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Securities  
Commission

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de l'Ontario

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Citation: Berry (Re), 2018 ONSEC 38

Date: 2018-07-16

File No. 2018-23

**IN THE MATTER OF  
WAYNE J. BERRY**

**REASONS AND DECISION  
(Subsections 127(1) and Subsection 127(10) of the  
*Securities Act*, RSO 1990, c S.5)**

**Hearing:** In Writing

**Decision:** July 16, 2018

**Panel:** D. Grant Vingoe Vice-Chair and Chair of the Panel

**Appearances:** Christina Galbraith For Staff of the Commission  
Peter Kott

Wayne J. Berry

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## REASONS AND DECISION

### I. INTRODUCTION

- [1] On April 23, 2018, Staff of the Ontario Securities Commission (**Staff**), elected to bring a proceeding using the expedited procedure as set out in Rule 11(3) of the Commission's *Rules of Procedure and Forms*<sup>1</sup> for an order pursuant to section 127 of the Ontario *Securities Act*<sup>2</sup> (the **Act**) to consider:
- a. whether Wayne J. Berry (**Berry**), who, along with other respondents, is subject to an order made by a securities regulatory authority, namely the Nova Scotia Securities Commission (**NSSC**), should be made subject to sanctions, conditions, restrictions or requirements in Ontario, pursuant to paragraphs 4 and 5 of subsection 127(10) of the Act; and if so,
  - b. whether the Ontario Securities Commission (**Commission**) should exercise its jurisdiction to make a protective order in the public interest in respect of Berry pursuant to subsection 127(1) of the Act.
- [2] On May 11, 2017, Berry, along with other respondents, entered into a settlement agreement with the NSSC (the **Settlement Agreement**).<sup>3</sup> Berry and the other respondents admitted to breaching registration and prospectus requirements under Nova Scotia securities legislation. On May 26, 2017, Berry, along with the other respondents, became subject to an order of the NSSC (the **NSSC Order**).<sup>4</sup>
- [3] The other respondents in the Settlement Agreement, EnCharge Inc., a Nevada corporation, EnCharge Inc., a Delaware corporation, and EnChangeCanada Corp., a Canadian corporation (collectively **EnCharge**) are dissolved corporations<sup>5</sup> and are not parties to this proceeding.
- [4] On April 25, 2018, Berry was served with a Notice of Hearing issued April 24, 2018, a Statement of Allegations dated April 23, 2018 and Staff's written submissions, hearing brief and book of authorities.<sup>6</sup>
- [5] On May 23, 2018, Berry provided the Commission with a "Hearing Brief and Written Submissions", including an affidavit of Wayne Berry dated May 18, 2018<sup>7</sup> and subsequently served these documents on Staff.
- [6] On June 21, 2018, Berry was served with a supplemental brief of authorities, supplemental hearing brief<sup>8</sup>, and reply submissions of Staff.<sup>9</sup>

### II. NSSC SETTLEMENT AGREEMENT AND ORDER

- [7] On May 11, 2017, Berry entered into the Settlement Agreement where he agreed that at all material times, he was an officer and/or director of EnCharge.

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<sup>1</sup> (2017), 40 OSCB 8988

<sup>2</sup> RSO 1990, s S.5

<sup>3</sup> Exhibit 1, Tab 1, Settlement Agreement dated May 11, 2017

<sup>4</sup> Exhibit 1, Tab 2, Order of the Nova Scotia Securities Commission dated May 26, 2017

<sup>5</sup> Exhibit 1, Tab 3, Corporate Profile Reports for EnCharge Inc. and EnChangeCanada Corp.

