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RE:	Berry v. Ontario Securities Commission et al.	
Court File No.: 508/09		**Pages (including coversheet): 30**
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NOTE: Please find attached a copy of the Judgment from Justices Jennings, Lederman and Wilton-Siegel with regard to the above-noted matter.

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CITATION: Berry v. Ontario Securities Commission, 2010 ONSC 3012
DIVISIONAL COURT FILE NO.: 508/09
DATE: 2010-11-26

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, LEDERMAN and WILTON-SIEGEL JJ.

BETWEEN:	)	
	)	
DAVID BERRY	)	*Peter H. Griffin* and *Linda L. Fuerst*, for the Appellant
Appellant	)	
	)	
– and –	)	
	)	
ONTARIO SECURITIES COMMISSION and MARKET REGULATION SERVICES INC.	)	*Brian Gover* and *Brendan Van Niejenhuis*, for Market Regulation Services Inc.
	)	
	)	*Peter Wardle* and *Daniel Bernstein*, for TSX Inc.
Respondents	)	
	)	*Johanna M. Superina* and *Alexandra Clark*, for the Respondent, Ontario Securities Commission
	)	
	)	
	)	**HEARD AT TORONTO:** May 27, 2010

THE COURT

[1] The appellant, David Berry ("Berry"), appeals a decision of a hearing panel (the "OSC Panel") of the Ontario Securities Commission (the "OSC") dated September 23, 2009 (the "OSC Decision") dismissing Berry's application for a hearing and review of a ruling made by a hearing panel of Market Regulation Services Inc. ("RS") dated February 29, 2008 (the "RS Ruling"). The effect of the RS Ruling and the OSC Decision was to find that the Universal Market Integrity Rules ("UMIR") are enforceable against Berry.

Background

The Parties

[1] In 2000, the Toronto Stock Exchange (the "TSE") completed a demutualization process with a view to becoming a publicly traded company. The continuing corporation resulting from that process was The Toronto Exchange Inc. (now TSX Inc.) (the "TSX"). The TSX is a corporation incorporated under, and subject to, the *Business Corporations Act*, R.S.O. 1990, c. B.16 and is also governed by the Toronto Stock Exchange Act, R.S.O. 1990, c. T.15, as amended, (the "TSE Act").

[2] The TSX owns and operates the TSE. The TSE is recognized as a stock exchange by an order of the OSC pursuant to s. 21(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") (the "TSE Recognition Order").

[3] Berry was employed by Scotia Capital Inc. ("Scotia") from 1995 until June 30, 2005. Scotia is a member of the TSE and a "Participant" of the TSE for the purposes of the UMIR. During his employment, Berry held the position of vice-president and director of Scotia. During the relevant period, he was the head of preferred share trading at Scotia and was responsible for trading its proprietary book of preferred shares.

[4] RS is a corporation that was incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 on September 21, 2001. As more fully described below, on January 29, 2002, RS was recognized by the Commission as a self-regulatory organization pursuant to s. 21.1(1) of the Act. Effective March 17, 2008, RS was reorganized through a merger with the Investment Dealers Association (the "IDA") to form the Investment Industry Regulatory Organization of Canada.

The Establishment of the Uniform Market Integrity Rules

[5] As part of the TSE demutualization process, the TSE proposed to transfer its trading regulation function to an independent self-regulatory organization, which would regulate trading on the TSE pursuant to a common set of market integrity rules. The UMIR is the result of the efforts made at that time by the TSE and another exchange to formulate a universal set of trading rules that would apply both to traditional exchanges, such as the TSE, and to alternative, non-exchange electronic trading systems operating in competition with the traditional exchanges. RS is the corporation to which the TSE trading regulation function was ultimately transferred.

[6] On November 26, 2001, the RS board of directors (the "RS Board") resolved to adopt the UMIR in principle.

[7] The TSX board of directors (the "TSX Board") considered a draft of the UMIR at a meeting held on November 27, 2001. The minutes of the meeting of the TSX Board indicate that the draft had not been approved by the relevant securities regulatory authorities and further changes to it were expressly contemplated. At that meeting, the TSX Board approved

"consequential" amendments to the rules of the TSE (the "TSE Rules") necessary to give force and effect to the UMIR once the UMIR were approved by such securities regulatory authorities. This included the repeal of various TSE Rules.

[8] These amendments included the following:

(a) Rule 1-101 of the TSE Rules was amended to define "RS Inc." to mean "Market Regulation Services Inc." and the "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 of the TSE Rules 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;"

(c) A number of provisions of the existing TSE Rules and policies were repealed to avoid duplication or inconsistency with the UMIR, including the former TSE Rules referenced in the Statement of Allegations of RS described below.

[9] The minutes of the meeting state that these amendments were 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". National Instrument 23-101 provides that a recognized exchange (including the TSE) shall set requirements governing the conduct of its members, shall monitor the conduct of its members, and shall enforce its conduct requirements either directly or through a regulation service provider such as RS.

[10] Also at the meeting on November 27, 2001, the TSX Board approved the transfer of the TSE market regulation function to RS upon recognition of RS by the relevant securities regulatory authorities, subject to TSX staff being satisfied with the terms of transfer.

[11] On January 29, 2002, the OSC issued an order recognizing RS as a self-regulatory organization pursuant to s. 21.1(1) of the Act (the "RS Recognition Order"). The Order provides, among other things, that RS has agreed to provide regulation services to the TSE and the Canadian Venture Exchange Inc. as agent for each of them, and, in that 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".

[12] On the same day, the OSC issued an amendment to the TSE Recognition Order. The amended TSE Recognition Order continued the recognition of the TSE granted under s. 21(2) of the Act subject to the amended terms and conditions attached to the Order.

[13] The following provisions of the TSE Recognition Order addressed the retention of RS as the TSE's regulation services provider:

> **5) Regulation**
>
> a) The TSE shall retain RS Inc. as an RSP to provide, as agent for the TSE, certain regulation services which have been approved by the Commission. The TSE shall provide to the Commission, on an annual basis, a list outlining the regulation services provided by RS Inc. and the regulation services performed by the TSE. All amendments to those listed services are subject to the prior approval of the Commission;
>
> b) In providing the regulation services, as set out in the Regulation Services Agreement, RS Inc. will act as the agent of the TSE pursuant to a delegation of the TSE's authority in accordance with Section 13.0.8(4) of the Toronto Stock Exchange Act and will be entitled to exercise all the authority of the TSE with respect to the administration and enforcement of certain market integrity rules and other related rules, policies and by-laws.
>
> ...
>
> **7) Purpose of Rules**
>
> The TSE shall, subject to the terms and conditions of this Recognition Order and the jurisdiction and oversight of the Commission in accordance with Ontario securities laws, through RS Inc. and otherwise, establish such rules, regulations, policies, procedures, practices or other similar instruments as are necessary or appropriate to govern and regulate all aspects of its business and affairs and shall in so doing specifically govern and regulate so as to:
>
> a) Seek to ensure compliance with securities legislation;
>
> b) Seek to prevent fraudulent and manipulative acts and practices;
>
> c) Seek to promote just and equitable principles of trade;
>
> ...
>
> e) Seek to provide for appropriate discipline.

