

THE LITIGATOR

NOVEMBER 2008



Ontario Securities Commission panel decisions criticize regulators' disclosure practices

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Two recent OSC decisions have sided against securities regulators on issues of documentary disclosure. In one case, an OSC panel found that there had been *too much* disclosure by OSC staff and, in another case, there had not been enough disclosure.

In ongoing regulatory proceedings against Biovail Corporation and several of its officers, OSC staff purported to comply with their obligation to disclose relevant documents by dumping on the respondents a computer hard drive containing more than 230 gigabytes of data – data that was made up of more than *600,000 documents* filling *4.3 million pages*. Four of the Biovail officers moved before an OSC hearing panel for an order requiring staff to make “meaningful disclosure” of the documents relevant to the specific allegations against each of them – rather than simply regurgitating every piece of paper that the OSC had obtained on its investigation. OSC staff countered by saying that it had done what it was required to do and it was up to each of the Biovail officers to go through the millions of pages and figure out which ones had significance to the case against them. The OSC panel hearing the motion agreed with the Biovail officers and found that staff had an obligation to “separate the wheat from the chaff” and produce to each Biovail officer only those documents with some relevance to the allegations against them.

In another disciplinary proceeding, an OSC hearing panel found that the privilege that normally prevents disclosure of settlement discussions did not trump the right of a former Scotia Capital trader to obtain documents relevant to his defence of a proceeding brought against him by Regulation Services (which is now part of the Investment Industry Regulatory Organization of Canada, or IIROC). On a motion by the trader, David Berry, RS was ordered to produce all documents relating to its settlement of a related regulatory proceeding brought against his former employer, Scotia Capital. Initially, RS had pursued both Berry and Scotia Capital in proceedings accusing them of serious market irregularities while Berry headed the Scotia Capital preferred share trading desk. After Scotia Capital settled the proceedings against it, Berry moved for production by RS of documents relating to that settlement and the negotiations leading to it, arguing that this documentation was relevant to the case against him for a couple of reasons. Firstly, Berry argued that the terms of the settlement could impact on the credibility of any Scotia Capital witnesses testifying against him. Secondly, Berry argued that the negotiations leading to the settlement could be relevant to his claim that it was Scotia's own compliance failures that were the real culprit in any regulatory breaches. The OSC panel agreed – finding that the privilege attaching to settlement discussions is not absolute and had to give way to the ability of Berry to fully defend the serious allegations against him.



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