to comply with UMIR?

(b) In any event, did the Commission's recognition of RS and approval of UMIR, as rules of RS, make UMIR (as amended) enforceable by RS against Berry?

(c) Notwithstanding or in addition to the foregoing, does RS have jurisdiction to bring a proceeding against a former employee of a Participant of the TSX?

[47] In his written submissions, Berry also submitted that in purporting to adopt UMIR, TSX did not comply with the Protocol for Commission Oversight of Toronto Stock Exchange Rule Proposals (*Memoranda of Understanding Between the Ontario Securities Commission and the Toronto Stock Exchange and the Toronto Futures Exchange* (1997), 20 O.S.C.B.

5682 (the "**MOU**") as required by the TSX Recognition Order, and therefore that UMIR were not validly adopted. However, in oral submissions, Berry stated that he was no longer pursuing that issue. Accordingly, that issue is not addressed in these reasons.

III. Threshold Issues: Prematurity and Standard of Review

[48] Before turning to the issues raised in the Application, we must dispose of two threshold or preliminary issues:

(a) Should the Application be dismissed as premature because the RS Proceeding has not yet been concluded? and

(b) What is the standard of review that should be applied by the Commission in considering the Application?

A. Prematurity

(i) Positions of the Parties

The Respondents

[49] RS Staff submits that the Application is premature. It relies on *Re TSX Inc*. (2007), 30 O.S.C.B. 8917 ("***Northern Securities***"), another section 21.7 application that concerned a challenge to the enforceability of UMIR, including UMIR 10.3(4). In that case, RS Staff argued that an application brought to the Commission to stay an RS proceeding was premature because it had been brought before the RS Panel had had an opportunity to rule on the UMIR validity issue. In the circumstances of that case, the Commission agreed that the application was premature.

[50] RS Staff urges us to reject Berry's argument that the reasoning of the Commission in *Re Berry* (2008), 31 O.S.C.B. 5441 ("***Berry Disclosure***") should be applied to this case. *Berry Disclosure* arose out of the same RS Proceeding that is before us. In that earlier proceeding, Berry applied under section 21.7 for a hearing and review of the RS Panel's refusal to order disclosure of certain documents he had requested from RS Staff. RS Staff submitted that the application should be dismissed on the basis that it was premature and would fragment the RS Proceeding. The Commission dismissed the prematurity motion and ordered the requested disclosures in order to enable Berry to prepare for the RS hearing on the merits. The Commission also found that rejecting the application as premature would offer no efficiency and could lead to further delay, if the need for disclosure of the requested documents became apparent during the RS hearing on the merits.

[51] RS Staff attempts to distinguish *Berry Disclosure* on the basis that this Application addresses a substantive legal issue on which the RS Panel has ruled, and therefore, rejecting the Application as premature would not affect the fairness of the RS Proceeding. RS Staff asks the Commission to dismiss the Application as premature, without prejudice to Berry's

right to argue these issues again, if he deems it necessary or appropriate, following the conclusion of the RS Proceeding.

[52] OSC Staff agrees with RS Staff that the Application is premature and submits that this is not a case of exceptional or extraordinary circumstances that would warrant interrupting the RS Proceeding.

[53] TSX takes no position on whether the Application is premature.

Berry

[54] Berry submits that because the RS Panel has already heard and decided the jurisdiction issue, there is nothing to be gained by remitting this matter back to the RS Panel for a hearing on the merits, which would be costly and unnecessary if Berry succeeds on the Application. As stated above, he relies on *Berry Disclosure* and the cases it follows and submits that *Northern Securities* is distinguishable.

(ii) Analysis and Conclusion on Prematurity

[55] In *Ontario College of Art et al. v. Ontario Human Rights Commission* (1993), 11 O.R. (3d) 798 (Ont. Div. Ct.) (“***Ontario College of Art*** ”), the Ontario Divisional Court set out the legal principles governing prematurity as follows:

> This court has a discretion to exercise in matters of this nature. It can refuse to hear the merits of such an application if it considers it appropriate to do so. Where the application is brought prematurely, as alleged by the Attorney General in these proceedings, it has been the approach of the court to quash the application, absent the showing of exceptional or extraordinary circumstances demonstrating that the application must be heard.
>
> (*Ontario College of Art*, *supra*, at p. 799)

[56] The Commission adopted these principles in *Northern Securities*, stating:

> Essentially, premature attempts to review tribunal decisions are routinely rejected because interrupting the proceedings prevents the first instance tribunal from properly and effectively performing its function.
>
> (*Northern Securities*, *supra*, at para. 180)

[57] The Commission also noted that these general legal principles were affirmed in *Coady v. Law Society of Upper Canada* (2003), 171 O.A.C. 51 (Ont. Div. Ct.) (“***Coady***”) where the Court stated:

> When litigants before administrative tribunals seek the court’s intervention in the midst of the litigation, the court is reluctant to do so except in very extraordinary circumstances. Experience has shown that the best course is to

> permit the hearings to be completed and then review the entire matter. Many apparent problems disappear in the light of further evidence, sometimes the result makes the application unnecessary.
>
> (*Coady*, *supra*, at para. 9, quoted in *Northern Securities*, *supra*, at para. 182)

[58] The Commission noted that the rationale for not dealing with premature applications is that it is preferable to consider a full record, including a reasoned tribunal decision (*Northern Securities, supra*, at para. 183, referring to *Ontario College of Art*).

[59] In conclusion, the Commission ruled in *Northern Securities* that:

> For these reasons, only in exceptional circumstances should a reviewing court or tribunal hear an application in the midst of a hearing before the first instance tribunal.
>
> (*Northern Securities*, *supra*, at para. 184)

[60] However, in some cases, an attack on the jurisdiction of a tribunal can constitute exceptional circumstances that justify the intervention of a reviewing court or tribunal. In our view, this may be particularly true when the original tribunal has appropriately considered and ruled upon the matter as a threshold question. As was noted in *Ainsley Financial Corp. v. Ontario Securities Commission*, [1993] O.J. No. 1830 (Ont. Gen. Div.) (“***Ainsley Gen. Div.***”) aff’d [1994] O.J. No. 2966 (Ont. C.A.):

> … the right of a litigant to challenge the jurisdiction of an administrative body to make rules, regulations or by-laws by bringing an action for a declaration that the administrative body has exceeded its jurisdiction under its enabling statute in issuing the disputed provisions, is well settled.
>
> (*Ainsley Gen. Div.*, *supra*, at para. 91)

[61] Similarly, in *Roosma v. Ford Motor Co. of Canada Ltd*, [1988] O.J. No. 3114 (Ont. Div. Ct.) (“***Roosma***”), the Ontario Divisional Court stated:

> Notwithstanding their reluctance to intervene in the proceedings of tribunals prior to their completion courts will do so in order to avoid wasting time and money. Thus, if it appears at the outset that a proceeding in a tribunal will be fatally flawed, a means exists by way of judicial review to challenge it. That is so even where an appeal is provided.
>
> (*Roosma*, *supra*, at para. 31)

[62] In this case, the Application, if successful, would put an end to the RS Proceeding and make a hearing on the merits before the RS Panel unnecessary. In these circumstances, we

accept Berry's submission that it would be unfair to all parties concerned to defer a hearing of the Application until after the hearing on the merits.

[63] This case is distinguishable from *Northern Securities*, where the application was brought before the RS Panel had heard and decided the jurisdictional issues. In contrast, in this case, the RS Panel heard and decided the jurisdictional issues that are in dispute in this Application, there are no additional facts relevant to the matter that are not before us, and we have the full record and reasons of the RS Panel that are necessary to decide the issues raised in this Application.

[64] As the Commission noted in *Berry Disclosure*:

> On the other hand, when approaching matters such as the one before us, the Commission can, and should, as Berry has submitted, consider the impact the reviewed decision has on the fairness to the applicant and whether the Commission's intervention would facilitate rather than interfere with the SRO process.
>
> (*Berry Disclosure, supra*, at para. 62)

[65] Applying the factors discussed above to the case before us, we conclude that the Application is not premature. We find, in the circumstances of this Application, that it is in the interests of fairness to Berry and other persons within the jurisdiction of the TSX for us to hear and determine the Application at this time and that doing so will facilitate rather than interfere with the SRO process.

