Commission of Inquiry into Money Laundering in British Columbia

Application for Directions on Access to Records – Ruling #26

Ruling of the Honourable Austin Cullen, Commissioner

Issued February 5, 2021

A. INTRODUCTION AND BACKGROUND

[1] On November 3, 2020, Paul King Jin brought an application for limited participant status before the Commission of Inquiry into Money Laundering in British Columbia (the "Commission").

[2] In the course of his application, Mr. Jin's then counsel, Bibhas Vaze, made the following submission:

> To be clear: Mr. Jin seeks participant status before the Commission for the sole purpose of questioning witnesses who may provide evidence with respect to his activities or of those associated with/to him, and to make submissions to the Commission with respect to any findings that may be made about or related to him. Mr. Jin does not seek participant status to explore or give questioning on issues or witnesses that relate to money-laundering or other issues more generally, but only with respect to issues or witnesses that directly relate to him and his activities.

[3] On November 5, 2020, I issued a ruling ("Ruling #14") granting Mr. Jin limited participant status "only insofar as it relates to evidence that affects his interests or engages him specifically." In that ruling I emphasized that Mr. Jin's participation was "not based on topic area" but confined to addressing "evidence being led [that] gives rise to the possibility of having an impact on his rights" (see Ruling #14 at para. 16).

[4] Despite his grant of participant status, Mr. Jin made no efforts to become involved in any of the Commission's hearings until January 25, 2021. He has not responded to a Summons to Produce Documents under s. 22(1)(b) of the *Public Inquiry Act*, S.B.C. 2007, c. 9 [*PIA*], which was issued on November 9, 2020, nor has he

complied with his obligations as a participant under R. 13 of the Commission's *Rules of Practice and Procedure*.

[5] It appears that he has only recently retained his present counsel, Greg DelBigio, Q.C.

B. THE APPLICATION

[6] Commission counsel seeks, by way of this application, directions on access to records by Mr. Jin. In his submissions, Commission counsel sets forth the process and procedure by which the Commission has gathered and disclosed records, from many sources, which are germane to the Commission's Terms of Reference. In summary, the Commission has the authority to receive non-privileged documents by request or by summons from participants and from other persons or agencies. Pursuant to Rule 17 of the Commission's *Rules of Practice and Procedure*, the documents are to be treated as confidential unless they are made public through the hearing process.

[7] Questions of the admissibility of any document sought to be used in the Inquiry and/or the need for any redactions are addressed when and if a participant or Commission counsel give notice of an intention to introduce the document as an exhibit.

[8] Participants have access to the documents held by the Commission under a regime which requires an undertaking from counsel and a confidentiality agreement from participants confirming that "all records disclosed by the Commission will be used solely for the purpose of the Inquiry" (*Rules of Practice and Procedure*, Rs. 18 and 19). Commission counsel explained in his submissions that not all participants have access to the entirety of the records acquired by the Commission and shared on its Relativity software platform (and in the case of Canada's documents, on the Titanfile software platform).

[9] Rather, the portion of the total records or dataset to which a participant has access depends on the nature and extent of the person or entity's grant of participant status.

[10] In some cases, Commission counsel have also granted limited access to documents for witnesses and other interested parties who do not have participant status. Commission counsel cited an example of credit union witnesses being given access to a report germane to their evidence "to inform themselves in advance of testifying."

C. COMMISSION COUNSEL'S SUBMISSIONS

[11] Commission counsel submits that a commission of inquiry "has significant flexibility and latitude in crafting procedures that are appropriate to the context and necessary to fulfil the mandate." Commission counsel cites s. 9 of the *PIA*, which grants the Commission the power to control its own process and to make directions respecting practice and procedure to facilitate the just and timely fulfilment of its mandate. Commission counsel also relies on s. 12 of the *PIA*, which gives the Commission an array of powers respecting the nature and extent of a participant's rights and responsibilities, including by allowing the Commission to exercise those powers differently as they relate to individual participants or classes of participants (see s. 11(2) of the *PIA*).

[12] Commission counsel further submits that the rights and interests at stake in the commission process are different than in other proceedings. While the commission process may have reputational impacts for certain individuals, it is settled law that commissions of inquiry are not permitted to make findings of civil or criminal liability. Accordingly, the disclosure obligations that arise in that context are "quite different" from those that arise in civil or criminal proceedings.

