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Citation: *Gong (Re)*, 2023 ONCMT 7
Date: 2023-02-03
File No. 2022-14

IN THE MATTER OF XIAO HUA (EDWARD) GONG

REASONS FOR DECISION

Adjudicators: Russell Juriansz (chair of the panel)
Sandra Blake
Timothy Moseley

Hearing: By videoconference, January 26, 2023

Appearances: Paul Stern For Xiao Hua (Edward) Gong
Margot Davis
Mark Bailey For Staff of the Ontario Securities
Braden Stapleton Commission

REASONS FOR DECISION

1. OVERVIEW

- [1] Following an investigation conducted by Staff of the Ontario Securities Commission, criminal charges were laid against Xiao Hua (Edward) Gong, the respondent in this proceeding, and against a company he controlled, Edward Enterprise International Group Inc. (**Edward Group**), which is not a party to this proceeding. Through Gong, Edward Group pled guilty to offences related to operating a pyramid scheme and using forged documents. The Crown withdrew the charges against Gong.
- [2] Staff then brought this proceeding against Gong, relating substantially to the same activities that were the subject of the charges against him and against Edward Group.
- [3] Gong submitted that there ought to be restrictions imposed in this proceeding on Staff's use of documents gathered in relation to the criminal proceeding. Specifically, Gong asked us to require that the documents that Staff intends to rely on here be subjected to the process set out in *D.P. v Wagg*,¹ a decision of the Court of Appeal for Ontario. In that case, the Court required that the defendant in the civil action, who had obtained Crown disclosure in related criminal proceedings, produce the brief for discovery in the civil action, but only after either:
- a. a screening process before the Superior Court of Justice, on notice to the Attorney General and the relevant police service; or
 - b. on consent of all parties, the Attorney General, and the police.
- [4] After hearing from Gong and Staff, we dismissed Gong's motion, for reasons to follow. These are our reasons for that decision.
- [5] We dismissed the motion because the process in *Wagg*, and the reasons for that process, do not apply in this case. Unlike in *Wagg*, in this case Staff did not obtain the subject documents from the Crown as part of disclosure in a criminal

¹ 2004 CanLII 39048 (*Wagg*)

proceeding. Staff obtained the subject documents through its own investigation and may use the documents in accordance with the mechanisms set out in the *Securities Act* (the **Act**).²

2. ANALYSIS

2.1 Introduction

[6] The sole issue on this motion was whether Staff should be constrained in its use of documents that also appeared in the criminal proceeding against Edward Group and Gong. Specifically, should Staff be required to pursue the process set out in *Wagg*, involving notice to the Attorney General for Ontario, before Staff may use those documents in this proceeding?

[7] We agree with Staff's submission that *Wagg* does not apply to this case. We begin with a brief review of the decision in *Wagg*.

2.2 The decision of the Court of Appeal for Ontario in *Wagg*

[8] *Wagg* was an obstetrician and gynecologist. He performed an examination on D.P., who alleged that *Wagg* sexually assaulted her during the examination. *Wagg* was charged with sexual assault, and in the course of that criminal proceeding, he received Crown disclosure. The proceeding was later stayed for unreasonable delay.

[9] D.P. sued *Wagg*. In that civil action, *Wagg* refused to disclose the Crown disclosure brief from the criminal proceeding. The dispute about that refusal ultimately resulted in the Court of Appeal decision mentioned above, in which the Court held that *Wagg* was required to disclose the existence of the Crown brief, but that he was required to produce the brief itself only after either:

- a. a screening process involving a hearing in the Superior Court of Justice, on notice to the Attorney General and the relevant police service; or
- b. consent from all parties, the Attorney General, and the police.

[10] The purpose of seeking consent of the Attorney General and the police, or alternatively having a hearing at which they were present, was to ensure the

² RSO 1990, c S.5

proper consideration of two things that the parties to the civil action (D.P. and Wagg) were not well equipped to assert:

- a. the privacy rights of third parties who were identified in the Crown disclosure; and
- b. the public interest, as promoted and defended by the Attorney General.

