



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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File No.: 2022-14

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

**NOTICE OF MOTION OF STAFF OF THE ONTARIO SECURITIES COMMISSION
(For Summary Dismissal of Respondent's Abuse/Stay Motion)**

A. ORDER SOUGHT

The Moving Party, Staff of the Ontario Securities Commission (**OSC**) requests, with notice, that the Capital Markets Tribunal make the following orders:

- a) An order dismissing the Motion of Xiao Hua (Edward) Gong (**Gong**) dated December 1, 2022 and returnable May 29 and 30, 2023, which alleges that this proceeding amounts to an abuse of process and seeks a stay of this proceeding (**Abuse/Stay Motion**); and
- b) such further relief as counsel may advise and the Tribunal may permit.

B. GROUNDS

The grounds for this motion are:

(i) The Criminal Proceeding

1. Between December 2016 and August 2022, the OSC's Joint Serious Offences Team (**JSOT**) conducted an investigation into Gong and companies controlled by him. The matter was referred by JSOT to the Crown for prosecution under the *Criminal Code*.

2. On December 20, 2017, Gong was personally charged with the following offences:
 - a. fraud of a value exceeding \$5000 under s. 380(1)(a) of the Criminal Code;
 - b. possessing property obtained by crime under s. 354(1) of the Criminal Code;
 - c. laundering proceeds of crime under s. 462.31 of the Criminal Code; and
 - d. using, trafficking or possessing forged documents under s. 368(1) of the Criminal Code.
3. The charges against Gong led to resolution discussions, resulting in the laying of a new Indictment against Gong's company, Edward Enterprise International Group Inc. (the **Edward Group**) on January 15, 2021.
4. Gong entered a guilty plea on behalf of the Edward Group, as its directing mind (the **Edward Group Guilty Plea**) and signed an Agreed Statement of Facts dated February 9, 2021 (the **ASF**) in relation to the guilty plea. Charges against Gong personally were withdrawn on consent as part of the negotiated resolution. The Edward Group was convicted of two counts:
 - a. conducting or being a party to a scheme by which a person on payment of a sum of money, became entitled under the scheme to receive from the Edward Group or any other person, a larger sum of money than the amount paid, by reason of the fact that the other persons have paid under the scheme, contrary to subsection 206(1)(e) of the Criminal Code; and
 - b. knowing or believing that documents were forged, to wit: 024 share certificates, caused other persons to deal with or act on the documents as if they were genuine, contrary to subsection 368(1)(b) of the Criminal Code.

5. The Court concluded that Gong's guilty plea on behalf of the Edward Group was informed, voluntary and was entered after a comprehensive guilty plea enquiry by counsel for Gong and the Edward Group, and that the corporation through its directing mind would appreciate the consequences and the forfeitures and the fine that will flow.
6. According to the ASF, Gong, personally and by directing representatives of his companies, ran an operation that promoted the products and shares under the Edward Group umbrella. Gong and the Edward Group operated primarily in Canada and recruited members in China. Gong and employees under his direction solicited investors to invest funds to receive a package that consisted of health supplements and "024" shares (or later Canadian National Television shares). Investors were promised large returns. However, the shares could not convey their purported interest because O24 had been dissolved years prior. The operation included a pyramid or multi-level marketing selling structure. Investors were told that they could make money by recruiting other investors. Between January 2012 and December 2017, approximately 40,000 people in China invested and hundreds of millions of dollars were raised.
7. During the hearing, counsel for Gong and the Edward Group referred to many alleged breaches of Gong's "fundamental rights". In response, the Crown made clear that it had been prepared to litigate the alleged *Charter* issues, and that "this resolution cannot be taken as any admission that the *Charter* breaches were made out".
8. The Edward Group was sentenced in accordance with a joint submission agreed to by the Crown and the Edward Group. Specifically, the Court imposed a fine of \$756,000 with a victim fine surcharge of \$229,500.38. In addition, forfeiture orders were made by the Court forfeiting property including bank accounts, real estate and personal property to the Ministry of the Attorney General.

(ii) The Section 127 Proceeding

9. On June 13, 2022, the OSC's Enforcement Branch brought a statement of allegations (**SOA**) against Gong personally in this section 127 proceeding before the Capital Markets Tribunal (**Tribunal**). The OSC's Enforcement Branch seeks, among other things, orders to remove Gong from the capital markets based largely on the admissions made by him in the Edward Group Guilty Plea and ASF, or on reasonable inferences directly available from those admissions.

10. Edward Wong, Senior Investigator in the Enforcement Branch, is the sole witness for the Enforcement Branch in this proceeding. A witness summary for Edward Wong has been served which attaches Edward Wong's draft affidavit for use at the merits hearing. Schedule "A" of the draft affidavit indicates the following documents will be relied upon:
 - a. The ASF;

 - b. A transcript of the Edward Group Guilty Plea;

 - c. The Edward Group's and Gong's Indictments;

 - d. Section 139 certificates;

 - e. A table of information compiled from the share certificates;

 - f. Forfeiture orders made against Gong and Gong's companies in the criminal proceeding;

 - g. Corporate profile reports and Companies House reports for Gong's companies;

 - h. A screenshot of the Deutsche Börse website indicating 024 Pharma PLC shares were delisted from the Frankfurt Stock Exchange;

- i. Production orders to the Toronto-based transfer agent for Gong's companies;
- j. A search warrant of Gong's business address;
- k. Treasury directions obtained from the transfer agent;
- l. Share certificates from the transfer agent and seized from Gong's business address; and
- m. The Analysis of O24 Pharma PLC Shareholder Register.