[13] In support of that submission, Commission counsel relies on the reasons of Cory J. in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System),* [1997] 3 S.C.R. 440 at para. 69 [*Krever Commission*]:

> There is no statutory requirement that the commissioner give notice as soon as he or she foresees the possibility of an allegation of misconduct. While I appreciate that it might be helpful for parties to know in advance the findings of misconduct which may be made against them, the nature of an inquiry will often make this impossible. Broad inquiries are not focussed on individuals or whether

> they committed a crime; rather they are concerned with institutions and systems and how to improve them. It follows that in such inquiries there is no need to present individuals taking part in the inquiry with the particulars of a "case to meet" or notice of the charges against them, as there would be in criminal proceedings. Although the notices should be given as soon as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. There will be some inquiries, such as this one, where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure.

[14] Commission counsel also relies on a ruling of the Federal Court in *Labbé v. Canada (Commission of Inquiry into Deployment of Canadian Forces to Somalia)* (1997), 146 D.L.R. (4th) 180 (Fed. T.D.) [*Labbé*] in support of a submission that only reasonable disclosure of the areas to be the subject of testimony and documents need be made to a testifying witness. The cogent reasoning was at paras. 16-17 which read as follows:

> In the first place, I am not persuaded that the principle of fairness supports a finding that Colonel Labbé is owed a duty by the Commission that would require more than reasonable disclosure of areas to be the subject of testimony and documents to which he may expect to be referred. He is to be a witness before a public inquiry engaged in investigative processes to determine facts. The Commission is not an adjudicative body and, at least at this stage, is engaged simply in investigating matters within its terms of reference. …
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> … public inquiries of the sort here concerned are not criminal investigations or criminal trials. They do not establish criminal or civil liability. Their findings may or may not be accepted or acted upon by government. In my view, a witness appearing voluntarily or by summons at investigative hearings of an inquiry is not faced with "a case to be met" which requires disclosure of the sort directed by *R. v. Stinchcombe* or by *Gough v. National Parole Board of Canada*. Those cases concern circumstances where a specific determination is to be made, one defined by criminal charges or statutory provision, with reference to an individual whose liberty may be at issue. The circumstances are very different from those facing witnesses before this Commission which is simply investigating general conditions.

[15] Commission counsel also relies for the same submission on the judgment of the Manitoba Court of Appeal in *The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes*, 2012 MBCA 99 at paras. 69-70 [*Southern First Nations Network of Care*] which read as follows:

> To that end, I agree with counsel for the appellants that a significant degree of procedural fairness is owed to those who are called to testify because of the potential impact on the witnesses' reputations and careers.
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> But there must be some balance. This is not a trial. The parties and intervenors are not entitled to perfection or even a *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, level of disclosure, as mandated in criminal proceedings. Procedural fairness must be balanced with the need for an inquiry to be thorough, rigorous, expeditious, efficient, timely and effective in the public interest. Justice delayed is justice denied. I also agree with the statements of Justice Teitelbaum in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 (at para. 54):
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> > This is not to say, however, that the content of fairness is necessarily more stringent where there is a risk that one's reputation may be negatively affected. As I stated in *Addy v. Canada (Commission and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (T.D.) "the possible and purported damage to the applicants' reputations must not trump all other factors and interests" (*Addy*, at paragraph 50). In determining the standard of fairness, it is necessary to "balance the risks to an individual's reputation and the social interests in publication of a report" (*Addy*, at paragraph 61). Likewise, the risks to an individual's reputation must be balanced with the social interest in permitting the commission to conduct its inquiry and to inform and educate the public about the matter or conduct under review.

[16] Commission counsel submits that Mr. Jin is in a unique position with the Inquiry relative to the other participants because of the allegations which underpin his participation. Media reports allege that he has been involved in money laundering activity and he has been linked to alleged money laundering activity in testimony from various witnesses in the gaming sector.

[17] Commission counsel argues that, because of these allegations, Mr. Jin's position is different from other participants. While the response of various participants may be under scrutiny, there is no allegation that they were actively involved in money laundering activity.

[18] Commission counsel further submits that giving Mr. Jin access to the Commission's Dataset raises the following concerns:

- The Dataset [the body of documents made available to participants] contains sensitive information including names and contact information that could be used to intimidate or harm individuals.

- The Dataset includes information related to police intelligence gathering that could have strategic or tactical value to further alleged illicit business activities.
- Mr. Jin has a criminal record and is associated to organized crime groups. He was recently the victim of a shooting.
- There is a potential for information to be used inappropriately if Mr. Jin personally gains access to the Dataset.
- The Dataset includes information pertaining to concluded police investigations, which could be used in support of future investigations; sharing that information inappropriately could impact on those investigations, and could permit persons to take steps to frustrate law enforcement efforts.
- The Dataset could permit Mr. Jin and his associates to obtain information about what law enforcement knows about them, allowing those persons to evade detection and regulation.
- Participants have, for over one year before Mr. Jin was granted standing, produced documents in a lengthy process, including vetting based on the existing group of participants. There has been reliance on this and it would not be appropriate to permit Mr. Jin access to the Dataset.

