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Securities
Commission

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**IN THE MATTER OF
BENEDICT CHENG, FRANK SOAVE,
JOHN DAVID ROTHSTEIN and ERIC TREMBLAY**

REASONS AND DECISION ON A MOTION REGARDING PRIVILEGE

Hearing: December 18-22, 2017

Decision: January 10, 2018

Panel: Janet A. Leiper Chair of the Panel

Appearances: Shara N. Roy For Benedict Cheng
Brian Kolenda

David Hausman For Frank Soave
Jonathan Wansbrough

Maureen Doherty For Eric Tremblay

Yvonne Chisholm For Staff of the Ontario Securities
Jennifer Lynch Commission
Christina Galbraith

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REASONS AND DECISION

I. INTRODUCTION

- [1] On April 12, 2017, Staff of the Ontario Securities Commission issued a Statement of Allegations pursuant to section 127 of the Securities Act¹ against the Respondents.²
- [2] The allegations concern illegal insider tipping and trading, misleading statements made to investigators and breaches of confidentiality. The events giving rise to the allegations took place within Aston Hill Financial Inc. and its related subsidiaries during the early spring and summer of 2014 and during the investigation by Staff of the OSC in 2015-2016.
- [3] The hearing into the merits of the allegations is scheduled for the weeks of April 16, 23 and 30, 2018.
- [4] On December 18-22, 2017, one of the respondents, Benedict Cheng, brought a motion requesting relief on the basis that solicitor-client privilege attaches to certain evidence from Mr. Michael K. that Staff may seek to introduce at the hearing on the merits. Staff brought a cross motion to defer the privilege issue to the hearing on the merits. For reasons issued separately, that motion was dismissed and the privilege motion ordered to proceed on the question of whether a solicitor-client relationship existed between Mr. Cheng and Mr. K. and if so, whether any of the communications were subject to solicitor-client privilege.
- [5] The evidence and a portion of the submissions on this privilege motion were heard in the absence of the public because solicitor-client privilege was at issue.
- [6] For the reasons below, Mr. Cheng's privilege motion is dismissed. Mr. Cheng has not established on a balance of probabilities that he had a solicitor-client relationship with Mr. K. at the time of the relevant events. Accordingly, the evidence of and documents from Mr. K at issue here are not subject to any privilege with respect to Mr. Cheng and do not give rise to a ground of relief on that basis.

II. BACKGROUND

A. The Entities

- [7] In 2014 Aston Hill Financial Inc. was a publicly traded company with its shares listed on the Toronto Stock Exchange and its head office in Calgary, Alberta. Aston Hill had five subsidiaries, including Aston Hill Asset Management (**AHAMI**) and Aston Hill Securities (**AHS**).
- [8] AHS was an investment dealer and member of Investment Industry Regulatory Organization of Canada (**IIROC**). It had offices in Toronto and a head office in Halifax, Nova Scotia.
- [9] AHAMI was a registered investment fund manager specializing in the development, sales and management of closed end investment funds, open end funds and hedge funds. Its office was in Toronto, Ontario where it shared

¹ RSO 1990, c S.5.

² On October 26, 2017, Staff issued an Amended Statement of Allegations.

contiguous space with AHS, although the two entities had different business functions and maintained separate entrances.

B. The Respondents and Other Individuals at Aston Hill

- [10] Eric Tremblay was the Chief Executive Officer and Chair of the Board of Directors of Aston Hill. He was also the Ultimate Designated Person of AHAMI and was responsible for AHAMI's compliance with securities laws in Ontario. He worked out of the Aston Hill office in Calgary.
- [11] Benedict Cheng was the President and a director of Aston Hill and the Co-Chief Investment Officer of Aston Hill and AHAMI. He was a portfolio manager at AHAMI and was registered with the OSC in that capacity. Mr. Cheng reported to Mr. Tremblay.
- [12] J.D. Rothstein was the Senior Vice President and National Sales Manager of AHAMI. He reported to Mr. Cheng. At the time of the motion, Mr. Rothstein had entered into a settlement with the OSC and was no longer appearing on the matter.
- [13] Frank Soave was a client of J.D. Rothstein. He was also an investment advisor at CIBC Wood Gundy.
- [14] Larry T. was the Chief Financial Officer at Aston Hill and worked in Calgary. John H. was the President, Chief Compliance Officer, UDP and CFO of AHS. He worked out of the Halifax office.
- [15] From June 2010 until September 2014, Mr. K. was the Chief Operating Officer of Aston Hill, including AHS and AHAMI. He was also the President of AHAMI. Mr. Cheng's motion claims that Mr. K. was employed as Chief Legal Officer for Aston Hill. This question is discussed in greater detail below.

