CITATION: Cheng v. Ontario Securities Commission, 2018 ONSC 2502
DIVISIONAL COURT FILE NOs.: 109/18 and 100/18
DATE: 20180430

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
BENEDICT CHENG	)	
Applicant/Appellant (Responding Party)	)	*Shara N. Roy and Brian Kolenda*, for the Applicant/Appellant (Responding Party)
– and –	)	
THE ONTARIO SECURITIES COMMISSION	)	*Paul Le Vay and Carlo Di Carlo*, for the Respondent (Moving Party)
Respondent (Moving Party)	)	
	)	**HEARD at Toronto:** April 18, 2018

Swinton J.:

Overview

[1] Staff of the Ontario Securities Commission ("OSC") has brought a motion to quash an appeal and an application for judicial review of an interlocutory ruling of the OSC dated January 10, 2018 on the ground of prematurity. For the reasons that follow, I would grant the motion.

Background

[2] Staff of the OSC commenced regulatory enforcement proceedings against Mr. Cheng and others in April 2017. The main allegation against Mr. Cheng is illegal insider tipping.

[3] Mr. Cheng brought a motion in advance of the merits hearing, scheduled to commence in April, 2018, in which he sought a stay of proceedings or the exclusion of certain evidence on the ground of solicitor and client privilege. He argued that the evidence of Mr. K and documents authored by him that were in the possession of Staff were subject to solicitor and client privilege.

[4] After five days of evidence and argument, in which both Mr. Cheng and Mr. K. testified, Commissioner Lieper issued a written decision on January 10, 2018 dismissing the motion. She concluded that there was no solicitor and client relationship between Mr. Cheng and Mr. K. Accordingly, there could be no solicitor and client privilege with respect to the evidence of Mr. K. and the documents which he had authored.

[5] Mr. Cheng then launched an appeal of that ruling. When advised by Staff that there was no right to appeal an interlocutory order, Mr. Cheng launched an application for judicial review raising the same grounds he had asserted in his Notice of Appeal.

[6] The hearing on the merits, scheduled to begin in late April, has now been adjourned to September, 2018.

The Appeal

[7] Section 9(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") provides:

> A person or company directly affected by a **final** decision of the Commission, other than a decision under section 74, may appeal to the Divisional Court within thirty days after the later of the making of the **final** decision or the issuing of the reasons for the **final** decision. (emphasis added)

Subsection 1(1) defines a "decision" as "…a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations."

[8] The OSC argues that the Divisional Court has no jurisdiction to hear the present appeal because the appeal is with respect to an interlocutory order and not a final order.

[9] Mr. Cheng argues that there is jurisdiction in the Divisional Court to hear his appeal because the decision under appeal has determined a substantive right – in this case, his right to solicitor and client privilege – and therefore, it is a final decision.

[10] The starting point, in determining the jurisdiction of the Court, is to look to the language of the Act. On its plain reading, s. 9(1) contemplates an appeal of a "final" decision – that is, a decision after the proceeding has been completed and there has been a final determination of all issues in the Notice of Hearing and Statement of Allegations. The omission of any reference to appeals of an interlocutory decision is telling, given the distinction made between the concepts of an interlocutory and a final order in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the *Rules of Civil Procedure*.

[11] Moreover, such an interpretation is consistent with the intention of the Legislature in establishing administrative tribunals like the OSC. This is done to provide resolution of disputes by an expert tribunal in a timely and efficient manner. Were the word "final" to be interpreted as allowing some interlocutory appeals, there is a real possibility of delay and fragmentation of the administrative proceedings.

[12] The decision under appeal is interlocutory in nature. It deals with the admissibility of evidence, and it was made during an ongoing proceeding. However, Mr. Cheng seeks to import

the jurisprudence from the civil courts respecting final and interlocutory orders. In *Ball v. Donais* (1993), 13 O.R. (3d) 322, the Court of Appeal held that an order depriving a party of a substantive right that could be determinative of the action is a final order. I note that this jurisprudence arises from the need to determine where an appeal lies – to the Court of Appeal or the Divisional Court (with leave) if the order is made by a judge, and to the Superior Court or the Divisional Court if the appeal is from the order of a master.