[14] On January 30, 2002, the RS Board approved a final version of the UMIR.

[15] On February 15, 2002, the OSC published a notice stating that it and the securities regulatory authorities of Alberta, British Columbia, Manitoba and Quebec (the "relevant securities authorities") had recognized RS as a self-regulatory organization, that the relevant securities authorities (including the OSC) had approved the UMIR, that they had established an oversight program for RS, and that the TSE Recognition Order had been amended to amend the requirements concerning regulation services. The version of the UMIR published along with the notice included the contemplated amendments to the UMIR that had been presented to the TSX Board at its November 27, 2001 meeting as well other changes that were made to the text of the UMIR after that meeting.

[16] The TSE transferred its market regulation function to RS pursuant to a regulation services agreement with RS dated as of March 1, 2002 (the "Regulation Services Agreement"). Section 2.1(1) of the Agreement provided that the services to be performed by RS for the TSE included administering and enforcing compliance with the UMIR as they relate to "Access Persons", being persons granted access to the TSE trading system by the TSE. For this purpose, the UMIR is defined to be "the universal market integrity rules as approved by the relevant securities regulatory authorities, adopted by the TSE and administered and enforced by RS, as amended from time to time".

[17] Section 2.1(2) of the Regulation Services Agreement addressed RS's authority in providing such services, using language that mirrored the conditions added to the TSE Recognition Order on January 29, 2002:

> In providing the Services RS will act as the agent of the TSE pursuant to a delegation of the TSE's authority in accordance with s. 13.0.8(4) of the *Toronto Stock Exchange Act* and will be entitled to exercise all the authority of the TSE with respect to the administration and enforcement of UMIR and other related rules, policies and by-laws. RS will perform these services in its own name as Regulation Services Provider and the TSE will not be entitled to direct or instruct RS with respect to its performance of the Services, provided that:
>
> (a) RS will coordinate with the TSE with respect to the performances of the Services described in Schedule A; and
>
> (b) RS will apply the Exchange Requirements applicable to the Services described in Schedule A in accordance with interpretations and guidelines concerning such Exchange Requirements that are published by the TSE but RS is not obligated to apply such an interpretation or guideline to an investigation or hearing that was initiated prior to its publication.

[18] For this purpose, "Exchange Requirements" are defined to mean and include:

> [T]he Articles, by-laws, policies, circulars, rules (including UMIR), guidelines, orders, notices, rulings, forms, decisions and regulations of the TSE as from time to time enacted, adopted or amended, any instructions, decisions and directions of the TSE (including those of any committee of the Exchange as appointed from time to time), the Ontario *Securities Act*, S.A. 1981, c. S-6.1 and rules and regulations thereunder as amended, and any policies, rules, orders, rulings, forms or regulations from time to time enacted adopted or amended by the Ontario Securities Commission and all applicable provisions of the securities laws of any other jurisdiction.

[19] On March 7, 2002, the TSE issued a "Notice to Participating Organizations" stating that the TSE had retained RS as its regulation services provider effective March 1, 2002 and that, effective April 1, 2002, the TSE would adopt the UMIR as the trading rules for its Participating Organizations (being its members) and amend its existing rules and policies to delete or vary any provisions where the subject matter was covered by the UMIR. No further meeting of the TSX Board was convened to adopt the final version of the UMIR that was approved by the OSC and the other relevant securities authorities in January and February 2002.

[20] On September 30, 2002, RS issued a Request for Comment on certain "Administrative and Editorial Amendments" to the UMIR, which had been approved by the RS Board on June 11, 2002. These proposed amendments included a new provision, s. 10.3(4) to the UMIR, which provided 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.

[21] The Request for Comment included a background note that read as follows:

> Most of the "administrative" amendments are merely clarifications in the language used in the provisions and the insertion of terminology that would otherwise be reasonably implied. 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 is liable for the conduct [*sic*]. While this provision was intended to be included in UMIR, in fact this provision was omitted from the version of UMIR submitted for approval by the CSA.

[22] In addition, it described the effect of this amendment to the UMIR as follows:

> Rule 10.3 – Extension of Responsibility

> UMIR was drafted such the [*sic*] various restrictions and prohibitions apply to Participants and Access Persons. Rule 10.3 of UMIR was designed to extend the responsibility for the conduct to various parties. For example, under subsection (1) a Participant or Access Person is made responsible for the conduct of any director, officer, partner, employee of [*sic*] individual holding a similar position. Under subsection (2) a partner or director is made responsible for the conduct of the Participant or Access Person and under subsection (3) a supervisor is made responsible for the conduct of any supervised employee. It had been intended that the structure of Rule 10.3 would provide that an officer or employee of a Participant or Access Person that engages in conduct that results in the contravention of a Requirement is liable for the conduct. The amendment would correct this oversight and ensure that the employees or officers who actually engage in offending conduct are held liable for that conduct and not just the Participant or Access Person.

[23] On January 30, 2004, the OSC issued a Notice of Commission Approval of the UMIR amendments, including the amendment to UMIR 10.3 to add s. 10.3(4). On the same day, RS issued a "Notice of Amendment Approval" indicating that the amendments had been approved by the relevant securities authorities. The amendment to s. 10.3 of the UMIR was never specifically considered or approved by the TSX Board.

[24] On September 29, 2006, the OSC published the following "Notice of Approval" relating to the consequential amendments to the TSE Rules approved by the TSX Board on November 27, 2001:

> 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 Panel as "non-public interest" amendments and approved by the Panel 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.

Authority of the TSX Board

[25] Pursuant to s. 13.0.8 of the TSE Act, the TSX Board is authorized to govern and regulate the business conduct of its members, as well as the business conduct of those employed by a member of the TSE. The relevant provisions of s. 13.0.8 for this proceeding are as follows:

> *Powers of the board*

Section 13.0.8(1) 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

(d) the business conduct of former members of the continued Corporation and other persons or companies formerly 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 a member in the continued Corporation or while employed or associated with a member of the continued Corporation.

By-laws, etc.

(2) In the exercise of the powers set out in subsection (1) and in addition to its powers 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.

...

Delegation of powers

(4) 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 hearing 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.

The Proceedings Against Berry

[26] RS commenced proceedings against Berry on February 20, 2007, after Berry ceased to be employed by Scotia.

