IN THE MATTER OF
Xiao Hua (Edward) Gong

File No.: 2022-14

MOTION – STAY OF PROCEEDINGS AND CONSTITUTIONAL QUESTION – Jurisdiction

(BROUGHT BY COUNSEL FOR EDWARD GONG)

A. Order Sought

Edward Gong respectfully requests that the Panel order a stay of these proceedings or grant such remedy as the Panel considers appropriate and just in the circumstances.

B. Grounds

The grounds for this motion are:

1) On December 20, 2017, Mr. Gong was charged with several offences under the Criminal Code.

2) Mr. Gong was released on consent on bail conditions that effectively resulted in his business being frozen. The bail conditions imposed were those sought by the Crown and OSC investigators. In other words, the Crown and OSC investigators represented to the Court that the public interest was properly protected by the terms imposed.

3) Significantly, it was not thought necessary or even justifiable to impose a term that would prevent Mr. Gong from being an officer, director or shareholder of any or all of his privately owned corporations. For the more than three years that followed until the end of the criminal proceedings on February 10, 2021, with the charges against Mr. Gong withdrawn, the position of the courts and the Crown has been that no such prohibition was or is needed to protect the public.

4) The punitive sanctions against Mr. Gong now sought by the OSC, after the case against Mr. Gong has been finally resolved, reflect an attempt by the OSC to circumvent the resolution of the criminal proceedings and to impose further punishment on Mr. Gong – to effectively take from Mr. Gong through ancillary proceedings what they were unable to take from him through the judicial process.

5) Given the passage of time until these proceedings were initiated in June of 2022, the outcome of the criminal case, and the reasons for the resolution of that prosecution, the terms now sought by Staff are an unwarranted overreaching that can only be intended by Staff as an attempt to use this process not in the public interest but to destroy Mr. Gong.

6) The OSC's investigation was led by its Joint Serious Offences Team, which included OSC staff and Royal Canadian Mounted Police ("RCMP") personnel seconded to the OSC – the group is hereafter referred to as the "OSC".

7) As part of its investigation, the OSC colluded and cooperated with various notorious state agencies in the People's Republic of China and with agencies in New Zealand, to jointly pursue Mr. Gong. In doing so, the OSC and counsel repeatedly embraced collaborating with foreign state actors who are widely acknowledged to engage in human rights abuses, and the OSC collected and relied on evidence that, if obtained in Canada by similar means, would be immediately rejected under the *Canadian Charter of Rights and Freedoms*.

8) Through the seconded RCMP personnel, the OSC obtained access to the RCMP Liaison Office in Beijing.

9) The OSC also initiated direct communications with the Chinese "Ministry of Public Security" ("Chinese MPS" – the state security arm of the Chinese state and the Chinese Communist Party) and the New Zealand Police ("NZP"). The OSC knew that the NZP were also sharing and cooperating with the Chinese MPS.

10) The Chinese MPS is accused by accredited and recognized international human rights watchers, including federal government agencies, of engaging in flagrant violations of human rights. They are widely known to engage in arbitrary detention, torture, coercing false confessions, and taking political prisoners and foreign hostages.

11) The OSC, the Chinese MPS, and the NZP agreed to jointly investigate Mr. Gong. The OSC entered into highly problematic separate information sharing agreements with both the Chinese MPS (in April 2017) and the NZP (in February 2017).

12) The joint investigation was conducted with no regard for Mr. Gong's rights, or the rights of third parties, including but not limited to the following actions:

a) The Chinese MPS rounded up a number of Chinese citizens accused of being involved with EEIGI, and they were detained without charge for months.

b) The Chinese MPS proceeded to charge and prosecute alleged "leaders" after several months of arbitrary detention. They extracted confessions from all prisoners, promptly secured "convictions" under the Chinese state "process", and seized their assets to the benefit of the Chinese state.

c) The OSC travelled to Beijing in February 2017. The OSC attended personally for the interrogation of the prisoners held by the Chinese MPS. The detained prisoners were interrogated through Chinese MPS agents and did not have legal counsel present. The OSC shared with and collected evidence from the Chinese MPS, all of this before any information sharing agreement was in place.

d) d) In New Zealand, in July 2016, Mr. Gong was detained by New Zealand Customs on the orders of the NZP, and had his laptop, cellphone, and other electronic devices seized and cloned. The cloned copies were disseminated to China and Canada in violation of New Zealand law, and the OSC made use of the information in their investigation.

e) Also in July 2016, the NZP compelled Mr. Gong to submit to interrogation over several days. The interrogation tapes were shared with China and Canada in violation of New Zealand law, and were later obtained by the OSC and reviewed by Staff. The compelled information was used by OSC Staff to obtain production orders, despite objections to any use emanating from the NZP.

