



Capital
Markets
Tribunal

Tribunal
des marchés
financiers

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue Queen ouest
Toronto ON M5H 3S8

Citation: *Gong (Re)*, 2023 ONCMT 28
Date: 2023-07-20
File No. 2022-14

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

REASONS AND DECISION

Adjudicators: Russell Juriansz (chair of the panel)
M. Cecilia Williams
Sandra Blake

Hearing: May 29, 2023; final written submissions received June 16, 2023

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

TABLE OF CONTENTS

1.	OVERVIEW	1
2.	BACKGROUND.....	1
	2.1 Summary of Allegations	1
	2.2 Summary of Grounds for Gong’s Stay Motion	2
3.	ISSUES.....	2
4.	LEGAL FRAMEWORK AND ANALYSIS.....	3
	4.1 The Applicable Standard to Summarily Dismiss a Stay Motion.....	3
	4.2 The Test for a Stay of Proceedings for Abuse of Process.....	4
	4.3 Does the Alleged Breach of Privilege Raise a Tenable Case for a Stay?	4
	4.4 Do Gong’s Other Alleged Grounds Raise a Tenable Case for a Stay?	7
5.	CONCLUSION.....	7

REASONS AND DECISION

1. OVERVIEW

[1] These are our reasons for dismissing Staff of the Ontario Securities Commission's motion for the summary dismissal of Gong's motion to stay this enforcement proceeding against him for abuse of process. The onus is on Staff to establish that Gong's motion for a stay has no reasonable prospect of success. Staff did not meet that onus.

2. BACKGROUND

2.1 Summary of Allegations

[2] Starting in December 2016, the Commission's Joint Serious Offences Team, in collaboration with the RCMP, investigated Gong and companies controlled by him. On December 20, 2017, Gong was charged with several criminal offences, including fraud. On January 15, 2021, a new indictment was laid against Gong's company, Edward Enterprise International Group Inc. On February 10, 2021, pursuant to a negotiated resolution, which included an agreed statement of facts, the Edward Group pled guilty to offences under s. 206(1)(e) [conducting pyramid schemes] and s. 368(1)(b) [using forged documents] of the *Criminal Code*.¹ The Ontario Superior Court of Justice imposed a fine of \$756,000 and a victim surcharge of approximately \$229,500. In addition, the Court made an order forfeiting several properties to the Crown and releasing \$14,895,943.05 to the Canada Revenue Agency.

[3] As part of the negotiated resolution, the Crown withdrew the charges against Gong.

[4] On June 13, 2022, Staff commenced this enforcement proceeding alleging that Gong perpetrated securities fraud contrary to s. 126.1 (1)(b) of the *Securities Act*,² and breached the registration requirements of s. 25 (1) of the *Act*. Staff further alleges that, under s. 129.2 of the *Act*, Gong is deemed to have not

¹ RSC 1985, c. C-46

² RSO 1990, c S.5 (**Act**)

complied with Ontario securities law because he authorized, permitted and acquiesced in the Edward Group's breaches of Ontario securities law.

2.2 Summary of Grounds for Gong's Stay Motion

[5] Gong's grounds for his stay motion, which Staff is seeking to have summarily dismissed, are summarized as follows:

- a. Staff failed to adequately protect privileged documents it obtained through its search warrants during the criminal proceeding;
- b. when bail conditions were imposed against Gong, the position of the Court and Crown was that no prohibitions against Gong acting as a director or officer of his private companies were required;
- c. Staff is now attempting to circumvent the criminal proceedings against Gong and Edward Group and impose further punishment on Gong;
- d. Staff improperly breached confidentiality by sharing with China information provided by New Zealand authorities on the basis that it was not to be disseminated; and
- e. as part of its investigation, Staff collaborated with China, which is "widely acknowledged to engage in human rights abuses." This collaboration included notifying Chinese authorities that Gong was potentially in China when he was subject to the death penalty, providing incriminating information to China about uninvolved third parties thereby placing them at risk, and collecting evidence in a manner that, if obtained in Canada by similar means, would be rejected under the *Charter of Rights and Freedoms*.³

3. ISSUES

[6] We must determine the following two issues on this motion:

- a. the applicable standard to summarily dismiss a motion to stay a proceeding based on an abuse of process; and

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11

- b. whether Staff met the standard to summarily dismiss Gong’s motion for a stay.

4. LEGAL FRAMEWORK AND ANALYSIS

4.1 The Applicable Standard to Summarily Dismiss a Stay Motion

- [7] Gong submits that the Supreme Court’s recent decision, *R v Haevischer*,⁴ has changed the standard that Staff must meet to succeed on this motion to summarily dismiss Gong’s motion for a stay. Staff submits it need only establish that Gong does not have a “tenable case” for a stay of proceedings. The “tenable case” standard is sometimes described as having “no reasonable prospect for success”. Gong submits that *Haevischer* now dictates that Staff must establish that his motion is “manifestly frivolous”.
- [8] Gong distinguishes the Tribunal’s decision in *Bridging Finance Inc. (Re)*,⁵ pointing out that decision was made in the context of the respondent’s disclosure request, while in this case Staff has brought a motion for summary dismissal of his stay motion. While there is that difference, the *Bridging Finance* panel found that *Haevischer* was inapplicable because it only applied to criminal cases.⁶ Indeed, the Supreme Court explained in the opening sentence of its reasons, “In this appeal the Court addresses the standard to be applied in criminal cases when judges are asked to summarily dismiss an application without hearing it on its merits.”⁷ As explained in *Bridging Finance*, the Supreme Court in *Haevischer* observed that rules and thresholds from the civil context could not simply be adopted in the criminal domain.⁸ In *Haevischer*, the Court said that the “no reasonable prospect of success” standard, while “a useful standard in other areas of law” was “ill suited to summary dismissal in the criminal context.”⁹
- [9] We conclude that the standard for the summary dismissal of a stay motion before the Tribunal is the “tenable case” standard. *Haevischer*, in which the

