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

- AND –

IN THE MATTER OF MR. X, THE APPLICANT

Hearing:	**October 15, 2003**		
Panel:	**Paul M. Moore, Q.C.**	**-**	**Vice-Chair (Chair of the Panel)**
	H. Lorne Morphy, Q.C.	**-**	**Commissioner**
	Wendell S. Wigle, Q.C.	**-**	**Commissioner**
Counsel:	**Kathryn Daniels**	**-**	**For Staff of the Ontario Securities Commission**
	Paul Steep	**-**	**For Mr. X, the applicant**
	Lorne Honickman	**-**	**For the author**

REASONS FOR DECISION

I. The Proceeding

[1] This is an application for amendment (the Amendment) of an order (the Section 17 Order) under section 17(1) of the *Securities Act* (the Act) authorizing disclosure of information otherwise prohibited by section 16(1) of the Act. Because of the nature of the application, the hearing was held in camera.

II. Background

[2] In 2001 and 2002, the applicant volunteered to be interviewed by staff of the Commission concerning an investigation that was being conducted by staff (the Investigation). Subsequent to interviews of the applicant, two articles were published in a national newspaper containing information which the applicant had disclosed in the interviews. Following publication of these two articles, the applicant commenced an action for defamation (the Defamation Action) against the author of the articles and the national newspaper that published them.

[3] The statement of claim in the Defamation Action, alleges that one of the articles is libellous in its entirety and specifically complains about statements in the article attributable to the author.

[4] As a result of the publication of the articles, the Commission issued an investigation order (the Investigation Order) pursuant to section 11(1) (a) of the Act to investigate how information from the interviews of the applicant was leaked and included in the articles. Pursuant to the Investigation Order, a summons to the author was issued and the author attended at the Commission for an interview.

[5] No transcript of that interview of the author was provided to the panel on this application and we do not have information of what, if anything, the author, in fact disclosed to the Commission. However, staff counsel, in her submission, stated that staff's transcript of the interview does not contain information as to who gave the author the transcripts of the applicant's interviews.

[6] When the author was examined for discovery in the Defamation Action, the author initially refused to answer certain questions. The rationale now given for the refusal is in part that section 16(1) of the Act precluded the answering of those questions. Following this initial stage of the author's examination for discovery, the author applied for the Section 17 Order to permit certain disclosure in the next stage of the examination for discovery.

[7] The applicant was not aware of the application for the Section 17 Order by the author at the time it was made. The Section 17 Order was issued with the consent of both the author and staff. It provided that the author could disclose in the Defamation Action the "existence of the Investigation Order and questions…asked on any of the interviews."

[8] As the Section 17 Order did not expressly state that the author could disclose any answers that were given to the questions asked in the interviews, the applicant now seeks the Amendment to provide

> (a) the Commission authorizes the author to disclose to the applicant and/or his counsel the information disclosed to the Commission including the questions asked together with the answers and the documents provided to the Commission pursuant to the Investigation Order;
>
> (b) the Commission authorizes the applicant and/or his counsel to disclose in the Defamation Action anything disclosed in (a) by the author to them.

III. Position of the Parties

[9] While all counsel agreed that any order made under section 17(1) of the Act has to be made in the public interest, each differed in his or her submissions as to what was the public interest.

[10] It was also agreed by all counsel that section 16(1) of the Act did not prohibit the author from answering relevant questions on the examination for discovery simply on the ground that those questions had been asked and the information in response to the questions had been given during the author's interview.

[11] Counsel for the applicant submitted that there was a public interest in making the Amendment for two reasons.

[12] First, in voluntarily being interviewed by staff, the applicant had a reasonable expectation of privacy and confidentiality as to what was disclosed in the applicant's interviews. He submitted there is a public interest in the Commission creating circumstances where a person can be voluntarily interviewed and have it treated privately and confidentially. In these circumstances, the person who has given information confidentially to the Commission will want inquiries made as to how that privacy and confidentiality were abused. To satisfy this legitimate concern, there should be a remedy available.

[13] The second reason submitted by counsel for the applicant was to enable the applicant to use in the Defamation Action the responses of the author in the author's interview. Reference was made to the pleading of malice in that action and reliance was placed upon the decision of *Young v. Toronto Star Newspapers Ltd., et al*, [2003] O.J. No. 3100, issued July 29, 2003 ("Young").

[14] Counsel for the author strongly opposed any disclosure and submitted that no public interest had been shown which would justify the disclosure of the author's interview.