B. Standard of Review

(i) Positions of the Parties

Berry

[66] Berry submits that the Commission should generally defer to the RS Panel with respect to its factual determinations. However, he submits that the RS Panel has no more specialized expertise than the Commission on the questions of law at issue in this Application and therefore no deference is warranted. Accordingly, Berry submits that the standard of review of the RS Panel's findings is correctness.

The Respondents

[67] RS Staff agrees with Berry that the Commission may substitute its own view for that of the RS Panel and need not show deference to the RS Panel on the issues in question.

[68] OSC Staff agrees that the Commission may substitute its judgment for that of the RS Panel, but submits that the Commission should take a restrained approach and if it does intervene, it should explicitly state the basis for its intervention. OSC Staff cites *Boulieris v.*

Investment Dealers Association of Canada, [2005] O.J. No. 1894 (Div. Ct.) ("***Boulieris Div. Ct.***") and *Taub v. Investment Dealers Association of Canada*, [2008] O.J. No. 2778 (Ont. Div. Ct.) ("***Taub (Div. Ct.)"***) in support of this position.

(ii) Analysis and Conclusion on Standard of Review

[69] In *Re Boulieris* (2004), 27 O.S.C.B. 1597 ("***Re Boulieris***"), the Commission described its approach to applications under section 21.7 of the Act in the following terms:

> The Commission may "confirm the decision under review or make such other decision as the Commission considers proper." The Commission is, therefore, free to substitute its judgment for that of the District Council. The hearing and review is treated much like a trial *de novo* where the panel may admit new evidence as well as review the earlier proceedings and the applicant does not have the onus of showing that the District Council was in error in making the decision that is the subject of the application. See *Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105 and *Re Security Trading Inc*., [1995] T.S.E.D.D. No.2; *Picard and Fleming - Brokers*, November (1953), O.S.C.B. 14; *BioCapital Biotechnology and Healthcare Fund and BioCapital Mutual Fund Management Inc*. (2001), 24 O.S.C.B. 2659 at 2662.
>
> In this regard, a hearing and review may be considered broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or whether a rule of natural justice has been contravened. See *Re C. Cole & Co Ltd., Coles Books Stores Ltd. and Cole's Sporting Goods Ltd.*, [1965] 1 O.R. 331; affirmed [1965] 2 O.R. 243 (C.A.).
>
> However, in practice the Commission takes a restrained approach. The Commission will interfere with a decision of a self-regulatory organization (SRO) if any of the following grounds are present:
>
> 1. the SRO has proceeded on an incorrect principle;
> 2. the SRO has erred in law;
> 3. the SRO has overlooked some material evidence;
> 4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or
> 5. the SRO's perception of the public interest conflicts with that of the Commission's.

> See *Re Canada Malting* (1986), 9 O.S.C.B. 3565 at 3587 and *Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105.
>
> The Commission will not substitute its own view of the evidence for that taken by an SRO just because the Commission might have reached a different conclusion. See *Re Cavalier Energy Ltd.* (1991), 14 O.S.C.B. 1480 at 1482; *Re Lafferty, Harwood & Partners Ltd. and Board of Governors of the Toronto Stock Exchange* (1973), O.S.C.B. 26, confirmed (1975), 8 O.R. (2d) 604 at 607 (Ont. Div. Ct.); and *GHZ Resource Corporation v. Vancouver Stock Exchange* (1993), 1 B.C.J. No. 3106 at para. 7 (B.C. C.A).
>
> (*Re Boulieris, supra*, at paras. 29-32)

[70] These principles were reaffirmed in *Taub (Div. Ct.)*, at paras. 25-34[1], and in *Berry Disclosure*, where we described our approach as follows:

> . . . . Although the statute provides the Commission with broad powers of review, the Commission has repeatedly emphasized the "restrained approach" urged upon us by Staff and RS. Such restraint is desirable to ensure that SROs have adequate control and direction over their own processes and procedures, and that they are not unduly hampered by interruptions caused by parties seeking a "second opinion" in the midst of an ongoing SRO regulatory proceeding. On the other hand, when approaching matters such as the one before us, the Commission can, and should, as Berry has submitted, consider the impact the reviewed decision has on the fairness to the applicant and whether the Commission's intervention would facilitate rather than interfere with the SRO process.
>
> We also agree with Berry that the nature and characteristics of the specific issue in dispute is relevant to this analysis. It is true that an RS Panel ought to be master of its own process and procedures, in a manner similar to this Commission in regard to its own proceedings. However, RS does not have unique or special expertise or jurisdiction with respect to disclosure issues and it is appropriate for the Commission to exercise its oversight powers to ensure procedural fairness in the RS Proceeding. Assessments and reviews of those matters should be measured against practices and principles articulated in law. In situations where the decision under review deals specifically with an issue squarely within an SRO's expertise or jurisdiction, higher deference should be accorded to the SRO.
>
> (*Berry Disclosure*, *supra*, paras. 62 and 63)

[1] On appeal to the Ontario Court of Appeal, *Taub (Div. Ct.)* was reversed on another point (*Taub v. Investment Dealers Association of Canada*, 2009 ONCA 628 ("***Taub (Ont.C.A.)***").

[71] We accept that the law is correctly stated in *Boulieris*, *Taub (Div. Ct.)* and *Berry Disclosure*, and we apply these principles in this case.

[72] This case does not involve a party's challenge to an RS Panel's findings of fact within its area of specialized expertise (as to the application of UMIR to specific circumstances, for example). Rather, the Application concerns questions of law and the role and powers of the TSX and RS within the framework of securities regulation in Ontario. Although we recognize the expertise of the TSX and RS in their respective roles, we find that neither the TSX nor RS has greater expertise than the Commission in respect of the issues arising in this Application. As the issues raised in this Application go to the heart of the Commission's supervisory jurisdiction and public interest mandate, we conclude that we may consider the issues before us as if they were matters of first instance and that we are free to substitute our decision for that of the RS Panel.

IV. Applicability of UMIR: Positions of the Parties

A. Did TSX "make or adopt" UMIR and require persons within its jurisdiction to comply with UMIR?

(i) Did TSX Adopt UMIR at the November 27, 2001 Meeting?

Berry

[73] Berry submits that UMIR were not presented to the TSX Board in final form at the November 27, 2001 Meeting and, accordingly, they were not adopted by the TSX Board on that day.

[74] Berry notes that the November 27, 2001 Minutes indicate that the TSX Board expected to receive further comments on UMIR from the CSA and intended to make further changes to UMIR based on those comments before UMIR were adopted and approved by securities regulators. Berry compares the version of UMIR considered by the TSX Board and the February 15, 2002 version that was approved by the Commission and submits that "extensive amendments were made" after the November 27, 2001 Meeting.

[75] Further, Berry submits that the November 27, 2001 Minutes do not indicate that the TSX Board adopted UMIR but rather proposed their incorporation into the TSX rules at a later date.

RS Staff

[76] RS Staff submits that the TSX Board took all the necessary steps at the November 27, 2001 Meeting to adopt UMIR and repeal duplicative TSX rules upon the transfer of regulatory services to RS and approval of UMIR by securities regulators. The use of the future tense in the November 27, 2001 Minutes was appropriate, according to RS Staff, because the TSX Board did not know when UMIR would take effect. That date turned out to

be April 1, 2002, one month after RS became RSP to the TSX. By that time, the TSX Board had discharged its role.

[77] RS Staff relies on the amendment to the TSX Rules that added a definition of "UMIR" as "the Universal Market Integrity Rules as adopted by RS Inc. **and approved by the applicable securities regulatory authorities and in effect from time to time**", and Rule 4-201, that requires each Participating Organization and each person under the jurisdiction of the Exchange to comply with "**all applicable**" securities legislation, Exchange Requirements and provisions of UMIR [emphasis added] (see paragraph 21 of these reasons). The November 27, 2001 Minutes confirmed that UMIR would take effect when RS became the RSP:

> THIS RULE AMENDMENT MADE the 27th day of November, 2001, to be effective following the approval of the Ontario Securities Commission on the date determined by the Exchange that RS Inc. shall commence to be the regulation service provider for the Exchange in accordance with the requirements of National Instrument 23-101.