[19] Commission counsel submits there are essentially two potential approaches to allay the concerns expressed by various participants over Mr. Jin's access to documents.

[20] The first option is contingent on an agreement by Mr. Jin's counsel and involves counsel (but not Mr. Jin personally) being given access "on a strict undertaking of non-disclosure" to Mr. Jin and generally, allowing counsel to review relevant documents provided by the Commission, including the non-public versions of exhibits marked in the hearings to date (the "First Option").

[21] While the Supreme Court of Canada expressed concern about that type of process in *R v. Basi,* [2009] 3 S.C.R. 389 [*Basi*], Commission counsel notes that the practice of permitting counsel access information not available to his or her client was viewed as acceptable prior to that decision. In *R. v. Guess*, 2000 BCCA 547, the court permitted defence counsel in an obstruction of justice trial to review wiretap information on the basis that it would not be shared with the accused. That was found to be an acceptable practice by the Court of Appeal.

[22] Commission counsel also questions whether *Basi* necessarily renders a “counsel only” approach impermissible in circumstances not involving informer privileged information, and, indeed, whether its use in a commission of inquiry without any criminal or civil liability would further attenuate the effect of *Basi.*

[23] However, Commission counsel recognizes that the First Option is only possible if Mr. Jin's counsel agrees it is appropriate and provides an acceptable undertaking. If so, Mr. Jin’s counsel should be able to seek directions if he wishes to show a document to Mr. Jin after notice to the document holder and Commission counsel to canvass the appropriateness of disclosing the document to Mr. Jin, and to canvass whether redactions are first necessary.

[24] The second approach advocated by Commission counsel is to furnish Mr. Jin and his counsel with select documents “which Commission counsel identifies as suitable to convey the anticipated evidence” and to enable Mr. Jin's participation to an appropriate level (the “Second Option”).

[25] Commission counsel submits this approach will be onerous and entail input from document holders as to disclosure issues or appropriate redactions, but it would only involve documents germane to Mr. Jin's limited grant of standing.

[26] Commission counsel notes that Mr. Jin, although being granted participant status on November 5, 2020, has to date done nothing to meet his obligations to produce documents sought by the Commission.

[27] Commission counsel submits that in light of the powers set out in s. 17 of the *PIA*, it would be appropriate to require that Mr. Jin meet his obligations to produce documents in light of the disclosure requests of the Commission.

D. POSITIONS OF THE PARTICIPANTS

[28] The Government of Canada (“Canada”), the Province of British Columbia (the “Province”) and the British Columbia Lottery Corporation (“BCLC”) all provided letters in November 2020 regarding Mr. Jin’s access to documents.

[29] In brief, those letters, provided by Commission counsel by way of the affidavit of Ms. Tam, all express varying degrees of concern with respect to Mr. Jin's unrestricted access to documents provided by participants to date under the Commission's *Rules of Practice and Procedure*. Mr. Jin's background, these participants say, gives rise to concerns with respect to the potential for the information contained in the records — much of which is sensitive and/or investigative in nature — to be used inappropriately.

[30] In order to mitigate those concerns, say Canada, the Province and BCLC, the Commission should craft a unique process with respect to Mr. Jin's access to documents. I summarize their positions on that process below.

[31] Canada supports, with modification, the First Option put forward by Commission counsel, whereby Mr. Jin's counsel would be given access to Commission documents on an undertaking of non-disclosure, but not Mr. Jin personally. Canada proposes one modification, namely, that Canada, in addition to Commission counsel and the document holder, have the opportunity to review and vet all documents which Mr. Jin's counsel seeks to provide to him. Such an approach, Canada says, is a compromise that allows for a balancing between Mr. Jin's interests and the public interest in protecting documents from inappropriate disclosure.

[32] Canada opposes the approach under the Second Option, whereby Mr. Jin and his counsel would receive select documents, tailored to his grant of standing, after participants propose redactions. The ordinary protections offered by a confidentiality agreement, which protect only the dissemination of documents and not the information in those documents, Canada says, are insufficient to prevent Mr. Jin's potential improper use of sensitive and otherwise non-public information. Canada further says that, from a practical perspective, the Second Option is time consuming, may lead to disputes regarding the scope of Mr. Jin's participant status, and creates procedural difficulties in terms of documents that may be displayed on the livestream of Commission hearings.