[27] In its notice of hearing and statement of allegations (the "Statement of Allegations"), RS alleged various breaches of the UMIR including (1) the solicitation of client orders during distributions of new issues of securities by Scotia in contravention of s. 7.7(5) of the UMIR; and (2) the conduct of off-marketplace trades that were not printed on a marketplace or recognized exchange in contravention of s. 6.4 of the UMIR. The Statement of Allegation further asserts that Berry is personally liable for these alleged contraventions in respect of breaches occurring after January 30, 2004 pursuant to the extension of responsibility provided for in s. 10.3(4) of the UMIR, which became effective as of that date.

[28] In the alternative, the Statement of Allegations alleges that Berry breached provisions of the former TSE Rules including (1) causing Scotia to breach former TSE Rules 4-101 and 4-102 by engaging in off-marketplace transactions; and (2) causing Scotia to breach former TSE Rule 4-303 by engaging in improper solicitations and, in doing so, further contravening former Rule 7-106(1)(b).

[29] Berry brought a motion for a permanent stay of the proceedings against him commenced by RS on the grounds that RS lacked jurisdiction. He asserted two grounds: (1) that the TSE expressly repealed the former TSE Rules upon which it relies in the Statement of Allegations but never validly adopted the UMIR; and (2) that, in any event, at the time of commencement of the proceedings Berry was neither a Participant, a Participating Organization, a current employee of a Participant, or an Approved Person of the TSE for the purposes of the UMIR and the former TSE Rules.

The RS Ruling

[30] In a decision dated February 29, 2008 (the "RS Ruling"), a hearing panel of RS (the "RS Panel") dismissed Berry's motion for a permanent stay of the proceedings.

[31] The RS Panel concluded first that s. 13.0.8(1) of the TSE Act gave the TSE the authority to discipline former employees and that this authority was included in the delegation to RS of the TSE's market regulation function. On this basis, it then concluded that "the Rules cover ex-employees", which is understood to mean that the Rules under which the charges against Berry were laid cover ex-employees.

[32] The RS Panel then considered the principal issue of the enforceability or validity of the UMIR. In doing so, it first addressed the legal effect of the actions of the TSX Board at its meeting on November 27, 2001. It concluded that the TSX Board adopted the UMIR as the rules of the TSE in the form that the UMIR existed on the date RS became the TSE's regulation services provider and as they may be amended from time to time thereafter:

> 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".

[33] The RS Panel then addressed Berry's remaining arguments regarding the alleged failure of the TSX to observe various legal requirements. It concluded that the OSC approval of the UMIR, and of RS as a self-regulatory organization, pursuant to the RS Recognition Order effectively validated the enforceability of the UMIR in respect of TSE members. The operative paragraph of the RS Panel Decision is as follows:

> As we noted earlier, the Respondent also urged upon us that the "adoption" of the 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 the TSX's transfer of regulatory power to RS, all demonstrates that the Commission has exercised [it's over-riding statutory power] and given its blessing to UMIR's applicability to TSX participants". [Citations deleted]

[34] The RS Panel found the authority for such OSC validation in the authority granted the OSC in ss. 21(5)(e) and 21.1(4) of the Act together with s. 14 of the TSE Act, which provides that nothing in the TSE Act shall be construed to derogate from the powers of the OSC and the Act or any other statute.

The Proceedings Before the OSC

[35] Berry then commenced an application for a hearing and review by the OSC of the RS Ruling pursuant to s. 21.7 of the Act. The TSX was granted limited intervenor status in the proceeding by order of the OSC dated September 30, 2008. Staff of the OSC became a party to the application under s. 21.7 of the Act.

The OSC Decision

[36] The OSC Panel dismissed Berry's application on September 23, 2009 for the reasons set out in the OSC Decision. The OSC Decision is summarized as follows:

[37] The OSC Panel identified the essential question in Berry's application as being whether the UMIR was enforceable against Berry, and whether RS had jurisdiction to enforce the UMIR against Berry, given that he was no longer an employee of a "Participant" for purposes of the

UMIR. The OSC Panel then set out the three issues that required determination to answer this question:

1. Did the TSE "make or adopt" the UMIR and require persons within its jurisdiction to comply with the UMIR?

2. In any event, did the OSC's recognition of RS and approval of the UMIR, as rules of RS, make the UMIR, as amended, enforceable by RS against Berry?

3. Notwithstanding or in addition to the foregoing, does RS have jurisdiction to bring a proceeding against a former employee of a Participant of the TSE?

Summary of Conclusions

[38] The OSC Panel summarized its decision regarding the first two issues in para. 5 of the OSC Decision stating that the "UMIR are rules of RS and are applicable to and enforceable against Participants and other persons within the jurisdiction of the TSX". In connection with this conclusion, the OSC Panel made the following findings:

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

(b) The OSC recognized RS as a self-regulatory organization ("SRO") under the Act and approved the UMIR as rules of RS; and

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

[39] With respect to the third issue, the OSC concluded (1) that s. 10.3(4) of the UMIR was validly adopted by RS; (2) that Berry was subject to the UMIR when he was an employee of Scotia pursuant to that provision; and (3) that, as the regulation services provider to the TSE, RS had jurisdiction to bring and continue the RS proceeding against Berry, in his capacity as a former employee of a Participant.

[40] The following summarizes the analysis by which the OSC Panel reached its conclusions on the three issues in the order in which they were addressed in the OSC Decision. We note that the OSC Panel dealt with the first and second issues in reverse order from the RS Panel.

Legal Effect of the OSC Recognition of RS and Approval of the UMIR

[41] The OSC Panel approached the issues in the proceeding principally as a question of the legal effect of the RS Recognition Order and the OSC approval of the UMIR. It concluded at para. 135 that "[a]t the end of the day, in our view, it is the Commission's SRO recognition, and

the Commission's rule approval process, that enables RS to enforce UMIR against TSX Participants and their employees".

[42] In reaching this conclusion, the OSC Panel drew a distinction between the legal effect of the OSC's approval of RS and the UMIR and the actions of the TSX Board, which is best illustrated by the following passages in paras. 125 and 139:

> 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.
>
> ...
>
> 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. [Emphasis in original]

[43] The OSC Panel grounded its decision in the overriding supervisory authority of the OSC over the TSE pursuant to s. 21(1) of the Act and over RS pursuant to s. 21.1(1) of the Act. In particular, the OSC Panel relied on the OSC's authority under s. 21(4) in respect of the TSE and s. 21.1(4) in respect of RS, as evidenced in the following conclusion at para. 133 of the OSC Decision:

> 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.

[44] The OSC Panel also referred to the non-derogation language in s. 14 of the TSX Act. At para. 136, the Panel considered that this provision reaffirmed or confirmed that "the [OSC's] oversight authority, and the powers granted to [it] under the Act, are sufficient to grant authority to the [OSC] to recognize RS and to authorize it to apply and enforce UMIR as RS rules". The OSC Panel concluded "That recognition grounds RS's authority over TSX Participants and their employees, including Berry".