[78] RS Staff submits that these amendments contemplate future amendments of UMIR – and indeed, of securities legislation – from time to time without the need for the TSX Board to consider and approve each subsequent amendment. As evidence supporting this submission, RS Staff notes that the TSX Board has not considered it necessary to amend its Rules every time UMIR has been amended in the roughly seven years since UMIR were approved. Further, RS Staff submits that there is no basis in law for any such requirement.

TSX

[79] The TSX concurs with the submissions made by RS Staff. The TSX submits that it adopted UMIR by amending its Rules to add Rule 4-201 and a definition of "UMIR" in Rule 1-101, the amendments to take effect at a future date, and no further action was necessary. Requiring TSX to put each and every provision of UMIR into its rule book would be excessively formal and impractical because UMIR were developed by RS, subject to approval by securities regulators, and liable to change from time to time. Moreover, Rule 4-201 also requires compliance with "securities legislation", which is amended from time to time, but it would be nonsensical to suggest that the TSX has to reiterate each and every provision of applicable securities legislation in its own rules.

OSC Staff

[80] OSC Staff agrees with the submissions of RS Staff and the TSX.

(ii) Did TSX Exceed its Jurisdiction by Adopting UMIR or Incorporating UMIR by Reference?

Berry

[81] In the alternative, Berry submits that if the TSX Board adopted UMIR at the November 27, 2001 Meeting, it exceeded its jurisdiction under the *TSX Act* by doing so. He submits that it is well settled law that the TSX, as a statutory body, and RS, as a domestic tribunal, cannot exceed their jurisdiction or confer expanded jurisdiction on themselves (*Ainsley General Division*, *supra*, at paras. 23-24 and 75-76; and *Chalmers v. Toronto Stock Exchange*, [1989] O.J. No. 1839 (Ont. C.A.) ("***Chalmers***") at paras. 26 and 28, leave to appeal dismissed, *Toronto Stock Exchange v. Chalmers*, [1989] S.C.C.A. No. 446 (S.C.C.)).

[82] Subsection 13.0.8(1) of the *TSX Act* gives the TSX Board certain powers to govern and regulate the Exchange. Subsection 13.0.8(2) of the *TSX Act* states:

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

[83] Berry submits that in Ontario statutes, the term "adopt" is synonymous with the term "make" and the two terms are used interchangeably. For example, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, in subsection 25.1(1) states "a tribunal may **make** rules governing the practice and procedure before it", and in subsection 25.1(5), states "the rules **adopted** under this section are not regulations as defined in Part II of the Legislation Act, 2006" [emphasis added]. (See also *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, at subsection 2(1) and section 176; and *Greenbelt Act*, 2005, S.O. 2005, c. 1 at subsections 13(3) and 18(7).) Berry notes, as well, the following statement from *The Interpretation of Legislation in Canada*:

> Even if the contrary is presumed, a statute may certainly be redundant. Sometimes the drafter has good reasons for saying the same thing in more than one way, for example, to dispel doubts or avoid controversy.
>
> (Pierre-André Coté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville (Quebec): Les Editions Yvon Blais, Inc., 1992) ("**Coté**"), at p. 233)

[84] Berry submits that subsection 13.0.8(2) gives the TSX Board power to adopt rules it has considered and approved, but does not authorize the adoption, or incorporation by reference, of rules considered and approved by RS, an external body. Berry submits that when the Ontario legislature intends to authorize an administrative body to adopt or incorporate

external standards by reference, it does so expressly and specifically in the rule-making provisions of the enabling legislation. In support of this position, Berry cites, for example, subsection 143(6) of the Act ("Incorporation by reference"), which states: "A regulation or rule may incorporate by reference, and require compliance with, one or more provisions of an Act or regulation and all or part of any standard, procedure or guideline." (See also: subsection 65(6) of the *Commodity Futures Act*, R.S.O. 1990, c. C.20, as amended; subsection 44(3) of *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B, as amended; and subsection 11(2) of the *Racing Commission Act*, 2000, S.O. 2000, c. 20, as amended.)

[85] Berry submits that the absence of similar express language in the *TSX Act* is significant because there is a presumption that the legislature uses the same language to mean the same thing when legislating in the same field. By giving the TSX Board power to "make or adopt" rules, the legislature impliedly excluded incorporation by reference or adoption by reference, in Berry's submission. (Coté, *supra*, at p. 291; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), at pp. 244, 248; and *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485 (Ont. C.A.) at para 31-32; leave to appeal dismissed, [2002] S.C.C.A. No. 23.)

[86] Further, Berry submits that while subsection 13.0.8(4) of the *TSX Act*[2] gives the TSX Board power to delegate its powers to "investigate", "examine", "hold hearings", "make determinations" and "discipline", it does not authorize delegation of "rule-making". Berry submits that for the TSX Board to adopt UMIR or incorporate UMIR by reference would result in impermissible subdelegation of the TSX Board's authority. The rule against subdelegation holds that, "absent express authority, a delegate of legislative powers may not further subdelegate those powers to another. It is enshrined in the legal maxim *delegatus non potest delegare*: a delegate cannot delegate" (Paul Salembier, *Regulatory Law and Practice in Canada* (Markham: LexisNexis, 2004) at p. 247). (See also: *Re Therrien*, [2001] S.C.J. No. 36 (S.C.C.) at para. 93; *Barnard v. National Dock Labour Board*, [1953] 1 All E.R. 1113

[2] Subsection 13.0.8(4) of the *TSX Act* provides as follows:

> The board of directors may by order delegate to one or more persons, companies or committees the power of the board of directors,
>
> > (a) to consider, hold hearings and make determinations regarding applications for any acceptance, approval, registration or authorization and to impose terms and conditions on any such acceptance, approval, registration or authorization;
> >
> > (b) to investigate and examine the business conduct of members of the continued Corporation, former members of the continued Corporation and other persons or companies referred to in clauses (1) (c) and (d); and
> >
> > (c) to hold hearings, make determinations and discipline members of the continued Corporation, former members of the continued Corporation and other persons or companies referred to in clauses (1) (c) and (d) in matters related to business conduct.

(C.A.), at p. 1118; and *King v. Nova Scotia (Institute of Chartered Accountants)*, [1993] N.S.J. No. 25 (N.S.T.D.) at p. 8.)

[87] In the further alternative, Berry submits that the open-ended nature of certain UMIR provisions has the effect of delegating the TSX's rule-making authority not only to RS but also to any employee of RS designated by RS as a "Market Integrity Official" to exercise the powers of RS under UMIR, including the power to make "Requirements". UMIR 7.1(2)(c) and 10.1(1) require compliance with Requirements, and UMIR 1.1 defines "Requirements" to include UMIR, RS policy, and "any direction, order or decision of the Market Regulator or a Market Integrity Official, as amended, supplemented and in effect from time to time". Berry submits, accordingly, that anyone subject to UMIR may be subjected to capricious and arbitrary decisions of RS or RS employees. Berry submits that this amounts to impermissible delegation and subdelegation of the exclusive rule-making authority of the TSX Board. (*Dene Nation v. Canada*, [1984] F.C.J. No. 188 (F.C.T.D.); *Canada (Attorney General v. Brent*, [1956] S.C.J. No. 10 (S.C.C.); *Outdoor Neon Displays Ltd. & Toronto*, [1959] O.J. No. 642 (Ont. C.A.), aff'd *Toronto (City) v. Outdoor Neon Displays Ltd.*, [1960] S.C.J. No. 10 (S.C.C.).)

RS Staff

[88] RS Staff submits that the TSX Board has the power to "make or adopt" rules, including UMIR. RS Staff submits that the inclusion of both "make" and "adopt" in subsection 13.0.8(2) of the *TSX Act* must mean that the words have different meanings. RS Staff submits that while the TSX "makes" a rule it creates, "adopt" has a broader meaning. RS Staff refers to a dictionary definition of the word "adopt" which includes "take as one's own" (Random House Unabridged Dictionary, 2006, as referred to at http://dictionary.reference.com/browse/adopt). RS Staff submits that the TSX Board properly adopted UMIR at the November 27, 2001 Meeting.