f) Assisting the OSC, the RCMP closely collaborated with the NZP to carry out the unlawful detention and interrogation of Mr. Gong in New Zealand. When Mr. Gong returned to Canada, the RCMP, assisting the OSC, engineered a separate unlawful search and seizure of Mr. Gong through the Canadian Border Services Agency ("CBSA"), for the benefit of themselves and the NZP. As it happened, the CBSA were unable to seize any further items from Mr. Gong as the NZP had taken everything from him.

g) In June 2017, the OSC received information that Mr. Gong may be in China. The OSC immediately informed the Chinese MPS, so that the Chinese MPS could arrest Mr. Gong in China. Mr. Gong is a Canadian citizen and not a citizen of China. If arrested in China he faced arbitrary detention, torture, and an unfair trial, potentially resulting in conviction for offences that carry the death penalty.

h) Thankfully, the OSC was mistaken, and Mr. Gong was not in China. That attempt to have him captured, tortured and destroyed failed;

i) In October 2017, the OSC invited the Chinese MPS to visit Toronto, Canada. The OSC provided a briefing on the case over multiple days, as well as providing extensive and expensive hospitality. The Chinese MPS, turned loose on Canadian soil, surveilled and attempted to harass Mr. Gong during this OSC sponsored visit (Surveillance by MPS in Canada is not directly mentioned in bail review materials);

j) A veteran and experienced member of the RCMP Liaison Office in Beijing, who was wholly independent of the OSC, raised concerns about the close cooperation between the Chinese MPS and the RCMP/OSC. In March 2017, the Government of Canada signed a demarche (diplomatic communique) objecting to China's detention and torture of human rights lawyers. However,

the RCMP Liaison Office itself disassociated itself from the Government of Canada's official position, in order to preserve the OSC's continuing collusion with the Chinese MPS (Did not find in Bail Review Materials).

k) The RCMP member who raised the concerns in an effort to make the RCMP/OSC comply with fundamental Canadian values, was pushed out of the RCMP Liaison Office. The letters he had written detailing his concerns, and the replies thereto, all disappeared (Did not find in Bail Review Materials).

13) The collusion between the OSC and the MPS continued unabated.

14) These troubling manifestations, coupled with the OSC's close collusion with a known abuser of human rights and international norms, is indicative of and demonstrates the continuing *animus* of the OSC towards Mr. Gong.

15) Unhappy with the judicially approved outcome supervised by very senior counsel from the Crown Law Office, the OSC now seeks, again, to harm Mr. Gong personally.

16) In addition the OSC deliberately breached Mr. Gong's rights by undermining his assertion of legal privilege and then engaging in a cover-up of its misconduct.

17) The OSC executed search warrants upon Mr. Gong's businesses in December 2017 and seized numerous materials including many computer hard drives and digital storage devices. The Crown and defence agreed to an out-of-court privilege review protocol whereby the hard drives were reviewed for solicitor-client privilege and divided into three categories: 'not privileged', 'potentially privileged', and 'privileged'.

18) Mr. Gong entrusted the OSC to sequester - to segregate, embargo and protect the potentially privileged and privileged material. The OSC assured Mr. Gong that they had that capability and could be trusted to fulfill their undertakings.

19) On June 19, 2020, the OSC informed Mr. Gong of a significant breach of solicitor-client privilege. OSC staff had uploaded 'not privileged', 'potentially privileged', and 'privileged' documents into a single database called "Ringtail" without properly sequestering the 'potentially privileged' and 'privileged' material.

20) As a result, OSC staff accessed 5,890 'potentially privileged' documents and six 'privileged' documents. A further seven documents were uploaded on to another litigation software called "Summation" and added to the Crown disclosure brief.

21) Mr. Gong's lawyers retained e-discovery experts to review the privilege breach. They demanded and obtained access to the OSC's Gong Ringtail database and backend data, to conduct a full inquiry into the breach.

22) The experts' review led to several troubling findings:

i) OSC staff failed to properly sequester 'privileged' and 'potentially privileged' documents, and in fact only took steps to properly sequester documents in April 2020. Between March 2018 (when the documents were uploaded on to the Ringtail database) and April 2020, 'privileged' and 'potentially privileged' documents were fully accessible to OSC investigators;

ii) OSC staff failed to follow basic practices in securing the 'privileged' and 'potentially privileged' material. They did not confirm that the documents were secured, either through a test account or by checking the accounts of other OSC staff;

iii) The improper sequestration of material was obviously identifiable, as the software clearly showed the 'privileged' and 'potentially privileged' documents remained unsecure;

