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

AND

IN THE MATTER OF
BIOVAIL CORPORATION, EUGENE N. MELNYK, BRIAN H. CROMBIE,
JOHN R. MISZUK and KENNETH G. HOWLING

DISCLOSURE MOTION
REASONS AND DECISION

Hearing:	June 27, 2008	
Decision:	July 11, 2008	
Panel:	James E.A. Turner	-Vice-Chair and Chair of the Panel
	Kevin J. Kelly	-Commissioner
Counsel:	Johanna Superina Melanie Adams	-For the Ontario Securities Commission
	Joel Wiesenfeld Natalie Biderman	-For Kenneth G. Howling
	Paul Le Vay Aaron Dantowitz	-For Brian H. Crombie
	James Doris Sean Campbell	-For Eugene N. Melnyk
	Wendy Berman	-For John R. Miszuk
	Laura Fric Karen Mintz	-For Biovail Corporation

REASONS AND DECISION

I. BACKGROUND

[1] On March 24, 2008, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing and Statement of Allegations of Staff of the Commission ("Staff") in respect of this matter. On April 15, 2008, the Commission issued an order, on consent, ordering that the hearing on the merits will commence on February 2, 2009 and continue until March 13, 2009, or such other dates as may be agreed to by the parties and fixed by the Secretary to the Commission.

[2] The Statement of Allegations relates to six categories of alleged misconduct involving Biovail Corporation ("Biovail"), Eugene N. Melnyk ("Melnyk"), Brian H. Crombie ("Crombie"), John R. Miszuk ("Miszuk") and Kenneth G. Howling ("Howling") (collectively, the "Respondents"). During the relevant period, Melnyk was Chief Executive Officer of Biovail and Chairman of the Biovail Board of Directors, Crombie was Chief Financial Officer, Miszuk was Assistant Secretary, Vice President and Controller, and Howling was Vice President, Finance and head of investor relations.

[3] Paragraph 13 of the Statement of Allegations indicates that the allegations against the Respondents fall into six general categories:

(i) Biovail's failure to account properly for a special purpose entity in its annual financial statements for the year ended December 31, 2001, and interim financial statements for Q3 of 2001, and Q1, Q2 and Q3 of 2002;

(ii) Biovail's failure to disclose in its filings with the Commission the establishment of and its arrangements with the special purpose entity;

(iii) Biovail's improper recognition in its interim financial statements for Q2 of 2003 of revenue relating to a purported sale of Wellbutrin XL tablets;

(iv) Biovail's failure to correct and disclose, on a timely basis, a known material error in its 2003 financial statements;

(v) Biovail's materially misleading or untrue statements in certain press releases in October 2003 and March 2004, in an analyst conference call held on October 3, 2003, and in investor meetings held in October 2003, relating to a truck accident; and

(vi) Biovail's provision of materially misleading information to OSC Staff during a continuous disclosure review conducted in 2003 and 2004.

[4] While Biovail is named with respect to all of Staff's allegations, Crombie is not named in relation to Staff's allegation in clause (iv), Miszuk is named only with respect to the allegations in clauses (iii) and (iv), and Melnyk and Howling are named only with respect to the allegation in clause (v).

[5] On April 22, 2008, Staff made disclosure to the Respondents in electronic form. The disclosure consisted of a computer hard drive containing more than 230 gigabytes of data, comprising more than 600,000 documents that exceeded 4.3 million pages (the "Database"). We are advised that if printed, the documents produced would fill more than 1,700 bankers' boxes.

[6] On May 23, 2008, Howling brought a motion for an order that Staff "make meaningful disclosure in respect of the one allegation made against Howling," including:

(i) an order requiring Staff to disclose to Howling only those documents that are relevant to the one allegation made against him in this proceeding; or

(ii) alternatively, an order requiring Staff to identify in the documents it has disclosed in this proceeding those that are relevant to the one allegation made against Howling.

[7] Howling also requested an order that Staff produce its disclosure data in a format that corrects certain technical problems in searching the Database.

[8] The other Respondents joined in Howling's motion.

[9] On June 10, 2008, Staff provided the Respondents with a CD that purportedly corrects many of the technical problems with the searchability of the Database.

[10] The parties filed written motion materials, and we heard the parties' oral submissions at the motion hearing held on June 27, 2008.