[89] RS Staff also submits that the absence of express language granting the TSX the power to incorporate by reference is of no consequence because the plain meaning of "adopt" embraces incorporation by reference. On this point, RS Staff relies on *Canada Post Corp. v. Key Mail Canada Inc*. (2005), 77 O.R. (3d) 294 ("***Key Mail***"), where the Ontario Court of Appeal rejected an argument that by granting Canada Post "the sole and exclusive privilege of collecting, transmitting and delivering letters to the addressee thereof within Canada," the legislature excluded outgoing international mail from the scope of the monopoly or privilege. With respect to the principle of implied exclusion (*expressio unius est exclusio alterius*), the Court said the following:

> The maxim "to express one thing is to exclude another" applies in statutory interpretation terms "whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly": R. Sullivan, *Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 186. As Professor Sullivan points out, at p. 187, however, "[t]he force of the implication

> depends on the strength and legitimacy of the expectation of express reference".
>
> (*Key Mail*, *supra*, at para. 22)

[90] RS Staff submits that under the ordinary principles of statutory interpretation the power to "adopt" rules includes the power to incorporate rules made by another body, and therefore the legislature's use of the words "make" and "adopt" in the *TSX Act* does not imply the exclusion of incorporation by reference.

[91] Further, RS Staff submits that in exercising its power to "make or adopt rules", the TSX Board need not spell out each and every provision of UMIR in its own rules.

[92] Finally, RS Staff submits that the Commission's consideration of what the statute authorizes has to be guided principally by the plain language of the statute and the purpose of the statute and that construing the word "adopt" narrowly would make it more difficult for the TSX to regulate its members.

[93] In response to Berry's submission that the TSX's adoption of UMIR amounts to an improper subdelegation of the TSX's rule-making power to RS and RS officials, RS Staff submits that the RS Proceeding does not involve the specific sections of UMIR that Berry identifies as problematic, and that the provisions of UMIR at issue in the RS Proceeding do not involve the exercise of rule-making discretion on the part of RS or its employees.

[94] In the alternative, RS Staff submits that, under UMIR 10.5, the powers of a market regulator are subject to oversight by an RS hearing panel. Further, RS Staff submits that the powers of Market Integrity Officials do not amount to subdelegation because generally they are on-the-spot short-term powers that are necessary given the fact that there is a real time surveillance aspect to regulating the Exchange.

[95] In response to Berry's submission that by requiring compliance with UMIR at a time when the language of UMIR was not finalized, the TSX Board engaged in improper subdelegation, RS Staff submits that by the same logic the requirement in TSX Rule 4-201 to comply with "securities legislation" would also amount to improper subdelegation, as the TSX Board does not approve each amendment of securities legislation. RS Staff submits that such a conclusion is untenable and thus Berry's argument that requiring compliance with UMIR amounts to improper subdelegation cannot succeed.

TSX

[96] TSX agrees with RS Staff's submissions. TSX submits that the inclusion of the term "adopt" in subsection 13.0.8(2) of the *TSX Act* gives the TSX power to adopt or incorporate by reference external rules or standards. TSX submits that the term "adopt" means to "pass or put into operation or enact" and "to take as one's own or to incorporate". TSX submits that this latter meaning gives the TSX Board the power to incorporate by reference.

[97] TSX finds further support for its position in the legislative evolution of the *TSX Act*. Prior to 1997, the *TSX Act* gave the TSX Board the power to "pass such by-laws and **make** such rules and regulations and issue such orders and directions pursuant to such by-laws as it considers necessary…" [emphasis added] (*Toronto Stock Exchange Act,* R.S.O. 1980, c. 506, as amended, subsection 10(1)).

[98] In 1997, as part of the demutualization process, the *TSX Act* was amended and the TSX Board was given power to "pass such by-laws and make such rulings, **adopt** such policies, rules and regulations and issue such orders and directions pursuant to such by-laws as it considers necessary…" [emphasis added] (S.O. 1997, c. 19, s. 26(6)). TSX submits that this amendment allows the TSX Board to incorporate external standards by reference.

[99] TSX further submits that a 1999 amendment, which changed the provision to state that the TSX Board has power to "pass by-laws, **make or adopt** rulings, policies, rules and regulations and issue orders and directions as it considers necessary…" [emphasis added] (S.O. 1999, c. 9, s. 23), was merely formal and not substantive.

[100] TSX cites *Kingston v. Ontario (Racing Commission)*, [1965] O.J. No. 951 (Ont. H.C.J.), aff'd [1965] O.J. No. 249 (Ont. C.A.) ("***Kingston***") in support of its position that there is nothing improper in adopting the rules of an external organization. In *Kingston,* the appellant challenged certain delegations made to the Canadian Trotting Association by the Ontario Racing Commission. The Court ruled, in part, that the mere embodiment of the rules of another organization into the rules of the adopting organization did not amount to the delegation of the authority to make rules.

[101] TSX also agrees with RS Staff's submissions with respect to improper subdelegation. TSX submits that improper subdelegation occurs when all discretion is delegated from one level arbitrarily down to the next. TSX submits that it has not delegated all its discretion to RS because it retains the power to repeal Rule 4-201, which requires compliance with UMIR.

[102] TSX also relies on *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569 (S.C.C.) ("***Coughlin***"). The issue in *Coughlin* was whether federal legislation (the *Motor Vehicle Transport Act*) was *ultra vires* Parliament because it delegated certain aspects of the regulation of inter-provincial transport to provincial transport boards. The Supreme Court of Canada held that there was no improper delegation of federal law-making power since Parliament could, at any time, alter the powers it had granted; rather, Parliament had adopted the legislation of the provinces as that legislation might, from time to time, exist.

[103] TSX submits that, when deciding if a subdelegation is valid or invalid, the key determining factor is whether the delegation conforms to the intentions of the legislature. TSX cites *Peralta v. Ontario* (1985), 49 O.R. (2d) 705 (C.A.) aff'd (1988), S.C.J. No. 92 ("***Peralta***") for support of its proposition that legislative intention is paramount. In *Peralta*, the Minister of Natural Resources of Ontario began issuing commercial fishing licenses with quotas, something he had never done before. Peralta argued that the federal *Fisheries Act*, under which the provincial Minister has authority to do so, created an unauthorized subdelegation. In deciding *Peralta*, the Supreme Court of Canada noted that there is no rule or

presumption against subdelegation; what is important is whether the legislative intent behind the affected statute is being fulfilled.

OSC Staff

[104] OSC Staff agrees with TSX's submission that the power to "adopt" in subsection 13.0.8.(2) of the *TSX Act* allows the TSX to incorporate by reference external standards. OSC Staff did not make submissions on the issue of subdelegation.

B. Is UMIR 10.3(4) valid and enforceable against Berry?

Berry

[105] Even if the TSX Board validly adopted UMIR at the November 27, 2001 Meeting, Berry submits, in the alternative, that UMIR 10.3(4), which is the provision upon which RS relies to extend personal responsibility to Berry for the contraventions by Scotia, was never adopted by the TSX Board.

[106] Berry submits that it was RS, not the TSX, that proposed and approved the amendment. He submits that there is no evidence that UMIR 10.3(4) was ever considered or adopted by the TSX Board pursuant to subsection 13.0.8(1) of the *TSX Act*, which gives the TSX Board its rule-making power, and thus, Berry submits, UMIR 10.3(4) has no application.

RS Staff

[107] RS Staff submits that the inclusion of the words "from time to time" in the definition of UMIR (found in TSX Rule 1-101) evidences the TSX Board's understanding that UMIR would be amended as necessary. RS Staff further submits that the obligation to comply with "all applicable provisions of UMIR" in TSX Rule 4-201 includes subsequent amendments so long as they have been approved by the Commission and are "in effect" at the time of the relevant conduct.

[108] RS Staff submits that the fact that the TSX Board has not considered it necessary to pass a new rule every time UMIR has been amended confirms that the TSX Board intended, and has always acted on the basis, that TSX Rules 4-201 and 1-101 impose an obligation on TSX members to "comply with UMIR", thus incorporating UMIR (and any amendments to UMIR that are approved by the Commission) into TSX rules.

