



Ontario
Securities
Commission

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Citation: Cheng (Re), 2018 ONSEC 13
Date: 2018-03-19

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

**REASONS FOR DECISION ON A MOTION TO ADJOURN
(Rules 28 and 29 of the Ontario Securities Commission *Rules of Procedure and
Forms (2017)*, 40 OSCB 8988)**

Hearing: March 15, 2018

Reasons: March 19, 2018

Panel: Philip Anisman Chair of the Panel
Deborah Leckman Commissioner
Robert P. Hutchison Commissioner

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

REASONS FOR DECISION ON A MOTION TO ADJOURN

- [1] On March 16, 2018, the Commission made an order granting a motion by Benedict Cheng (**Cheng**), a respondent in this proceeding, to adjourn the hearing on the merits that was scheduled to begin on April 16, 2018. These brief reasons explain why the motion was granted.
- [2] On January 10, 2018, the Commission dismissed a motion by Cheng that had requested a stay of this proceeding or, alternatively, an order prohibiting the testimony of a proposed witness to be called by staff of the Commission (**Staff**) on the basis of Cheng's allegations that information previously provided by the witness to Staff was, and his evidence would be, in breach of Cheng's solicitor-client privilege.¹
- [3] On February 9, 2018, Cheng filed an appeal to the Divisional Court from the Commission's decision.² A few days later, on February 13, 2018, his counsel informed Staff that he would be requesting an adjournment of the merits hearing, scheduled to begin on April 16 and continue to May 4, 2018, pending the decision on his appeal. Cheng has perfected his appeal, and has requested a hearing in May or June.
- [4] A motion brought by Staff to quash Cheng's appeal is to be heard in the Divisional Court on April 6, 2018.
- [5] Cheng's motion to adjourn the hearing was filed on March 5, 2018 pursuant to Rules 28 and 29 of the Commission's *Rules of Procedure and Forms*.³ Rule 29 provides that a hearing shall proceed on the date scheduled, unless the requesting party satisfies a Commission panel that "there are exceptional circumstances requiring an adjournment." This standard reflects the objective of the *OSC Rules*, that Commission proceedings be conducted "in a just, expeditious and cost-effective manner."⁴
- [6] It is in the public interest that enforcement and other proceedings proceed expeditiously to a timely resolution and that proceedings are conducted in a manner that is fair, particularly to respondents.⁵ The balancing of these objectives is necessarily fact-based and must take into account the circumstances of the parties and the manner in which they have conducted themselves in the proceeding.⁶ In determining whether exceptional circumstances require an adjournment, the dominant factor will usually be the requesting respondent's ability to make full answer and defence in the circumstances.

¹ *Cheng (Re)* (2018), 41 OSCB 819, 2018 ONSEC 2.

² Pursuant to section 9 of the *Securities Act*, RSO 1990, c S.5. Following discussion with Staff, Cheng subsequently filed an application for judicial review of the Commission's January 10 decision, to be heard concurrently with his appeal. In these reasons, references to the appeal include both the appeal and the application for judicial review.

³ *Ontario Securities Commission Rules of Procedure and Forms* (2017), 40 OSCB 8988, r 28-29 (**OSC Rules**).

⁴ *OSC Rules*, r 1.

⁵ See *Darrigo (Re)* (2016), 39 OSCB 5443, 2016 ONSEC 21 at para 9; *Law Society of Upper Canada v. Igbinosun*, 2009 ONCA 484 at para 48.

⁶ See, e.g., *Access Automation LLC (Re)* (2012), 35 OSCB 9019, 2012 ONSEC 34 at paras 39-41; *Meharchand (Re)* (2018), 41 OSCB 1317, 2018 ONSEC 5 at paras 31-38.

- [7] The parties' written submissions were far apart. Staff opposed the requested adjournment in light of its motion to quash. Cheng submitted that proceeding with the hearing would render his appeal meaningless, even if it succeeds, because his request for a stay would be moot and the information over which he claims privilege would become public. In his submission, a successful appeal would preclude or significantly shorten the merits hearing and reduce the costs to all parties. Supported by the other respondents, he requested that the hearing be adjourned to October or November to ensure time for preparation after his appeal is decided by the Divisional Court. Staff agreed that an adjournment would be appropriate, if its motion to quash does not succeed.
- [8] At the beginning of the hearing, the hearing panel (the **Panel**) informed the parties that on the basis of the record and their written submissions, it was prepared to adjourn the hearing for the week of April 16, but thought it in the public interest to have this matter proceed as expeditiously as possible, taking both Cheng's appeal and Staff's motion into account. The Panel requested the parties to consider possible schedules for the hearing on the basis that Staff's motion is granted by the Divisional Court and on the basis that it is dismissed, and suggested the possibility of staggered dates, with Staff presenting its case beginning in the week of April 23 (to preserve some of the days previously scheduled), followed by an adjournment to dates in June, July or August, when the respondents would call their evidence, with a view to completing the hearing in the Summer.
- [9] The Panel also requested the parties to consider a date in the week of April 16 for the hearing of a disclosure motion that Cheng intends to bring and to address the timing of required procedural matters preceding the hearing on the merits. The Panel then adjourned the hearing to enable the parties to discuss possible dates under both scenarios.
- [10] When the hearing reconvened, the parties agreed that if Staff's motion is not granted by the Divisional Court, the hearing on the merits should be held during the first three weeks of September. They were in substantial agreement on all but one of the remaining issues. Staff submitted that if its motion is successful, the hearing should begin on April 23 for Staff to present its evidence and then be adjourned to and completed in the first three weeks of September. Cheng argued that in both scenarios the hearing would end around the same time, but that he would have a fuller opportunity to prepare his defence if it begins on the later date and he and the other respondents would avoid the extra costs of counsel having to prepare for hearings in both April and September.
- [11] All parties agree that an adjournment is necessary if Cheng's appeal proceeds. In view of the fact that the majority of the hearing will be conducted in September even if Staff's motion is granted, the proceeding will not be significantly expedited by beginning in April. The Panel determined, therefore, to grant Cheng's motion and to schedule the hearing to begin in September. Dates for the hearing and other matters were then selected, with the agreement of all the parties, to ensure that the hearing will be completed without the need for a further adjournment.
- [12] At the conclusion of the hearing, the Panel informed the parties that it would make an order adjourning the hearing on the merits to the agreed dates, setting the agreed date for the hearing of Cheng's disclosure motion and scheduling the

other dates necessary for the merits hearing to proceed. This order was issued the next day, March 16, 2018.

- [13] The Panel wishes to thank all counsel for their cooperation in resolving these issues.

Dated at Toronto this 19th day of March, 2018.

"Philip Anisman"

Philip Anisman

"Deborah Leckman"

Deborah Leckman

"Robert P. Hutchison"

Robert P. Hutchison