<sup>6</sup> Exhibit 2, Affidavit of Lee Crann dated April 25, 2018

<sup>7</sup> Exhibit 3, Affidavit of Wayne Berry dated May 18, 2018

<sup>8</sup> Exhibit 4, Supplemental Hearing Brief of Staff

<sup>9</sup> Exhibit 5, Affidavit of Lee Crann dated June 21, 2018

- [8] EnCharge was not and had never been a reporting issuer in Nova Scotia or any other Canadian jurisdiction and neither Berry nor EnCharge were registered to trade or distribute securities at any time in any capacity.
- [9] Encharge solicited and distributed securities from and to residents in Nova Scotia through word of mouth, personal invitation, and the internet. As a result of the promotion and solicitation of investments, Berry and EnCharge received money from Nova Scotia residents for investments in EnCharge.
- [10] One investor received a private placement memorandum prior to investing in EnCharge. Other investors did not receive any share certificates or any other documentation evidencing their investments in EnCharge.
- [11] No prospectus, preliminary prospectus or reports of trades relying on exceptions were filed with the NSSC.
- [12] As a result of soliciting investments from and distributing securities to residents of Nova Scotia without being registered to do so, and having not filed a prospectus or preliminary prospectus and without relying on exemptions contained in Nova Scotia securities law, Berry and EnCharge acknowledged and admitted that they violated sections 31(1)(a) and 58(1) of the Nova Scotia *Securities Act*<sup>10</sup> and that their conduct was contrary to the public interest and undermined investor confidence in the fairness and efficiency of the capital markets.
- [13] The NSSC Ordered that:
- a. Berry comply with and cease contravening Nova Scotia securities laws, pursuant to section 134(1)(a) of the Nova Scotia *Securities Act*;
  - b. Berry cease trading in securities on his own behalf or on behalf of others for a period of five years from the date of the NSSC Order, except through a person or company duly registered with the NSSC, pursuant to section 134(1)(b) of the Nova Scotia *Securities Act*;
  - c. all exemptions contained in Nova Scotia securities laws do not apply in respect of Berry for a period of five years from the date of the NSSC Order, pursuant to section 134(1)(c) of the Nova Scotia *Securities Act*;
  - d. Berry shall be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager for a period of three years from the date of the NSSC Order, pursuant to section 134(1)(d)(ii) of the Nova Scotia *Securities Act*;
  - e. Berry shall be prohibited from becoming or acting as a registrant, investment fund manager or promoter for a period of five years from the date of the NSSC Order, pursuant to section 134(1)(g) of the Nova Scotia *Securities Act*;
  - f. Berry be reprimanded, pursuant to 134(1)(h) of the Nova Scotia *Securities Act*;
  - g. Berry shall pay to the NSSC, on a joint and several basis with the other respondents, an administrative penalty in the amount of forty thousand

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<sup>10</sup> RSNS 1989, c 418, as rep by RSNS 2008 c 32, s 6 (proclaimed in force 28 September 2009)

dollars (\$40,000), pursuant to sections 135(a) and (b) of the Nova Scotia *Securities Act*; and

- h. Berry shall pay to the NSSC, on a joint and several basis with the other respondents, costs in the amount of three thousand five hundred dollars (\$3,500) in connection with the investigation and conduct of the NSSC's proceeding forthwith.

### **III. ORDER REQUESTED IN THE PUBLIC INTEREST**

[14] Staff requests an order in the public interest in Ontario that imposes terms similar to the sanctions imposed by the NSSC, to the extent possible under the Act. Staff submits that the following order should be issued:

- a. against Berry that:
  - i. Pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Berry cease until May 26, 2022, with the exception that Berry is permitted to trade through a registrant to whom Berry must provide a copy of the NSSC Order and a copy of the this order, if granted;
  - ii. Pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Berry until May 26, 2022;
  - iii. Pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Berry resigns any positions that he holds as a director or officer of any issuer, registrant or investment funds manager;
  - iv. Pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Berry be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager until May 26, 2020;
  - v. Pursuant to paragraph 8.5 of subsection 127(1) of the Act, Berry be prohibited from becoming or acting as a registrant, investment fund manager or promoter until May 26, 2022; and
  - vi. Pursuant to subsection 127(2) of the Act, as a term and condition of this order, if granted, should Berry become aware that EnChargeCanada Corp. is to be revived or has been revived between the date of this order and May 26, 2027, Berry is to immediately advise Staff of the Commission that EnChargeCanada Corp. has been revived;
- b. Staff of the Commission may provide a copy of this order, if granted, and a copy of the NSSC order imposing sanctions, conditions, restrictions and requirements upon Berry, EnCharge Inc. and EnCharge Canada Corp., to any Director appointed under section 260 of the *Canada Business Corporations Act*<sup>11</sup> (the CBCA);
- c. The Commission respectfully requests the aid of any Director appointed under section 260 of the CBCA who issues a certificate of revival with

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<sup>11</sup> RSC 1985, c C-44

respect to EnChargeCanada Corp. prior to May 26, 2027 by advising Staff of the Commission of the issuance; and

d. Such other orders as the Commission considers appropriate.