2.3 Wagg does not apply to this case

2.3.1 Introduction

[11] We concluded that we should not apply the *Wagg* process here primarily because of one fundamental difference between *Wagg* and this case. In *Wagg*, the party from whom disclosure was sought was an accused person and therefore a recipient of the Crown disclosure, whereas here Staff obtained the documents not from the Crown, but during its own investigation. As Staff correctly submitted, *Wagg* and the cases that follow it deal with parties that are in possession of the subject materials only because the Crown disclosed those materials to the party in fulfillment of the Crown's disclosure obligations.

2.3.2 Who obtained the documents?

[12] Before continuing our analysis of this point, we must address a question that Gong raised in his motion materials and in his submissions at the motion hearing. Gong challenged whether it was indeed Staff that obtained the subject documents. We concluded that it was.

[13] In making that submission, Gong asserted that almost all of the disclosure that Staff has made to him in this proceeding was "from the criminal investigation". However, affidavit evidence that Staff filed on this motion refers to "the OSC investigation" in which the documents were collected. The affidavit explains that all the documents Staff relies on in this case were obtained by Staff members of the OSC's Enforcement Branch or RCMP officers who were seconded to the Enforcement Branch.

[14] Gong neither cross-examined on, nor successfully refuted, Staff's evidence that it was Staff who obtained the documents. Gong did adduce evidence by which he attempted to establish that the Joint Securities Offences Team (**JSOT**), the group that conducted the investigation, was independent of the OSC. He quoted

from various publications that described JSOT as a partnership, and that stated that JSOT was treated internally “like” an independent law enforcement agency that is physically separated from the rest of the Branch. However, none of those references leads to the conclusion that the team is outside, or independent of, the OSC. All the evidence in the record is to the contrary.

[15] We therefore accepted Staff’s clear and uncontradicted evidence that it was Staff that conducted the investigation leading both to the criminal charges and to this proceeding.

[16] Our conclusion on that point meant that we must reject Gong’s assertion that the *Wagg* process should apply because the subject documents traveled from the Crown to Staff. As we have found, the documents did not. The fact that some documents appear in two places does not support the opposite conclusion. The Court in *Wagg* made an observation that applies here, *i.e.*, that the use of documents should not be circumscribed merely because those documents “found their way into the Crown brief and were disclosed to the defence”.³

2.3.3 Is there a role for the Attorney General?

[17] Applying that same principle, we cannot accept Gong’s repeated submission that because of the involvement of the Attorney General in the criminal proceeding, through the Crown, we must find that the *Wagg* process applies. The Crown’s involvement in a parallel proceeding cannot by itself impose limitations that would not otherwise apply had Staff elected not to refer the matter to the Crown but rather to proceed only before this Tribunal.

2.3.4 Are there policy reasons to apply *Wagg*?

[18] *Wagg* on its terms does not apply. In addition, the policy reasons that might exist for applying *Wagg* in another case do not apply here. In particular, there is no “collateral use of the Crown brief”, to use the words of the Divisional Court in *College of Physicians and Surgeons of Ontario v Peel Regional Police*,⁴ a 2009 decision that Gong cited to us.

³ *Wagg* at para 84

⁴ 2009 CanLII 55315 at para 76

[19] Similarly, we cannot accept Gong’s submission that in this proceeding there is a risk that there would be disclosure of “confidential Crown information”. The material in Staff’s possession is subject to all the constraints that normally apply in Staff’s investigations and in proceedings before the Tribunal. This includes the confidentiality protections set out in s. 16 and 17 of the *Act*, and the requirement in s. 3 of the Tribunal’s *Practice Guideline* to redact personal information.

3. CONCLUSION

[20] It was Staff who obtained the documents, during its investigation. *Wagg* is fundamentally dissimilar from this case, and there is no policy reason to apply here the process set out in that case. Indeed, applying *Wagg* would improperly impose unnecessary constraints on Staff in this proceeding. For these reasons, we dismissed Gong’s motion.

Dated at Toronto this 3rd day of February, 2023

“Russell Juriansz”

Russell Juriansz

“Timothy Moseley”

Timothy Moseley

“Sandra Blake”

Sandra Blake