(iii) The Abuse/Stay Motion

11. On December 1, 2022, the Abuse/Stay Motion was filed and served. On March 27, 2023, Gong filed and served a skeletal affidavit in support of the Abuse/Stay Motion purporting to introduce over 2100 pages of documentary materials and referring to over 1500 pages of transcripts from Gong's preliminary hearing in the criminal proceeding.
12. On April 5, 2023, Gong served a witness list including short summaries of the evidence of five *viva voce* witnesses Gong intends to call in support of the Abuse/Stay Motion. The intended witnesses include three representatives of the New Zealand Police and two expert witnesses.

(iv) No Tenable Case at Law

13. The Abuse/Stay Motion does not disclose a tenable case at law:
- a. The alleged abusive conduct does not arise in this proceeding. It arose in the context of the criminal proceeding and was known to Gong at the time of the Edward Group Guilty Plea. Gong nonetheless entered the voluntary and informed plea on behalf of the Edward Group after legal advice from counsel. In turn, the allegations in the SOA are wholly consistent with Gong's admissions in the Edward

Group Guilty Plea and ASF. Any anticipated issues in the Crown's case were noted on the record as having factored into the sentence agreed to by the Crown, and the fact that it was prepared to accept a guilty plea from the corporation as opposed to the individual directing mind. The OSC was not a party to the resolution, nor does Gong allege in the Abuse/Stay Motion that the criminal resolution bound the OSC;

- b. Contrary to the Abuse/Stay Motion, the institution of section 127 proceedings after a criminal conviction is not abusive. It is consistent with the Act and its objects, purposes and scheme and the public interest;
- c. The sharing of information with foreign law enforcement agencies, formally and informally, was conducted in a manner consistent with all legal requirements and was within the Commission's legal authority. Further, it was necessary to carry out the Commission's mandate and was consistent with the public interest;
- d. The alleged abusive conduct is not connected to the evidence to be relied on to prove the allegations in the SOA, as set out in the Edward Wong witness summary, and is therefore irrelevant to this proceeding;
- e. The conduct alleged in the Abuse/Stay Motion does not otherwise, even if proven, meet the test for an abuse of process. The alleged conduct has no bearing on the evidence to be relied upon or the remedy sought in this proceeding; and
- f. The conduct and circumstances alleged in the Abuse/Stay Motion, even if proven, does not meet the test for the granting of a stay of proceedings. Any alleged abuse of process is not manifested, perpetuated or aggravated through the conduct of the merits hearing or its outcome and there are adequate alternative remedies, including the exclusion of evidence, to address any alleged abusive conduct if they can be proven (which is denied).

(v) No Tenable Case on the Facts

14. The materials filed to support the Abuse/Stay Motion and the *viva voce* evidence Gong intends to call do not disclose a tenable case on the facts as follows:
- a. Taking the materials filed in support of the Abuse/Stay Motion and the intended *viva voce* evidence at their highest and assuming admissibility, they do not disclose a tenable case on the facts to support the Abuse/Stay Motion. Despite the volume of materials, they are largely irrelevant to the matters raised in the Abuse/Stay Motion and the SOA, present numerous admissibility issues and do not establish proof of the alleged abusive conduct or a connection between the intended evidence in these proceedings and the alleged abusive conduct;
 - b. The materials filed and the intended *viva voce* evidence are not capable of establishing any evidence of bad faith conduct or negative “animus”, contrary to the allegations in the Abuse/Stay Motion; and
 - c. For the above reasons, an evidentiary hearing of the Abuse/Stay Motion will not assist with the resolution of the motion.

(vi) The Abuse/Stay Motion should be Dismissed

15. The Abuse/Stay Motion should be summarily dismissed because:
- a. The issues raised in the Abuse/Stay Motion are irrelevant to this s. 127 proceeding;
 - b. The Abuse/Stay Motion does not disclose a tenable case of an abuse of process at law or on the facts. Consequently, the Abuse/Stay Motion discloses no reasonable prospect of success, and should be summarily dismissed pursuant to the Tribunal’s authority to control its process;
 - c. The Abuse/Stay Motion is frivolous and vexatious, and attempts to relitigate matters addressed and resolved in the criminal proceeding; and

- d. An evidentiary hearing will not assist in the resolution of the Abuse/Stay Motion but will unnecessarily add to the time and costs expended, especially given the numerous evidentiary and procedural issues that will require resolution.

16. Rules 1, 3 and 28 of the Tribunal's *Rules of Procedure and Forms*;

17. Sections 2, 23 and 25.0.1 of the *Statutory Powers Procedure Act*, RSO 1990, c S.22;

18. Section 127 of the *Securities Act*, R.S.O. 1990, c. S.5; and

19. Such further and other grounds as counsel may advise and the Tribunal deems just.

C. EVIDENCE

Staff of the Ontario Securities Commission intends to rely on the following evidence for the motion:

- a. The Motion Record of Gong dated March 27, 2023;
- b. Affidavit of Edward Wong affirmed April 20, 2023 with exhibits; and
- c. Such other evidence as counsel may advise and the Tribunal may permit.

April 20, 2023

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