[33] Canada says that, if an order is made consistent with the approach under the Second Option, Canada should be included in the review and vetting of all documents before Commission counsel provide those documents to Mr. Jin and his counsel.

[34] The Province supports the First Option with a similar modification to that proposed by Canada. Namely, the Province says that, in the event that Mr. Jin wishes to personally review a document, participants in the relevant sector (in addition to Commission counsel and the document holder) should be consulted to determine whether further redactions to that document are necessary. In the Province's submission, several participants may have a stakeholder interest in a particular document produced by another participant and, as such, any participant who has a stakeholder interest in a document proposed to be disclosed to Mr. Jin should have an opportunity to respond.

[35] The Province opposes the Second Option, and makes submissions similar to those of Commission counsel and Canada. More specifically, it submits that that the Second Option will lead to extensive consultation and delay. In the alternative, the Province says that any order under the Second Option should permit consultation with participants in the relevant sectors (in addition to the document holder and Commission counsel), providing an opportunity to respond to the potential disclosure of documents to Mr. Jin.

[36] BCLC likewise supports — with some proposed modification — the First Option, and opposes the Second Option for logistical and administrative reasons. BCLC says that the First Option should be modified to provide to BCLC notice and the opportunity to propose redactions to documents before they are provided to Mr. Jin's counsel. Like Canada and the Province, BCLC submits that, if the Second Option forms part of an order, participants should be provided with prior notice of the documents to be provided to Mr. Jin for review and response.

[37] In his response to the application, Mr. Jin submits that the prospect of a special process for him to have access to documents should not be determined "until the

parties who support a special process for Mr. Jin provide evidence which can properly be considered and responded to by Mr. Jin."

[38] He submits any procedure which provides access to documents by counsel but not Mr. Jin "puts counsel in an untenable position and is contrary to law."

[39] Underlying Mr. Jin's position is his assertion that the Inquiry's Terms of Reference do not specifically refer to Mr. Jin and, therefore, it is the Commission who brought him into the Inquiry. This, he says, led to investigations and evidence which required notice be given to him that "his reputation may be negatively impacted."

[40] Mr. Jin stresses that, in his case, the allegations are that he engaged in criminal conduct, not that he fell short of living up to his employment obligations. Mr. Jin also stresses that Canada's clients include the Royal Canadian Mounted Police (the "RCMP") and the Province's clients include the Director of Civil Forfeiture, both of which have an adversarial relationship with Mr. Jin. He also submits that it is correct to characterize his relationship with the Commission as adversarial.

[41] Mr. Jin says that he does not know what information the Commission has received through its investigations or whether it is complete or accurate. He has been unable to test that information. He submits that he cannot properly or fairly respond to assertions or allegations "unsupported by any supporting information whatsoever."

[42] Mr. Jin submits that the *Basi* decision makes the First Option problematic and submits it ought not to be ordered for two reasons. In the first place, he submits, it places Mr. Jin and his counsel in the awkward and professionally undesirable position described by the Court in *Basi* at paras. 44-47. In the second place, it would be a time consuming process to have to negotiate or convince the Commission through an application that he, Mr. Jin's counsel, ought to be allowed to share the documents with his client. It would also involve or require Mr. Jin to reveal matters in relation to his strategy and thought processes which are privileged and confidential. He submits that the Commission cannot and should not endorse a procedure that would rest on such a problematic basis.

[43] A recurring theme in Mr. Jin's submissions is that "it is the Commission that decided to include Mr. Jin in its investigations and Inquiry and the allegations being investigated." Mr. Jin further submits the allegations being investigated through the Inquiry process "are criminal in nature and substance" and, accordingly, he contends, "it undermines the appearance of fairness [should Mr. Jin] … now be limited in the manner in which he may defend himself through the creation of a special procedure."

[44] Mr. Jin did not advance an argument with respect to any actual unfairness that a special procedure might create, observing that such an argument would necessarily need to await the specifics of any order or special procedure that might be made.

[45] In reply to Mr. Jin's submissions, Commission counsel submits that Mr. Jin's contention, namely, that it is up to the parties seeking a special process to provide justifying evidence, is not correct.

[46] Commission counsel submits that a participant is not entitled to full unfettered access to documents held by the Commission absent some contrary evidence. He submits the question of access to information "is always dependent on the participant; the information; the position taken by document-holders and affected stakeholders; and the context."