Legal Effect of the Actions of the TSX Board of Directors at its Meeting on November 27, 2001

[45] In an alternative conclusion, the OSC Panel also held, based on the minutes of the meeting of the TSX Board on November 27, 2001, that, by adopting Rule 4-201, the TSX Board required each person within its jurisdiction to comply with the UMIR as a standard of conduct similar to its requirement that such persons comply with securities laws.

[46] The OSC Panel identified and addressed three separate considerations that are part of this conclusion.

[47] First, it concluded that, by passing Rule 4-201, the TSX Board properly required all persons within its jurisdiction to comply with the UMIR as a TSE standard of conduct. In reaching this conclusion, it stressed that the TSE requirement under Rule 4-201 was entirely separate from the jurisdiction of RS to enforce the UMIR addressed above.

[48] The OSC Panel based this conclusion regarding the scope and effectiveness of Rule 4-201 on an intention that the amendments to the TSE Rules were to take effect only once RS was recognized by the relevant securities authorities and, therefore, by implication, only after the anticipated amendments were subsequently proposed, finalized, and approved by the relevant securities authorities. The OSC Panel rejected Berry's position that the TSX Board could not approve the UMIR until it had the final form of the UMIR. Although not express, it appears to have reached this conclusion based on the procedure contemplated for finalizing the UMIR as well as the public notice of this procedure, which precluded any possibility that any other person within the TSE's jurisdiction – including Berry – could reasonably have been confused as to the applicability of the UMIR to them.

[49] Second, the OSC Panel rejected two specific arguments of Berry relating to the approval of Rule 4-201 in its actual form.

[50] In the view of the OSC Panel, the form of Rule 4-201 did not amount to improper incorporation by reference any more than the obligation to comply with applicable securities legislation improperly incorporated by reference such securities legislation. The OSC Panel also reasoned that the concurrent and independent authority of RS, having the effect of requiring the same persons to comply with the UMIR as RS rules, precluded any issue of incorporation by reference and thereby provided additional support for this conclusion.

[51] In addition, the OSC Panel rejected the submission that Rule 4-201 constituted an improper sub-delegation of the TSE rule-making authority under the TSX Act. The Panel reached this conclusion using reasoning that paralleled its finding that the UMIR derived their authority from the OSC recognition of RS under the Act. The OSC Panel also concluded that Berry's argument of improper delegation, based on the obligation in Rule 4-201 to comply with all Exchange Requirements, which incorporates the discretion vested in the Market Regulator or a Market Integrity Official, did not need to be addressed because the issues did not arise on the facts before it. We concur with that conclusion and do not propose to address this argument below.

Section 10.3(4) of the UMIR was Validly Adopted

[52] The OSC Panel also held that s. 10.3(4) of the UMIR was validly adopted by RS with OSC approval and that it applied to Berry by virtue of the UMIR or, alternatively, by virtue of the definition of UMIR in Rule 1-101 of the TSE Rules. The OSC Panel conclusion on this issue, at para. 158 of the OSC Decision, is as follows:

> 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.

The Jurisdiction of RS over Former Employees

[53] Lastly, the OSC Panel determined (1) that s. 10.3(4) of the UMIR 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 of UMIR; and (2) that the jurisdiction to enforce these rules against persons who subsequently leave the employ of a Participant is granted by para. 13.0.8(1)(c) of the TSX Act, which jurisdiction was assigned or delegated to RS pursuant to para. 13.0.8(4) of the TSX Act.

[54] On the basis of these determinations, the OSC Panel concluded that the TSX Act provided a valid basis for RS's jurisdiction to proceed against Berry as a former employee of a Participant in enforcing the UMIR.

Standard of Review

[55] This appeal proceeds under s. 9 of the Act, which provides that a person directly affected by a final decision of the OSC may appeal to this Court.

[56] The present proceedings involve two principal issues:

1. Did the TSE make or adopt the UMIR in such manner that persons within its jurisdiction are required to comply with the UMIR? and

2. Did the OSC recognition of RS and the OSC approval of the UMIR as rules of RS make the UMIR enforceable by RS against Berry?

[57] The first issue requires an interpretation of the TSE Act and of the effect of recognition of the TSE under s. 21(2) of the Act. The second issue requires an interpretation of the effect of recognition of RS under s. 21.1(1) of the Act and of the OSC approval of the UMIR under the Act. In each case, the essence of the issue is the interpretation of the jurisdiction of self-regulatory organizations recognized by the OSC under the Act.

[58] In *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190 at para. 62, the Supreme Court set out the following two-stage analysis for determining the standard of review of decisions of statutory tribunals:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[59] Accordingly, the Court must begin its analysis by first considering whether the jurisprudence has already determined the degree of deference to be accorded to the OSC Panel with respect to the OSC Decision. Based on the decisions below, we conclude that the standard of reasonableness has already been established by the applicable jurisprudence.

[60] In *Taub* v. *Investment Dealers Assn. of Canada*, 2009 ONCA 628, 98 O.R. (3d) 169 ("*Taub*"), the Court of Appeal addressed the standard of review on a determination of the jurisdiction of a self-regulatory organization subject to OSC recognition under s. 21.1 of the Act to discipline former members. Based on the standard set out at para. 59 in *Dunsmuir* that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it authority to decide a particular matter", Feldman J.A. speaking for the Court of Appeal held that the circumstances in *Taub* did not involve an issue of jurisdiction to be reviewed on a correctness standard. She held, instead, that the OSC had the authority to interpret s. 21.1(3) of the Act (the particular provision at issue in that proceeding) to determine whether the jurisdiction of the IDA, once it had been recognized as a self-regulatory organization, was limited to disciplining only current members. Accordingly, in *Taub* the Court of Appeal held that the standard of review of the OSC's interpretation of s. 21.1(3) was one of reasonableness, based on the OSC's expertise in the interpretation of its home statute.

[61] We would note that Feldman J.A. also references para. 60 in *Dunsmuir*, in which the Supreme Court considered that the correctness standard could also apply where there is a

question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise"; however, she does not make an express finding on the application of this principle to the facts in *Taub*. Nevertheless, it is clear that Feldman J.A. concluded that the issue in *Taub* did not invoke a correctness standard of review on the basis of this principle, given both her reference to the expertise of the OSC in the interpretation of the Act and her finding that reasonableness was the applicable standard applied in the case.

[62] We would also note that essentially the same issue of interpretation was raised in *Dass* v. *Investment Dealers Assn. of Canada*, 2008 BCCA 413, 302 D.L.R. (4th) 354 ("*Dass*"). In that decision, the British Columbia Court of Appeal reviewed a decision of the British Columbia Securities Commission (the "BCSC") in which the issue was the interpretation of s. 26(1) of the *Securities Act*, R.S.B.C. 1996, c. 418, the equivalent provision under that statute to s. 21.1(3) of the Act.

