IN THE MATTER OF
THE *SECURITIES ACT*, R.S.N.S. 1989, CHAPTER 418, AS AMENDED ("Act")

- and -

IN THE MATTER OF
WAYNE J. BERRY ("Respondent")

DECISION ON PRELIMINARY MOTION RE DISCLOSURE

Panel: J. Walter Thompson, Q.C., Commissioner, Chair of Panel
Valerie Seager, Commissioner
Michael Deturbide, Commissioner

Decision Date: January 17, 2017

The Respondent, Wayne Berry, moves for a variety of remedies alleging a failure of Enforcement Staff to make disclosure promptly and in accordance with a direction the Commission had made following a pre-hearing conference. The Commission had set a date of June 13, 2016. This date was extended, by agreement, to June 27th. The Director of Enforcement for the Nova Scotia Securities Commission chose to provide Mr. Berry with its documents electronically and dispatched them by June 30th. Mr. Berry, however, only had ten days to access and download them. Enforcement Staff say the ten day access limit is imposed to protect the confidentiality of the documents by reducing the opportunity for third parties to help themselves. Mr. Berry did not access them during the ten day access period, although he had been reminded to do so, and had contacted Enforcement Staff to discuss the disclosure. He contacted Enforcement Staff later in early August telling them that he had not been able to access the materials. Through illness and oversight, Enforcement Staff did not then resend the materials. Delay followed. Mr. Berry did not tell Enforcement Staff he had not received it. In the end, Mr. Berry did not receive proper disclosure until November 8th, 2016.

Mr. Berry submits this tribunal should:

- Find the Director of Enforcement in contempt;
- Find the Director failed to make disclosure of a document in accordance with the disclosure direction made at the pre-hearing conference;
- Find that counsel to the Director wilfully, knowingly and in bad faith made false statements to mislead this tribunal in letters of October 20th and November 16th, 2016;
- And either dismiss the proceeding against him, or refuse to admit the evidence contained in the late disclosure which might be used against him.

Although largely self-represented, Mr. Berry has engaged in the process and been responsive to it. Obviously, receipt of disclosure is vital to his ability to respond to the allegations. It is also trite to say that a respondent in a securities law proceeding may be made subject to orders disqualifying him or her from plying their occupation and to substantial monetary penalties. Proper disclosure is all important.

Rule 5.01 provides:

> Any notice or document required under the Rules to be served may be served by any means effective to deliver the notice or document or a copy thereof to the person or company being served or to that person's or company's counsel of record and shall be served no later than ten (10) days after the issuance of the notice or document. The notice or document shall be sufficiently served upon a person or company if it is served in accordance with this Part and is:
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> a. Personally served upon the person or company;
> b. Sent to the person or company appearing on the records of the Commission or, if not so appearing, to such address as the Commission may direct; or
> c. Given in such other manner as the Commission may direct.
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> A notice or document served in accordance with paragraph b. of this section shall be deemed to be received by the person or company on the fifth day after the day it is mailed.

It appears Enforcement Staff opted for electronic disclosure through email. Although one cannot, in principle, object to electronic disclosure by email, there is no specific provision for it in the Rules. The general requirement is that the means be effective. Without denying that there may have been some reluctance by Mr. Berry to deal with the material, we confirm that the Director must be sure full disclosure is prepared and delivered by whatever mode or form, and the directions of the Commission itself are complied with. The mode or form is secondary. The point is to make sure the documents are delivered.

The Director seems to have been preoccupied with delivery by one particular mode under a particular internal protocol called "The Province of Nova Scotia Secure File Transfer Service", and did not follow up through the summer to see if the actual object of the exercise had been achieved. The protocol is, frankly, almost irrelevant to the obligation to deliver documents as a matter of natural justice and under the Rules. Delivery of a compact disc or thumb drive would have been effective. If resort had to be to bound hard copies and personal service, then so be it. In any event, it might be a good idea in future to specify the mode of service in the directions issuing from a pre-hearing conference.

Mr. Berry had made an earlier motion submitting that the proceeding against him should be dismissed under the *Canadian Charter of Rights and Freedoms.* The Director responded saying the motion was more appropriately dealt with at the hearing, itself, rather than as a preliminary motion. We agreed, but we also addressed the substance of Mr. Berry's motion by expressing our opinion that the issue would be best addressed through principles of administrative law rather than consideration of delay under the *Charter.* We referred to the Supreme Court's opinion in *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44 (CanLII) at paragraph 101:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: R. v. L. (W.K.), 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, at p. 1100; Akthar v. Canada (Minister of Employment and Immigration), [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay. (emphasis added)

In our view, the same principle of "proof of significant prejudice" applies to the grant of a remedy to Mr. Berry for the confusion and delay in providing disclosure. Mr. Berry's affidavit included with his notice of motion recites the difficulties he experienced in receiving disclosure, but simply relies on the Director's failure to comply in time with the direction from this Commission tribunal. He does not provide evidence of any prejudice. Mr. Berry, in his second affidavit sworn December 2nd, 2016, can only say that he is informed by his unnamed attorney that the attorney "does not have adequate time to prepare given that the holidays are in a few weeks and work does not start until mid-January, 2017". He concludes:

> 30. The Director failed to provide the disclosure in compliance with the rules of the agreed order.

That, however, is not the point. Prejudice is. Mr. Berry does not, in our view, provide "proof of significant prejudice". Disclosure was finally provided on November 8th. The hearing is set to begin on February 13, 2017. Mr. Berry and his attorney will have had over three months to digest the disclosure and prepare. Mr. Berry has not established that this is not enough time in the circumstances of this case.

We agree with Mr. Berry that the delay in resending certain documents between August and October, 2016 due to various extenuating circumstances relating to an Enforcement staff member was not appropriate. It is the Director of Enforcement's responsibility to ensure that organizational commitments are met, regardless of the circumstances of any one individual. Nevertheless, as we have indicated, we are of the view that Mr. Berry has not established prejudice.

We are also not persuaded that the Director or his agents proceeded in bad faith, or in such a way as to show contempt for the Commission or its processes. Reliance upon electronic disclosure in the form used by the Director was perhaps ill advised in this case, and the failure to follow up to be sure of delivery was certainly unfortunate, but we accept the explanations that these were simply errors and the result of having bound themselves with protocol. There is no evidence of any intent to prejudice Mr. Berry.

Mr. Berry makes specific allegations that counsel to the Director made false statements to mislead the panel in her letters of October 20th and November 16th. Both these letters relate to the ongoing difficulties of delivery.

The October 20th letter asserts a chronology and provides an explanation of the failure to effect actual delivery. The November 16th letter says that the Director delivered disclosure three times, June 30, October 19 and November 2nd and submits that Mr. Berry contributed to the failure of effective delivery by not accessing the documents online in accordance with the Director's protocol. We accept that the documents were "delivered". We do not find objectionable the Director's explanation of the failure of effective delivery, the assertion that "delivery" was made, or the assertion that Mr. Berry was not as active in accessing the delivery as he might have been. The ten day access time was clearly stated and Mr. Berry, himself, did not follow up the failure to access. The Director ought not to have relied on his active participation in the process, but that does not mean that the Director cannot assert that Mr. Berry was unduly passive in the process.

We dismiss Mr. Berry's application.

Dated at Halifax, Nova Scotia, this 17th day of January, 2017.

J. Walter Thompson, Q.C.
Commissioner
Chair of Panel

Valerie Seager
Commissioner

Michael Deturbide
Commissioner