Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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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
REQUEST BY TSX INC. TO INTERVENE IN THE HEARING AND REVIEW

- and -

IN THE MATTER OF
DAVID BERRY

HEARING HELD PURSUANT TO SECTION 21.7 OF THE ACT

REASONS FOR DECISION

HEARING:	September 29, 2008	
REASONS:	December 10, 2008	
PANEL:	Lawrence E. Ritchie	- Vice Chair and Chair of the Panel
	Patrick J. LeSage	- Commissioner
APPEARANCES:	Johanna Superina Susan Kushneryk	- for Staff of the Ontario Securities Commission
	Daniel Bernstein	- for TSX Inc.
	Brian Gover Charles Corlett	- for Market Regulation Services Inc.
	Linda Fuerst Usman Sheikh Rebecca Studin (Student - at - law)	- for David Berry

REASONS FOR DECISION

Background

[1] This matter relates to a request by the TSX Inc. (the "TSX") to intervene in the Hearing and Review of a decision of Market Regulation Services Inc. ("RS") in the matter of David Berry, ("Berry"), which is scheduled to be heard by the Ontario Securities Commission (the "Commission") on October 29, 2008.

[2] On September 29, 2008 we convened a hearing in this matter to address a request of the TSX to intervene in the Hearing and Review. We heard submissions from the TSX, Staff of the Commission ("Staff"), RS and Berry.

[3] At the end of the hearing, we granted limited intervenor status to the TSX and gave oral reasons. The following text has been prepared based on our oral reasons for the purpose of providing a public record of the decision.

Chronology of Events

[4] Berry is a respondent in a disciplinary proceeding commenced by RS, now the Investment Industry Regulatory Organization of Canada ("IIROC"). In the RS disciplinary proceeding, it is alleged that Berry is responsible pursuant to subrule 10.3(4) of the Universal Market Integrity Rules ("UMIR") for violations of UMIR 6.4 and 7.7, which govern the conduct of trading activities on the TSX. On December 10, 2007, Berry moved before the RS Panel to permanently stay the RS proceeding on the basis that, *inter alia*, UMIR are invalid. In support of this motion Berry argued that:

1. UMIR were never validly adopted by the board of directors of the TSX; and,

2. even if that were not so, UMIR would be invalid because the TSX did not comply with the terms of the Memorandum of Understanding entered into between the TSX and the Commission on October 23, 1997, pertaining to the filing of rules with, and the approval of the rules by, the Commission.

[5] On February 29, 2008, the RS Panel released its decision dismissing Berry's motion. The RS Panel concluded that, *inter alia*, (1) UMIR were validly adopted by the TSX's board of directors and, (2) any potential breach of the Memorandum of Understanding was irrelevant, as the Commission approved UMIR and recognized RS, and approved the transfer of the market regulation function from the TSX to RS pursuant to its powers under sections 21(5)(e) and 21.1(4) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, (the "Act") to make any decision with respect to:

> "any by-law, rule, regulation, policy, procedure, interpretation or practice"

of a recognized stock exchange and a self-regulatory organization respectively.

[6] Berry alleges that the RS Panel erred in reaching these conclusions and filed a Notice of Request for a Hearing and Review. It is this request, which is scheduled to be heard on October 29,

2008, that gave rise to the proceeding before us. In the particular matter before us, the TSX seeks standing to intervene in the Hearing and Review.

Position of the Parties

[7] The TSX claims that it has a direct and substantial interest in the outcome of the issues raised in the Hearing and Review. It is a recognized stock exchange which delegated authority to RS to investigate and discipline certain persons through the administration and enforcement of UMIR. The TSX takes the position that the entire UMIR structure and the TSX's market regulation and enforcement regime is at issue at the Hearing and Review. Berry, in contrast, states that he does not seek declaratory relief and no relief of any kind against the TSX. Rather, he seeks an order for a permanent stay and an order, in the alternative, prohibiting RS from enforcing UMIR against Berry.

