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, 19e 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
SHANE SUMAN AND MONIE RAHMAN

REASONS FOR DECISION

Hearing:	July 30, 2008	
Order:	August 1, 2008	
Decision:	January 12, 2009	
Panel:	Lawrence E. Ritchie	- Vice-Chair and Chair of the Panel
	David L. Knight, FCA	- Commissioner
	Carol S. Perry	- Commissioner
Counsel:	Cullen Price Kathryn Daniels	- For the Ontario Securities Commission
	Randy Bennett Sara J. Erskine	- For Monie Rahman
	Shane Suman	- Representing himself

REASONS FOR DECISION

I. BACKGROUND

A. Overview

[1] The Application before us raises the issue of a respondent's right to have access to proprietary information of a third party, when that information is in the hands of Staff of the Ontario Securities Commission (the "Commission"). In considering the Applicant's request, we, as a Commission panel, must consider and balance (a) the legitimate interest of the third party in ensuring the protection of sensitive commercial information, and (b) Staff's ability to garner cooperation from witnesses in its investigative process, against (c) a respondent's right to make full answer and defence to serious allegations with potentially serious consequences.

[2] After the hearing on July 30, 2008, we issued our Order, dated August 1, 2008, which set out a protocol by which, in our view, the various interests of the parties are best accommodated. The following are our Reasons for making that Order.

[3] This matter arises out of a Statement of Allegations and Notice of Hearing dated July 24, 2007. Staff of the Commission ("Staff") alleges that Shane Suman ("Suman"), a former employee of MDS Sciex, a division of MDS Inc. ("MDS"), conveyed material non-public information about MDS to his wife, Monie Rahman ("Rahman"). The information concerned the proposed acquisition by MDS of Molecular Devices Corporation ("MDCC"), a U.S. issuer listed on the NASDAQ. The acquisition was publicly announced on January 29, 2007 (the "Announcement"). Staff alleges that Suman and Rahman (collectively, the "Respondents") bought 12,000 shares and 900 options contracts in MDCC in the days immediately prior to the Announcement. Staff alleges that the Respondents liquidated the MDCC securities on March 16, 2007 for a profit of $954,938.

[4] Staff alleges that Suman, as an employee of MDS, was a person in a special relationship with MDS in accordance with subsection 76(5) of the *Securities Act*, R.S.O. 1990, c. S.22, as amended (the "Act") at the time of the subject trading and at the time of the Announcement. Staff alleges that Suman traded in MDCC securities with knowledge of material undisclosed information respecting it, being its proposed acquisition by MDS, contrary to the public interest. Staff also alleges that Suman improperly advised Rahman about the proposed acquisition, contrary to subsection 76(2) of the Act and contrary to the public interest. With respect to Rahman, Staff alleges that she traded in MDCC securities with the knowledge of a material undisclosed fact, being the acquisition of MDCC by MDS, having acquired the knowledge from her husband, whom she knew to be an employee of MDS, contrary to the public interest.

[5] Staff seeks an order that Suman be prohibited from becoming or acting as an officer or director of an issuer, pursuant to paragraph 8 of subsection 127(1) of the Act, that he cease trading in any securities for such period as is specified by the Commission, pursuant to paragraph 2 of subsection 127(1), pay an administrative penalty of not more than $1,000,000, pursuant to paragraph 9 of subsection 127(1), disgorge any amounts he obtained by virtue of his non-compliance with Ontario securities law, pursuant to paragraph 10 of subsection 127(1), and pay the costs of the Commission investigation and hearing, pursuant to subsection 127(1) [sic]. With respect to Rahman, Staff seeks an order that she be prohibited from becoming or acting as an officer or director of an issuer, pursuant to paragraph 8 of subsection 127(1), that she cease

trading in any securities for such period as is specified by the Commission, pursuant to paragraph 2 of subsection 127(1), and that she be ordered to pay the costs of the Commission investigation and hearing.

[6] At the time of the Application, the hearing on the merits was scheduled to begin on October 20, 2008. The hearing was subsequently adjourned to a future date.