II. THE POSITIONS OF THE PARTIES

A. Howling's Submissions

[11] Howling submits that Staff's disclosure obligation is set out in Rule 3.3(2) of the *Ontario Securities Commission Rules of Practice*, (1997) O.S.C.B. 1947 ("*Rules of Practice*"), which states:

> In the case of a hearing under section 127 of the *Securities Act* . . ., staff of the Commission shall, as soon as is reasonably practicable after service of the notice of hearing, and in any case at least 10 days before the commencement of the hearing, make available for inspection by every other party all other documents and things which are in the possession or control of staff that are relevant to the hearing and provide copies, or permit the inspecting party to make copies, of the documents at the inspecting party's expense.
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> *Rules of Practice*, Rule 3.3(2).

[12] Howling states that he was reassigned from his position at Biovail following the commencement of this proceeding and that this proceeding and its outcome have significant consequences for him personally and professionally. He submits that given the risk of harm to his reputation, section 8 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, ("*SPPA*") applies. That section states:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.
>
> *SPPA*, s. 8.

[13] Rule 3.4 of the *Rules of Practice* imposes more onerous disclosure obligations where section 8 of the *SPPA* applies:

> . . . if the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party making the allegations shall, as soon as is reasonably practicable after service of the notice of hearing, and in any case at least 10 days before the commencement of the hearing, provide particulars of the allegations and disclose to the party against whom the allegations are made all documents and things in the party's possession or control relevant to the allegations including [witness statements and experts' reports].
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> *Rules of Practice*, Rule 3.4.

[14] Howling's main submission is that Staff has failed to make meaningful disclosure of relevant documents and material in accordance with the standard established for criminal proceedings in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.) ("*Stinchcombe*").

[15] The parties agree 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. While the Crown must err on the side of inclusion, clearly irrelevant documents should be excluded, and the initial obligation to separate "the wheat from the chaff" rests with the Crown. 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.

> *Stinchcombe*, paras. 20 and 29.
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> *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 (S.C.C.), para. 26, aff'g [2002] O.J. No. 2350 (Ont. C.A.) ("*Deloitte CA*"), para. 39-44.
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> *Re Market Regulation Services Inc.* (2008), 31 O.S.C.B. 5441, paras. 66-68.

[16] Howling submits that Staff has failed to make meaningful disclosure to him such that he may exercise his right to make full answer and defence. He submits that Staff has simply made bulk disclosure of the enormous number of documents it obtained from Biovail and from the U.S. Securities and Exchange Commission (the "SEC") based on "wide sweeps" during a long investigation, and without sifting the material for relevance. He submits further that Staff made a unilateral strategic decision to join unrelated allegations against a number of respondents in a single proceeding. He submits that by disclosing to him the same immense volume of documents disclosed to all the Respondents in this proceeding, Staff has foisted on him its obligation to identify and disclose the documents that are relevant to the allegations against him.

[17] According to Howling, Staff's disclosure is deficient in that:

i. it contains documents that are irrelevant to the single allegation against him, which he submits is factually independent of the other allegations and is not the focal point of the proceeding, and the documents are not organized in any way that assists in identifying relevant documents;
ii. it contains at least some documents that are irrelevant to any of the issues in this proceeding;
iii. the volume of the disclosure makes it impossible for him to review each document in time for the hearing on the merits in February 2009, but adjourning that hearing would be severely prejudicial to him; and
iv. some of the documents are not electronically searchable because of technical deficiencies.

[18] Further, Howling submits that Staff's disclosure obligation requires it to conduct a level of manual review of the documents because only a human being is capable of deciding whether a given document has a reasonable likelihood of being relevant to his case.

[19] Howling requests an order that Staff complete proper disclosure by the end of July.

B. Submissions of the Other Respondents

[20] Crombie, Miszuk and Melnyk adopt Howling's submissions as they relate to their own circumstances.

[21] Biovail also adopts Howling's submissions. Biovail submits that Staff appears to have disclosed to it the entire volume of documents that Biovail disclosed to the SEC, many thousands

of which are irrelevant to any issue in dispute in this proceeding. Further, Biovail submits that Staff's disclosure obligation does not shift depending on the source of the documents, or the experience, expertise or knowledge of the respondent.