[63] Speaking for the court, K.J. Smith J.A. expressly held that the interpretation of s. 26(1) was neither a question of general law that was of central importance to the legal system as a whole nor was it one that lay outside the specialized area of expertise of the BCSC. The British Columbia Court of Appeal held, consistent with *Taub* although preceding it, that the question of whether s. 26(1) limited the disciplinary jurisdiction of the IDA to current members, despite the provisions of the IDA by-law that extended jurisdiction to certain former members, was at the core of the BCSC's expertise, as well as its functions to protect investors and ensure capital market efficiency and public confidence in the system. On this basis, it concluded that the applicable standard of review was reasonableness.

[64] While the specific legal issues before the Court are not the same as in *Taub* and *Dass*, in our opinion the essential character of the legal issues in the present proceeding is the same insofar as they address the legal effect of the actions of the TSX Board. This issue requires an interpretation of those actions in the context of the recognition provisions of the Act pertaining to the TSE as well as the applicable provisions of the TSE Act. This issue does not present a true issue of jurisdiction. It does, however, invoke the expertise of the OSC in respect of the overall regulatory structure established under the Act pertaining to the regulation of the TSE and its members.

[65] Accordingly, we feel bound by the decision in *Taub* that a reasonableness standard applies to the review of the OSC Decision on this issue. Given the determination below, it is unnecessary to consider whether the issue of the legal effect of the RS Recognition Order and the OSC's approval of the UMIR also raises a true issue of jurisdiction and, accordingly, we do not address that issue in these Reasons.

Is the OSC Decision Reasonable?

[66] We have approached the review of the OSC Decision by adopting the three-part test for conducting a review of reasonableness that was applied by Feldman J.A. in *Taub*, which was itself based on the principles articulated by the Supreme Court in *Dunsmuir* at para. 47.

[67] The OSC Panel considered that its standard of review should be one of correctness. The appellant does not challenge this conclusion of the OSC Panel. In any event, while the OSC Panel considered itself free to substitute its own decision for that of the RS Panel, it confirmed the RS Ruling in the result. We are satisfied that there is no basis for any complaint that the OSC failed to understand, or address, the substantive issues advanced by Berry or that the OSC failed to follow the process required of it in respect of Berry's application under s. 21.7 of the Act.

[68] In addition, in our view, the OSC Panel's reasons on the issues addressed in this endorsement are clear, are understandable, and justify the result reached. Accordingly, the OSC Decision also satisfies the test that it be "justified, transparent and intelligible".

Is the Decision of the OSC Panel Within a Range of Acceptable Outcomes?

[69] The outcome of the OSC Decision is that the provisions of the UMIR identified in the Statement of Allegations applied to Berry. The principal issue for the Court on this application is whether such an outcome is reasonable.

[70] As we understand the OSC Decision, the OSC Panel reached this conclusion on two alternative grounds.

[71] First, it concluded that the TSX Board validly adopted the UMIR at its meeting on November 27, 2001 and that the UMIR, as adopted, included amendments to the UMIR that may be made from time to time thereafter including, as a result, the amendment to include s. 10.3(4). The OSC Panel also concluded that s. 10.3(4) of the UMIR extended to former employees of a TSE member notwithstanding the absence of any express language to this effect in that provision. These findings are sufficient to support a conclusion that RS has jurisdiction to enforce the UMIR against Berry in the present circumstances.

[72] Second, the OSC Panel concluded that, independently of any action taken by the TSX Board, the UMIR were enforceable against Berry. It grounded this enforceability in the legal effect of the OSC's exercise of its overriding public interest authority under ss. 21(5)(e) and 21.1(4) of the Act to implement a set of market rules applicable to the TSE and all persons within its jurisdiction through a public process involving the RS Recognition Order, the OSC approval of the UMIR in connection with that Order, and the amendments to the terms of the TSE Recognition Order. This alternative ground of finding that RS has jurisdiction to enforce the UMIR against Berry also relies upon the OSC Panel's conclusion that s. 10.3(4) of the UMIR extended to former employees of a TSE member.

[73] We will address each of these grounds in turn although in reverse order to that adopted by the OSC.

The Legal Effect of the Actions of the TSX Board of Directors at its Meeting on November 27, 2001

[74] Berry submits that the OSC Panel did not find a valid or effective adoption of the UMIR by the TSX Board at its meeting on November 27, 2001 or at any other time. Berry argues that the TSX Board had proposed to incorporate the UMIR in final form into the TSE Rules at a later date and that this never occurred.

[75] As stated above, however, we read the OSC Decision to include a determination that the TSX Board, in adopting Rule 4-201 in the manner provided for in the minutes of its meeting, required each person within its jurisdiction to comply with the UMIR, as they may exist from time to time, as a standard of conduct. This determination extended not only to the final form of the UMIR as approved by the OSC in 2002 but also to subsequent amendments, including the amendment to include s. 10.3(4) of the UMIR effective January 30, 2004.

[76] We are satisfied that the result in the OSC Decision on this issue falls within a range of acceptable, defensible outcomes for the reasons set out below having regard to the approach mandated in *Dunsmuir* cited above.

Analysis Regarding TSX Board Approval of the UMIR as Finalized in 2002

[77] The issue of whether the TSX Board action was effective to approve the UMIR on the basis of a draft version of the UMIR is, in essence, a matter of corporate authority. The issue turns on the intention of the TSX Board at the time it adopted Rule 4-201. The OSC Panel concluded that the TSX Board intended, by adopting Rule 4-201, to adopt the UMIR, as they may exist from time to time without further TSX Board action. We think the OSC Panel could reasonably reach this conclusion on the evidence before it. In particular, the language of both the amendment to the TSE Rules and of the TSX Board resolution effecting such amendment as well as the surrounding circumstances at the time of the adoption of Rule 4-201 support this conclusion.

[78] The definition of the UMIR in Rule 1-101, set out above, makes clear provision for amendments to the UMIR from time to time. It defines the 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".

[79] On a plain reading, this language is sufficient to incorporate into Rule 4-201 all amendments to the UMIR that were approved by the OSC and the other relevant securities authorities without further action of the TSX Board. Considering that the process of the creation and approval of the UMIR involved RS and the OSC, among other third parties, but did not involve the TSX Board, we think it is clear from this definition alone that the TSX Board

envisaged, and intended, to adopt the UMIR, as amended from time to time, without further corporate action.

[80] The conclusion that the TSX Board did not intend to defer actual approval of the UMIR and their incorporation into Rule 4-201 is also supported by the text of the actual resolution passed by the TSX Board. Paragraph b. uses language that expressly amends the TSE Rules; it does not approve an amendment in principle, nor does it contemplate a future amendment. Paragraph c. makes provision for effecting TSX Board approval of future amendments by action of the chief executive officer without further TSX Board action:

> Upon motion duly made, seconded and approved, the [TSX] Board accepted the recommendations 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 the Appendix "D" to these Minutes and amended the Policies as set out in Schedule "E" of the 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 the 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.