[47] Commission counsel says there is no presumption of full access for any participant and he submits Mr. Jin does not appear to contest Commission counsel's submissions that he is the sole participant alleged to have been significantly involved in money laundering. As far as an evidentiary basis for those allegations is concerned, Commission counsel submits that the evidence of Mr. Beeksma, Mr. Vander Graaf and Mr. Tottenham given in the fall of 2020 meets that requirement.

[48] Commission counsel notes the Province, BCLC, and Canada all oppose the Second Option, but submit, in the alternative, that if I made such an order, notice should be given not just to the document holder, but also to other participants potentially affected. Commission counsel agrees with that modification.

[49] As far as what is practical, Commission counsel notes that the breadth of the Commission's mandate and the time constraints on doing its work militate against a cumbersome document-by-document review process for many thousands of documents. He submits that could prove unworkable.

[50] Commission counsel also notes that in the Inquiry process, with no prospect of a finding of civil or criminal liability at stake, the disclosure requirements are attenuated and essentially equate to providing "suitable identification of the information relating to Mr. Jin's interest and his grant of standing" (underlining in original).

[51] Commission counsel notes that Mr. Jin does not have a broad grant of standing. It is limited to "wherever the evidence being led gives rise to the possibility of having an impact on his rights" (Ruling #14 at para. 16).

[52] Commission counsel submits that Mr. Jin's access to documents should be conditioned in light of that limitation. Commission counsel also notes that, despite being granted participant status, Mr. Jin has failed to live up to his obligations under the *Rules of Practice and Procedure* to "[a]s soon as reasonably possible after being granted standing … identify … the nature and character of records in [his] possession or under [his] control relevant to the subject matter of the Inquiry" and "if requested … provide copies to and allow inspection of such records by the Commission …" (*Rules of Practice and Procedure*, R. 13).

[53] Commission counsel submits that, in light of Mr. Jin's failure to heed those rules, "any broader access to documents should be contingent on compliance with the Rules."

E. DISCUSSION AND CONCLUSION

[54] In my opinion, Mr. Jin's underlying assumption, that it is the Commission, not its Terms of Reference, which brought him into the Inquiry, thus imperiling his reputation, is simply wrong.

[55] The Commission must take the evidence as it finds it; it cannot pretend evidence that falls squarely within its mandate — to inquire into the extent, growth, evolution and

methods of money laundering — does not exist. Mr. Jin has been linked to alleged money laundering through media reports and the testimony of numerous witnesses in the gaming sector. An assessment of responses of various agencies to this activity is central to the Commission's mandate. Moreover, Mr. Jin has applied for participant status for the purpose of questioning witnesses who may provide evidence with respect to his activities or the activities of those associated with him.

[56] The Commission would be abdicating its responsibilities if it did not receive and consider evidence of his involvement in alleged money laundering activity.

[57] Nor does he have any basis to complain that he is somehow blindsided by the fact that his activities are at issue in this Inquiry. Mr. Jin was given warning in an October 2020 letter from Commission counsel of the prospect that evidence would be led about his alleged “loan sharking” and money laundering activities. Since then more than 13 witnesses have given evidence about his involvement in such activities. Transcripts of all that evidence are posted on the Commission's website. In addition, there are at least four documents that have been marked as exhibits and are on the Commission's website which contribute to an understanding of the alleged actions of Mr. Jin.

[58] The implication of Mr. Jin’s submission, namely, that he has somehow been arbitrarily “pulled into” this Inquiry and is in the dark about what the allegations against him are, or what information they rely on, is thus unsustainable.

[59] Similarly, his assertion that the allegations against him are criminal in nature and substance does not alter the calculus respecting his entitlement to disclosure. The Commission is tasked with exploring the nature and prevalence of particular criminal activity within the province as well as the response of those charged with combatting it. That is a valid provincial objective (see, for example, *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at 201 and *Quebec (AG) and Keable v. Canada (AG),* [1979] 1 S.C.R. 218 at 254–55 [*Keable*]).

[60] What the Commission cannot do and, has no intention of doing, is to make a finding of criminal liability against anyone. Mr. Jin has no more exposure to a finding of criminal liability from the Commission than does any other participant.

[61] In the context of this application, the allegations of Mr. Jin's criminality and criminal associations are germane to the risk that providing him with disclosure that is neither carefully considered nor focused only on the narrow limits of his participant status would cause harm to potential or actual investigations, to individuals, or to the repute of the administration of justice.