C. Mr. K.'s Employment Background and Term as Chief Operating Officer at Aston Hill

- [16] Mr. K. was called to the bar of Ontario in 1992 and practiced for several years at a large firm in Toronto. Prior to joining Aston Hill, he was Senior Vice President and General Counsel at a financial organization. Mr. Cheng, who is not a lawyer, was employed at the same financial organization for eight years. Mr. Cheng testified that he knew that Mr. K. was a lawyer from his time there.
- [17] Mr. K. testified he left the financial organization because he wanted to change career direction. He was tired of the role of general counsel, the work with people in conflict and the "tedious" subject matter. He decided to look for a leadership position that did not involve legal work. He was encouraged to pursue executive education and to that end, took an intensive course at Harvard University in the U.S.A. On his return to Canada in 2008, the job market had taken a downturn, so he spent some time networking. He then accepted a role at a cheque company as Executive Vice President and Chief Legal Officer.
- [18] In 2009, Mr. Cheng assisted Mr. K. by providing him with contract work and office space in downtown Toronto. The contract work included the use of Mr. K.'s legal skills as he reviewed documents and did the "due diligence" on an acquisition. Mr. Cheng saw Mr. K. as doing both the legal and acquisition work for this contract. Mr. K. described himself as the "quarterback" of the deal, a role

which does not require legal training. This experience led to an offer of employment with Aston Hill, negotiated between Mr. Cheng and Mr. K.

- [19] The offer of June 15, 2010 described Mr. K.'s role as "Chief Operating Officer" of Aston Hill Financial Inc. In addition to a salary, bonus, stock options and benefits, Mr. K. was provided with parking, expenses and his Law Society membership fees. Business insurance held by the company was stipulated to cover any liability associated with the performance of his duties. Mr. K. maintained his license to practice law during the time he was employed at Aston Hill.
- [20] On June 16, 2010, Mr. K. signed back the offer of employment. On July 27, 2010 Aston Hill issued a press release announcing Mr. K. had been appointed COO, to "take a lead role in growing Aston Hill's own mutual fund and structured financial products business." The press release made no mention of any legal position or legal duties assigned to Mr. K.
- [21] On January 1, 2013, Mr. K.'s employment status was formalized. Two members of Aston Hill's Board of Directors and Mr. K. signed an executive employment agreement which described his position and acknowledged he had been so employed since August of 2010. The agreement set out Mr. K.'s duties as the COO of the corporation, which required him to:
- a. perform the duties and responsibilities of the COO of the corporation, including all those duties and responsibilities customarily performed by a person holding the same or an equivalent position in entities of a similar size to the corporation, engaged in business similar to that of the corporation, as well as such other related duties and responsibilities as may be assigned to the Executive by the CEO from time to time;
 - b. accept such other office or offices which may be elected or appointed by the Board in addition to that of COO, and
 - c. devote the whole of his working time, attention, efforts and skill to the performance of his employment duties and responsibilities as set out herein, and truly and faithfully serve the best interests of the corporation at all times. In particular and without limiting the generality of the foregoing, the Executive shall not engage in any personal activities or any employment consulting work, trade or other business activity on his own account or on behalf of any other Person which may compete, conflict or interfere with the performance of the Executive's duties hereunder in any way.
- [22] The Executive Employment Agreement did not mention any duties as General Counsel or Chief Legal Officer. It included provisions as to confidentiality but did not discuss privilege or the specific duties of confidentiality owed by lawyers to clients.
- [23] The Aston Hill organizational charts obtained and filed by Staff showed Mr. K. as COO to the parent company and to the subsidiaries AHS and AHAMI. These charts do not identify Mr. K. as having any counsel or legal officer role.
- [24] Staff's motion materials included copies of Aston Hill regulatory filings under Mr. K.'s signature. The filings recorded Mr. K.'s title as COO of Aston Hill, President of AHAMI or both.