C. Did the Commission's recognition of RS and the TSX and approval of UMIR make UMIR enforceable by RS against Berry?

Berry

[109] Berry submits that the Commission's oversight authority over the TSX does not include the power to make rules for the TSX to cure the TSX's procedural deficiencies in approving UMIR.

[110] Subsection 21(5) of the Act gives the Commission supervisory jurisdiction over the TSX. It states:

> The Commission may, if it appears to be in the public interest, make any decision with respect to,
>
> …
>
> (e) any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange.

[111] Berry submits that paragraph 21(5)(e) of the Act authorizes the Commission to make a decision with respect to a *pre-existing* rule of the Exchange, but not to make rules *for* the Exchange. Further, while paragraph 143(1)12 of the Act grants the Commission extensive rule-making authority with respect to stock exchanges, Berry submits that it does not authorize the Commission to make rules *for* an exchange. Further, Berry submits that there is no evidence that the Commission undertook to follow any part of the mandatory rule-making procedure set out in section 143.

[112] Berry argues that had the legislature intended to give the Commission power to make rules for the TSX, it would have done so expressly. For this proposition Berry cites *Ainsley Gen. Div*., where the Court ruled that the Commission had exceeded its authority by issuing a policy statement that purported to govern securities dealers without explicit authority to do so under the Commission's enabling legislation (*Ainsley Gen. Div.*, *supra*, at paras. 66 and 67).

[113] Berry submits that the Commission's position has long been that the TSX is responsible for administering its affairs, including making its own rules, and that the Commission considers TSX rules only after they are in the form of formal proposals. Berry cites *In the Matter of the Toronto Stock Exchange and the Proposed Schedule of Commission Rates* (1967), O.S.C.B. 15, and *Re Instinet* (1990), 13 O.S.C.B. 2179.

[114] Berry argues that while section 14 of the *TSX Act* provides that nothing in that Act shall be construed to derogate from the powers of the Commission, this does not give the Commission powers or jurisdiction beyond those set out in its enabling legislation. Accordingly, Berry submits that the RS Panel erred when it ruled that section 14 of the *TSX Act* gives the Commission a "free hand" to make rules for the TSX (*RS Stay Decision*, *supra*, at p. 14).

[115] It is Berry's position that interpreting subsection 21(5) or subsection 143(1) of the Act to mean that the Commission has a "free hand" to create rules and adopt UMIR for the TSX, would directly conflict with the *TSX Act*, NI 23-101, the MOU and every TSX Recognition Order issued by the Commission, because all, in some manner, require the TSX to create its own rules.

RS Staff

[116] In response, RS Staff notes that paragraph 21(5)(e) of the Act gives the Commission power to "**make any decision with respect to** . . . **any** . . . rule" of an Exchange [emphasis added] and that subsection 21.1(4) uses the same broad language with respect to the Commission's supervisory authority over SROs. RS Staff relies on *Northern Securities*, *supra*, at paras. 100 and 134-137, where the Commission confirmed that paragraph 21(5)(e) gives the Commission an "overriding supervisory jurisdiction" over the TSX and its rules. While the cases cited by Berry demonstrate a variety of ways in which this power has been exercised in the past, RS Staff submits that none of those cases restrict the ambit of the Commission's overriding power.

[117] RS Staff submits that in approving UMIR, the Commission did not impose a rule on the TSX because the TSX Board had passed Rule 4-201 at the November 27, 2001 Meeting. RS Staff submits that in that context, paragraph 21(5)(e) of the Act makes it clear that if there is a technical defect in the process (arising from a Recognition Order, National Instrument, etc.), the Commission has power to make a decision approving the change. RS Staff submits that the Commission, through its actions in 2002 (approving UMIR, recognizing RS and recognizing the TSX on condition, among other things, that TSX retain RS as its RSP) and in 2006 (approving the amendments reflected in TSX Rules 1-101 and 4-201) has exercised this power.

[118] In summary, RS Staff submits that neither a technical breach of other Commission instruments nor a breach of the *TSX Act* can displace the Commission's overriding authority to approve the adoption of UMIR by the TSX.

OSC Staff

[119] OSC Staff submits that the Commission has supervisory jurisdiction over SROs pursuant to section 21.1 of the Act and that it recognized RS and approved UMIR pursuant to that jurisdiction. The Commission also has supervisory jurisdiction over stock exchanges pursuant to section 21 of the Act. Pursuant to that jurisdiction, the Commission approved the TSX's transfer of certain regulation services to RS and amended the TSX Recognition Order to reflect that RS would be entitled to exercise the authority of the TSX with respect to the administration and enforcement of UMIR.

[120] OSC Staff further submits that the TSX's adoption of Rule 4-201 (which was not an adoption of UMIR but of a rule implementing UMIR for its Participating Organizations) was deemed approved by the Commission on the TSX's filing of Rule 4-201 with the Commission.

TSX

[121] TSX did not make submissions on the effect of the Commission's approval of UMIR.

V. Applicability of UMIR: Analysis

[122] Given the conclusions we have reached, we address the issues raised by Berry, but in a different order than they were addressed before us.

A. The Commission's recognition of RS and approval of UMIR makes UMIR enforceable by RS against persons within the TSX's jurisdiction

[123] The RS Panel, in its reasons, said the following:

> …in the final analysis we agree with counsel for RS that [t]he Commission's approval of UMIR, of RS, and of TSX's transfer of regulatory power to RS, all demonstrate that the Commission has exercised [its over-riding statutory power] and given its blessing to UMIR's applicability to TSX participants.
>
> (*RS Stay Decision*, *supra*, at p. 14)

[124] We agree.

[125] While counsel for Berry has done an exemplary job at characterizing the complex issues before us as a question relating to the actions of the TSX Board, we agree with OSC Staff's observation that Berry's argument "conflates the approval of the substance of UMIR and the approval of TSX's adoption of UMIR into its own rule book". The distinction between RS approval and the TSX rule-amending process, however, is significant and has different purposes and legal effects. For us, the overall regulatory scheme including the Commission's discretionary and authorizing power to "recognize" an SRO, and the public interest principles it reflects, is the key to resolving this Application.

[126] While the TSX's process for its own "adoption" of UMIR may not have been ideal, in our view, a strict review of that process and its effectiveness is unnecessary to resolve the issues raised in this Application. We are of the view that the appropriate place to start an analysis of RS's jurisdiction is with the regulatory purpose and history of RS, and the source of its jurisdiction over TSX Participants and their employees.

[127] A review of the Chronology section of these reasons highlights the following:

(a) In the April 2001 Regulatory Notice, UMIR were published for public comment jointly by the TSX, RS and CDNX. As well, the CSA published a Request for Comment and proposed that "the market regulator will adopt the UMI rules" and "the TSE and CDNX will delete their existing market integrity rules".

(b) The April 2001 Regulatory Notice also indicated that if and when UMIR became effective, the existing rules and policies of the Exchange and the CDNX would be amended to delete any provisions where the subject matter is covered by UMIR.

(c) An 85-day public comment period followed the publication of the April 2001 Regulatory Notice.

(d) RS was incorporated as a legal entity in September 2001.

(e) In October 2001, the Recognizing Regulators published a notice seeking further public comment on the proposed recognition of RS as the RSP for TSX (the RS Application for Recognition and Request for Comment) and the TSX issued a further notice concurrently, indicating that recognition of RS as its RSP would trigger the application of UMIR to its members (the October 2001 Regulatory Notice).

(f) The Commission recognized RS as an SRO by order dated January 29, 2002. In the RS Recognition Order, the Commission approved UMIR and the policies under UMIR, as well as the transfer of market regulation functions from TSX to RS.

[128] To repeat, for us, the determining issue is the legal effect of the Commission's RS Recognition Order and approval of UMIR.

[129] As pointed out, the Commission has overriding supervisory authority over both the TSX and RS. This authority is granted by statute. Pursuant to subsection 21(1), "no person or company shall carry on business as a stock exchange in Ontario unless recognized by the Commission under this section". Subsection 21(2) states that "the Commission may, on the application of a person or company proposing to carry on business as a stock exchange in Ontario, recognize the person or company if the Commission is satisfied that to do so would be in the public interest". Similarly, subsection 21.1(1) of the Act states that "the Commission may, on the application of a self-regulatory organization, recognize the self-regulatory organization if the Commission is satisfied that to do so would be in the public interest".