[62] I do not consider that it would be fair to make what might amount to be a finding of misconduct against Mr. Jin based on evidence or information that he is unaware of; however, there is a substantial body of evidence before the Commission which is available to Mr. Jin. I have attached a chart as Appendix "A" to this ruling showing the dates of transcripts posted on the Commission's website, the corresponding names of witnesses, and the page references where Mr. Jin's name is mentioned and his activities are described (up to the evidence of Mr. Kroeker, given January 26, 2021). Exhibits 144, 145, 149, and 163 also add to the evidence in relation to Mr. Jin and to his activities. All have been publicly available for some time, on the Commission's website.

[63] I note that the attached chart also refers to the evidence of Professor Schneider given in May 2020, before Mr. Jin was given a warning that evidence which might reflect negatively on him may be led. Professor Schneider's evidence was in the nature of a literature review and his references to Mr. Jin come largely from media reports. I will not rely on any media reports as a basis for any finding of potential misconduct against Mr. Jin.

[64] In *Krever Commission*, an issue of procedural fairness arose because the commissioner waited until the last day of the hearings to issue notices identifying potential findings of misconduct which might be made against certain entities and individuals. On judicial review, Richard J. declared that no findings of misconduct could be made against certain individuals and entities, but dismissed the balance of the

applications. The Federal Court of Appeal subsequently dismissed, save for one, all of the appeals filed by those whose notices were not quashed in the court below.

[65] On appeal to the Supreme Court of Canada, the appellants submitted that their ability to cross-examine witnesses effectively and to present evidence was compromised as a result of the late notice.

[66] In determining that the late notice was not procedurally unfair, Justice Cory for the Court described the nature of an inquiry in contrast to a trial at para. 34 of his reasons as follows:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:
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> > A public inquiry is not equivalent to a civil or criminal trial. . . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report". . . . Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding . . . is that reputations could be tarnished.
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> Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.

[67] In light of those observations Justice Cory concluded at para. 69 that:

> … While I appreciate that it might be helpful for parties to know in advance the findings of misconduct which may be made against them, the nature of an inquiry

> will often make this impossible. Broad inquiries are not focussed on individuals or whether they committed a crime; rather they are concerned with institutions and systems and how to improve them. It follows that in such inquiries there is no need to present individuals taking part in the inquiry with the particulars of a "case to meet" or notice of the charges against them, as there would be in criminal proceedings. Although the notices should be given as soon as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. There will be some inquiries, such as this one, where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure.

[68] Other appellate courts have similarly noted the distinction between criminal proceedings and public inquiries: see for example *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 37 [*Consortium Developments*]; *Hartwig v. Saskatoon (City) Police Assn.*, 2008 SKCA 81 at paras. 52-53, 62; *Canada (Royal Canadian Mounted Police) v. British Columbia (Commissioner)*, 2009 BCCA 604.

[69] Although dealing with a different issue, in my view Justice Cory's reasoning is apposite to the present case.

[70] This Inquiry is not focused on Mr. Jin or on whether he committed a crime. The evidence concerning his conduct represents part of an attempt to understand whether suspicious activity occurring in British Columbia casinos and other sectors of the economy was reasonably likely to be money laundering and whether institutions and systems within those sectors were and are dealing responsibly and adequately with those activities. It also gives the Commission, and by extension, the public, a window into some of the methods and techniques used by those alleged to be involved in money laundering activity.

[71] The October 14, 2020 warning given to Mr. Jin relates to evidence which has the potential to ground a possible finding of general misconduct. It does not reference any specific justiciable criminal offence. I note that in *Consortium Developments*, the Court was clear to distinguish between those inquiries that tread in the criminal sphere, bordering on police investigations (such as that at issue in *Starr v. Ontario*

(Commissioner of Inquiry), [1990] 1 S.C.R. 1366), and those that do not (at paras. 50-52):