⁴ 2023 SCC 11 (*Haevischer*)

⁵ 2023 ONCMT 21 (*Bridging Finance*)

⁶ *Bridging Finance* at paras 10-14

⁷ *Haevischer* at para 1 [emphasis added]

⁸ *Bridging Finance* at para 12

⁹ *Haevischer* at para 77

Supreme Court determined the standard for summary dismissal of stay motions in the criminal context, is not applicable to similar motions before this Tribunal.

4.2 The Test for a Stay of Proceedings for Abuse of Process

[10] A stay of proceedings for abuse of process is a drastic remedy available only in the clearest cases. There are two categories of cases where a stay of proceedings might be available. The first and foremost category is where the state's conduct compromises the fairness of the hearing to which the moving party is subject. The second and residual category is where the state conduct creates no threat to the fairness of the upcoming hearing but undermines the integrity of the judicial process.¹⁰

[11] The parties both relied on the statement of the test set out in *R v Babos*, which is the same for both categories and consists of three requirements:

1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);

2) There must be no alternative remedy capable of redressing the prejudice; and

3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).¹¹

4.3 Does the Alleged Breach of Privilege Raise a Tenable Case for a Stay?

[12] In his motion for a stay, Gong filed a report by a document management expert he had retained, dated November 16, 2020, that found:

- a. Staff failed to sequester "privileged" and "potentially privileged" documents obtained during its investigation; and

¹⁰ *R v Babos*, 2014 SCC 16 (***Babos***) at para 31

¹¹ *Babos* at para 32, citing *R v Regan*, 2002 SCC 12

b. Staff accessed the documents that should have been sequestered numerous times between February 5, 2019, and February 19, 2019. In all, 6 “privileged” documents and 5,890 “potentially privileged” documents were accessed by Staff.

- [13] The report shows that Staff members actively involved in preparing the enforcement proceeding against Gong were among those who accessed the documents. Gong alleges that Staff discovered the privilege breach at least by May 5, 2020, but failed to inform Gong of the breach until June 19, 2020.
- [14] Staff did not file any evidence contradicting or responding to Gong’s evidence about the privilege breach (apart from some information provided via email following the hearing of the motion regarding when staff who had access to the privileged materials prepared their analysis of the case). Instead, Staff submitted, “Gong is unable to point to any evidence or anticipated evidence which establishes a link between the alleged privilege breach and this proceeding. There is no assertion that any materials tainted by the alleged privilege breach are relied on in this case.”¹²
- [15] In oral submissions, Staff argued that Edward Group’s guilty plea and the Agreed Statement of Facts that supported it were a “circuit breaker” that disposed of the whole motion. They disposed of the whole motion because, if we understand Staff’s argument correctly, they contain all the facts necessary to support the breaches alleged in this case. Staff points out Gong did not object to those facts being entered when he pled guilty on behalf of Edward Group, and the Court accepted them. Staff says he should not be allowed to “re-litigate” them. Therefore, Staff submits the motion to quash must be granted because Gong cannot show that the alleged abuse is carried forward into this proceeding.
- [16] Staff’s position is based on a misapprehension of the law. Gong’s motion for a stay relies on the residual category. State conduct that falls within the residual category does not necessarily have to be manifested, perpetuated or aggravated in the hearing that the person seeking a stay faces. The Supreme Court explained in *Babos*:

¹² Written Submissions of Staff of the Ontario Securities Commission, May 10, 2023 at para 71(g)

By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.¹³

[17] In *Canada (Minister of Citizenship and Immigration) v Tobiass*,¹⁴ the Supreme Court said:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.¹⁵

[18] Staff has failed to satisfy us there is no reasonable prospect that a stay is warranted in this case even though the privilege breach may not create unfairness in this enforcement proceeding against Gong. The argument that the Tribunal must dissociate itself from the significant breach of privilege that occurred in this case to avoid the impression that the justice system condones such breaches has a reasonable prospect of success.

[19] Both parties filed written material after the hearing that provided additional detail about the privilege breach. This material does not affect our analysis and conclusion on this motion to summarily dismiss Gong's application for a stay.

¹³ *Babos* at para 35 [emphasis added]

¹⁴ 1997 CanLII 322 (SCC) (*Tobiass*)

¹⁵ *Tobiass* at para 91 [emphasis added]

4.4 Do Gong's Other Alleged Grounds Raise a Tenable Case for a Stay?

[20] Staff urged us to consider each of Gong's several grounds individually and assess whether each had a reasonable prospect of success. We decline to do so. Staff sought to have Gong's motion for a stay dismissed summarily without it proceeding to a hearing. We have concluded that Staff has failed to prevent Gong's motion from being heard. A comprehensive analysis of each of the issues raised by Gong's motion is therefore unwarranted and would be out of keeping with the summary nature of Staff's motion.

5. CONCLUSION

[21] Staff's motion to quash is dismissed. The parties are directed to contact the Registrar to arrange a date for an attendance to schedule the hearing of Gong's motion for a stay.

Dated at Toronto this 20th day of July, 2023

"Russell Juriansz"

Russell Juriansz

"M. Cecilia Williams"

M. Cecilia Williams

"Sandra Blake"

Sandra Blake