C. Staff's Submissions

[22] Staff submits that it has already complied with its disclosure obligation to the Respondents by disclosing, through the Database, all relevant documents, whether inculpatory or exculpatory, whether or not Staff intends to rely on them.

[23] Staff submits that the order requested by the Respondents would require Staff to manually review every document in the Database to determine its potential relevance to every issue in this proceeding. This process, in Staff's submission, would be extremely labour intensive and would require Staff to make a subjective assessment of the relevance of each document in the Database. Staff notes that it is not privy to the position the Respondents will take in this matter or other information the Respondents may possess. The process would likely necessitate an adjournment of the hearing on the merits scheduled for February 2009.

[24] Staff submits that the Respondents have confused disclosure with particulars. Staff submits that there is no authority requiring it to fulfill its disclosure obligations by classifying documents according to the issues raised in a proceeding. Further, Staff does not agree with the Respondents' submission that Staff's allegations are severable in this case. According to Staff, the allegations address the overall integrity of Biovail's financial statements and financial disclosure from 2001 to 2003. Staff notes that paragraph 7 of the Statement of Allegations states that the conduct at issue relates to Biovail's annual financial statements for the fiscal year that ended on December 31, 2001, Biovail's interim financial statements for Q3 of 2001, Q1, Q2 and Q3 of 2002, and Q1, Q2 and Q3 of 2003, and Biovail's financial disclosure during that time.

[25] With respect to the technical issues related to the searchability of the Database, Staff submits that it has resolved, in a timely manner, all the technical issues it can resolve. Staff submits that the documents in the Database are reasonably accessible to the Respondents and their counsel, all of whom are familiar with litigation support databases and the search methods that can be employed.

[26] Further, Staff states that over 500,000 of the 600,000 documents in the Database were provided by Biovail in response to requests from the Commission or the SEC. All of the individual Respondents were officers or directors of Biovail during the relevant time, and Howling and Miszuk are currently employed by Biovail. Further, in the fall of 2007, Biovail provided the individual Respondents with a subset of the documents it had produced to the Commission.

[27] Staff states that it is currently preparing its hearing briefs, which will be provided to the Respondents as soon as they are available and in advance of the 10 days required by Rule 3.3 of the *Rules of Practice.* The hearing briefs will contain all the documents on which Staff intends to rely at the hearing, and the documents will be sorted by issue. Staff submits there is no need for the Commission to fix a date for the delivery of hearing briefs.

[28] Finally, Staff states that it will comply with its continuing disclosure obligation to the Respondents.

[29] Staff asks us to dismiss the motion.

III. ANALYSIS

A. Introduction

[30] This motion requires a consideration of the nature of Staff's obligation to make disclosure of relevant documents to the Respondents. This question is an important one and could affect the date for the hearing on the merits.

[31] We should say at the outset that it is difficult for us to make judgements about the disclosure of documents when, necessarily, we have very limited knowledge of the nature of those documents. We intend through this decision to apply the applicable legal principles in a way that is fair to the Respondents but that does not put Staff in an untenable position.

B. The Obligation to Disclose

[32] As a matter of law, Staff has an obligation to disclose to the Respondents all documents that are relevant to this proceeding, whether inculpatory or exculpatory, in accordance with principles akin to those articulated in *Stinchcombe*. There is no dispute between Staff and the Respondents with respect to that conclusion. The obligation to disclose is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them. In furtherance of that obligation, Staff has provided the Database to the Respondents. As noted above, the Database contains a massive amount of material.

[33] Staff has been assisting the Respondents in facilitating the effective search of the Database by them. Staff has indicated that they have resolved, in a timely manner, all technical issues raised by the Respondents with respect to searching the Database that Staff is able to resolve without recoding the documents in the Database. Providing that assistance to the Respondents is obviously an appropriate way for Staff to have proceeded.

[34] We believe, based on the submissions made to us, that the documents contained in the Database are reasonably accessible to the Respondents. We note that the Respondents are not objecting in principle to electronic disclosure effected by means of the delivery of a database.