[81] The circumstances at the time of the TSX Board meeting reinforce this conclusion. It was clearly understood at that time that amendments to the UMIR were contemplated, including, but not limited to, the proposed amendments before the TSX Board.

[82] This understanding is evidenced in the following excerpts from the minutes of the meeting:

> **Future Changes to the UMI Rules Prior to Adoption**
>
> While the current draft of the UMI Rules reflects many of the comments received from the CSA, staff of the CSA has indicated that additional comments may be made. In addition, staff of the CSA has indicated that comments will be forthcoming on the draft policies that were published on October 12, 2001.

Incorporating comments on the policies may in turn require additional amendments to the rules. The version attached as Appendix "D" to these Minutes have not been approved by the securities regulatory authorities and additional amendments may be required.

...

Amendment to the Rules and Policies of the TSE

With the recognition of RS Inc. as a regulatory 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. The proposed amendments necessitated on the adoption of the UMI Rules are set out in Schedule "C" under the heading "General Market Integrity Rules". The text of the rule amendment to implement these changes is set out as Schedule "D" of Appendix "D" and the policy amendments are set out as Schedule "E of Appendix "D".

...

Implementation

The proposed changes to the Rules and Policies as a result of the adoption of the UMI Rules as the general integrity rules of the TSE are consequential in nature as they are necessary to properly give force and effect to the UMI Rules. As the contents of the UMI Rules will be approved by the applicable securities regulatory authorities, Regulation Services is of the opinion that these consequential amendments should be considered to be administrative in nature for the purposes of the Protocol between the TSE and the OSC. As administrative amendments, the amendments will be considered approved upon being filed with the OSC and effective on the date indicated by the TSE in its filing.

[83] Moreover, as the last excerpt and the resolution of the TSX Board illustrate, the TSX Board understood that the proposed amendments were of an administrative, rather than substantive nature. On this basis, there was no corporate requirement for further TSX Board approval of the final text of the UMIR. We note that, consistent with this view of the proposed amendments, while the appellant stresses the number of changes made to the draft version of the UMIR prior to approval of the final form, he has not identified any material substantive changes to the UMIR made subsequent to the TSX Board meeting that would have necessitated a further meeting.

[84] In addition, at the same TSX Board meeting, the TSX Board also approved the transfer of the TSE market regulation function to RS, upon recognition by the relevant securities authorities,

subject to TSE staff being satisfied with the terms of transfer that may be imposed by such authorities. The transfer was effected by the Regulation Services Agreement described above. The text of the relevant resolution of the TSX Board is as follows:

> **Transfer TSE Market Regulation to Market Regulation Services Inc.**
>
> Upon motion duly made, seconded and approved, the TSE Board approved the transfer of TSE market regulation to RS Inc. upon recognition of RS Inc. by the appropriate members of the CSA, subject to TSE staff being satisfied with the terms of transfer that may be imposed by such members of the CSA.

[85] There is no suggestion in the minutes that a further TSX Board approval was required for such transfer to become effective. Instead, the transfer was intended to occur simultaneously with the coming into force of the UMIR and Rule 4-201. This automatic transition arrangement reinforces the conclusion that no further TSX Board approval was contemplated for the coming into force of the new TSE Rules to be enforced under the Regulation Services Agreement.

[86] In reaching its' conclusion, the OSC Panel further addressed and rejected two arguments also raised in the present proceedings:

1. that the TSX Board approval of Rule 4-201 amounted to improper incorporation by reference of the UMIR; and

2. that by requiring compliance with the UMIR, the TSX Board improperly delegated its rule-making authority to RS.

[87] With respect to the first argument, the appellant argued before the Court that there is no authority in the TSE Act to incorporate other rules or standards into the TSE Rules by reference, nor is there authority to require compliance with them. He submitted that, therefore, Rule 4-201 as purportedly adopted is *ultra vires* because it amounts to an unauthorized incorporation of the UMIR into the TSE Rules.

[88] The OSC Panel concluded that the requirement in Rule 4-201 to comply with the provisions of the UMIR was substantially similar to the requirement in the same rule to comply with all applicable securities legislation, which the OSC Panel took to be unimpeachable.

[89] Before the Court, the issue was addressed by the parties in terms of the wording of s. 13.0.8(2). That provision gives the TSX Board the power to "make or adopt rulings, policies, rules and regulations ... as it considers necessary ..." in the exercise of its powers set out in s. 13.0.8(1). The TSX argues that the use of the language "make or adopt ... rules and regulations" constitutes the necessary authority to incorporate by reference the UMIR by way of adoption. The appellant submits that neither s. 13.0.8(1)(c) and (d) nor s. 13.0.8(2) of the TSE Act gives the TSX Board the power to incorporate the UMIR by reference. In this connection, he argues that there is no difference in meaning between the words "make" and "adopt" in s. 13.0.8(2) that

would permit the TSE to rely on the concept of "adoption" in the manner it suggests. Instead, the appellant says that express statutory language is required which is absent.

[90] We are of the view that the OSC Panel could reasonably conclude that the adoption of Rule 4-201 did not constitute an invalid incorporation by reference of the UMIR by the TSX Board.

[91] On a plain reading of s. 13.0.8(2), the interpretation placed upon the words "make or adopt" by the TSX is not unreasonable. A recognized principle of statutory construction is that a provision should be interpreted to give effect to the meaning of all of the words of the provision if such an interpretation yields a commercially reasonable result. In this case, interpreting "make" and "adopt" as separate concepts does yield a commercially reasonable interpretation. Moreover, a construction of s. 13.0.8(2) which allows the adoption of other rules and regulations is, as the OSC Panel noted, consistent with the similar approach to adoption of applicable securities legislation in Rule 4-201. Lastly, there is no policy reason for imposing the narrow interpretation proposed by the appellant.

[92] The appellant's argument proceeds from the absence of any provision in the TSX Act which is comparable to section 143(6) of the Act, which expressly grants the OSC the power to make rules that incorporate other enactments by reference. The appellant urges the Court to interpret s. 13.0.8 of the TSE Act on the basis of a principle of statutory interpretation that presumes a uniformity of expression in legislation within the same field — in this case between the TSE Act and the Act on the grounds that both are securities legislation. The appellant relies on the maxim of statutory construction *expressio unius est exclusio alterius*. He also argues that each principle yields the conclusion that the Legislature did not intend the TSE to have the authority to make a rule that incorporated the UMIR by reference.

[93] The maxim *expressio unius* must be approached with caution. In the present proceeding, we do not think it is relevant in the face of the phrase "make or adopt" in s. 13.0.8(2).