> The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may incidentally, in the course of discharging its mandate, uncover misconduct potentially subject to criminal sanction. …
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> It must be remembered that in *Starr* the police criminal investigation was ongoing during the Houlden inquiry itself. A senior official in the office of the Ontario Premier had resigned after admitting improper receipt of personal benefits at no cost, including the famous refrigerator. The Houlden inquiry had regular police officers assigned to its investigation staff. Efforts had to be made to prevent the work of the "inquiry police" from tainting the work of the" police police" who were investigating concurrently the possibility of charges under the *Criminal Code*. Both investigations were working under substantially identical terms of reference, namely s. 121 of the *Criminal Code*, R.S.C. 1985, c. C-46, as may be seen by comparing s. 121 with the Houlden Commission terms of reference.
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> In the result, the "police police" and the "inquiry police" were covering the same ground under substantially the same terms of reference at the same time. The difference was that the "police police" had to work within the constraints of the criminal law, whereas the "inquiry police" did not. The Houlden Commission Order in Council was thus quashed on the basis that it was directed to exclusive federal jurisdiction over criminal law and procedure and was therefore ultra vires the legislative authority of the province. The narrowness of its finding is evident from the judgment of Lamer J., as he then was, at p. 1402:
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> > The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel *Criminal Code* provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the *Code*, into allegations of specific criminal acts by Starr and Tridel Corporation Inc.
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> Further, the general constitutional rule that permits provincial inquiries that are in "pith and substance" directed to provincial matters (in this case local government) to proceed despite possible "incidental" effects on the federal criminal law power was affirmed by Lamer J. at p. 1409:
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> > There is no doubt that a number of cases have held that inquiries whose predominant role it is to elucidate facts and not conduct a criminal trial are validly constituted even though there may be some overlap between the subject-matter of the inquiry and criminal activity. Indeed, it is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission *ultra vires* the province. But in no case before this Court has there ever been a provincial inquiry that combines the virtual replication of an existing

> *Criminal Code* offence with the naming of private individuals while ongoing police investigations exist in respect of those same individuals.
>
> The exceptional nature of *Starr*, and the exceptional set of facts that compelled this Court's decision, was emphasized in the *Blood Inquiry* case, *supra*. In that case as stated, the Krever Inquiry, established under the federal *Inquiries Act*, was held to be within its jurisdiction to make findings of misconduct, even misconduct carrying potential civil or criminal liability, provided such findings were properly relevant to the broader purpose of the inquiry, as set out in its terms of reference. In delivering the reasons of this Court, Cory J. distinguished *Starr* and *Nelles v. Grange* (1984), 46 O.R. (2d) 210 (Ont. C.A.) at para. 47:
>
> > Clearly, these two inquiries were unique. They dealt with specific incidents and specific individuals, during the course of criminal investigations.
>
> The *Blood Inquiry* case picked up and endorsed the earlier line of cases in this Court giving broad scope to provincial inquiries, including *Quebec (Attorney General) v. Canada (Attorney General)* (1978), [1979] 1 S.C.R. 218 (S.C.C.); *Robinson v. British Columbia*, [1987] 2 S.C.R. 591 (S.C.C.); and *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.). The *Westray* case is particularly interesting in comparison to the facts of this case because at the time the mine managers were called to testify before the Commission they were in fact simultaneously facing charges under the provincial *Occupational Health and Safety Act*. The affirmation of the correctness of those decisions by a unanimous Court in the *Blood Inquiry* case renders the division of powers ground of appeal untenable in the present case as well.

[72] It follows that in this instance, as in *Krever Commission,* there is no need to provide Mr. Jin with the case to meet comprised of full and uninhibited disclosure. It is sufficient that he be given the opportunity to cross-examine witnesses on their evidence and that he be given an opportunity to call evidence and make submissions.

[73] That conclusion is fortified in *Consortium Developments* at para. 41 which reads, as follows:

> Before leaving the appellants' first ground of appeal, I want to emphasize that the concerns of individuals caught up in judicial inquiries are real and understandable. Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of commission counsel what the documents will show, what the key witnesses will say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy carrying participants of widely different

> interests, motives, information, involvement, and exposure. It is a tall order to ask any Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants. While the appellants go too far in arguing that the particulars they seek must be built into the s. 100 resolution, inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond (if they have not already responded) as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and in the spirit of even-handedness it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into. Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no *lis* between the participants. Judicial inquires are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were. [Emphasis added.]

[74] There is an abundance of evidence in the transcripts and in some of the exhibits available to Mr. Jin to enable him to understand and respond to the general allegations related to his activities.

[75] If there are documents which relate to Mr. Jin to be introduced in evidence by either Commission counsel or counsel for a participant and which will become accessible to the public, then they will presumptively be provided to Mr. Jin and his counsel in advance of the witnesses being called, where feasible.

[76] In this regard I direct that any participant who seeks to place into evidence a document which relates to Mr. Jin or his activities provide five days' notice of the document, along with an indication that it relates to Mr. Jin, to Commission counsel and other participants and that the participant seeking to tender the document provide to Commission counsel and participants a copy of the document redacted in accordance with Ruling #22. If any participant seeks further redactions they must, by 4:00 p.m. on the second day after notice is given, seek that direction by way of a letter to Commission counsel, setting out the further redactions sought and the basis for those

redactions. As with the document provisions in the Commission's *Rules of Practice and Procedure*, I retain the discretion to abridge these time periods in appropriate circumstances.