[15] Counsel for staff submitted that the onus in this matter was on the applicant to demonstrate that the public interest justifies the Amendment. We agree. She submitted that if the

Section 17 Order had not been made, the Amendment should not be granted as the applicant had not met the onus to demonstrate that granting such order, as amended, is in the public interest. She submitted, however, that the Section 17 Order having been made, it is appropriate that the Amendment be made permitting disclosure in the terms sought by the applicant, as the Amendment is really a clarification of the Section 17 Order.

IV. Analysis

[16] One issue that arose on the application is whether the terms of the Section 17 Order, properly interpreted, in fact permits the author to disclose – not only the questions that were asked – but the answers given. If such was the case, this application by the applicant would not of course be necessary.

[17] Counsel for the author strongly opposed that interpretation. He submitted that the purpose of the author in seeking the order was only to be able to reveal on the author's examination for discovery that there was an investigation order issued and that the author was summonsed as a witness pursuant to which the author attended at the Commission for the purpose of an interview.

[18] Section 17(1) of the Act provides:

> If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,
>
> (a) the nature or content of an order under section 11 or 12;
>
> (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or
>
> (c) all or part of a report provided under section 15. 1994, c. 11, s. 358.

[19] It is of interest to note that section 17(1)(b) breaks down what can be disclosed pursuant to an order under Section 17, and distinguishes among "the nature or content of any questions asked under section 13" and, "any testimony given under section 13," and "any information obtained under section 13."

[20] The Section 17 Order appears to follow the distinctions made in section 17 as to the type of information that can be released in that it authorized the author to disclose the "existence of the investigation order and questions she was asked on any interview."

[21] To give the Section 17 Order a broader interpretation is simply not logical having regard to the purpose of the author in seeking the order. As a defendant in the Defamation Action, it would not make sense for the author to seek an order permitting disclosure on the examination for discovery of the answers given to questions when such could only assist the applicant in the civil action. The Section 17 Order was a consent order and just as the author is opposing the present application to permit the answers to be disclosed, the author would not have consented to such an order if it directed the answers to be given.

[22] Further, the fact that the applicant is making this application rather than seeking enforcement of the Section 17 Order demonstrates that the applicant must be accepting the author's interpretation of the order.

[23] Having regard to confidentiality in connection with the author's interviews imposed by section 16, and the onus that must be met for disclosure as found in section 17, any interpretation of the Section 17 Order should be strict. It would be contrary to the requirements set out in the matter of *Re Coughlan*, (2000) 24 O.S.C.B. 287, (Coughlan) to give the order a broader interpretation even if the words of the order were capable of that interpretation. Incidentally, in our view they are not.

[24] In *Coughlan*, Molloy J., in writing for the court, stated at paragraph 12 - 15:

> 12. I have referred in para. [5] above to the statutory framework as it existed at the time of Mr. Coughlan's examination in 1989. There was a statutory requirement that the information from the examination could not be disclosed without the OSC's consent. As well, there was a written OSC policy that the OSC considered it not to be in the public interest to consent to such release. Since 1988, there has been some development of the applicable law with respect to the requirement of confidentiality and the circumstances in which disclosure is authorized, both through case law and statutory amendment.
>
> 13. In *Biscotti v. Ontario (Securities Commission)* (1991), 1 O.R. (3d) 409 (Ont. C.A.), the Court of Appeal ruled that it was an error in principle for the OSC to make a blanket ruling prior to a hearing that it would not consent to the disclosure of s. 11 transcripts for use by the respondents at the hearing. The Court held that the OSC was required to make such a decision on a witness-by-witness basis, in each case exercising its discretion by weighing all the relevant interests and determining whether principles of fairness and justice required disclosure. The Court specifically rejected the suggestion that the confidentiality requirements under the then s. 14 of the Act were diminished once the investigation had been completed. The Court held that the Commission's rulings as to whether to disclose s. 11 material should be guided by the purposes for which s. 14 was enacted and cited with approval (at pp. 413-414) the following excerpt from the decision of the OSC Chairman as correctly setting out those purposes:
>
> > *The power of the Commission to compel a person to come forward and give statements under oath relating to an*

> *investigation is a broad and unusual power afforded by the Legislature to the Commission to enable it to carry out its responsibilities* to the public under the Securities Act. It is not a power to be lightly used *nor in our view should the information gathered be made available to anyone other than staff and counsel conducting the investigation, except in the most unusual circumstances. Any other treatment would prejudice the investigatory responsibilities of the Commission, and could severely prejudice persons whom the Commission staff require to give such statements.*

The fact that, under s. 14 of the Act, statements made pursuant to s. 11 may not be disclosed in any way without the consent of the Commission itself indicates the understanding of the Legislature of the necessity of confidentiality. *This power to compel testimony under s. 11 is exercised, and the statements are given, in the course of an investigation on the understanding that they will not become public in any way.*

We refer in this regard to OSC Policy 2.8, Section A, subsection 3. The information gathered is not intended to be and indeed cannot be used as evidence without appropriate proof at a hearing before the Commission.