[94] We also do not think that the other principle of statutory interpretation upon which the appellant relies is applicable in the present circumstances. That principle is directed towards ensuring coherence among statutes enacted by the same level of Parliament, particularly in respect of the same subject matter. There is, however, no reason for assuming or enforcing a uniformity of approach between the Act and the TSE Act. While the OSC is a public authority, the TSE is now an entirely private entity. There is no reason why the approach to TSE rule-making in respect of its members should be interpreted in the same manner as the OSC powers under the Act. This conclusion is reinforced by the fact that all rule-making of the TSE is subject to approval by the OSC. In our view, the interpretation of s. 13.0.8(2) is more appropriately addressed in the manner in which articles of incorporation or by-laws of a corporation are interpreted in accordance with customary corporate law principles. In this context, there is no presumed prohibition against the adoption by reference of rules of other entities as they may exist from time to time.

[95] With respect to the second argument, the appellant argues that the TSX Board action was *ultra vires* as an unauthorized delegation of the Board's exclusive rule-making authority, insofar as the TSX Board purported to adopt the UMIR as they were amended from time to time by RS and approved by the relevant securities authorities.

[96] This argument is based on the submission that s. 13.0.8(4) of the TSE Act, which authorizes the TSX Board to delegate certain specified powers, does not provide for delegation of the power to make or adopt by-laws governing the conduct of TSE members and their employees. Because the UMIR were not in final form on November 27, 2001, the appellant argues that the TSX Board delegated the responsibility for finalizing the UMIR to others. The same argument is asserted with respect to the enforceability of s. 10.3(4), which it is agreed was never formally adopted by the TSX Board.

[97] While the OSC Decision does not address the specific issues raised by the appellant in this proceeding, we are of the opinion that the determination of the OSC Panel – that the combined effect of the amendments to Rules 1-101 and 4-201 of the TSE Rules did not involve an unauthorized delegation of the powers of the TSX Board under s. 13.0.8 of the TSE Act – is reasonable according to the standard in *Dunsmuir* for the following reasons.

[98] As the TSX Board retained the right to amend or revoke Rule 4-201 at any time, the OSC Panel could reasonably conclude that the TSX Board had not delegated the authority to amend the UMIR to RS in a manner that contravened the provisions of s. 13.0.8(4).

[99] This principle has been accepted in respect of public or quasi-public bodies: see *Kingston* v. *Ontario Racing Commission*, [1965] 2 O.R. 10 (H.C.J.) at p. 6 in respect of incorporation of rules of another body and *Denison Mines* v. *Ontario (Securities Commission)* (1981) 32 O.R. (2d) 469 (Ont. S.Ct. (Div. Ct.)) at pp. 476-477 in respect of incorporation of standards of generally accepted accounting principles. The operative principle is whether the relevant entity retains control over the content of the rules for its own purposes. That requirement is satisfied in the present circumstances. In addition, we think there is a strong argument that, given the private rather than public or quasi-public nature of the TSE and given the OSC oversight of its actions, the powers of the TSX Board should be interpreted liberally in a manner that would exclude the characterization of Rule 4-201 as giving rise to an improper delegation of the TSX's Board's authority.

[100] As a further argument, the appellant also suggests in his factum that RS lacked the jurisdiction to bring the proceedings against him because the Statement of Allegations of RS does not allege that Berry breached TSX Rule 4-201 but rather breached the UMIR and the former TSX Rules, which were repealed by the TSX Board at the meeting of November 27, 2001.

[101] It is not clear to us that this issue is before the Court on this appeal. We would observe, however, that this is an argument of form over substance. While it would have been preferable to have referenced a breach of Rule 4-201 in connection with the alleged breaches of the UMIR,

there is no possibility whatsoever that the appellant was either mislead or prejudiced by the manner in which the Statement of Allegations identified such alleged breaches.

Analysis Regarding TSX Board Approval of Amendments to the UMIR Subsequent to Initial OSC Approval

[102] Based on the foregoing analysis of the intention of the TSX Board in adopting Rule 4-201, it follows that the amendment to the UMIR to incorporate s. 10.3(4) had the automatic result of incorporating such amendment into Rule 4-201 of the TSE by virtue of the definition of "UMIR" in Rule 1-101 of the TSE Rules without further action of the TSX Board.

[103] Accordingly, we are satisfied that the OSC Panel could reasonably find that the TSX Board validly approved Rule 4-201 at its meeting of November 27, 2001 and, by doing so, validly incorporated into Rule 4-201 the UMIR, as amended from time to time thereafter by RS and approved by the OSC.

Analysis of the Jurisdiction of RS over Former Employees Pursuant to Section 10.3(4) of the UMIR

[104] Section 10.3(4) provides for the liability of officers or employees of a member of the TSE who engages in conduct that causes the member to contravene the UMIR. The appellant submits, however, that s. 10.3(4) of the UMIR should be construed narrowly and that, accordingly, this provision does not apply to him given the absence of any reference to former directors, officers, employees of a Participant in this provision.

[105] The basis for the decision of the OSC Panel appears to be that the provisions of s. 13.0.8(1) of the TSE Act provided the TSE with the authority, which it delegated to RS pursuant to the Regulation Services Agreement, to enforce s. 10.3(4) against persons who leave the employment of a member of the TSE.

[106] We are satisfied that the OSC Panel could reasonably conclude, for the reasons set out in the OSC Decision, that RS has jurisdiction to proceed against Berry as a former employee of a member of the TSE as a result of the adoption of Rule 4-201 by the TSX Board.

[107] Section 13.0.8(1)(c) of the TSE Act provides the TSX Board with the authority to regulate the business conduct of former employees of members provided that the conduct occurred during the period of employment. In other words, it is the employment relationship as it existed at the time of the alleged infraction, and not that which existed at the time of the commencement of enforcement proceedings, that is relevant. There is no doubt that the TSE had the power under s. 13.0.8(4) of the TSE Act to delegate or assign to RS under the Regulation Services Agreement the power to enforce the TSE Rules, including, for the reasons stated above, the UMIR.

[108] There is no decision that requires that by-laws regulating the conduct of members specifically address former members. The issue in *Chalmers* v. *Toronto Stock Exchange* (1989),

70 O.R. (2d) 532 (C.A.) ("Chalmers") was one of *ultra vires* based on the absence of corporate authority in the then-current version of the TSE Act. It did not address the interpretation of a corporate by-law which included the requisite authority.

[109] Section 10.3(4) speaks only to officers or employees of a Participant who engage in contravening conduct. While section 10.3(4) clearly requires that the misconduct occur at a time when an individual is an officer or employee of a Participant, it does not expressly require that the individual must also be an officer or employee at the time of institution of proceedings in respect of such misconduct. Given the context in which this provision is being interpreted, we are of the opinion that s. 10.3(4) should be interpreted as applying to an officer or employee of a member of the TSE in respect of his or her actions on behalf of the member irrespective of the status of the employment relationship at the time proceedings are instituted against such employee. Given the purpose of section 10.3(4) and the scope of regulation under the TSE Act at the time of the establishment of the UMIR, we see no reason to interpret the provision more narrowly than the express wording requires. We note that this conclusion is consistent with the observation of Feldman J.A. to the same effect in *Taub* at para. 51 in which she concluded that the timing of the institution of disciplinary proceedings is a procedural rather than a substantive matter that was not addressed in the by-law at issue in that decision and, by implication, was not required for the by-law to cover former employees.

