



Ontario
Securities
Commission

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de l'Ontario

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

**REASONS AND DECISION ON MOTIONS REGARDING JURISDICTION AND
PREMATURITY**

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
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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 Act* (the **Act**)¹ against the respondents. The hearing on the merits of the allegations is scheduled for the weeks of April 16, 23 and 30, 2018. Staff intends to tender communications, from “Mr. K.”, who is a lawyer, as a witness at the hearing on the merits.
- [2] On December 18-22, 2017, Benedict Cheng brought a motion for relief on the basis that solicitor-client privilege attaches to certain evidence involving Mr. K.
- [3] Staff brought a cross-motion to defer the privilege issue to the hearing on the merits on the basis that Mr. Cheng’s motion is premature. Staff raised the question of whether a panel has jurisdiction to make evidentiary rulings in advance of a hearing on the merits, and if so, whether in this case it would be preferable to defer the privilege motion to the hearing.
- [4] These reasons supplement the brief oral reasons given on December 18, 2017. The cross-motion was dismissed and the privilege motion proceeded on the question of whether a solicitor-client relationship existed between Mr. Cheng and Mr. K.

II. CAN A PANEL OTHER THAN THE MERITS PANEL MAKE RULINGS WITH RESPECT TO EVIDENCE IN ADVANCE OF THE MERITS HEARING?

- [5] As part of its cross-motion, Staff submitted that there was a jurisdictional question as to whether a panel other than the merits panel can determine a question of the admissibility of evidence in advance of the merits hearing.
- [6] The *Act*, the *Statutory Powers Procedure Act*² and the Commission’s *Rules of Procedure*³ are silent on this point. Staff provided examples of single-member panels determining pre-hearing matters at the Commission, including quashing a summons and hearing a motion a determination in respect of the admissibility of compelled transcripts.⁴ In these cases, the Panel members also sat on the merits proceedings.
- [7] Staff and Mr. Cheng provided case law from criminal and civil matters on this question as well.
- [8] In criminal jury cases, pre-trial motions have been permitted by the trial judge prior to empanelling a jury by virtue of 1985 amendments to the *Criminal Code*.⁵ In a procedural ruling made in *R v Curtis*⁶ it was noted that it is practical for the same judge conducting an evidentiary hearing under these provisions to act as

¹ RSO 1990, c S.5.

² RSO 1990, c S.22.

³ *Ontario Securities Commission Rules of Procedure and Forms* (2017), 40 OSCB 8988 (the **Rules**).

⁴ *Waheed (Re)* (2012), 36 OSCB 1071; *Agueci (Re)* 2013, 36 OSCB 12133.

⁵ RSC 1985, c C-46 (the **Criminal Code**).

⁶ [1991] OJ No 1070 (**Curtis**) at para 9.

the trial judge as well. The judge in *Curtis* cited *Duhamel* for the proposition that one judge cannot bind another judge.⁷

- [9] In *Duhamel*,⁸ a decision of the Supreme Court of Canada, an evidentiary ruling made in one trial did not bind a different judge at a separate trial of a different offence, even though the same piece of evidence and the same accused were involved in both trials. *Duhamel* was not concerned with evidentiary rulings made in the same proceeding.
- [10] Criminal procedure has moved on since *Curtis*. The *Criminal Code* now has explicit provisions for case management judges to exercise the powers of a trial judge, including the ability to adjudicate pre-trial matters such as the admissibility of evidence before the trial. Such rulings advance trial management and avoid delays. It is implicit that such rulings will be binding on the trial judge as part of the proceedings leading to the ultimate verdict.
- [11] In *R v Wabason*⁹ the pre-trial motion judge was not a case management judge as contemplated by the section of the Code.¹⁰ The trial judge noted the comments from *R v Davis*¹¹ that underline the importance of retaining prior rulings to “avoid the time, expense and risk of conflicting decisions associated with re-litigation.”¹² The trial judge applied the case management principle by analogy.
- [12] In civil proceedings, interlocutory determinations on evidentiary questions, including those of privilege, are binding on the trial judge.¹³
- [13] In these proceedings, the rights of appeal of the parties are provided for in subsection 9(1) of the *Act*. These will include any decisions made on pre-hearing matters and on the merits. The ability to make pre-hearing decisions on discrete issues that do not relate to the allegations on the merits ought to be encouraged as a matter of pre-hearing management. The legislation and the Rules do not require the same panel to hear all aspects of the matter including appropriate pre-hearing management rulings and orders.
- [14] I conclude that there is jurisdiction to hear a question of whether privilege attaches to evidence sought to be tendered at a merits hearing and to consider what relief should flow from such a finding, including whether to make a finding that privileged evidence is inadmissible.
- [15] Having made this finding, the second question raised by Staff is whether it is preferable to defer the question to the merits panel on the basis that a complete factual record is preferable to determining relief that includes a motion for a stay of proceedings.