[13] There are good policy reasons not to apply the distinction between final and interlocutory orders from the civil courts in administrative proceedings. These policy reasons were discussed recently by the Divisional Court in *Law Society of Upper Canada v. Piersanti*, 2018 ONSC 640, in the context of a determination of the meaning of a "final decision" under the *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.38. The Court explained why the jurisprudence of the courts, such as *Ball v. Donais,* above, was not applicable in determining whether a decision of the Law Society Tribunal was final. In my view, the analysis of the Divisional Court at paras. 15-17 is equally appropriate in the present case in interpreting s. 9(1) of the *Securities Act*:

> [15] In my view, the *Ball v. Donais* line of cases are distinguishable when determining whether the Appeal Division's decision or order is final pursuant to s. 49.38 of the Act given the context in which they were decided.
>
> [16] In that regard, a civil proceeding is quite different than a regulatory proceeding and specifically a conduct proceeding under the Act. In regulatory proceedings, fragmentation and/or bifurcation of issues and piecemeal court proceedings are discouraged. Rather the preferred course is to allow matters to run their full course before the tribunal and then consider all the legal issues arising from the proceeding, following its conclusion. In conduct proceedings that involves a finding of professional misconduct or conduct unbecoming.
>
> [17] The policy reasons giving rise to this distinction were clearly set out by Mark Sandler as Chair of the Appeal Panel in *Law Society of Upper Canada v. Paul Alexander Robson*, 2013 ONLSAP 0003 at para. 31:
>
> > ...The policy considerations that apply in the disciplinary setting are very different than in those civil cases cited above [*Ball v. Donais; Stoiantsis*]. As we stated in *Coady* 2005 at paragraph 55, and as stated by the Alberta Court of Appeal in *Partington*, the hearing process would soon grind to a halt if mid-hearing rulings were generally subject to immediate appeal. Seized panels would be unable to fulfill their responsibilities in a timely and effective way. This has implications for the public, members of the profession, and the Society. This is especially so when it is remembered that a full hearing on the merits may make the appeal academic, and that there is an appeal from the final decision following a disciplinary hearing.

[14] Given the language of s. 9(1) of the Act and the policy reasons for allowing an administrative proceeding to run its course before an appeal, I see no reason why a "final" decision under the *Securities Act* would mean other than a final determination of the proceeding – in this

case, after the final determination with respect to the allegations made against Mr. Cheng, including any sanction if the allegations are proven.

[15] This approach to the interpretation of s. 9(1) was taken by this Court in *MRS Sciences Inc. v. Ontario (Securities Commission)*, 2012 ONSC 7198 at para. 1. Analogously, in *Mitchell v. Ontario (Securities Commission)*, [1998] O.J. No. 1537, the Divisional Court dismissed an application for judicial review of interlocutory orders as premature, albeit without discussing s. 9(1).

[16] It is true that the Divisional Court did hear an appeal of an interlocutory decision concerning solicitor and client privilege in *Philip Services Corp. (Receiver of) v. Ontario Securities Commission*, [2005] O.J. No. 4418. However, the reasons contain no discussion of the meaning of s. 9(1) of the Act, which is referred to only in connection with a standard of review analysis (at para. 20). Therefore, I do not take this decision as a binding determination of the meaning of the subsection. Indeed, the decision is inconsistent with more recent jurisprudence cited above, where the Court has refused to hear an appeal or a judicial review of an interlocutory ruling.

[17] Mr. Cheng would, in effect, carve out an exception for a determination on solicitor and client privilege, but I see no basis to do so in the language of the Act. Moreover, it is instructive that in criminal proceedings, the Supreme Court of Canada and the Court of Appeal have made it clear that interlocutory rulings affecting privilege or Charter rights cannot be appealed until the completion of the criminal proceeding (*R. v. Mills*, [1986] 1 S.C.R. 863 at para. 275; *United States v. Fafalios*, 2012 ONCA 365 at paras. 40, 42 and 75; *R. v. Rutigliano*, 2015 ONCA 452 at paras. 36-37).

[18] In sum, pursuant to s. 9(1) of the Act, there is a right to appeal only a final decision. An interlocutory ruling about solicitor and client privilege is not a final decision. Therefore, the appeal should be quashed for lack of jurisdiction.

The Application for Judicial Review

[19] The OSC argues that the application for judicial review should be quashed as well, either as an abuse of process or on the ground of prematurity.

[20] Mr. Cheng argues that the application is not an abuse of process, and there are exceptional circumstances here, such that it is not plain and obvious that a panel of the Divisional Court would refuse to exercise its discretion to hear the application. This is because of the importance of the right to solicitor and client privilege and the fact that the damage caused by disclosure cannot be cured if the ruling on privilege is later set aside – in other words, "the genie is out of the bottle."

[21] There is no question that this application for judicial review is premature, given that it seeks to overturn an evidentiary ruling made in the course of an ongoing proceeding before the OSC. Generally, courts are reluctant to interfere in ongoing proceedings before administrative tribunals for good policy reasons. However, in exceptional circumstances, a court may exercise its discretion to hear an application for judicial review of an interlocutory decision.

[22] Such cases are rare. As Nordheimer J. stated in *Azeff v. Ontario Securities Commission* 2014 ONSC 5365 (Div. Ct.) at para. 7, the exception should be reserved for cases where the ruling

complained of is "so tainted" that the result of the later judicial review would be "preordained" at para. 7). He did so in a case where the applicants alleged a denial of natural justice.