[130] Pursuant to subsection 21(4) of the Act, a recognized stock exchange shall regulate the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, regulations, policies, procedures, interpretations and practices. Pursuant to subsection 21(5) of the Act, the Commission may, if it appears to be in the public interest, make any decision with respect to:

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

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

. . .

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

[131] Similarly, by virtue of subsection 21.1(3) of the Act, "a recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices". Pursuant to subsection 21.1(4), "The Commission may, if it is satisfied that to do so would be in the public interest, make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation, and practice of a recognized self-regulatory organization."

[132] Recognition of an exchange and/or a self-regulatory organization is a discretionary "decision" made under section 21 (or section 21.1 in the case of an SRO) of the Act.

[133] In our view, the Commission's decision to recognize RS and RS's adoption of UMIR and the enforceability of UMIR as against TSX Participants and their employees as a term and condition of such recognition, was made pursuant to subsection 21.1(4) of the Act. Similarly, regardless of whether the TSX, by its own actions, effectively adopted UMIR as applicable to TSX Participants and their employees, the RS Recognition Order was a decision of the Commission requiring RS (or its assignee) to enforce UMIR as a "standard of practice and business conduct" within the meaning of subsection 21(4) or the Act.

[134] We find that RS's jurisdiction arises from the Commission's exercise of its powers under sections 21 and 21.1 of the Act. The Commission has the power, through "recognition", to empower entities to carry on business as stock exchanges, SROs, clearing agencies and quotation and trade reporting systems, and to impose any terms and conditions within its jurisdiction to impose (see subsections 21(2) and (3) and 21.1(2) and (3)). The Act contemplates and permits recognized entities to have certain powers and authority but only if and when these entities are empowered by the Commission through the exercise of a statutory discretion of "recognition", as permitted by the Act. In addition, as OSC Staff points out in its factum, "the supervisory jurisdiction of the Commission is broader than subsections 21(5) and 21.1(4)". The Commission ultimately has responsibility "for the administration of [the] Act and shall perform the duties assigned to it under this Act and any other Act" (subsection 3.2(2)).

[135] At the end of the day, in our view, it is the Commission's SRO recognition, and the Commission's SRO rule approval process, that enables RS to enforce UMIR against TSX Participants and their employees.

[136] As the RS Panel properly points out (referring to RS Staff's submission), the *TSX Act* specifically provides (in section 14) that "nothing in [the TSE] Act shall be construed to derogate from the powers of the Ontario Securities Commission and the Securities Act or any other Act". In other words, the Commission's oversight authority, and the powers granted to the Commission under the Act, are sufficient to grant authority to the Commission to recognize RS and to authorize it to apply and enforce UMIR as RS rules. That recognition grounds RS's authority over TSX Participants and their employees, including Berry.

[137] The RS Recognition Order states as follows:

> RS Inc. has agreed to provide regulation services to the Toronto Stock Exchange Inc. and the Canadian Venture Exchange, Inc. under the ATS Rules, as agent for each of them. In this capacity, RS Inc. will administer the exchanges' market conduct and trading requirements and monitor and enforce compliance with these requirements by the exchanges' members, their directors, officers, employees, affiliates and representatives.

[138] The RS Notice of Approval states as follows:

> On January 29, 2002 the Commission recognized Market Regulation Services Inc. (RS Inc.) as a self-regulatory organization. RS Inc. will operate as a regulation services provider under the Alternative Trading System (ATS) rules and will administer and enforce ***trading rules*** for the market places that retain its services. [emphasis added]
> …
> Rules and Policies
>
> The recognizing regulators approved the Universal Market Integrity Rules (UMIRs).

[139] In our view, UMIR are rules of RS and were approved as such by this Commission. UMIR, as approved rules of RS, are enforced and apply to TSX Participants, *regardless of whether they were adopted by the TSX*. We note that the intention to make UMIR applicable to Participants and other persons within the jurisdiction of the TSX was always made clear by the TSX. The history demonstrates that UMIR were proposed by RS when it was a division of the TSX, and were put into effect as RS rules simultaneously with the establishment and recognition of RS as an entity separate and distinct from the TSX. Subsequent amendments to UMIR were made by the RS board of directors and were approved as such by the Commission.

B. By adopting TSX Rule 4-201 at the November 27, 2001 Meeting, the TSX Board required persons within the TSX's jurisdiction to comply with UMIR, as adopted by RS

[140] Based on the November 27, 2001 Minutes, we find that the TSX Board, by adopting TSX Rule 4-201, required each person within its jurisdiction to comply with UMIR as a standard of conduct similar to its requirement that such persons comply with securities law.

[141] The November 27, 2001 Minutes state the following with regard to UMIR:

> Board Action
>
> Upon motion duly made, seconded and approved, the TSE Board accepted the recommendation of Regulation Services as follows:

> a. confirmed the assessment by Regulation Services that the proposed amendments are in the best interests of the capital markets of Ontario and are "administrative" in nature; and
>
> b. amended the Rules as set out in Schedule "D" of Appendix "D" to these Minutes and amended the Policies as set out in Schedule "E" of Appendix "D" to these Minutes;
>
> c. authorized the CEO to make such additional changes in the form and content of the amendments set out in Schedule "D" and Schedule "E" of Appendix "D" to these Minutes as may be required to properly give effect to any changes in the Universal Market Integrity Rules and Policies from that set out in Schedule "A" of Appendix "D" to these Minutes that may be required by the applicable securities regulatory authorities as a condition of approving the application of [the] Market Regulation Services Inc. to be a self-regulatory organization in accordance with applicable securities legislation in Alberta, British Columbia, Manitoba, Ontario and Quebec.

[142] By approving Appendix "D" referred to in the board motion above, TSX, among other things, amended its rules as set out in paragraph 21 of these reasons, by adding Rule 1-101 (definition of "RS Inc." and "UMIR") and Rule 4-201 (requiring compliance with UMIR) and repealing some existing rules to avoid duplication or inconsistency.

[143] In amending the TSX Rules in this manner, the TSX Board validly created a requirement that any person under its jurisdiction must comply with UMIR. However, this was its own requirement. As expressed above, it is our view that the jurisdiction of RS to enforce UMIR is not grounded on the actions of the TSX, once TSX retained RS as an RSP and the Commission empowered RS as such pursuant to the RS Recognition Order.

[144] As described above, UMIR were adopted by RS at the time of its recognition, and UMIR were approved by the Commission as RS rules at the same time.

[145] It is clear from the November 27, 2001 Minutes that the TSX Board intended that the amendments to its rules referred to above take effect once RS was recognized by the relevant CSA jurisdictions. The November 27, 2001 Minutes state:

> Regulation Services proposes that the changes be effective on the date determined by the TSE that RS Inc. shall commence to be the regulation service provider for the TSE in accordance with the requirements of National Instrument 23-101.

[146] One of Berry's complaints is that UMIR were not in final form at the time of the November 27, 2001 Meeting. He submits that the TSX Board could not properly approve UMIR until it had the final form of UMIR before it. Therefore, its approval was not effective to require compliance by persons within the TSX's jurisdiction.

[147] We do not agree. As discussed above, the relevant actions to make UMIR applicable were those of RS and the Commission, together with the TSX's retainer of RS as its RSP.

[148] In the RS Notice of Approval dated February 15, 2002, the Commission recognized the approval by RS of UMIR. The February 15, 2002 Notice also included the version of UMIR that was approved by the Commission. Given that the November 27, 2001 Minutes made it clear that the Commission's approval of UMIR was required, we find that Participating Organizations and persons within the jurisdiction of TSX, who must comply with UMIR, knew or ought to have known that the version of UMIR published by the Commission, subject to any future amendments, was the version of UMIR applicable to them.

[149] We find that the Commission's February 15, 2002 Notice, publishing the version of UMIR that it approved, clearly informed market participants as to the effective date and the version of UMIR that was applicable to them.

[150] Finally, TSX's Notice to Participating Organizations, published on March 7, 2002, as discussed in the Chronology section of these reasons, clearly stated that UMIR would become effective April 1, 2002 and that persons under the TSX's jurisdiction would be subject to UMIR and the enforcement regime established by UMIR.

