

**IN THE MATTER OF**  
**XIAO HUA (EDWARD) GONG**

**FILE NO. 2022-14**

**MOTION OF XIAO HUA (EDWARD) GONG**  
(For an Order that the *Wagg* principles apply to proceedings before the Capital  
Markets Tribunal)

**“Materials Issue”**

**A. ORDER SOUGHT**

The Moving Party Respondent, Xiao Hua (Edward) Gong (“Mr. Gong”) will make a motion to the Capital Markets Tribunal (the “Tribunal”) on notice to Staff as timetabled by the Tribunal for orders and directions:

1. An order that the public interest principles and consequent required processes addressed by the Court of Appeal in [\*D.P. v. Wagg\*, 2004 CanLII 30948 \(ON CA\)](#) properly apply to Capital Markets Tribunal proceedings;
2. Directing and requiring Staff to be constrained in the use of criminal disclosure unless and until there has been compliance with the *Wagg* requirements;
3. Such further and other directions and order consequent upon the specific process mandated by *Wagg*;
4. Such further and other relief as Counsel may advise and the Tribunal may deem appropriate.

## **B. GROUNDS**

The grounds for the Motion are:

5. On June 13, 2022, the Ontario Securities Commission issued a Statement of Allegations alleging that Mr. Gong breached sections 25(1), 126.1(1)(b), and 129.2 of the [Securities Act](#) contrary to the public interest.
6. Counsel for Staff of the Ontario Securities Commission (“Staff”) point to the proceedings that ended with the charges against Mr. Gong being withdrawn, and to the proceedings which included guilty pleas by Edward Enterprise International Group Inc. (the Edward Group) for the use of forged documents and for operating a pyramid scheme.
7. In support of the Statement of Allegations, and to prove compliance with the applicable limitation period, Staff intend to rely upon materials filed in connection with the Edward Group corporate guilty pleas and in addition upon materials which formed the “disclosure” in the criminal prosecution that ended with the charges against Mr. Gong being withdrawn.
8. Staff take the position that they as a custodian of this information and the principal investigating agency can be the sole decision-maker and unilaterally circulate that material as disclosure and use it as evidence within this proceeding as they see fit.
9. Thus, the questions become:

- i. What principles guide the use can be made in these civil proceeding of material gathered up and created as part of the criminal case?
- ii. What process should be followed where it is proposed to use criminal investigation material in a different proceeding?
- iii. What record may Mr. Gong tender and rely upon in relation to his Constitutional and other issues?

## **Principles**

10. Staff of the Ontario Securities Commission provided counsel for Mr. Gong with “disclosure” in August 2022.
11. The “disclosure” consisted of a massive amount of data. Almost all of the disclosure, except two small folders totalling 1.6 gigabytes, was from the criminal investigation.
12. Counsel for Mr. Gong already had the disclosure from the criminal case (the two small folders were new and do not appear to be related to the criminal disclosure).
13. However, counsel for Mr. Gong received the material in the criminal proceedings subject to an “undertaking”. The undertaking by counsel was as follows:

I agree that all disclosure provided in this case is to be used for the exclusive purpose of making full answer and defence to the criminal charges and for no other purpose.

14. During an October 17, 2022 conference call (“conference call”) among counsel, counsel for Mr. Gong, raised a series of disclosure related questions. The applicability of what has been referred to as the *Wagg* principles were among these questions.
15. At the October 27, 2022 Attendance, counsel were advised that this issue (*i.e.* as referenced as the *Wagg* issue) would be known as the “Materials Issue”.

### **Public Interest and Process**

16. Disclosure of criminal materials presents unique concerns. (See [Wagg at para. 46](#))

There are important policy reasons for recognizing an implied undertaking rule with respect to disclosure of materials to the defence in a criminal case. The disclosure is compulsory and required because of the public interest in ensuring that the accused obtains a fair trial of the criminal charges. However, as a result of the criminal disclosure process, individuals, including innocent third parties, may find that highly personal information is made available to the accused. These individuals must, as explained in Taylor, accept this intrusion in the interests of achieving a proper result in the criminal case, but the law should provide them with some reasonable protection against use of the information for entirely different purposes. In addition to the policy reasons referred to in Taylor, which essentially concern privacy interests of third parties, there are the policy reasons identified by the Divisional Court in this case, namely, the fact that the disclosure may contain documents over which the Crown could claim public interest immunity, that might attract privilege or which broadly speaking it is not in the public interest to produce.

17. While decided in the context of civil litigation, [\*Wagg\*](#) should not be presumed to end there.
18. Past case law has concluded that the “public interest principles arising from the collateral use of the Crown brief concerns recognized in *Wagg*” apply to a regulatory body’s summons “...for production of all or any part of a Crown brief” (See [\*College of Physicians and Surgeons of Ontario v. Peel Regional Police\*, 2009 CanLII 55315 \(ON SCDC\) at para. 76](#)) .
19. The specific process mandated by [\*Wagg\*](#) would be appropriate with respect to a Capital Markets Tribunal Proceeding. The [\*Securities Act\*](#) and the [\*Commodity Futures Act\*](#) do not mention the [\*Public Inquiries Act, 2009\*](#). (See [\*College of Physicians and Surgeons of Ontario v. Peel Regional Police\*, 2009 CanLII 55315 \(ON SCDC\) at para. 76](#)).

For the foregoing reasons, we conclude that the public interest principles arising from the collateral use of the Crown brief concerns recognized in *Wagg* apply to a summons by the College for production of all or any part of a Crown brief. The public interest concerns arise from the nature of the documents and their use in the criminal investigation and prosecution system. The court has jurisdiction to consider the relevant public and private interests, and to ensure that the College engages a process that permits those interests to be identified and weighed in a particular case. The Attorney General has an important role in safeguarding such interests. However, the specific process mandated by *Wagg* was fashioned in the context of civil proceedings and may not be necessary or appropriate in the context of an administrative body exercising powers under the *PIA*.

## **C. EVIDENCE**

The Moving Party relies upon the following evidence:

1. The Statement of Allegations, dated June 13, 2022, In The Matter of Xiao Hua (Edward) Gong.
2. The Transcript of the October 27, 2022 Attendance In The Matter of Xiao Hua (Edward) Gong.
3. The Moving Party's "Motion for Directions" dated October 17, 2022.
4. The Affidavit of Allana Neto, legal assistant, to be sworn.
5. Ontario Securities Commission, "About Us." This webpage describes the OSC's regulatory function. <https://www.osc.ca/en/about-us>.
6. Such further evidence as counsel may advise and the Panel may permit.

**DATE: November 10, 2022**

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