- [25] On September 16, 2014, Mr. Tremblay sent an email to one of the Aston Hill Directors who had also signed Mr. K.'s employment agreement. The email advised of a plan to let Mr. K. go from the company and discussing his work as the COO. The email identified problems with staff being "alienated." He wrote that Mr. T. had become "very cautious" forwarding even the "simplest task" to outside counsel. Mr. Tremblay wrote that as a result the "legal bills are adding up." The email did not identify Mr. K. as general counsel or a chief legal officer.
- [26] On September 18, 2014, Aston Hill issued a press release over the names of Eric Tremblay, CEO and Ben Cheng, President announcing Mr. K's successor as COO and AHAMI President. Mr. K.'s successor was also a lawyer and he was not identified as Chief Legal Officer.

D. The Amaya Acquisition and Subsequent Investigation within AHS: April-October 2014

- [27] The events underlying these proceedings concerned trading in advance of the public announcement of a major gaming company acquisition. In 2014, Amaya Gaming Group Inc. was pursuing an acquisition of PokerStars and Full Tilt Poker brands. On April 25, 2014, a representative of Amaya's financial advisor from Canaccord Genuity Group Inc. asked AHAMI to sign a confidentiality agreement (**NDA**). Mr. Cheng arranged to have an AHAMI employee, (M.)K. sign the NDA. On signing the NDA, Mr. (M.)K. received a slide presentation on April 29, 2014 which described an offer to participate in the acquisition.
- [28] The slide presentation set out an opportunity for funds managed by AHAMI to participate in the financing in exchange for debt and new Amaya shares priced at \$20 per share. Mr. (M.)K. shared this information with Mr. Cheng and provided him with a copy of the presentation. Mr. Cheng agreed to have AHAMI participate in the financing.
- [29] On June 12, 2014, Amaya announced the acquisition of the owner of the PokerStars and Full Tilt Poker brands.
- [30] The CCO for AHS, Mr. H., noticed that certain AHS accounts had accumulated "a lot of Amaya" prior to the June 12 announcement. He decided to review the trades to find out whether there were any regulatory concerns. Mr. H. sent an email on June 13, 2014 to three traders at AHS letting them know that he was looking at the trading activity and would be speaking with them. Mr. H. copied Mr. K. on the email. Mr. H. and Mr. K. also spoke by phone within a few days of the June 13 email about next steps.
- [31] Mr. H. consulted with outside counsel as arranged by Mr. K. He updated Mr. K. on his work as it progressed. As required by IIROC rules, Mr. H. alerted IIROC of the investigation into unusual trading by filing a "ComSet" report concerning the three AHS brokers. In October 2014, Mr. H. filed further ComSet reports with IIROC which concluded there had not been any improper use of insider information by the brokers at AHS.
- [32] On the AHAMI side of the business, Mr. K. learned that there may have been trading in Amaya prior to the announcement of the acquisition. He consulted with outside counsel and as a result began to gather documents such as pre-clearance forms, trading records, emails and expense reports concerning trading by AHAMI employees, including Mr. Cheng. Mr. K. did not complete the review of the AHAMI trading before he was let go from Aston Hill.

[33] During the period from mid-June to late July, Mr. K. created four memos to file describing information he learned during his review and interactions that he had with senior members of Aston Hill, including Mr. Cheng. During the investigation, these memos were produced to Staff by Mr. K. under summons. They are part of the intended evidence over which Mr. Cheng claims privilege.

E. The OSC Investigation: FINRA Referral, the Anonymous Letter and Identification of Potential Privilege Issues

[34] On February 25, 2015, the Financial Industry Regulatory Authority Inc. (**FINRA**) referred information to the Commission about suspicious trading in Amaya in Ontario. The FINRA letter mentioned an Aston Hill account, the April 29, 2014 NDA concerning the private placement, clients of AHS and employees of AHS and AHAMI.

[35] In April of 2015, the Staff investigator assigned to the matter was provided with an anonymous letter. The letter, dated in January of 2015, was sent by its author to both the OSC and the Autorité des marchés financiers (**AMF**) in Quebec. The letter alleged insider trading or tipping by a list of individuals, employees or clients of Aston Hill parent or subsidiary companies.