[15] Staff is not seeking an order against the EnCharge corporations as they are dissolved corporations and corporate law precludes an administrative proceeding against them at this stage.<sup>12</sup>

#### **IV. RESPONDENTS POSITION**

[16] Berry asserts that he had no intention to contravene Nova Scotia securities law and that any breach that did occur was unintentional or inadvertent. As stated in his submissions in this matter and in the Settlement Agreement, Berry sought and relied upon legal advice which led him to believe EnCharge was acting in accordance with Nova Scotia securities laws and that EnCharge was an exempt corporation under Nova Scotia securities laws.

[17] Issues of fairness in the proceeding leading to the Settlement Agreement were also raised by Berry, including being “pursued by what seems like unfettered power”<sup>13</sup>, a lack of institutional independence, a lack of transparency, and a delay in the NSSC matter. Further evidence was provided by Berry in the form of an affidavit that alleged a conflict of interest, which resulted in “possible malicious” prosecution.<sup>14</sup>

[18] Berry indicated that he has no plans to revive EnCharge and does not expect to become a Director of a public company in the future.<sup>15</sup>

#### **V. ANALYSIS**

[19] Subsection 127(10) of the Act facilitates cross-jurisdictional enforcement of judgments for breaches of securities law by providing the Commission with a mechanism to issue protective and preventive orders to ensure that conduct which has taken place in other jurisdictions will not be repeated in Ontario capital markets.<sup>16</sup>

[20] Subsection 127(10) of the Act provides, in part, that an order may be made under subsection 127(1) of the Act if a person or company is subject to an order or has agreed with a securities regulatory authority to be made subject to sanctions, conditions, restrictions or requirements upon them.<sup>17</sup> Berry is subject to an order of the NSSC and agreed to be made subject to the NSSC Order.

[21] Once the threshold in subsection 127(10) has been met, it is open to the Panel to make one or more orders under 127(1) or 127(5), if it is of the opinion that it is in the public interest to make the orders.<sup>18</sup>

[22] The Commission has regard to the purposes of the Act under section 1.1, which are to provide protection to investors from unfair, improper and fraudulent

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<sup>12</sup> *Canada Business Corporations Act*, RSC 1985, c C-44, s 226(2)(b); *General Corporation Law*, 8 Del C 1983, s 278

<sup>13</sup> Written submissions of Wayne Berry dated May 20, 2018

<sup>14</sup> Exhibit 3, Affidavit of Wayne Berry dated May 18, 2018, para 38

<sup>15</sup> Exhibit 3, Affidavit of Wayne Berry dated May 18, 2018, para 39

<sup>16</sup> *Black (Re)*, 2014 ONSEC 16, (2014), 37 OSCB 5847 at para 7

<sup>17</sup> Subsection 127(10) at para 4 and 5

<sup>18</sup> *Elliot (Re)*, 2009 ONSEC 26, (2009), 32 OSCB 6931 at para 27

practices, to foster fair and efficient capital markets and confidence in capital markets, and to contribute to the stability of the financial system and the reduction of systemic risk.

- [23] Orders made under subsection 127(1) are “protective and preventive” and are made to restrain potential conduct which could be detrimental to the integrity of the capital markets.<sup>19</sup>
- [24] Berry has asked the Panel to “revisit” the Settlement Agreement which informs the NSSC Order. It is not appropriate for this Panel to revisit the findings in the Settlement Agreement as an enforcement proceeding under subsection 127(10) of the Act is not a forum for re-litigating findings made in other jurisdictions.<sup>20</sup>
- [25] In order for Berry to successfully resist reciprocation of the NSSC Order, he must prove that the proceeding leading to the Settlement Agreement and NSSC Order was so outrageous as to violate Canadian notions of fundamental justice.<sup>21</sup> This is a very high bar, which he has not met.
- [26] I reject Berry’s assertion that there has been procedural unfairness in the NSSC matter and conclude that the high bar necessary to resist reciprocation of the NSSC Order has not been met. Berry voluntarily entered in the Settlement Agreement and agreed to be bound by the NSSC Order.<sup>22</sup>
- [27] Staff submits that the following factors establish that it is in the public interest to make a protective order:
- a. Berry admitted to breaching Nova Scotia securities law pursuant to the Settlement Agreement;
  - b. the conduct admitted by Berry and the other respondents for which they were sanctioned in the NSSC Order would likely have constituted contraventions of Ontario securities law, specifically contraventions of subsections 25(1) and 53(1);
  - c. the terms of the proposed order are consistent with the fundamental principle that the Commission maintain high standards of fitness and business conduct to ensure honest and responsible conduct by market participants;
  - d. the terms of the proposed order align with the sanctions imposed in the NSSC Order to the extent possible under the Act;
  - e. the sanctions proposed by Staff are prospective in nature and would impact Berry only if he attempted to participate in the capital markets of Ontario.
- [28] The Commission may consider a number of factors in determining the nature and scope of sanctions, including the seriousness of the misconduct, any mitigating