III. IS MR. CHENG’S PRIVILEGE MOTION PREMATURE?

⁷ *Ibid.*

⁸ *R v Duhamel*, [1984] 2 SCR 555 (*Duhamel*).

⁹ 2015 ONSC 6128 (*Wabason*).

¹⁰ *Criminal Code* at 551.3(1).

¹¹ 2012 ONSC 5526 (*Davis*).

¹² *Wabason* at para 29, citing *Davis* at para 16.

¹³ *Toronto Dominion Bank v Leigh Instruments Ltd (Trustee of)* (1997), 35 OR (3d) 273 (Ont Gen Div [Commercial List]); *Hawley v North Shore Mercantile Corp*, 2009 ONCA 679 at paras 25-26.

- [16] Mr. Cheng’s motion hinges on whether there was a solicitor-client relationship between Mr. Cheng and Mr. K. This is a question that is distinct from the allegations that are to be heard at the merits hearing. A substantial record was compiled in advance of the motion on the question of this relationship. The oral evidence anticipated at the hearing was limited to three or four witnesses. The parties were ready to proceed and time set aside for the motion.
- [17] In *Duhamel*, the Supreme Court noted the desirability of holding evidentiary hearings “outside the proceedings” where the issue to be determined does not relate to the substance of the offence.¹⁴
- [18] In *Mega-C Power Corp (Re)*, the Commission has held that it is useful to ask the following questions when determining the stage at which a preliminary motion should be heard, in advance of the hearing on the merits:
- a. Can the issues raised in the motion be fairly, properly or completely resolved without regard to contested facts and the anticipated evidence that will be presented at the hearing on the merits? In other words, will the evidence relied upon on the motion likely be distinct from, and unique of, the evidence to be tendered at the hearing on the merits?
 - b. Is it necessary for a fair hearing that the relief sought in the motion be granted prior to the proceeding on its merits?
 - c. Will the resolution of the issues raised in the motion materially advance the resolution of the matter, or materially narrow the issues to be resolved at the hearing on the merits such that it will be efficient and effective to have them resolved in advance of the commencement of the hearing on the merits?¹⁵
- [19] The evidence proposed to be tendered from Mr. K. appears to be a significant part of the case against the respondents. The preparation for his cross-examination at the merits hearing will be affected by a ruling on the admissibility of any or all of his evidence. The relief sought affects much of his oral evidence and a number of memos he wrote at the relevant times. Mr. Cheng argues that having a ruling on the question of solicitor-client privilege in advance will give the parties some certainty, potentially narrow the issues at the hearing and add to the efficiency of hearing preparation.
- [20] A fair hearing would require adjudication of the issue of privilege before the merits hearing begins in any event to avoid potentially compromising the substantive and important protection for privileged communications.

¹⁴ *Duhamel* at para 11.

¹⁵ 33 OSCB 8245 (*Mega-C*) at paras 34 and 35.

[21] The questions set out in *Mega-C* as applied to this record, can all be answered in the affirmative. I am satisfied that the question of solicitor-client privilege and the relationship between Mr. K. and Mr. Cheng, is sufficiently discrete and capable of determination in advance of the merits hearing. The motion should proceed now.

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

"Janet A. Leiper"

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