[8] The TSX seeks intervenor status to participate in the October 29, 2008 hearing, although it states it does not seek to file evidence. It claims that Berry's challenge of both UMIR and the TSX's delegation to RS is "nothing less than a challenge to the validity of the TSX's market regulation and enforcement regime" and that its participation would be of assistance to the Commission.

[9] Counsel for RS and Staff, already parties to the proceeding, agree with the position of the TSX and support its request for intervenor status.

[10] Berry opposes the intervention, essentially questioning what the TSX can add that RS, as its appointed agent under the UMIR regime, cannot otherwise assert at the Hearing and Review. In addition, Berry's counsel points to additional costs and likely delay, which would occasion the TSX's involvement, particularly at this late stage of the proceeding. Berry's counsel emphasizes that their notice was filed many months ago and that the TSX has only brought its request for intervenor status at the "eleventh hour". As counsel for Berry pointed out, citing *Halpern v. Toronto (City) Clerk*, [2000] O.J. No. 4514 (S.C.J.) at para. 6, as moving party, the onus is on the TSX to establish that it has met the test for intervenor status and that the discretion of the Commission should be exercised to permit it to intervene.

Decision

[11] We conclude it is appropriate to grant the TSX limited intervenor status in this matter. We have canvassed the case law put forward by the parties on this issue, citing *Re Hollinger Inc.* (2006), 29 O.S.C.B. 7071 ("*Re Hollinger*") and *Torstar Corp. v. Southam Inc.* (1985), 8 O.S.C.B. 5068. As stated by Chief Justice Dubin in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.) at para. 10, "… the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the [matter] without causing injustice to the immediate parties". Subsequent decisions of this Commission in *Re Albino* (1991), 14 O.S.C.B. 365 and *Re Hollinger* have largely followed these factors. All parties agree that the factors set out in *Re Hollinger*, *supra* at paras. 44-45 are appropriate for the Commission to take into consideration:

1. the nature of the proceeding;

2. whether the proposed intervenor will make a useful contribution to the proceeding;

3. whether the proposed intervention would unfairly prejudice the interests of the existing parties; and

4. the effect, if any, of the proceeding's potential outcomes on the economic interests of the proposed intervenor.

[12] Given the allegations made and the potential implications of the October 29, 2008 Hearing and Review, regardless of whether relief is sought as a declaration or otherwise, we are of the view that the TSX is affected by the proceeding and that its limited participation in these proceedings would make a useful contribution.

[13] As the RS Panel observed, the issues raised are complex. Counsel for Berry submits that the TSX's involvement would amount to unfair piling on and would duplicate the prosecution of this matter. As such, she states that the intervention would unfairly prejudice the interests of Berry in the proceeding. We do not agree, but in any event, think that any potential unfairness can be overcome by limiting the role that the TSX can play. Given that the allegations made are about the TSX's actions or inaction and the relief sought will have implications on its enforcement regime, its limited participation would be fair and appropriate in the circumstances and would be useful to the Commission.

[14] For the record, our order issued September 30, 2008 states the following:

> IT IS HEREBY ORDERED that the TSX be given limited intervenor status to participate at the hearing and review on October 29, 2008, on the following terms:
>
> i. The TSX shall deliver its factum to the parties by the end of the day Friday, October 3, 2008;
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> ii. The TSX factum shall be limited to 15 pages and be confined to matters at issue in this proceedings that directly affect or concern the TSX and shall not duplicate materials and submissions of RS;
>
> iii. That TSX shall abide by the timetable agreed to by the existing parties to this proceeding; and
>
> iv. The extent of oral participation of the TSX shall be determined by the Hearing Panel if the parties cannot otherwise agree.

Approved by the Panel on December 10, 2008.

"*Lawrence E. Ritchie*"
Lawrence E. Ritchie

"*Patrick J. LeSage*"
Patrick J. LeSage, Q.C.