B. The Disclosure Motion

[7] On August 28, 2007, counsel for Staff and counsel for the Respondents attended before the Commission for a first appearance. On consent, the matter was adjourned to a pre-hearing conference on October 23, 2007. Further pre-hearing conferences were held on November 26, 2007, December 28, 2007, January 29, 2008, February 12, 2008 and June 27, 2008.

[8] By the date of the pre-hearing conference on October 23, 2007, Staff had produced to the Respondents the September 3, 2007 report of Steven L. Rogers, whom Staff proffers as a forensic computer expert (the "Rogers Report"), setting out the results of his forensic analysis of computer hard drives belonging to Suman (the "Suman Images") and forensic images taken from computer hard drives belonging to MDS (the "MDS Images"). By the date of the second pre-hearing conference, held on November 26, 2007, Staff had produced to the Respondents copies of the Suman Images.

[9] In December 2007, Staff produced copies of the MDS Images to then counsel to the Respondents, ("Previous Counsel"), which Staff submits contain confidential and highly sensitive commercial information of a third party. As a condition to the production, Staff sought and obtained an undertaking from Previous Counsel, to safeguard any confidential information contained in them. In January 2008, Previous Counsel terminated his retainer with the Respondents. In accordance with his undertaking, he returned the copies to Staff.

[10] On March 7, 2008, Staff produced to the Respondents five of seven MDS Images that did not raise confidentiality concerns. Staff declined to produce copies of the two remaining images (the "Disputed Hard Drive Images"), taking the position that the Disputed Hard Drive Images contain private personal employee information and highly sensitive commercial information. Further, Staff took the position that the Disputed Hard Drive Images contain little, if any, relevant information. Staff nonetheless, offered to provide the Respondents with an opportunity to review the Disputed Hard Drive Images at the Commission's offices "in a private setting at a mutually convenient time but without the ability to make copies given the confidentiality concerns expressed above."

[11] The Respondents objected to the offered conditions and gave notice that they would bring a motion for disclosure of the Disputed Hard Drive Images. At a sixth pre-hearing conference, held on June 27, 2008, at which Suman acted for himself and as agent for Rahman, the disclosure motion was set down for July 17, 2008.

[12] On July 14, 2008, Staff refined its offer to provide limited access to the material, saying that it would permit the Respondents access to the Disputed Hard Drive Images on the basis that:

(i) the Respondents would retain counsel on a limited basis to maintain possession and control of the electronic disclosure by providing and fulfilling the terms of an undertaking to safeguard the confidential information in a form acceptable to Staff;

(ii) upon receipt of the undertaking, signed by counsel, Staff would provide counsel with copies of the Disputed Hard Drive Images; and

(iii) the Respondents would consent to an order not to obtain, use or distribute, for any reason collateral to their defence in this matter, any of the confidential information.

[13] On the evening of July 14, 2008, Rahman retained new counsel. However, Suman continues to represent himself.

[14] On July 17, 2008, the motion was adjourned to July 30, 2008, when it was heard.

II. THE POSITIONS OF THE PARTIES

A. The Respondents

[15] The Respondents submit that complete and unrestricted disclosure of the Disputed Hard Drive Images is necessary to enable them to make full answer and defence, and that Staff has failed to comply with its disclosure obligations.

[16] Kevin Lo ("Lo") has been retained by Rahman's counsel to provide expert forensic analysis of the Disputed Hard Drive Images. In his affidavit sworn July 25, 2008, Lo states that he requires physical possession of complete copies of the Disputed Hard Drive Images in order to verify that the images referred to in the Rogers Report are actually on the Disputed Hard Drive Images and to conduct a forensic analysis of the Disputed Hard Drive Images. He estimates that it will take 4 to 6 full days to conduct his analysis. He also states that he will need to review the Disputed Hard Drive Images with Suman, who would have familiarity with their content.