[36] During the Commission's investigation into Aston Hill, Staff served summonses under the Act. The recipients were reminded to ensure that any correspondence between Aston Hill and any legal counsel were to be removed from the production of materials in response to the summons.

[37] Aston Hill produced documents to the OSC but had not completed a document by document review for potential claims of privilege. Staff took the step of having a litigation counsel unconnected with the investigation review these materials and identify documents which could lead to a claim of privilege. Because of that review, all of the materials were returned to counsel for Aston Hill to do a further privilege review and remove potentially privileged material before making further production of documents. These steps were not related to the Mr. K. memo productions, which happened later.

[38] Aston Hill produced a new set of documents that included emails sent/received by Mr. K. A protocol was created with notice to counsel to address any documents that could lead to a claim of privilege.

[39] On August 11, 2015, counsel to Aston Hill confirmed that his client was not claiming privilege over any documents produced to date. Counsel stated that "Aston Hill is aware that Mr. K. would provide legal advice from time to time (as you noted, we are told that he trained and practiced as a lawyer prior to joining Aston Hill.)" Counsel suggested to Staff that it is possible that "recipients of that advice might regard their communications with Mr. K. as privileged." Those recipients were not identified. At this stage, the memos created by Mr. K. during his investigation, and over which Mr. Cheng claims privilege, were not known to or produced to Staff.

[40] As part of its investigation, Staff contacted Mr. K. Counsel for Mr. K. accepted service of a section 13 summons for Mr. K. Counsel for Mr. K. identified potential privilege issues and Staff advised him that AHF had waived privilege over communications with him in relation to documents produced to Staff.

- [41] On April 6, 2016, Mr. K. attended at the OSC under summons. During that meeting, Mr. K. was not interviewed because he had documents to produce which could lead to a claim of privilege by Aston Hill. A log was created by counsel to Mr. K. and an agreement to postpone the interview was reached pending instructions from Aston Hill's counsel as to any potential privilege issues arising from documents produced by Mr. K. to Staff.
- [42] The documents produced by Mr. K. were provided to counsel for Aston Hill. On receipt of instructions, counsel to Aston Hill advised Staff that Aston Hill was not asserting any privilege over the documents held by Staff and agreed that Staff should access those documents. Counsel to Mr. K. confirmed his understanding and noted "We are unaware of any other claim or possible or potential claim of privilege in relation to any of the documents."
- [43] Staff unsealed the documents produced by Mr. K. on May 5, 2016 and used these, including the disputed memos to file, as part of its ongoing investigation.
- [44] On June 2, 2016, Staff interviewed Mr. K. under section 13 summons. During that interview, Mr. K. discussed the making of the memos and his inquiries into the Amaya trading at Aston Hill. He did not identify any other potential clients who might have an interest in these communications at the time of his interview.
- [45] Mr. K. admitted that he was the author of the anonymous letter to the OSC and to the AMF.
- [46] On June 9, 2016, Mr. Cheng was interviewed under a section 13 summons. He was asked questions about the memos written by Mr. K. Through counsel, Mr. Cheng reserved the right to claim privilege over any of the documents. Staff noted the OSC had been informed that Mr. K. did not hold a general counsel position at Aston Hill and had been employed there as the COO. Mr. Cheng testified at his examination that Mr. K. was also Chief Legal Officer of Aston Hill.
- [47] With this background in place, the issues relating to Mr. Cheng's claims of privilege on this motion are ready to be discussed.

III. ISSUES AND ANALYSIS

- [48] Mr. Cheng seeks to claim privilege over a broad collection of evidence disclosed by Staff, including things such as memos written by Mr. K, the anonymous letter delivered to the Commission and AMF and transcripts of compelled testimony.
- [49] The issues here are:
- a. Did Mr. K. and Mr. Cheng have a solicitor-client relationship?
 - b. If such a solicitor-client relationship is established by the evidence, which, if any of the communications identified by Mr. Cheng, are subject to solicitor-client privilege?
- [50] The parties agree that in considering whether privilege attaches to any communication, the following statement of the law from *Solosky* and *Campbell* applies:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by

