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

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

Decision Date: August 3, 2016

The Respondent, Wayne J. Berry, moves under s. 11(b) of *The Canadian Charter of Rights and Freedoms* to dismiss this proceeding against him because of delay. The proceeding dates from November 27, 2012 when the Director of Enforcement for the Nova Scotia Securities Commission filed a Statement of Allegations. Enforcement now seeks to have this motion considered as a part of the hearing on the merits of the allegations against Mr. Berry rather than separately beforehand. Enforcement submits the proceeding should not be split or, as we lawyers say, bifurcated.

In our view, the motion is best heard as a part of the hearing on the merits. The proceeding then will not be split. There are two main reasons; the motion is ill-founded upon section 11(b) and in any event there is not evidence, nor could there be without a substantial hearing, about whether the delay caused Mr. Berry the degree of prejudice that warrants a stay. A simple solution would have been to dismiss the motion altogether, but in fairness to Mr. Berry he should be given the opportunity to present proper evidence and to reformulate his argument to conform with the applicable law. More than three years passed between the date the proceeding began and the date the Commission convened to set dates for a hearing. That is enough time to raise the issue. We begin with a brief statement of the background to Mr. Berry's motion.

The Allegations

The Director alleges that Mr. Berry was at all material times an officer and director of EnCharge Inc., a Nevada corporation, EnCharge Inc., a Delaware corporation and EnChargeCanada Corp, and that he solicited purchases of and distributed EnCharge securities in Nova Scotia. In the process, the Director alleges, Mr. Berry misrepresented the returns to be expected, did not disclose the risks of the investments and held out that EnCharge was a public company listed on various North American stock exchanges. The Director also alleges that EnCharge is not and never has been a reporting issuer in Nova Scotia, never filed other documents required to be filed in connection with the sale of such securities in Nova Scotia and that the Nova Scotia investors received neither share certificates nor any return at all on their investments.

Evidence in Support of the Motion

Mr. Berry, in his affidavit in support of his motion, says the allegations of November, 2012 are based on the view that EnCharge Canada is not an exempt corporation under National Instrument NI 45-106. He disputes this allegation. He says that he left matters in the hands of reputable lawyers who established EnCharge Canada as "a non-distributing Federal corporation." He says the matter has already, as of filing his motion in February, 2016, been delayed 40 months and will take at least ten months to go to a hearing. He says he has been prejudiced by the delay because of emails lost to a failed hard drive and a missing lap top and because three witnesses are no longer available due to the passage of time. He adds that his reputation is being damaged by the outstanding allegations and that they have interfered with his business.

Section 11(b) of the *Charter*

Section 11(b) provides:

> Any person charged with an offence has the right....
>
> (b) to be tried within a reasonable time.

We refer to *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44 (CanLII) where Bastarache J. says at paragraph 88:

> However, it must be emphasized that this statement was made in the context of s. 11(b) of the *Charter* which provides that a person charged with an offence has the right "to be tried within a reasonable

> time". The qualifier to this right is that it applies individuals who have been"charged with an offence". The s. 11(b) right therefore has no application in civil or administrative proceedings. This court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(b) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s.7. There is no analogous provision to s. 11(b) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be "tried" within a reasonable time. (emphasis added).

Later at paragraph 93 Bastarache J. says:

> In the criminal law context, the test to be applied under s.11(b) is an objective one, and prejudice may be inferred from unreasonable delay. This stands in sharp contrast to the two-tiered approach to s.7 of the Charter where the mere passage of time in resolving a complaint does not automatically give rise to the kind of prejudice that is presumed to follow from the laying of a charge under s.11(b) of the Charter...

That is not to say, however, that there is no argument to be made under s.7 of the *Charter* or for a stay as a remedy within the realm of remedies a court or tribunal may impose as a part of the general law providing for the supervision of the administrative actions of government.

Section 7 of the *Charter*

Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Bastarache J. leaves open the possibility that delays in a process may violate s.7 of the *Charter:*

> My conclusion that the respondent is unable to cross the first threshold of the s. 7 *Charter* analysis in the circumstances of this case should not be construed as a holding that state-caused delays

> in human rights proceedings can never trigger an indidviual's s.7 rights. It may well be that s. 7 rights can be engaged by a human rights process in a particular case. I leave open the possibility that in other circumstances delays in the human rights process may violate s. 7 of the *Charter.* (emphasis in original)

Bastarache J., later in the opinion, sets out the criteria for the application of s. 7:

> Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Thus, before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by LaForest J. In *R. v. Beare*, 1988 Can LII 126 (SCC), [1988] 2 S.C.R. 387, at p. 401, as follows:
>
> > To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.
>
> Thus, if no interest in the respondent's life, liberty or security of the person is implicated, that s. 7 analysis stops there. It is at the first stage in this s. 7 analysis that I have the greatest problem with the respondent's arguments.

Administrative Law

Bastarache J. goes on to say that there is a remedy for delay "under principles of administrative law", but says "there must be proof of significant prejudice which results from an unacceptable delay". At paragraph 101 he says:

> 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 and unacceptable delay.

The Evidence Presently Before Us

Mr. Berry has made his motion under s. 11(b) of the *Charter*, where, as Bastarache J. says, the delay may speak for itself. Mr. Berry's affidavit does not provide proof of a violation of s. 7 of the *Charter* of significant prejudice to justify an administrative remedy. This cannot be surprising since the motion did not address either remedy.

The only paragraphs in his affidavit in which he raises "evidence" of prejudice are the following:

> 18. I have been prejudiced by the delay
>
> 19. Evidence has been destroyed due to a failed hard drive and missing laptop which contained emails that were helpful to my case
>
> 20. Three witnesses are no longer available due to the passage of time

There is really no evidence before us to sustain the evidentiary burden of either a remedy under section 7 of the *Charter* or a remedy under the general administrative law. Evidence to support a *Charter* remedy, in our view, requires extensive evidence and an inquiry into the effects of delay upon the deprivation of Mr. Berry's rights, and the more objective question of the principles of fundamental justice. Similarly, proof of significant prejudice will demand much more by way of evidence than we have before us now. In our view evidence and submissions on both *Charter* and administrative remedies would consume some days and would be better and more comprehensively dealt with as a part of the hearing on the merits. The paragraphs before us now are, in our view, clearly inadequate to sustain any remedy available to Mr. Berry, but he has the opportunity to make his case in full as a part of the hearing on the merits. We are obliged to conduct our hearings in a fair, expeditious and cost effective proceeding. In our view, having a separate long hearing on the delay issue alone would not serve any of those ends. We direct that Mr. Berry's motion to dismiss the proceeding against him for delay be heard as a part of the full hearing of the allegations.

Dated at Halifax, Nova Scotia, this 3rd day of August, 2016.

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

Valerie Seager
Commissioner

Michael Deturbide
Commissioner