[17] Rahman submits that in Commission proceedings, the principles of natural justice and fairness require a high standard of disclosure akin to that in criminal trials. Rahman submits that the Commission has accepted that Staff must meet the standard for disclosure established in *R. v. Stinchcombe,* [1991] 3 S.C.R. 326 (S.C.C.) ("*Stinchcombe*"). Rahman cites a number of cases decided in the context of Commission proceedings in support of this standard for disclosure (*Re Market Regulation Services Inc.* (2008), 31 O.S.C.B. 5441 ("*Re Berry*"), at paras. 66-68, *Deloitte & Touche LLP v. Ontario (Securities Commission),* [2003] S.C.J. No. 62 (S.C.C.) ("*Deloitte*"), and *Re Biovail Corporation et al.*, (2008), 31 O.S.C.B. 7161 ("*Re Biovail*")).

[18] Rahman submits that the situation in this case is similar or analogous to that in *Deloitte*. In *Deloitte*, Staff obtained an order under s. 17 of the Act authorizing it to disclose to Philip Services Corporation ("Philip") and its officers (collectively, the "Philip Respondents"), documents and information obtained from Deloitte, Philip's auditor. Deloitte appealed on the basis that the information was private. Deloitte was successful at the Divisional Court, but the Ontario Court of Appeal overturned that decision and restored the Commission's order. The Supreme Court of Canada dismissed Deloitte's further appeal on the basis that the Commission's decision was reasonable and soundly based to allow the Philip Respondents to make full answer and defence, since there was a reasonable possibility that all of the disputed material would be relevant to the allegations.

[19] Rahman submits that the principle that Staff must disclose relevant information to enable the respondent to make full answer and defence was recently reaffirmed by the Commission in *Re Biovail*. At paragraph 15 of that decision, the Commission stated:

> Documents should not be withheld if there is a reasonable possibility that doing so would impair the right of the accused to make full answer and defence.

[20] Further, Rahman submits that a specific order restricting the use of the Disputed Hard Drive Images is unnecessary, as MDS's privacy interests are adequately protected by the implied undertaking rule. In *Re Melnyk* (2006), 29 O.S.C.B. 7875 ("*Re Melnyk*"), the Commission reaffirmed that the implied undertaking rule "is a recognized principle of law in Ontario and applies to Commission proceedings." (*Re Melnyk*, at para. 35, referring to *A. Co. v. Naster* (2001), 143 O.A.C. 356 (Ont. Div. Ct.))

[21] Rahman notes that Staff's Statement of Allegations alleges that Suman had access to information concerning the proposed acquisition of MDCC through his administration of and use of MDS's computers and email server, which have been forensically captured on the MDS Images, including the Disputed Hard Drive Images. Rahman submits that Staff intends to rely on the MDS Images, including the Disputed Hard Drive Images, to prove its allegations. Further, Staff intends to rely on the Rogers Report, which was based on Staff's unrestricted access to the MDS Images, including the Disputed Hard Drive Images. Rahman submits that the Respondents are entitled to have the same access as Staff.

[22] Rahman submits that the information on the Disputed Hard Drive Images is relevant to the Respondents' ability to make full answer and defence. She submits that imposing improper restrictions or undue burdens on the Respondents neither satisfies the disclosure obligations of Staff nor permits the Respondents to make full answer and defence.

B. Staff

[23] Staff recognizes that it has a broad duty to disclose all relevant information, subject to its discretion to withhold information that is clearly irrelevant, privileged, beyond its control or should not be disclosed on grounds of privacy, which discretion is open to review by the Commission. Staff submits that it has met its disclosure obligations.

[24] Staff submits that when the information of a third party is involved, Staff must consider the respondents' right to meet the case against them yet also be sensitive to the third party's privacy interests and expectations.

[25] Staff submits that dissemination of information contained in the Disputed Hard Drive Images could cause harm to MDS. For example, Staff submits that the Disputed Hard Drive Images contain information about potential acquisition targets, joint venture partners, research and development plans and product cost data.