himself or by the legal adviser, except the protection be waived.³

A. Did Mr. K. and Mr. Cheng have a solicitor-client relationship?

- [51] The first step in determining whether privilege attaches to any communication is to determine whether any advice was sought by Mr. Cheng from Mr. K. acting as a legal adviser. The mere demonstration of a communication between the two parties, where one is a lawyer, will not be enough to establish a solicitor-client relationship.
- [52] The “capacity” of the professional legal adviser must be determined with regard to the evidence of the relationship. This is a fact driven analysis. It is considered using objective criteria, looked at from the perspective of the client. Indications of a solicitor-client relationship may be found in any of the following:
- a. a contract or retainer;
 - b. a file opened by the lawyer;
 - c. meetings between the lawyer and the party;
 - d. correspondence between the lawyer and the party;
 - e. a bill rendered by the lawyer to the party;
 - f. a bill paid by the party;
 - g. instructions given by the party to the lawyer;
 - h. the lawyer acting on instructions given;
 - i. statements made by the lawyer that the lawyer is acting for the party;
 - j. a reasonable expectation by the party about the lawyer’s role;
 - k. legal advice given; and
 - l. any legal documents created for the party.⁴
- [53] Formality is not a prerequisite to forming a solicitor-client relationship.⁵ The onus of establishing a solicitor-client relationship is on the party asserting the privilege.⁶

1. Did Aston Hill Have a Solicitor-Client Relationship with Mr. K.?

- [54] As part of the analysis into any solicitor-client relationship between Mr. Cheng and Mr. K., it is important to consider both Mr. K.’s corporate role at Aston Hill as well as his role as potential counsel to Mr. Cheng personally. If Mr. K. was counsel to Aston Hill this could be relevant to the reasonableness of Mr. Cheng’s claim that he had a personal solicitor-client relationship with Mr. K.

³ *R v Campbell*, [1999] 1 SCR 565 (**Campbell**) at para 49; *Solosky v The Queen*, [1980] 1 SCR 821 (**Solosky**) at 835.

⁴ *Jeffers v Calico Compression Systems*, 2002 ABQB 72 (**Jeffers**) at para 8; applied in *Trillium Motor World Ltd. v General Motors of Canada Ltd.*, [2015] OJ No 3602 (**Trillium**) at para 412.

⁵ *Mammarino’s Creative Foods Inc. v Pezzaniti*, 2015 ONSC 1190 at para 13.

⁶ *Gower v Tolko Manitoba Inc.*, 2001 MBCA 11 (**Gower**) at para 18.

- [55] The Aston Hill corporate records, internally and externally, consistently described Mr. K. as a COO at Aston Hill and/or President of AHAMI. The records are silent on any legal responsibilities. This was consistent with Mr. K.'s evidence about his role. Mr. K. testified that from the beginning of his employment he made it clear that "he did not want to be the 'go-to' guy for legal issues." Although Mr. K. maintained his status as a licensee of the Law Society of Upper Canada by reporting to his legal regulator that was "exempt in-house counsel," he said he did so to maintain his membership.
- [56] Mr. Cheng recalled a different set of discussions leading to Mr. K.'s employment at Aston Hill. He said that initially he offered a contract to Mr. K., to assist with an acquisition of a set of funds, and that this included legal work. This in turn led to the offer of employment at Aston Hill. Mr. Cheng said Mr. K. agreed to take on operational duties and take care of legal issues that arose with senior management. Mr. Cheng said that he had not read through the employment agreement signed by Mr. K. but if it only described the COO role that "regardless, it was agreed upon between [Mr. K.] and myself and Mr. Tremblay that [Mr. K.] would handle all of the legal responsibilities at the firm."
- [57] As noted above, Mr. K.'s executive employment contract described him as COO and did not refer to any legal duties. The contract did not require an active law licence, nor did it describe any of the specific responsibilities owed by lawyers to clients under the Rules of Professional Conduct for privilege and confidentiality or the importance of avoiding potential conflicts when acting as in-house counsel. Although the offer in 2010 included payment of Mr. K.'s licensing fees, the agreement was silent on this aspect of remuneration.
- [58] The signatories to the employment agreement for Aston Hill, two members of the board, did not testify as to the employment arrangement or any additional legal duties expected of Mr. K. and not mentioned in the agreement.
- [59] Mr. K. described his duties as COO: he handled operations, product development, people management and vendor relationships including auditors, lawyers, the fund custodian and the information technology providers to Aston Hill. Where legal advice was required for Aston Hill funds and entities, outside counsel performed this function. He reported largely to Mr. Cheng, but noted that the organization chart showed joint reporting to Mr. Cheng and Mr. Tremblay. He was not challenged on his description of his operational duties to Aston Hill.
- [60] Mr. K. testified that he took steps to remind Mr. Tremblay of his role on the occasions when Mr. Tremblay introduced Mr. K. to third parties as a lawyer.
- [61] Mr. K. testified that during his time at Aston Hill he did not provide legal advice to Mr. Cheng on any of the issues raised by Mr. Cheng in the motion materials. He denied giving legal advice in any of the areas claimed by Mr. Cheng, specifically about his capacity as portfolio manager, his responsibilities with the IA Clarington Funds, advice about conflicts among funds, and advice on trading, blackouts and confidentiality agreements. Mr. K. testified that he did not provide legal advice to Mr. Tremblay or to any other senior executive at AHAMI.
- [62] Mr. Cheng described the legal needs of the organization as being "complex." He testified that Mr. K. assisted him with trading in Aston Hill stock, with blackout periods and questions about confidentiality agreements. He testified that Mr.