[35] There is no evidence before us, however, that staff has made a reasonable attempt to determine which documents in the Database are relevant to the specific allegations made against the Respondents in this matter. The Database contains a huge number of documents provided to staff (directly or indirectly through the SEC) in connection with an investigation that took more than four years. We understand that investigation included issues that were much broader in scope than the specific allegations that were ultimately made against the Respondents in this proceeding. We also note that, unlike the circumstances in *Deloitte*, the Respondents have identified at least some documents in the Database that are clearly not relevant to this proceeding.

C. The Allegations

[36] We note that each of Staff's allegations against the Respondents is focused on specific circumstances. For instance, Staff is not alleging that the Biovail financial statements for the fiscal year 2001 and the relevant interim periods in 2001 and 2002 were generally misleading but that those financial statements failed to properly reflect or account for one special purpose entity. Similarly, it is alleged that misleading statements were made in October 2003 and 2004 specifically with respect to a truck accident. As noted above, not all of the allegations are made against each of the Respondents.

D. Delivery of the Database

[37] In our view, Staff has not satisfied its legal obligation to disclose relevant documents to the Respondents by delivering the Database. The question is not who supplied the documents contained in the Database or whether the Respondents can effectively search or access the

Database. The question is whether Staff has made meaningful disclosure of all relevant documents.

[38] Staff appears to have conducted a very wide ranging investigation of the Respondents, has assembled and reviewed a massive volume of material and, as a result of its investigation, has made six relatively specific allegations against the Respondents. Staff has an obligation to disclose to the Respondents the documents that Staff considers relevant as a result of those efforts. The Respondents should not have to search a massive database and guess which documents Staff considers relevant. Staff has an obligation, in the first instance, to separate the "wheat from the chaff."

[39] We agree that Staff should apply a low or generous threshold of relevance in deciding what to disclose to the Respondents. Staff does not know what position the Respondents and their counsel may take in response to the allegations. However, in our view, Staff must apply some judgement in determining which documents in the Database are relevant to the allegations against each of the Respondents. As Howling's counsel submitted at the motion hearing, a low threshold is nonetheless a threshold.

E. The Meaning of "Relevance"

[40] With respect to determining relevance, we adopt the following statement from the Court of Appeal decision in *Deloitte*:

> Relevant material in the *Stinchcombe, supra*, sense includes material in the possession or control of Staff and intended for use by Staff in making its case against the [Philip] respondents. Relevant material also includes material in Staff's possession which has a reasonable possibility of being relevant to the ability of the [Philip] respondents to make full answer and defence to the Staff allegations. This latter category includes material that the [Philip] respondents could use to rebut the case presented by Staff; material they could use to advance a defence; and material that may assist them in making tactical decisions.
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> *Deloitte CA*, para. 44.

[41] The case law also indicates that relevance is determined where the allegations made intersect with the contents of the particular document in the possession of Staff. That is another way of saying that one can only determine the relevance of a document by considering it in the context of the allegations being made. While it is not for us to decide on this motion what documents in the Database may be relevant, it seems to us unlikely that the vast majority of those documents can be relevant to the specific allegations made against the Respondents. At the end of the day, Staff must exercise reasonable judgement in assessing the relevance of the documents in the Database to the allegations against the Respondents. We are not satisfied that Staff has done so.

F. Attribution of Documents to Allegations

[42] Generally, in providing disclosure of documents, Staff does not have to attribute or reference documents to specific allegations. In this case, however, not all of the allegations are made against all of the Respondents. Accordingly, Staff should make disclosure of documents that are relevant to the allegation or group of allegations made against each Respondent (but without necessarily referencing the documents to specific allegations where more than one allegation is made against a Respondent). For instance, Howling and Melnyk are entitled to disclosure of documents that are relevant to the one allegation made against them. Staff decided in its discretion to proceed against all of the Respondents in this one proceeding. That decision should not have the effect of prejudicing any Respondent by forcing him to search a vast volume

of material for the specific documents that may be relevant to the one or two allegations made against him.