[26] Staff submits that its position is consistent with practice in the criminal context. Staff relies on the Crown Policy Manual, published by the Ministry of the Attorney General, which addresses the situation where an accused is self-represented and the Crown's disclosure material contains information that is subject to privacy concerns. In that situation, the Crown Policy Manual states:

> An unrepresented accused is entitled to the same disclosure as the represented accused. However, if there are reasonable grounds for concern that leaving disclosure material with the unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide the disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. . . . Crown counsel shall

> inform the unrepresented accused in writing of the appropriate uses, and limits upon the use, of the disclosure materials.
>
> *Crown Policy Manual*, Ontario Ministry of the Attorney General, section D-1, para. 9(b).

[27] Staff submits that the above policy flows from the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (the "Martin Committee"). The Martin Committee's Recommendation 12(h) was as follows:

> where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence. The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy of any audio or video recording where Crown Counsel has reasonable cause to believe that there exists a reasonable privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest, which cannot be satisfied by an appropriate undertaking from defence counsel.
>
> *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Queen's Printer for Ontario, 1993), p. 234, para. 12(h)

[28] Further, Staff submits that this recommendation has received judicial approval in *R. v. Blencowe*, [1997] O.J. No. 3619 (Ont. Gen. Div.) ("*Blencowe*"), at paras. 56-57, *R. v. Schertzer*, [2004] O.J. No. 5879 (Ont. S.C.J.) ("*Schertzer*"), at paras. 5-7, and *R. v. Cassidy*, [2004] O.J. No. 39 (Ont. C.A.) ("*Cassidy*"), at paras. 9-13.

[29] Further, Staff submits that while the Respondents may prefer a different procedure for disclosure, Staff is obligated to provide a fair procedure, not a perfect procedure. Staff relies on the following statement by the Alberta Securities Commission:

> Disclosure must enable respondents to know and be in a position to answer the case against them. The disclosure obligation continues throughout the course of a hearing. However, disclosure need not be perfect. Nor is perfect disclosure a realistic expectation in complex cases involving large volumes of material.
>
> *Re Proprietary Industries Inc.*, 2005 ABASC 986, at para. 44.

[30] We note that another Panel of the Commission made a similar point in *Re Biovail*, at para. 47.

[31] Staff submits that its approach to disclosure in this matter is consistent with the Martin Committee procedure, which was approved by the Court, and strikes the appropriate balance between the Respondents' right to answer the case against them and the right of MDS to safeguard its confidential information – "especially in a case where the underlying allegation is one of abuse by the Respondents of the confidential information of the witness, namely, MDS."

[32] Staff notes that despite its offer on March 7, 2008 to allow the Respondents to inspect the Disputed Hard Drive Images privately at the offices of Staff, no effort to access the material has been made. Further, Staff notes that although Rahman retained counsel on the evening of July

14, 2008, the day when Staff suggested the Respondents retain counsel for the limited purpose of giving an undertaking, and although Staff provided Rahman's counsel with a draft undertaking, no such undertaking has been provided, and Suman continues to be self-represented.

[33] Staff also disputes Lo's affidavit evidence that he requires physical possession of the Disputed Hard Drive Images, relying on the reply affidavit of Colin McCann, who is Assistant Manager of the Technology and Evidence Control Unit of Staff and the primary investigator in this matter ("McCann"), sworn July 25, 2008. In his affidavit, McCann states that there is no technical impediment to Lo performing his analysis at the offices of Staff, and that he would need much less than 4 to 6 days to review the Disputed Hard Drive Images.

[34] Staff does not accept that the implied undertaking rule adequately protects MDS's interests. Further, Staff submits that the existence of an implied undertaking does not preclude the Commission from including in its order express limitations on disclosure intended to protect the privacy of a third party, as it did in *Deloitte*.