K.'s replacement was also a lawyer and was retained to handle operational and legal issues. Mr. Cheng testified that Mr. K. assisted the firm, himself and all subsidiaries with legal issues on a consistent basis. In cross-examination, Mr. Cheng was unable to identify a specific occasion when he received personal advice from Mr. K. Mr. Cheng agreed that he did not have any documentation or opinion letters concerning personal legal advice received from Mr. K.

- [63] In cross-examination, Mr. Cheng agreed that the titles and entities shown on the organizational charts for himself, the CEO, the CFO and for Mr. K. as COO were accurate. He agreed that there was no reference on the organizational charts to Mr. K. being Chief Legal Officer or Counsel to Aston Hill.
- [64] Staff put an article describing a 2013 interview with Mr. K. to Mr. Cheng in cross-examination. Mr. K. described his work in that interview, which pre-dated the Amaya acquisition, in operational terms. The interview was consistent with Mr. K.'s evidence about his intended career trajectory to seek "a broader leadership opportunity." Mr. Cheng agreed that the article did not describe any legal work on the part of Mr. K. The only portions of the article that referred to law were the summary of Mr. K.'s biography and a reference to the highly regulated mutual fund sector and his ability to "contribute with my corporate-and securities-law backgrounds."
- [65] Mr. Cheng agreed that as a public company, it was important for Aston Hill's filings to be accurate. He agreed that all public filings referred to Mr. K. as COO or President, and none of the filings described his role as Chief Legal Officer.
- [66] The CEO of Aston Hill, Mr. Tremblay, did not testify on the motion.
- [67] In support of his position that Mr. K. provided legal officer services while at Aston Hill, Mr. Cheng tendered email communications in which Mr. K. was asked for or provided information about matters that had legal implications for either Aston Hill or officers of Aston Hill. These are described and discussed in turn:
- a. **An email string concerning employment/termination negotiations alongside outside counsel in June of 2014:**

these communications were consistent with Mr. K.'s evidence that he managed relationships with outside professionals including employment counsel in June of 2014. Mr. K.'s passed along external counsel's communications and an offer from opposing counsel. The communication is consistent with being from an executive representative tasked with managing outside relationships with counsel and having an HR function. Mr. K. testified that he had these responsibilities. There is no legal advice in the email communication from Mr. K.
 - b. **A one-page email report from Mr. K. to Mr. Tremblay, Mr. Cheng and the CFO of Aston Hill on his attendance at a mediation, and an offer to settle made to the former employee:**

Mr. K. testified that he did not recall if he was there as a representative of the company alongside external counsel, or was there for Aston Hill without counsel present. The emails do not contain any legal advice.
 - c. **A May 13, 2014 email in which Mr. Cheng sent an NDA to Mr. K. along with a request to look at it for "any issues":**

Mr. K testified that part of his operational role was to review NDAs. No response or advice from Mr. K. was tendered. At its highest, and if there were no other evidence about Mr. K.'s role at Aston Hill, this request could be seen to be ambiguous. If an employee asked this question of a lawyer in the role of general counsel, it could fairly be described as a request for advice of a legal nature, consistent with that role. If made to a head of operations, it could also be seen to be ensuring that the person responsible for company activities on a broader context is aware and able to provide strategic direction on issues that could accompany non-disclosure. An executive in that role might identify legal issues to be pursued with counsel to the firm. This would be consistent with an executive tasked with making referrals to outside providers of services, including legal services. Mr. K. testified that part of his role was to be the common record keeping of NDAs. On its own, this communication without more, does not determine the question of Mr. K's role.

