



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Cheng (Re), 2018 ONSEC 7
Date: 2018-02-15

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

REASONS FOR DECISION ON MOTION REGARDING CONFIDENTIALITY

Hearing: In writing

Decision: February 15, 2018

Panel: Janet A. Leiper Chair of the Panel

Submissions: Shara N. Roy For Benedict Cheng
Brian Kolenda

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

REASONS AND DECISION

- [1] On December 18-22, 2017, the Commission heard motions on questions of solicitor client privilege, prematurity of the motion and jurisdiction. These motions were heard in advance of the hearing on the merits, which is scheduled to proceed on April 16, 2018.
- [2] Mr. Cheng requested that the entire motion regarding privilege be heard in the absence of the public. After receiving written submissions and hearing oral argument on the issue, I dismissed Mr. Cheng's request to have the public excluded for the entire motion, although at the further request of counsel, I allowed the public to be excluded for portions of the hearing, in the event that solicitor client privilege over the evidence in issue was established. The balance of the motions and the submissions on the solicitor client privilege portion of the motion were heard in public.
- [3] By reasons dated January 10, 2018, the Commission dismissed Staff's motion on the question of prematurity and jurisdiction. These reasons have been published.
- [4] In separate reasons dated January 10, 2018, the Commission dismissed Mr. Cheng's motion on solicitor client privilege (the **Privilege Reasons**). The Commission's practice is to deliver reasons to parties 24 hours in advance of publication. After receiving the Privilege Reasons, Counsel for the Mr. Cheng, wrote to the Registrar to request that the Privilege Reasons be kept confidential from the public.
- [5] The Commission sought and received written submission on the question of the public release of the Privilege Reasons. After considering these submissions, and authorities filed by Staff, an order was made publishing the Privilege Reasons. These are the reasons for that decision.
- [6] Mr. Cheng submits that portions of the Privilege Reasons refer to the evidence over which privilege is claimed. Mr. Cheng submits that he may appeal the Commission's decision and that publication of the Privilege Reasons would render the privilege claimed moot.
- [7] Mr. Cheng submits that the same balancing that was conducted by this Panel in determining that some of the evidence in the motion was to be heard in the absence of the public should be applied to the publication of the Privilege Reasons, in order to protect his claim of privilege. Mr. Cheng relies on his counsel's submissions that were made at the hearing, though he did provide any authorities specific to the issue of keeping a decision confidential on the basis that it may be appealed by a party.
- [8] Staff submits that the open court principle has been applied by the Commission in the context of other requests for delaying publication. The Commission has recognized that part of its responsibilities as a statutory tribunal is to ensure that investors, those who are regulated and the public know what decisions are made by the Commission and the reasons behind those decisions. This is a fundamental principle of justice in Canada. It is not to be departed from lightly.
- [9] Staff also submits that the Privilege Reasons do not make specific reference to or disclose any alleged legal advice. Documents are referred to generically and full

names of individuals (other than the Respondents) are not used. Any concerns about confidentiality were met by holding portions of the hearing dealing with specifics in the absence of the public.

- [10] Mr. Cheng has not established any prejudice that would warrant departing from the open court principle. Non-publication of the ultimate reasons was not argued at the time of the hearing of the motions and the reasons dealing with similar subject matter in dismissing Staff's motion with respect to prematurity and jurisdiction were published without objection. The Privilege Reasons themselves do not describe evidence which could fairly be considered legal advice, even in the event that a reviewing court determines that a solicitor-client relationship was established.
- [11] The Respondent's request to refrain from publishing the Privilege Reasons is dismissed.

Dated at Toronto this 15th day of February, 2018.

"Janet A. Leiper"

Janet A. Leiper