[35] Staff submits that while child pornography, which was the focus of the criminal cases cited by Staff, engages perhaps the highest level of privacy interest, there is a full spectrum of privacy rights entitled to protection, including the commercial interests of MDS. (*R. v. Beauchamp*, [2008] O.J. No. 1347 (Ont. S.C.J.) at para. 53)

[36] Staff submits that there is no principle of fundamental justice that the Crown and the accused must enjoy precisely the same privileges and procedures, and even in the context of *Stinchcombe*, the right to disclosure is not unlimited; the Crown has discretion, reviewable by the trial judge, to withhold disclosure based on, for example, privilege. The real question is whether the disclosure procedure allows the accused to make full answer and defence. (*R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at paras. 111-112)

[37] Finally, Staff objects to any process that allows Lo to consult with Suman. In Staff's submission, this would taint Lo's expert evidence because of Suman's inherent bias. As the motion is brought by Rahman, the issue is whether Rahman, her counsel and her expert have access to the Disputed Hard Drive Images.

III. ANALYSIS

[38] The Respondents are entitled to disclosure of relevant materials in order to make full answer and defence. In several decisions – most recently, *Re Berry* and *Re Biovail* – the Commission has accepted that given the serious consequences faced by a respondent in many Commission proceedings, such as this one, "principles of natural justice and fairness require a high standard of disclosure akin to that required in criminal trials", and accordingly, the Commission has accepted that "Staff has a broad duty of disclosure akin to the *Stinchcombe* standard". The *Stinchcombe* standard "requires the Crown to disclose all relevant information, whether inculpatory or exculpatory, subject to the discretion of the Crown, which discretion is reviewable by the Court." (*Re Berry*, at para. 66. See also *Re Biovail*, at para. 15)

[39] However, as Staff points out, the case law also recognizes that a respondent's right to disclosure from Staff is not absolute. In *Deloitte*, the Supreme Court of Canada recognized that the Commission's disclosure orders must balance the rights of respondents and third parties:

> . . . the OSC, in cases like this, is in an awkward position. A proceeding has been ordered against respondents who are entitled to disclosure of information involving a third party. The OSC must search for an approach that provides fair

> consideration for the respondents in jeopardy and enables them to meet the case against them yet also is sensitive to the third party's privacy interests and expectations. (*Deloitte*, at para. 28)

[40] As the Supreme Court of Canada said in *Deloitte*, "the OSC has a duty to parties like [MDS] to protect its privacy interests and confidences. That is to say that OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act." (*Deloitte*, at para. 29)

[41] In that case, the Court held that the Commission had "properly weighed the necessary disclosure and the interests of Deloitte," as could be seen from the operative parts of the order. The Commission's order required Staff to disclose the compelled evidence on the basis that the respondents and their counsel would not use it for any purpose other than making full answer and defence to the allegations in those proceedings and would maintain custody and control over the evidence, so that copies of it would not be improperly disseminated. The Court concluded that the Commission's order "properly balanced the interests of Deloitte and its own obligation to conduct hearings under the Act fairly and properly by restricting the disclosure to that which was necessary to pursue the OSC's mandate." (*Deloitte*, at para. 29-30)

[42] Staff has limited the Respondents' access to the Disputed Hard Drive Images on the basis that they were received from a third party, in the course of Staff's investigation, and that third party asserts that they contain confidential and otherwise sensitive information.

[43] We have been asked, by this motion, to make an order which requires us to balance the Respondents' right to disclosure of the Disputed Hard Disk Images without, in their words, "any unfair and unnecessary obstruction and restrictions", against the legitimate privacy concerns of MDS, a third party to this proceeding.

[44] At the hearing on the merits, Staff intends to rely on the Rogers Report, which was based on a forensic analysis of the MDS Images, including the Disputed Hard Drive Images, in support of its allegation that Suman had access to material non-public information about the proposed acquisition as an employee in the information technology department at MDS. Accordingly, there is no issue as to the relevance of these materials: they clearly are relevant.

[45] The Commission's order in *Deloitte* was intended to address Deloitte's submission that the compelled documents, if disclosed, could be used against it in civil proceedings. Notwithstanding section 17 of the Act and the implied undertaking rule, we find it appropriate in this case, as well, to include in our disclosure order an express order that the material disclosed to the Respondents shall not be used for any collateral or ulterior purpose and shall be governed by section 17.