- d. **An email of April 14, 2014 sent by Mr. K. to Mr. Tremblay, Mr. Cheng and the CFO marked "Confidential" in which Mr. K. described the termination provisions in a contract with a mutual fund provider:**

The email included underlined provisions around the expiry and continuation of the contract. The CFO forwarded it to the Board of Directors by the CFO who wrote "Below is an update from (Mr. K.) regarding the situation with (the fund) as requested at the last Board meeting." Mr. K. testified that he underlined the point in the email because there was confusion in the office about the contract. He said he summarized its content, did not provide legal advice and that the question was a strategic rather than a legal point. As with the question about the NDA, this question is ambiguous.

Although Mr. K.'s clarification of the contract in is consistent with providing legal advice to a corporate client interested in its responsibilities under that contract, it is equally consistent with a reading of the contract by an executive. It could have been reasonable for any of the recipients to conclude that on that isolated occasion, they had the benefit of Mr. K.'s legal training in reading legal text. It is a second isolated example in the larger context of the role and duties undertaken by Mr. K. In the context of the other consistent evidence about Mr. K.'s role, including corporate documentation, this communication does not establish that Mr. K. was acting throughout his time at Aston Hill as a legal officer or in-house counsel.

- e. **A request for advice in relation to trading in the Amaya stock by a member of the Board of Directors referred to one of Mr. K.'s memos:**

Mr. K. noted that he had been approached by a Board member for advice on trading in Amaya. Mr. K. said that he received a faxed copy of a late fee notice from SEDI to the Board member. Mr. K. spoke with the Board member who reported getting advice from a person in the Aston Hill Calgary office. Mr. K. asked the Board member's permission to look into the matter and contacted outside counsel to get advice from them on

what to do next. He passed along this advice to the Board member, and gave no legal advice himself. This was consistent with the documents filed about that contact and the other evidence of his role. No evidence was called to the contrary and Mr. K. was not cross-examined on this description of that event.

- [68] As the Supreme Court of Canada noted in *Campbell*, lawyers may be valuable as much for their business sense as for legal acumen. "No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer." The finder of fact must determine the nature of the relationship, the subject matter of the advice and the circumstances in which the information is sought and provided.⁷
- [69] Here, the documents that defined the relationship from the beginning of the employer-employee relationship, the extrinsic evidence of statements made about the role in 2013 during the interview with Mr. K. and the unchallenged account of Mr. K.'s actions when asked directly for advice by a Board member, are consistent with an operational, not a legal role. Mr. Cheng's assertion of a different negotiation and hiring arrangement is not borne out by the contracts, announcements, filings and contemporaneous description of Mr. K.'s role.
- [70] Mr. Cheng's evidence that he understood to be Mr. K. was acting as Chief Legal Officer cannot be said to have been reasonably held. The ambiguous nature of the isolated communications tendered by Mr. Cheng and discussed above are insufficient to establish a solicitor-client relationship between Aston Hill and Mr. K. during Mr. K.'s employment. The indicia applied in *Jeffers* and *Trillium* to determine the existence of a solicitor-client relationship are largely absent here, with the only common factor being meetings among executives in a regulated industry, with public and private legal obligations attaching to the work at hand.

2. Did Mr. Cheng have a Solicitor-Client Relationship with Mr. K. prior to the June 2014 Review?

- [71] In Mr. Cheng's affidavit he testified he sought legal advice from Mr. K. on matters relating to his own personal trading, his obligations under non-disclosure agreements, blackout periods and otherwise. However, Mr. Cheng's affidavit also stated that he would not waive privilege in any of these discussions and was not intending to get into the substance of those discussions. This leaves his position as a bare assertion, without substance, of a personal solicitor-client relationship with Mr. K.
- [72] As described above, Mr. K. specifically denied giving any personal legal advice to Mr. Cheng. I accept this evidence.
- [73] I am unable to find that Mr. Cheng has established on a balance of probabilities that he had a solicitor-client relationship with Mr. K. prior to the June 2014 Review.
- [74] These findings do not complete the analysis. By June of 2014, Mr. K. had assigned himself the task of reviewing certain trades made by AHAMI in Amaya and liaising with John H., in the investigation mandated by IIROC rules. In June, Mr. K. requested that a staff member begin pulling the necessary records to assist with this review. This raises the related question as to whether Mr. K.'s

⁷ *Campbell* at para. 50.

role changed at this stage to include legal responsibilities and again whether he formed a solicitor-client relationship with Mr. Cheng.