G. No Need for Review of Every Document

[43] Howling submits that a manual review of the documents in the Database is required in order to determine the relevance of the documents to be disclosed by Staff. In this respect, he relies on *Air Canada et al. v. WestJet Airlines Ltd. et al.*, (2006), 81 O.R. (3d) 48 ("*Air Canada*"), a decision of the Ontario Superior Court of Justice. In that case, which involved corporate espionage, both parties had disclosed thousands of documents, including disclosure previously ordered by the Court. Air Canada had conducted electronic and some level of manual review of potentially relevant documents, but then moved for an order that it could make electronic disclosure without any further manual review of another 75,000 documents for relevance, privilege or confidentiality. Justice Nordheimer dismissed the motion. He agreed with counsel for WestJet that electronic searches alone cannot determine whether a document is relevant or privileged. He also stated that he was "unmoved by Air Canada's complaint that a manual review of the documents will be time consuming and expensive. Air Canada instigated this proceeding and chose to cast its claim in a certain manner that made the documents that Air Canada must now produce, relevant."

Air Canada, pp. 52-53.

[44] However, Justice Nordheimer did not order Air Canada to conduct a manual review of every document. Having dismissed Air Canada's objections to any further manual review, he stated:

> Having said that, it does not follow from my conclusions that each and every page of each and every document was [to] be manually reviewed. Presumably different categories of documents will require different levels of review. It is up to Air Canada and its counsel to determine to what extent a detailed review of the electronic documents must be conducted. They must do so, however, cognizant of the obligations under the Rules of Civil Procedure regarding the production of documents . . . .
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> *Air Canada*, p. 54.

[45] Staff's position is that civil cases such as *Air Canada* are not relevant to this proceeding. We accept that the Rules of Civil Procedure do not apply to Commission proceedings. However, we take note of the Court's approach to disclosure in *Air Canada*.

[46] In *Deloitte*, the Court of Appeal concluded that Staff's bulk disclosure of compelled material was reasonable because the nature of the allegations against the respondents in that case put into issue their entire relationship with Deloitte. Speaking for the Court, Doherty J.A. stated: "No doubt, in many circumstances, the relevance of a document cannot be determined without examining the document itself." However, in those circumstances, the Court saw "considerable merit in the concerns expressed by the Commission over attempts to judge relevance on a document-by-document basis."

Deloitte CA, para. 49.

[47] We are not suggesting that Staff has to look at every document in the Database in a manual review to determine whether it is relevant to the allegations. In our view, it would be reasonable for Staff to begin by identifying all those documents that it knows from its investigation are relevant to the Respondents in this proceeding. Staff must already have identified most of those documents in determining what allegations to bring against the Respondents. In addition, Staff should make relevant searches of the Database (in the same

manner that Staff says the Respondents are able to do) and assess which documents or categories of documents identified in this manner may be relevant to the Respondents. We recognize that this may be an imperfect process that may not identify every relevant document. Both Staff and the Respondents are at risk that some relevant document could be missed. We believe, however, that this process is fair and reasonable and that it can be completed within the time frames set forth in our order.

[48] We would also add that, except as noted above under "Attribution of Documents to Allegations", Staff does not have to particularize the documents or evidence it identifies as relevant to particular allegations. We recognize the distinction between providing particulars and providing disclosure. We are dealing only with the latter in these reasons.

[49] We would add that it is completely appropriate for Staff to have made the entire Database available to the Respondents. That gives the Respondents the opportunity to conduct their own Database searches and to apply their own standard of relevance to the documents in the Database. We are simply saying that, in our view, providing the Database to the Respondents did not satisfy Staff's legal obligation to make meaningful disclosure to the Respondents of all relevant documents. It is not satisfactory disclosure when the relevant documents are submerged in an ocean of other possibly irrelevant documents and materials.

IV. CONCLUSION

[50] In the circumstances, we make the following order:

1. Staff shall make reasonable efforts to prepare and deliver to the Respondents, as soon as reasonably possible but in any event on or prior to August 31, 2008, its hearing briefs containing the documents and materials Staff proposes to tender in evidence at the hearing on the merits of this matter.

2. Staff shall make reasonable efforts to disclose to the Respondents, as soon as reasonably possible but in any event on or prior to September 30, 2008, all of the documents that Staff believes are relevant to the specific allegations made against the Respondents. We expect that Staff would do that by providing an updated database that deletes any documents or categories of documents that Staff concludes are not relevant. In making that disclosure, Staff shall apply in good faith the principles we have articulated above.

[51] If Staff or the Respondents believe that further direction is needed with respect to this order, they are free to make further application to us.

DATED at Toronto this 11th day of July, 2008.

"James E.A. Turner" *"Kevin J. Kelly"*

James E.A. Turner Kevin J. Kelly