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<sup>19</sup> *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 26, [2001] 2 SCR 132 (SCC) at para 42 - 43

<sup>20</sup> *Black (Re)*, 2014 ONSEC 16, (2014), 37 OSCB 5847 at para 24

<sup>21</sup> *Beals v Saldanha*, 2003 SCR 72, [2003] SCR 416

<sup>22</sup> Exhibit 1, Tab 1, Settlement Agreement dated May 11, 2017 at para 3 and 31

factors and the need to deter a respondent and other like-minded individuals from engaging in similar abuses of the capital markets in the future.<sup>23</sup>

- [29] Registration requirements play a key role in maintaining fairness of and confidence in Ontario's capital markets. Registration serves as a "gate-keeping mechanism" to ensure that only properly qualified and suitable individuals are permitted to be registrants and to trade on behalf of the public.<sup>24</sup> Further, the prospectus requirement is a core protection for investors.<sup>25</sup>
- [30] While an Ontario connection is not a precondition to the exercise of the Commission's jurisdiction in considering an inter-jurisdictional order under 127(10), it is a factor that may be considered when determining to make such an order.<sup>26</sup> Berry is now a resident of Brampton, Ontario.<sup>27</sup>
- [31] Taking into consideration the nature of the misconduct engaged in, the importance of inter-jurisdictional cooperation among securities regulators, and the need to deter Berry and other like-minded individuals from engaging in similar misconduct in Ontario, I conclude that an order ought to be made in the public interest pursuant to the authority provided in subsection 127(1) of the Act that substantially mirrors the sanctions that Berry agreed to be made subject to as part of the Settlement Agreement.
- [32] Staff also requested that that the order sought by Staff specify:
- a. that Staff of the Commission may provide a copy of this Order, and a copy of the NSSC Order imposing sanctions, conditions, restrictions and requirements upon Berry, EnCharge Inc. and EnChargeCanada Corp., to any director appointed under section 260 of the *CBCA*; and
  - b. that the Commission respectfully requests the aid of any Director appointed under section 260 of the *CBCA* who issues a certificate of revival with respect to EnChargeCanada Corp. prior to May 26, 2027 by advising Staff of the Commission of the issuance.
- [33] Staff's materials did not provide reasons why these matters need to be specified in an order issued by the Commission as opposed to being dealt with as administrative matters exclusively by Staff. I therefore have determined not to include these provisions in the order.

## **VI. ORDER**

- [34] For the reasons as discussed above, I will issue the following order against Berry that:
- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities by Berry cease until May 26, 2022, with the exception that Berry is permitted to trade through a registrant to whom Berry must provide a copy of the NSSC Order and a copy of this order;

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<sup>23</sup> *Belteco Holdings Inc (Re)* (1998), 21 OSCB 7743 at para 7746-7747; *MCJC Holdings* (2002), 25 OSCB 1133 at 1134

<sup>24</sup> *Limelight Entertainment (Re)*, 2008 ONSEC 4, (2008), 31 OSCB 1727 at para 135-136

<sup>25</sup> *Ibid*, at para 139

<sup>26</sup> *Biller (Re)*, 2005 ONSEC 15, (2005), 28 OSCB 10131 at para 32

<sup>27</sup> Exhibit 2, Affidavit of Lee Crann dated April 25, 2018

- b. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Berry until May 26, 2022;
- c. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Berry resigns any positions that he holds as a director or officer of any issuer, registrant or investment funds manager;
- d. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Berry be prohibited from becoming or acting as a director or officer of any issuer, registrant or investment fund manager until May 26, 2020;
- e. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Berry be prohibited from becoming or acting as a registrant, investment fund manager or promoter until May 26, 2022; and
- f. pursuant to subsection 127(2) of the Act, as a term and condition of this order, should Berry become aware that EnChargeCanada Corp. is to be revived or has been revived between the date of this order and May 26, 2027, Berry is to immediately advise Staff of the Commission that EnChargeCanada Corp. is to be or has been revived;

Dated at Toronto this 16<sup>th</sup> day of July, 2018.

"D. Grant Vingoe"

D. Grant Vingoe