[23] The Court of Appeal in *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 has emphasized that even a breach of the rules of natural justice or a true question of jurisdiction is not sufficient to warrant automatic access to judicial review (at para. 63). See also *Lourenco v. Hegedus*, 2017 ONSC 3872 (Div. Ct.) at para. 6:

> In rare cases this court will intervene on an application for judicial review in the midst of an administrative process where there are strong reasons to believe that the ongoing process is so deeply flawed that there is a strong likelihood that it will have to be run over again, usually on the basis of bias, reasonable apprehension of bias or want of jurisdiction.

[24] Mr. Cheng argues that he need only show that it is plain and obvious that the application for judicial review would be quashed on the grounds of prematurity. The case cited, *Certified General Accountants Association of Canada v. Canadian Public Accountability Board*, [2008] O.J. No. 194, does not deal with a motion to quash for prematurity, but rather a motion to quash for lack of jurisdiction. Cases where single judges have quashed for prematurity do not cite the plain and obvious test (*Lourenco*, above; *Sears Canada Inc. v. Davis Inquest (Coroner of)*, [1997] O.J. No. 1424 (Div. Ct.)).

[25] Mr. Cheng argues that the panel might exercise its discretion to hear this case because it involves the issue of solicitor and client privilege. He points to cases in the Federal Court where tribunals had ordered disclosure of information protected by informer privilege or solicitor and client privilege, and judicial review was found to be justified at an interlocutory stage (*Canada (Minister of Citizenship and Immigration) v. Hanjra*, 2018 FC 208 at para. 21; *Bank of Montreal v. Sasso*, 2013 FC 584 at para. 16; *Boulos v. Canada (Attorney General)*, 2013 FC 1047 at para. 36).

[26] Mr. Cheng has not identified any Ontario case stating that a tribunal's determination that evidence is not protected by solicitor and client privilege constitutes an exceptional circumstance. Admittedly, in *Toronto (City) Police Services Board v. Briggs,* 2017 ONSC 1591 at para. 19, I stated that a court may decide to intervene "to prevent the continuation of a proceeding that is fatally flawed due to a denial of procedural fairness, or to review certain types of orders, such as one directing the disclosure of privileged documents, that cannot be adequately corrected in a later review." I emphasize that the word used was "may". It is clear there is no categorical approach to "exceptional circumstances" that would automatically allow early judicial review of a ruling on solicitor and client privilege (see *Ontario (Liquor Control Board) v. Lifford Wine Agencies* (2005), 76 O.R. (3d) 40 (C.A.) at paras. 42-45).

[27] I note as well that the Divisional Court in *Sears Canada,* above, held that judicial review was premature and quashed the application even though there were issues of solicitor and client privilege engaged. See, as well, *Minty v. Lucas*, 2014 ONSC 3169 (Div. Ct.) at para. 33.

[28] Finally, in *Dioguardi Tax Law v. Law Society of Upper Canada*, 2016 ONCA 531, the Court of Appeal upheld the order of the application judge who had refused to determine an

application on the basis of prematurity, even though the applicant raised issues of solicitor and client privilege and breach of Charter rights.

[29] Here, the Commissioner made a determination about the relationship of Mr. Cheng and Mr. K. after a lengthy hearing, and she gave detailed reasons for her decision. Based on the evidence, both in terms of testimony and documents, she found that Mr. Cheng had not established there was a solicitor and client relationship with Mr. K., and therefore, there was no merit to the claim of privilege with respect to the evidence of Mr. K. and the memoranda he had prepared.

[30] This is not the rare case where early intervention is warranted because there is a danger of manifest unfairness in the hearing. Indeed, if Mr. Cheng's argument were accepted, it would open the way for numerous efforts to review evidentiary rulings rejecting a claim of solicitor and client privilege, with the resulting fragmentation and delay of the administrative proceeding that the doctrine of prematurity seeks to avoid.

[31] Moreover, allowing this application to proceed would be inconsistent with the legislative scheme, which, in s. 9(1) of the Act, provides a right to appeal to the Divisional Court when there is a final decision. I am not prepared to characterize this application as an abuse of process, but it is premature and should not be allowed to proceed. Mr. Cheng will have an opportunity to challenge the Commissioner's order if he ultimately loses on the merits and chooses to appeal.

[32] In sum, this is not one of the rare cases where a court should or would exercise its discretion to hear a premature application for judicial review, and the application for judicial review should be quashed.

Conclusion

[33] For these reasons, the motion to quash is granted, and the appeal and the application for judicial review are quashed. Costs to the OSC are fixed at $20,000.00, an amount agreed upon by the parties.

K. Swinton J.

Swinton J.

Released: April 30, 2018

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REASONS FOR JUDGMENT

Swinton J.

Released: April 30, 2018