[46] As stated above, we agree that the interests of third parties need to be given thoughtful and considered attention when they become engaged by OSC investigations and subsequent Commission proceedings. OSC Staff needs the cooperation of third parties to effectively investigate possible improprieties and wrongdoing, and that cooperation ought not be discouraged or constrained by concerns that their legitimate privacy interests will be ignored. For this reason, we reaffirm the message reflected in *Deloitte* that this Commission will strive to accord Respondents with their rights to make full answer and defence, in a manner which minimizes intrusions into the privacy and confidences of third parties. In this case, Staff has also identified specific concerns raised by MDS with respect to the risk of improper use or dissemination of sensitive commercial information contained in the Disputed Hard Drive Images. We do not agree, however, that it is necessary to restrict Suman to merely having an opportunity

to inspect the Disputed Hard Drive Images at Staff's offices. We are of the view that MDS's interests can be protected if our order requires that the Disputed Hard Drive Images be maintained in the custody and control of counsel for Rahman, counsel for Suman (if he retains counsel), or an expert retained by counsel for the Respondents.

[47] To further ensure against the improper use or dissemination of sensitive information, we order that the Disputed Hard Drive Images may not be viewed by anyone other than the Respondents, counsel for the Respondents or either of them or an expert retained by counsel. Further, we order that the Disputed Hard Drive Images may not be electronically copied, and may not be hard copied except for the purpose of enabling the Respondents to make full answer and defence. Further, the Disputed Hard Drive Images and all hard copies made by or on behalf of the Respondents are to be returned upon the completion of this proceeding and any appeal.

[48] We are of the view that our order achieves an appropriate balance, which permits the Respondents to have broader access to the MDS Images than Staff proposed, on the one hand, but also imposes certain conditions on disclosure to ensure the appropriate custody and limit the use of the sensitive commercial information.

IV. CONCLUSION

[49] For the above reasons, we made the following order on August 1, 2008:

a) The hearing on the merits, previously scheduled to commence on September 3, 2008, is adjourned to commence on October 20, 2008, or such other date as is agreed by the parties and determined by the Office of the Secretary, or otherwise ordered by the Commission;

b) Staff shall provide the Respondents or either of them with an opportunity for private inspection of the Disputed Hard Drive Images at Staff's offices, with or without the assistance of counsel for the Respondents or either of them ("Counsel"), and with or without the assistance of a computer forensic expert retained by Counsel ("Expert Retained by Counsel");

c) Staff shall provide Counsel with a copy of the Disputed Hard Drive Images;

d) Counsel may provide an Expert Retained by Counsel with the copy of the Disputed Hard Drive Images provided by Staff;

e) Except with the express consent of Staff or by order of the Commission, no one other than the Respondents, Counsel and/or an Expert Retained by Counsel shall view the Disputed Hard Drive Images;

f) The Disputed Hard Drive Images shall not be electronically copied;

g) The Disputed Hard Drive Images shall not be hard copied except for the purpose of enabling Rahman and Suman to make full answer and defence in this proceeding;

h) The Disputed Hard Drive Images shall be maintained in the custody and control of Counsel or an Expert Retained by Counsel;

i) Upon the completion of this proceeding and any appeal, Counsel shall return to Staff the copy of the Disputed Hard Drive Images provided by Staff and all hard copies made by or on behalf of the Respondents or either of them, Counsel or an Expert Retained by Counsel;

j) The Disputed Hard Drive Images and the information contained therein shall not be used or disseminated except for the purpose of making full answer and defence to the allegations made against the Respondents in this proceeding and any appeal, and shall not be used for any collateral or ulterior purpose; and

k) The Disputed Hard Drive Images, to the extent not filed and admitted in this proceeding, shall be governed by section 17 of the Act, as well as the implied undertaking rule, and shall not be used by Suman or Rahman in any other regulatory, criminal or civil proceeding.

DATED at Toronto this 12th day of January, 2009.

"Lawrence E. Ritchie"

Lawrence E. Ritchie

"Carol S. Perry"

Carol S. Perry

"David L. Knight"

David L. Knight, FCA