[110] The appellant argues that s. 10.3(4) should be construed strictly in accordance with the principle, articulated in certain decisions, that rules and legislation dealing with professional discipline should be strictly construed: see, for example, *Henderson* v. *College of Physicians and Surgeons of Ontario* (2003), 65 O.R. (3d) 146 (C.A.) ("*Henderson*") per Armstrong J.A. at paras. 26 and 27. He also relies on several decisions in which courts have found that a disciplinary body ceases to have jurisdiction upon the termination of membership in that body.

[111] We would observe that the present circumstances are distinguishable from the cases of professional discipline for the following reasons. The decisions cited to the Court in which rules and regulations of a professional body were strictly construed involved issues of procedural fairness. In the decisions in which jurisdiction was found to have terminated upon termination of membership in a professional body, there was no policy reason to interpret the applicable statute as permitting the institution of disciplinary proceedings against former members of the body.

[112] The issue in the present appeal does not, however, raise an issue of procedural or substantive fairness. There is also a valid policy reason for an interpretation of s. 10.3(4) that permits the institution of proceedings against former employees of members of the TSE. For these reasons, we do not think the principle in *Henderson* is applicable in the present circumstances nor do we think that s. 10.3(4) should be strictly construed in the absence of a policy reason for another interpretation.

[113] We acknowledge that, on its own, s. 10.3(4) exhibits an ambiguity. However, in our view, that ambiguity is resolved by taking into consideration the scope of s. 13.0.8 of the TSE Act. That provision indicates an intention to extend the TSX jurisdiction to former employees of

members of the TSX. It is, therefore, reasonable to assume that any rule passed by the TSX governing the responsibility of directors, officers, and employees of members for actions of members was intended to include, by extension, former directors, officers, employees of members. We see no distinction for this purpose between any rule that the TSX might have made or adopted prior to the enactment of Rule 4-201 and the enactment of Rule 4-201 itself. In this context, we are, therefore, of the opinion that s. 10.3(4) should be interpreted in accordance with this intended scope of the TSX jurisdiction.

[114] This conclusion is further supported by the history of this issue within the securities industry and the public process of adoption of the amendment to the UMIR to add s. 10.3(4). We do not think that there is any issue that the appellant, as an officer and director of a TSE member, knew of, and, by his continued employment with Scotia, assented to, the TSX's assertion of jurisdiction over former directors, officers, employees of TSE members. There is no doubt that the appellant would have been aware of the position of the TSE that it had the power to pursue enforcement proceedings against former officers and employees of TSE members, whether or not he was actually aware of the specific wording of s. 13.0.8 of the TSE Act. The court decisions in *Chalmers, Taub* and *Dass* all received wide publicity at the time of their release, as did the response of the TSE in respect of the decision in *Chalmers*. It is, therefore, a matter of common knowledge that self-regulatory organizations in the securities industry assert jurisdiction over former members of such bodies, and former employees of members of such bodies, in respect of conduct occurring during their employment.

[115] The operative principle in respect of the jurisdiction of domestic tribunals such as the TSE was set out in *Chalmers* by Finlayson J.A. at p. 541, when he stated that "[t]heir authority is restricted to those who have voluntarily submitted to that authority." The TSE members voluntarily submitted to the authority of the TSE in respect of the TSE Rules by contract as members of the TSE. We think that, at a minimum, directors and officers of a TSE member must be treated as having voluntarily submitted to the jurisdiction by the TSE by their continued employment by a TSE member with presumed knowledge of the extent of that jurisdiction. On this basis, there is no doubt that the appellant submitted to the authority of the TSE in respect of his actions on behalf of Scotia regardless of whether he was employed by Scotia at the time of initiation of any proceedings against him in respect of such actions.

[116] Lastly, and, in any event, we adopt the conclusion of Feldman J.A. in *Taub* at para. 52:

> [I]n making its decision ... the OSC applied its expertise in the securities industry and considered whether it was consistent with the purposes and objects of the legislative and regulatory scheme for SROs to have the authority to discipline former members for misconduct they are alleged to have engaged in while they were members. The OSC concluded that not only did its interpretation serve 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.

[117] Such conclusion is equally appropriate in the present circumstances, given that the standard of review of the OSC Decision is one of reasonableness.

Conclusion

[118] As set out above, the OSC Panel determined RS had jurisdiction to enforce the UMIR against Berry on the basis of the following determinations: (1) that by adopting Rule 4-201 of the TSX Rules, the TSX Board required each person within its jurisdiction to comply with the UMIR as a standard of conduct; (2) that s. 10.3(4) of the UMIR was validly adopted by virtue of the definition of the UMIR in Rule 1-101 of the TSX Rules; (3) that s. 10.3(4) of the UMIR extended the jurisdiction of the TSX Board to Berry as a former employee of a member of the TSX; and (4) that the jurisdiction to enforce s. 10.3(4) was validly delegated or assigned by the TSX Board to RS.

[119] For the reasons set out above, we conclude that, in the circumstances of this proceeding, such decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The Legal Effect of the RS Recognition Order and the OSC Approval of the UMIR

[120] In view of the finding above regarding the legal effect of the actions of the TSX Board, it is unnecessary to address the appellant's appeal of the alternative conclusion of the OSC Panel upon which it also determined that the UMIR are enforceable against Berry.

[121] This issue raises issues of considerable complexity regarding the effect of the approval process followed by the OSC Panel, potentially including an issue as to the appropriate standard of review of the OSC Decision on the issue. We would note that the OSC Decision on this issue was supported by RS but not by the staff of the OSC who made representations in the present proceedings only on the legal effect of the actions of the TSX Board.

[122] In declining to address these issues, we do not wish to indicate that we have taken any position on the determination of the OSC Panel on these issues or on the standard of review applicable to review of the alternative conclusion in the OSC Decision.

Conclusion

[123] Based on the foregoing, the appeal is dismissed.

Costs

[124] Neither the OSC nor the TSX seeks its costs of the appeal. Costs in the amount of $15,000 are awarded in favour of RS to be payable forthwith.

Jennings J.

Lederman J.

Wilton-Siegel J.

Released: November 26. 2010

CITATION: Berry v. Ontario Securities Commission, 2010 ONSC 3012

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, LEDERMAN and WILTON-SIEGEL JJ.

BETWEEN:

DAVID BERRY

Appellant

– and –

ONTARIO SECURITIES COMMISSION and MARKET REGULATION SERVICES INC.

Respondents

JUDGMENT

Released: November 26, 2010