[151] There is no evidence before us to suggest that Berry, or any other person then within the TSX's jurisdiction, was actually confused, nor, in our view, could it be successfully argued that anyone reasonably could have been confused, as to the applicability of UMIR to them.

[152] As discussed above, we are of the view that UMIR are rules of RS and as such are enforceable against TSX Participants and their employees by virtue of the Commission's recognition of RS and TSX and approval of UMIR. In our view, this conclusion applies irrespective of whether UMIR were formally approved as TSX rules.

[153] Given the securities regulatory framework, the coming into force of UMIR, as applicable to TSX Participants and their employees, required steps by multiple actors. The RS board of directors needed to approve UMIR, the Commission needed to give its approval pursuant to its overriding supervisory authority, and the TSX had to confirm that persons within its jurisdiction are required by its rules to comply with UMIR. By adopting Rule 4-201, at the November 27, 2001 Meeting, the TSX Board confirmed that Participating Organizations and other persons within the jurisdiction of the TSX are required to comply with UMIR "as adopted by RS Inc.", and it deleted duplicative or inconsistent TSX rules.

[154] We find that these steps were taken and all prerequisites were satisfied for the implementation and enforcement of UMIR against persons within the TSX's jurisdiction. Specifically, we find that:

(a) The TSX Board properly required Participating Organizations and other persons within the jurisdiction of the TSX to comply with UMIR as a TSX standard of conduct by passing Rule 4-201; and

(b) There is nothing in the *TSX Act* that prevents the TSX in its rules from requiring such persons to comply with UMIR.

[155] In our view, the TSX's approval of Rule 4-201 does not amount to improper incorporation by reference, as asserted by Berry. Again, UMIR are RS rules that apply to TSX Participants and other persons under TSX jurisdiction pursuant to the RS Recognition Order and the TSX Recognition Order. By adopting Rule 4-201 and eliminating rules that were duplicative of UMIR, the TSX confirmed the expectation and requirement that persons subject to its jurisdiction must comply with UMIR **as a TSX requirement**. Those persons were already subject to and required to comply with UMIR as RS rules. Rule 4-201 also requires compliance with Exchange Requirements and securities legislation. By requiring compliance with securities legislation, we believe that no one can seriously suggest that the TSX improperly incorporated by reference securities legislation.

[156] We do not accept that by requiring compliance with UMIR, TSX has improperly delegated its rule-making authority to RS, as asserted by Berry. While TSX has delegated or assigned its enforcement powers to RS, as permitted under subsection 13.0.8(4) of the *TSX Act*, the authority for UMIR comes not from the *TSX Act* but from RS and the exercise of the Commission's recognition powers under the Act, in combination with the other prerequisite steps taken and authorized by the *TSX Act*, as described above.

[157] We do not find it necessary to consider Berry's argument that because TSX Rule 4-201 requires compliance with Exchange Requirements, which, pursuant to UMIR, includes "any direction, order or decision of the Market Regulator or a Market Integrity official", TSX's adoption of UMIR amounts to improper subdelegation. That issue does not arise on the facts before us.

C. UMIR 10.3(4) was validly adopted by RS and applies to Berry

[158] As stated above, we find that UMIR are rules of RS. RS, with the required approval of the Commission, properly amended UMIR to include subsection 10.3(4). The TSX Board is not required to approve or adopt each and every amendment of UMIR – or of securities legislation. If there was any uncertainty on this point, it was dispelled by the amendment of the TSX Rules to define "UMIR" as the RS rules "in effect from time to time". Accordingly, we find that UMIR were validly amended to include subsection 10.3(4), which applies to Berry to the extent that his conduct in issue occurred after its adoption.

VI. Jurisdiction of RS over Former Employees

A. Positions of the Parties

(i) Berry

[159] Berry submits that even if UMIR were validly enacted, those rules are unenforceable against him because he is no longer an employee of a TSX Participant and was not an employee when RS Staff commenced the RS Proceeding against him.

[160] Berry submits that, while paragraph 13.0.8(1)(c) of the *TSX Act* grants the TSX power to regulate the conduct of former employees of its members,[3] RS has only those powers granted under UMIR and the Act. Subsection 21.1(3) of the Act states that a recognized SRO "shall regulate the operations and the standards of practice and business conduct of its members and their representatives...", but is silent with respect to former members. UMIR 10.3(4) extends responsibility to employees of TSX members (see paragraph 28 of these reasons), but uses the present tense ("who engages in conduct that results in" a contravention) and is silent with respect to former employees. Berry submits that express language would be required to give RS jurisdiction over former employees.

[161] By contrast, Berry refers to By-law 17.19 of the Former TSE Rules,[4] By-law 24.1.4 of the Mutual Fund Dealers Association ("**MFDA**") and subsection 5(2) of the *Architects Act*, R.S.O. 1990, c. A.26, which expressly authorize proceedings against former members.

[162] Berry submits that it is an established principle that disciplinary provisions should be construed strictly, as recognised in, for example, *British Columbia College of Teachers v. Stafford*, [1991] B.C.J. No. 217 (B.C.S.C.), *Ross v. British Columbia Psychological Assn.*, [1987] B.C.J. No. 2145, and *In the Matter of Louis Anthony DeJong and Dwayne Barrington Nash*, RS No. 2004-04.

[163] The most important decisions for purposes of this argument are *Chalmers* and *Taub (Ont. C.A.)*.

[164] In *Chalmers*, the Ontario Court of Appeal ruled that By-law 17.19 of the Former TSE Rules was beyond the jurisdiction of the TSX because the *TSX Act*, as it then read, did not authorize the regulation of former members or former employees. Paragraph 13.0.8(1)(c),

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[3] Paragraph 13.0.8(1)(c) of the *TSX Act* provides:

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

[4] Former TSX By-law 17.19, "Retention of Jurisdiction", provided as follows:

> (1) The Exchange continues to retain jurisdiction under this Part over any person that has ceased to be under the jurisdiction of the Exchange and the Exchange may investigate the person, whether or not on the basis of a complaint or other communication in the nature of a complaint, and, subject to subsection (2), may commence discipline proceedings against the person.
>
> (2) The Exchange may not commence discipline proceedings pursuant to subsection (1) against a person unless the Exchange has served on the person a Notice of Hearing and Particulars pursuant to section 17.09 within twelve months from the date upon which the person ceased to be under the jurisdiction of the Exchange.

which expressly grants the TSX jurisdiction to discipline former employees of members of the Exchange, was subsequently added to the *TSX Act*.

[165] The issue in *Taub (Div. Ct.)* was whether the IDA had jurisdiction to commence a proceeding against Taub after he ceased to be an IDA member. The IDA relied on its By-law 20.7, which provided that a member remained subject to the jurisdiction of the IDA for five years after ceasing to be a member. The Commission dismissed Taub's application for review of that decision under section 21.7 of the Act ((2007), 30 O.S.C.B. 4739) ("***Taub (O.S.C.)***"), but that decision was overturned on appeal by the Divisional Court.

[166] The Divisional Court concluded that an SRO, "though voluntary, is coloured by recognition under the Act" and therefore the court had to decide whether subsection 21.1(3) of the Act "is limiting in the sense that it prescribes whom a self-regulated organization may regulate" (*Taub (Div. Ct.), supra*, at para. 35).

[167] The Court continued:

> Recognition of a self-regulatory organization under the Act makes the organization subject to the limitations and obligations of the Act. This legislative intent is reflected in s. 21.6 of the Act which requires that by-laws of self-regulatory organizations must not contravene Ontario securities law. Regulation of "members" rather than "former members" is such a limitation.
>
> (*Taub (Div. Ct.), supra*, at para. 40)

[168] The Court concluded that the Act does not authorize SROs to discipline former members.

> In our view, the plain meaning of s. 21.1(3) of the Act cannot be stretched to include the discipline of former members without doing violence to the meaning of the statute. "Members" and "former members" are not interchangeable terms. Such an interpretation of the governing statute is unreasonable.
>
> (*Taub (Div. Ct.), supra*, at para. 44)

[169] Berry submits, by the same reasoning, that RS lacks statutory authority to commence proceedings against former employees of TSX members.

