



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19^e étage
20, rue queen ouest
Toronto ON M5H 3S8

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

- and -

**IN THE MATTER OF
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**

**ORDER
(Section 21.7 of the *Securities Act*)**

WHEREAS David Berry (“Berry”) was employed by Scotia Capital Inc. (“Scotia”) from 1996 to 2005 as a trader (non-retail) and in 1998 was appointed Head of Preferred Trading responsible for trading Scotia’s proprietary book of preferred shares;

AND WHEREAS in May 2005, Market Regulation Services Inc. (“RS”) conducted a trade desk review, which raised questions regarding various short positions held in Berry’s inventory account for the Preferred Share Trading Desk (the “Preferred Desk”);

AND WHEREAS subsequent to the trade desk review, RS initiated an investigation into the conduct of Berry, Scotia and Marc McQuillen (“McQuillen”), a fully licensed trader who was Berry’s assistant on the Preferred Desk;

AND WHEREAS on February 20, 2007, RS issued a Notice of Hearing and Statement of Allegations with respect to Berry, and an amended Notice of Hearing was issued by RS on June 12, 2007 (the “RS Proceeding”);

AND WHEREAS in the context of the RS Proceeding, RS alleges that between June 3, 2004 and April 18, 2005, Berry engaged in certain conduct which resulted in Scotia contravening the Universal Market Integrity Rules (“UMIR”);

AND WHEREAS Scotia and McQuillen, respectively, entered into settlement agreements with RS Staff relating to the matters at issue in the RS Proceeding, which were approved by RS Panels on February 26, 2007 and on February 28, 2007, respectively;

AND WHEREAS Berry filed a reply to RS’s Notice of Hearing and Statement of Allegations on March 14, 2007 (the “Reply”) in which Berry takes the position that:

- (1) his conduct did not result in Scotia contravening UMIR, but that if breaches of UMIR did occur, they were the result of Scotia’s own compliance failures (the “Scotia Defence”); and
- (2) Scotia:
 - (i) was responsible for supervising his trading and educating him about securities regulatory requirements;
 - (ii) was directly aware of Berry’s trading practices in general, and of the very trades in issue; and
 - (iii) expressly advised Berry that the impugned trading was not considered improper;

AND WHEREAS on October 15, 2007, in the context of the RS Proceeding, Berry brought a motion before RS for further disclosure, returnable November 2, 2007 (“Berry’s Motion”) requesting: (1) all materials relating to prior investigations or reviews by RS Staff of Berry’s trading practices while employed at Scotia, other than the present investigation (the “Other RS Files”), and (2) communications and documents relating to the negotiations of the Scotia settlement and the McQuillen settlement (the “Settlement Materials”);

AND WHEREAS the Chair of the RS Panel rendered his decision on November 8, 2007, denying Berry's Motion for further disclosure (the "RS Disclosure Decision");

AND WHEREAS on November 26, 2007, Berry filed an application with the Commission for a hearing and review of the RS Disclosure Decision (the "Application") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended;

AND WHEREAS Berry seeks only review of the RS Disclosure Decision with respect to the Settlement Materials (because issues relating to the Other RS Files were settled prior to the Application being heard before the Commission);

AND WHEREAS a hearing was held on March 6, 2008 to consider the issues raised in the Application with respect to the Settlement Materials;

AND WHEREAS the Commission considered Berry's position as follows:

- (1) RS alleges that Berry, as an employee of Scotia, is liable for Scotia's conduct pursuant to UMIR 10.3(4);
- (2) the issue of whether representatives of Scotia had knowledge relevant to Berry's conduct may be raised in the RS Proceeding;
- (3) Berry has indicated an intention to call individuals employed with Scotia (including McQuillen) as witnesses at the RS Proceeding (if RS Staff does not do so);
- (4) the Settlement Materials may contain information relevant to Berry for the purposes of deciding which witnesses to call at the RS Proceeding; and
- (5) the Settlement Materials may contain information which is necessary for Berry to make full answer and defence in the RS Proceeding;

AND WHEREAS the RS Proceeding is scheduled to commence on April 21, 2008, and we consider it appropriate to release our decision promptly, prior to the commencement of the RS Proceeding, and therefore, in advance of our written reasons;

AND WHEREAS the terms of this order will not prejudice the positions of Scotia or McQuillen in connection with their settlements;

AND UPON HAVING CONSIDERED written and oral submissions made by counsel for Berry, RS and Staff of the Commission;

AND FOR THE REASONS to be released in written form in due course;

IT IS HEREBY ORDERED that:

1. Subject to clause 3 below, RS shall provide Berry's counsel access to the Settlement Materials and, if requested, copies thereof for purposes relating to Berry's defence in the RS Proceeding.
2. Disclosure and use of the Settlement Materials will be on the basis that:
 - (a) Berry and his counsel will not use the Settlement Materials other than in connection with Berry making full answer and defence to the allegations against him in the RS Proceeding;
 - (b) any use of the Settlement Materials other than in connection with Berry making full answer and defence to the allegations against him in the RS Proceeding will constitute a violation of this Order;
 - (c) RS shall maintain custody and control over the Settlement Materials so that copies of the Settlement Materials are not disseminated for any purpose other than as contemplated in clause 1 above;
 - (d) the Settlement Materials shall not be used for any collateral or ulterior purpose; and
 - (e) Berry and his counsel shall, promptly after the completion of the RS Proceeding and any appeals, return all copies of the Settlement Materials to RS or confirm that they have been destroyed.
3. The foregoing Order is subject to any claim by RS of solicitor-client privilege, or litigation "work product" privilege, and if asserted, the particulars of such a claim shall be set out by RS in a written list and provided to Berry's counsel with the Settlement Materials.

Dated at Toronto on this 26th day of March, 2008.

"Lawrence E. Ritchie"

Lawrence E. Ritchie

"James E. A. Turner"

James E. A. Turner