iv) Backend data showed that OSC staff had in fact identified their improper sequestration in April 2020 but did not advise the Crown or the defence of their error. In May 2020, when an OSC investigator raised internal questions about no longer being able to access 'privileged' and 'potentially privileged' material that was previously accessible, OSC staff purportedly conducted an "investigation" into the "issue" that they, in fact, knew about in April 2020;

v) As a result of their "investigation", OSC staff placed the blame on a system failure by Ringtail. No such failure has ever been identified on the platform by any client, including not by the OSC, at any time. The OSC knew that the true source of the issue was in fact their own improper sequestration in March 2018;

vi) After concluding their "investigation", OSC staff finally informed the defence of the privilege breach in June 2020;

vii) When asked what steps OSC staff had taken to "cap" the breach and prevent any further access, it was revealed that the OSC had taken no steps to protect the information by removing the 'privileged' and 'potentially privileged' material from the Ringtail database, and that the same material

had been uploaded on to a third software called "Relativity", which remained fully accessible to OSC investigators; and

viii) It was further revealed that OSC staff had made an identical "error" in sequestering documents for another earlier, unrelated case, but took no steps to confirm that the Gong documents were secure when they identified that error. This lack of follow-up again violated the most basic practice to check that privileged documents would be properly secured.

23) These findings confirmed that the OSC was, at a minimum, grossly negligent in their handling of Mr. Gong's privileged documents, and that there was an effort to cover-up and sustain the breach by OSC staff.

24) The same *animus* that drove OSC investigators to make a "deal with the devil" and – contrary to all established Canadian legal norms and values – partner with the secret police in China, also animated efforts to suppress the facts of the breach of privilege.

25) The effort to institute, continue and perpetuate proceedings against Mr. Gong based on the profoundly tainted investigation amounts to an abuse of process.

26) The only remedy in the circumstances is a stay of proceedings; any thing less would be no remedy at all.

Legal Principles

27) Section 24(1) of the *Canadian Charter of Rights and Freedoms* states that

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Capital Markets Tribunal is a Court of Competent Jurisdiction:

28) The Supreme Court of Canada has created criteria for determining if a court or tribunal is a court of competent jurisdiction.

> All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if Charter jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).
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> *R v. Conway*, 2010 SCC 22 at para. 22. Abella J.

29) The *Securities Commission Act, 2021* states that the Capital Market Tribunal has

> … the exclusive jurisdiction to exercise the powers conferred on it under the *Securities Act* and the *Commodity Futures Act* and **to determine all questions of fact or law** in any proceeding before it under those Acts.
>
> S.O. 2021, c. 8, Sch. 9 at s. 26.

30) The *Commodities Futures Act*, Ontario's *Business Corporations Act*, the *Securities Act* and the *Securities Commission Act, 2021* do not exclude *Charter* jurisdiction.

31) Thus, the Capital Markets Tribunal is a court of competent jurisdiction.

The Capital Markets Tribunal Can Grant a Stay:

32) With that established, the question of granting a particular remedy comes into play.

33) In the above-mentioned *Conway*, the Supreme Court of Canada made two observations

> first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a Charter remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).
>
> Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*,

> at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. **And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction** (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).
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> 2010 SCC 22 at paras. 78-79. J Abella.

34) Post-*Conway* case law has re-iterated these principles and applied them to various tribunals.

35) In *Perry v. Cold Lake First Nations*, the Federal Court of Appeal ruled

> Thus, in my view, the presumption that the Committee also has jurisdiction over constitutional questions is in play. However, I also am of the view that the said presumption is rebutted by a clear implication arising from the provisions of the Election Law itself.
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> 2018 FCA 73 at para 45. Gauthier J.A.

36) No clear implication that rebuts the presumption of jurisdiction exists in either the *Securities Act*, the *Securities Commission Act, 2021* or the *Commodities Futures Act*.

37) The conduct of the Ontario Securities Commission is a matter whose essential factual character falls within the Capital Markets Tribunal's specialized statutory jurisdiction.

38) While more procedural in nature, the *Capital Markets Tribunal Rules of Procedure and Forms* explicitly considers constitutional questions. Rule 31 states

> A Party who intends to question the constitutional validity or applicability of any legislation, regulation, bylaw or common law rule, shall serve notice of the constitutional question on the Attorney Generals of Canada and Ontario and on the other Parties and shall file the notice as soon as the circumstances requiring the notice are known and, in any event, at least 15 days before the day on which the question is to be argued.

39) The Capital Markets Tribunal can decide that a stay is an appropriate and just remedy.

40) Rule 31 of the *Capital Markets Tribunal Rules of Procedure and Forms.*

41) Such further and other grounds as counsel may advise and the Panel permit.

D) Evidence

The Applicant Edward Gong intends to rely upon this Notice of Motion and such further and other material as may be advised following determination of the "Materials" motion in this matter.

Dated this 1st day of December 2022.

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