(ii) The Respondents

[170] In response, RS Staff submits that *Taub (Div. Ct.)* does not govern this case because paragraph 13.0.8(1)(c) of the *TSX Act* expressly provides that the TSX retains jurisdiction over former employees of members in respect of their conduct while employed. RS Staff submits that as an agent and delegate of the TSX, RS has jurisdiction to commence a proceeding against a former employee of a TSX Participant pursuant to the authority granted

by the *TSX Act*. Though UMIR 10.3(4) is silent with respect to former employees, RS Staff submits that an express provision is not required.

[171] TSX and OSC Staff did not make submissions on the "former employee" issue.

B. Analysis

[172] We accept that it is established law that a domestic tribunal or self-regulatory body cannot confer on itself jurisdiction not conferred by its enabling legislation. As the Ontario Court of Appeal noted in *Chalmers*:

> I am satisfied that our courts will intervene where it appears that a domestic tribunal or self-regulatory body has purported to confer on itself, through a by-law, jurisdiction not provided for in the statute which created or incorporated it.
>
> (*Chalmers, supra*, at para. 20)

[173] However, the Court went on to state:

> . . . while by-laws of domestic tribunals or self-regulatory organizations may be declared *ultra vires*, before courts will do so, the by-law must be in some way in conflict with the governing statute or with the purposes underlying that statute.
>
> (*Chalmers*, *supra*, at para. 27)

[174] In *Taub (O.S.C.)*, the Commission held that the IDA had jurisdiction to bring enforcement proceedings against a former employee of an IDA member for rule infractions that allegedly occurred while the person was employed by the IDA member. The Commission (and the dissent in the Divisional Court) came to this conclusion, notwithstanding that the IDA's jurisdiction was founded in subsection 21.1(3) of the Act, which speaks only to "members", not "former members".

[175] Shortly prior to releasing this decision, the Ontario Court of Appeal released its decision in *Taub (Ont. C.A.)*. In that decision, the Court of Appeal reversed the decision of the Divisional Court and concurred with the Commission's original decision. The result in *Taub (Ont. C.A.)* is consistent in result with another decision, which was decided just prior to the hearing of this matter by the British Columbia Court of Appeal (*Dass v. Investment Dealers Assn. of Canada*, 2008 BCCA 413).

[176] In *Taub (Ont. C.A.)*, the Ontario Court of Appeal held, first, that subsection 21.1(3) of the Act "sets out the statutory obligations of a recognized SRO, but does not state that those are its only obligations or powers". Second, the Court held that section 21.6 of the Act specifically provides that a recognized SRO may "impose additional requirements within its jurisdiction", and "[b]ecause s. 21.1(3) does not limit the jurisdiction of the SRO to regulate

only current members, s. 21.6 effectively enlarges the power of the SRO to enact rules to fulfill its regulatory mandate". Third, as an alternative, the Court held that "[e]ven if s. 21.1(3) did limit the IDA's jurisdiction to regulate and discipline only current members, it is not clear that such a limitation refers to the timing of discipline, as opposed to the timing of the misconduct". Finally, the Court held that the Commission applied its expertise in the securities industry and concluded that its interpretation not only served the interests of protecting the public "but also that it would be contrary to those interests if former members were allowed to resign from the association in order to avoid discipline" (*Taub (Ont. C.A.), supra*, at paras. 49-52). Accordingly, the Court concluded that the Commission decision was reasonable and should be upheld (*Taub (Ont. C.A.), supra*, at para. 61).

[177] In any event, we are of the view that *Taub (Ont. C.A.)* does not resolve the matter at issue in this case. We agree with counsel for RS that the facts of the case before us are distinguishable from *Taub (Ont. C.A.)*. Unlike the Act (which was at issue in *Taub (Ont. C.A.)*), the *TSX Act* gives the TSX express jurisdiction to commence proceedings against former employees of TSX Participants in relation to conduct while they were employed. Pursuant to subsection 13.0.8(4) of the *TSX Act*, the TSX has (and had at the relevant time) authority to delegate its enforcement powers to RS. The TSX Recognition Order provides that "the TSE shall retain RS as an RSP, as agent for the TSE, to provide the regulation services approved by the Commission (i.e., the enforcement of UMIR)". The TSX has retained RS and delegated its enforcement powers to it. The *TSX Act* is the original source of RS's authority over persons within the jurisdiction of the TSX in this matter.

[178] We agree with the submissions of RS Staff that the absence of a reference to former employees in UMIR 10.3(4) is neither determinative nor limiting in the way subsection 21.1(3) of the Act was found to be in *Taub (Div. Ct.)*. In our view, UMIR 10.3(4) extends responsibility to an employee of a Participant for the employee's conduct, while he or she was employed, where that conduct results in the Participant contravening a requirement. The jurisdiction to enforce those rules against persons who subsequently leave the employ of a Participant is granted by paragraph 13.0.8(1)(c) of the *TSX Act*, and that jurisdiction was assigned or delegated to RS pursuant to subsection 13.0.8(4) of the *TSX Act*.

[179] Accordingly, we conclude that the *TSX Act* provides the basis for RS's jurisdiction to proceed against Berry as a former employee of a Participant in enforcing UMIR.

VII. Conclusion

[180] This case has turned a magnifying glass on the manner in which the TSX migrated much of its regulatory functions to RS, and on the process of implementation of UMIR in 2001, which accompanied this transition.

[181] We do not agree that the actions (or omissions) of the TSX Board created a regulatory void in relation to oversight of TSX Participants by TSX, or RS as its agent and delegate, from 2002 to 2006.

[182] In all of the circumstances, for the reasons discussed above, we conclude as follows:

(a) As set out in the Chronology section of these reasons, in November 2001, the CSA published the ATS Rules. Specifically, in section 7.1 of NI 23-101, a recognized stock exchange is required to "set requirements governing the conduct of its members", and is empowered to assign responsibility for monitoring "the conduct of its members and enforce the [established] requirements" to a "regulation services provider". The standard of conduct of TSX members is included in TSX Rule 4-201, requiring "each person under its jurisdiction" to comply with all applicable securities legislation, Exchange Requirements and provisions of UMIR. By virtue of the regulation services agreement between the TSX and RS, and in accordance with section 7.1 of NI 23-101 and the TSX Recognition Order, the TSX assigned responsibility for monitoring the conduct of its members and enforcing the established requirements.

(b) UMIR (and their subsequent amendments) are rules of RS, an SRO properly and validly recognized by the Commission and other CSA jurisdictions. While UMIR apply to TSX Participants and their employees, they are not rules of TSX. Rather, the steps taken by the TSX Board in establishing and amending UMIR were taken as the legal predecessor of RS, which was "spun off" as an entity distinct from TSX only as of March 1, 2002. In our view, the steps taken by the TSX Board at its November 27, 2001 Meeting with respect to UMIR (summarized at paragraphs 20 to 23 of these reasons) were part of its own internal process to avoid duplication and inconsistency between UMIR and the TSX Rules and requirements applicable to its Participants and their employees. If the process followed by TSX lacked any clarity, that does not affect the enforceability of UMIR and the jurisdiction of RS.

(c) The RS Panel was therefore correct in finding that (i) the Commission's recognition of RS, (ii) RS's actions in making and amending UMIR, and (iii) the Commission's actions in approving UMIR, provided sufficient legal authority for the enforceability of UMIR by RS against persons within the TSX's jurisdiction.

(d) The TSX Board properly passed, and made effective, a requirement that persons under its jurisdiction must comply with UMIR. In doing so, the TSX is not improperly incorporating UMIR by reference, nor is the making of UMIR by RS an exercise by RS of delegated authority from TSX.

(e) The TSX had jurisdiction over former employees of TSX Participants at the time that it delegated compliance and enforcement jurisdiction to RS and, in our view, that jurisdiction was retained when RS made UMIR and sought and obtained recognition and approval of UMIR from the Commission. Under the RS Recognition Order, RS enforces UMIR as

agent for TSX. In our view, this distinguishes this case from the circumstances in *Taub*.

[183] Accordingly, we conclude, for the reasons discussed above, that RS had authority to commence and has jurisdiction to continue the RS Proceeding against Berry and did not err in making the RS Stay Decision. The Application is therefore dismissed.

DATED in Toronto this 23rd day of September, 2009.

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