[75] The question of whether such a relationship developed in June and July of 2014 is considered below.

3. The June 2014 Review: Did Mr. K.'s Role Change? Was Any Solicitor-Client Relationship Formed with Mr. Cheng During the Review?

[76] Mr. K. gave evidence that he asked for advice from outside counsel about whether to review trades made in advance of the Amaya announcement within AHAMI. He brought these recommendations to Mr. Tremblay and to Mr. Cheng. His goal was to avoid jumping to conclusions, and to be thorough. Mr. K. identified the need to have outside counsel because of the complexity of securities law and due to close personal relationships between two staff members being investigated by Mr. H. on the AHS side, and Mr. Cheng.

[77] In June and July of 2014, Mr. K. made personal notes and observations about what he was hearing from his fellow officers on a laptop computer. These are the memos which have attracted a claim of privilege from Mr. Cheng. Mr. Cheng disputes some of the comments attributed to him by Mr. K. in these memos, and does not have a separate recollection of what was said on these occasions. His affidavit in support of the motion says he is not certain about the details of these conversations and at times, Mr. Tremblay was present. Mr. Cheng testified that generally Mr. K. had given him advice about the risks to the company as well as to himself, personally, but he provided no further detail, recordings or notes.

[78] It is not the task on this motion to determine the accuracy of the conversations in Mr. K.'s memos. On their face, the memos describe conversations among executives, including Mr. K., in casual locations, in the company of other people. There is no direct request for legal advice or response with legal advice recorded in any of the memos. Mr. Cheng did not describe a specific recollection or recording of requests for legal advice on these occasions. They are therefore not associated with "consultation for legal advice."⁸

[79] It will be for the merits panel to resolve the dispute about any apparent admissions of wrongdoing by Mr. Cheng as found in the memos from Mr. K. If these are accurate recordings of Mr. K.'s recollection of the events, they are not couched in the language of requests for advice by Mr. Cheng. They are more in line with assertions to Mr. K. by an officer senior to him about the utility of the review. If the memos are inaccurate, there is no reliable alternative account of advice sought or received that provides support for the assertion that Mr. Cheng had a solicitor and client relationship with Mr. K. as of the summer of 2014.

[80] Mr. Cheng testified that he thought that the conversations described in the memos would be kept confidential. In the context of the confidentiality provisions contained in the employment agreement Mr. K. signed, this is reasonable. Mr. K. agreed with this and recorded the following in his memo of July 2, 2014:

They [Mr. Tremblay and Mr. Cheng] seemed worried that [Mr. H.] would jump to conclusions so I told them we were

⁸ *Pritchard v Ontario (Human Rights Commission)*, [2004] SCJ No 16 at para 15.

working together on this and I would personally make sure they were in the loop before any kind of further filing or outside involvement was necessary.

- [81] This expectation of business confidentiality, during a review that was ongoing, does not equate to a solicitor-client obligation of confidentiality merely because the person conducting the review had legal training or credentials.
- [82] Staff described Mr. K as an “officer of the company engaged in a fact-finding exercise who happened to have a law degree.” This is a fair characterization of Mr. K.’s role during June-September 2014. The evidence does not establish that Mr. K.’s role as COO expanded during the review to include a solicitor-client relationship with Mr. Cheng, or jointly with Mr. Tremblay.

IV. CONCLUSION

- [83] Having found that Mr. K. was not counsel to Aston Hill, nor to Mr. Cheng at any of the relevant times, solicitor-client privilege does not attach to the communications recorded or reported by Mr. K. concerning these events. The balance of the motion for relief depends on such a finding and as such, Mr. Cheng’s motion is dismissed.

Dated at Toronto this 10th day of January, 2018.

“Janet A. Leiper”

Janet A. Leiper