The right to compel a witness to make a statement under oath is perhaps the most important tool which staff has in conducting investigations. Information and opinions are divulged which could not be admitted in any proceedings before this tribunal or any other. The very nature of this process under which they are obtained in our view dictates that these statements should not be released or used in the manner suggested by the respondents.

There undoubtedly are circumstances in which the consent provided for in s. 14 might be given, but it appears to us that the basis for this consent should be that the confidentiality clearly provided for in the statute is outweighed by the public interest in disclosure.

14. In *Re Glendale Securities Inc.* (1995), 18 O.S.C.B. 5975, the OSC applied the underlying principles of the Supreme Court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.). *Stinchcombe* addressed the disclosure obligations of the Crown in criminal cases involving indictable offences. While holding that the Crown's obligation to disclose is not absolute, the Court ruled that the constitutional right of the accused to make full answer and defence requires that the Crown produce all relevant information whether or not it will be presented at trial. The Crown has discretion in relation to disclosure of irrelevant materials and the timing of disclosure. As well, the rules of privilege limit the Crown's disclosure obligations. The OSC found the principles relating to disclosure and fairness instructive in its deliberation on the fairness obligations of administrative tribunals. Particular reference was made to the elimination of the element of surprise from proceedings to

> better serve the interests of justice and to the fact that there are no proprietary rights in the "fruits of investigation."
>
> 15. The *Securities Act* has been revised since *Biscotti* and *Stinchcombe*. The disclosure requirements established by both cases have now been codified in the Act. Policy 2.8 (dealing with the OSC's position on disclosure) is no longer in force. The current law on confidentiality and disclosure is set out in ss. 16 and 17 of the *Securities Act*. Section 16(1) prohibits the disclosure of any information obtained from a s. 13 examination (the equivalent of the s. 11 examination in 1989), except in accordance with s. 17. Section 16(2) provides as follows:
>
> > 16(2) Any … testimony given or documents or other things obtained under section 13 shall be for the exclusive use of the Commission and shall not be disclosed or produced to any other person or company or in any other proceeding except in accordance with section 17.

[25] The Amendment would, in effect, allow the applicant to obtain a transcript of the Commission's interview of the author. Indeed, the applicant's counsel stated that this is what he was seeking. The applicant indicated that he sought a transcript for two reasons. The first was that the applicant was owed an explanation as to why there was leakage in what he disclosed during his interviews with the Commission. His counsel argued that, given the circumstances of those interviews, there was a reasonable expectation of privacy and non-disclosure.

[26] On this application, the applicant gave evidence concerning the circumstances under which he gave his interviews, but no evidence was given by him that he was given any assurance of non-disclosure. Even if such an assurance was presumed, in these circumstances, it does not justify the Amendment of the Section 17 Order.

[27] If there was any improper disclosure of the applicant's interviews, it is a matter for staff to pursue. Even if it was in the public interest to permit some disclosure, it would not justify releasing the entire transcript to the applicant (see *Coughlan*, where it is indicated the transcript should be reviewed prior to granting any order under Section 17).

[28] As previously noted, this panel has not seen the transcript of the author's interview but we do know from staff counsel that the transcript does not contain information as to who gave the author the transcripts. It simply would not be appropriate to release the entire transcript or even part of it when it does not appear to even contain the key question to which the applicant seeks an answer.

[29] The second purpose for which the applicant sought the Amendment was to use the transcript in the Defamation Action. *Coughlan* sets out a number of considerations that have to be considered prior to an order under Section 17 being issued for the purpose of pending litigation. One is that it must be shown that the information sought is relevant to the litigation. As noted, counsel for the applicant referred to the pleading of malice and the recent decision of *Young*. The issue of malice in that case centred on the authenticity of the sources used by the

Toronto Star writer in the article that was the subject of the defamation. Unlike that case, in this matter there appears to be no real issue as to the source of the information concerning the applicant's interviews and the accuracy of information.

[30] Accordingly, as it has not been shown that the transcript would be relevant and for the other considerations set out in *Coughlan*, it is not in the public interest to make the Amendment to aid the applicant in the Defamation Action.

[31] The onus in this application was on the applicant. For the reasons given, the onus has not been met. The application is dismissed.

DATED at Toronto this 17th day of December, 2003.

"Paul M. Moore" "H. Lorne Morphy"

Paul M. Moore, Q.C. H. Lorne Morphy Q.C.

"Wendell S. Wigle"

Wendell S. Wigle, Q.C.