[77] Where it is not feasible for Mr. Jin to be given such documents in advance of the witness being called, he will have leave to apply for further relief to ameliorate any prejudice.

[78] In the event there are documents put before the Commission in relation to Mr. Jin's activities which were not made public or provided to him, then I will not rely on them in considering whether or not to make a finding of misconduct in relation to Mr. Jin (unless they are favourable to him).

[79] I have considered the options proposed by Commission counsel to enable the possibility of more comprehensive access to documents, but I have concluded that in the circumstances those options are simply not viable. With respect to the First Option, of giving access to the documents to Mr. Jin's counsel with an undertaking that he not disclose unto his client absent agreement or direction from me, neither Mr. Jin nor his counsel are prepared to agreed to that process and have given cogent reasons for not agreeing. It is thus not an available option.

[80] As to the Second Option, that is, having Commission counsel furnish Mr. Jin with select documents "which commission counsel identifies as suitable to convey the anticipated evidence", I consider that approach to be too onerous and, in the circumstances, too time consuming. This Inquiry is in the middle of hearing from witnesses in the gaming sector in which a considerable amount of Mr. Jin's alleged activity has taken place. Going through that process at this late stage would derail or fracture the hearings by introducing the prospect of multi-party wrangling over Mr. Jin's access to what could amount to thousands of documents, many of which may never become exhibits in the hearing in any case. While I have doubts as to whether that would ever have been a practical solution, Mr. Jin's late engagement in the hearings has made it impracticable if not impossible.

[81] In determining the nature and extent of the disclosure necessary to ensure procedural fairness, I have considered the following principles:

- First, the authorities make it clear that the concept of procedural fairness is a shifting one which changes depending on the type of inquiry, the mandate of the commissioner and the nature of the rights that the inquiry may affect. There are no hard and fast rules, and a commissioner has broad latitude and discretion in crafting rules and procedures best suited to the needs of their inquiry (*Beno v. Canada (Somalia Inquiry Commission)*, [1997] 2 F.C. 527 at para. 110).

- Second, it is well established that public inquiries are not criminal investigations and were never intended to establish criminal or civil liability. While the commission process may have reputational impacts for a person, there is no duty to provide *Stinchcombe*-type disclosure (*Labbé* at paras. 16-17).

- Third, the cases suggest that the level of procedural fairness accorded to a particular individual must be balanced with other relevant considerations, including efficiency and cost-effectiveness, so as to ensure that the commission's mandate is completed in a timely but fair manner (*Southern First Nations Network of Care* at para. 34). In this case, it strikes me that what is being balanced is Mr. Jin's ability to protect his reputational interests against the interests of other participants, who have produced documents for use by the Commission in the expectation that they would be treated appropriately, as well as the broader public interest in ensuring that sensitive information does not get into the hands of an individual alleged to have been involved in money laundering activity (which would be counterproductive and undermine the purpose for which the Inquiry was called). Concerns about efficiency, cost-effectiveness and the timely completion of the Commission's mandate are also highly relevant to the analysis.

[82] As in *Krever Commission*, I am satisfied that the circumstances which I have outlined in this case meet the standard of procedural fairness. In the first place, Mr. Jin has sought and received a grant of participant status which enables him to engage in the hearings, to make objections, to conduct cross-examinations, potentially to have evidence called, and to make submissions. He has access to a significant body of evidence which alerts him to the allegations being made against him. He will have access to publicly available exhibits and evidence, and any findings in relation to allegations of misconduct against him will be confined to evidence to which he has access.

[83] Although Mr. Jin sought participant status in this Commission, he has not yet, and, in my view, will not likely voluntarily comply with his obligations as a participant. His lack of compliance may have procedural or even substantive consequences for him in the context of this Inquiry, but it also militates against providing him with documents that are sensitive and cannot be made accessible to the public generally. Mr. Jin's lack of compliance reflects the absence of a commitment to the processes of this Commission, which are designed to ensure its effectiveness and integrity.

[84] In all the circumstances, I consider it would violate the precepts of the proper administration of justice to put Mr. Jin in possession of documents or information that could be inappropriately used.

[85] Accordingly, I direct that Mr. Jin's access to documents be handled in accordance with this ruling.

Commissioner Austin F. Cullen

APPENDIX "A"

Transcript References to the name "Jin"

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