Commission of Inquiry into Money Laundering in British Columbia

Application for Directions Regarding Redactions – Ruling #22

Ruling of the Honourable Austin Cullen, Commissioner

Issued December 7, 2020

A. INTRODUCTION

[1] This ruling addresses an application originally brought by Commission counsel in oral submissions on November 10, 2020, seeking a direction that casino patron names discussed in oral evidence not be redacted in public facing copies of exhibits.

[2] The context for this application arose out of an earlier series of applications brought between October 20 and 23, 2020 seeking various redactions of identifying information contained in documents and affidavits to be filed as exhibits in the gaming sector portion of the Inquiry which commenced on October 26, 2020.

[3] I issued my ruling in response to that earlier series of applications on October 27, 2020 ("Ruling #13"). It included the following direction:

> [45] Insofar as names are concerned, I conclude that a blanket redaction of names goes too far. To redact all names from the documents would deprive the media and the public of insights into or understanding of the nature and extent of interactions and relationships between and among those individuals who work within the gaming industry as representatives of one or another of the participants. As I see it, those parties, whether current or former employees of one or another of the participants, are not in essence third parties whose identity and information warrants shielding.
>
> [46] Insofar as the names of gaming patrons are concerned, I conclude that their names should be redacted, in the public version of the documents, but subject to further directions to remove the redactions in an appropriate context. In my view, documents which are relevant to the issue of money laundering in casinos which name casino patrons may cause unfair or unwarranted reputational harm by linking the patrons to criminal activity which they may or may not be complicit of. Where, in the view of Commission counsel, other participants, the media, or the public, the evidentiary context establishes either that the redactions are not necessary to prevent a serious risk to the proper administration of justice, or the deleterious effects of the redactions to the public

> or the parties outweigh their salutary effects, then directions may be sought to set them aside if there is no agreement.
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> [47] Similarly, for the names I have not ordered to be redacted, if the evidentiary context establishes the requisite justification, directions for a redaction may be sought, if counsel are unable to agree.

[4] In Ruling #13 I expressly directed that Commission counsel, the participants and members of the media may propose to alter the redactions made.

[5] Pursuant to submissions filed November 12, 2020, counsel for the British Columbia Lottery Corporation ("BCLC") submits that Commission counsel's application "[is] in essence, an application to set aside on a blanket basis any redaction made or to be made in any public-facing Exhibit on the ground that a person's name has been expressly stated in *viva voce* testimony at some point during the Inquiry hearings."

[6] BCLC notes that many casino patrons' names or other third party names have been redacted in documents which have been made exhibits and not referred to in evidence. BCLC submits that it is neither necessary to the Commission's mandate, nor appropriate in light of the reasons for Ruling #13, to reveal a patron's name in every public facing version of an exhibit filed or to be filed "simply because that person's name has been mentioned orally in the context of discussing a single document or in a discrete context without reference to any document."

[7] BCLC also submits that a variance of Ruling #13 should not override privilege or other reasons for redacting names pursuant to other rulings which have been made or may be made in the future.

[8] BCLC, while opposing the direction sought by Commission counsel, seeks a direction in the following terms:

> (a) Ruling 13 is varied to permit a document within an Exhibit (including an affidavit filed as an Exhibit) that reveals the name of a patron to be unredacted to reveal such name on the document but only to the extent that patron's name is expressly stated by a witness in *viva voce* evidence in relation to the Exhibit, or document within an Exhibit in the case of an affidavit;
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> (b) Any other document that is within or comprises an Exhibit (including an affidavit filed as an Exhibit) that refers to a patron's name which has been

> expressly stated in *viva voce* evidence in the context of a different document shall remain redacted pursuant to Ruling 13;
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> (c) For greater clarity, this direction does not supersede any other privilege or Ruling, and in particular does not require any document to be unredacted which has been redacted pursuant to Ruling 8, for reasons of privilege or immunity or any other reason in the copy produced to the Commission, or pursuant to any other Ruling or Direction of the Commissioner; and
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> (d) For the purposes of this Direction, the body of an affidavit filed as an Exhibit shall be considered a "document", but each exhibit to an affidavit shall be treated as a separate "document".

[9] Gateway Casinos and Entertainment Ltd. ("Gateway") supports the orders sought by BCLC. Gateway relies on my reasoning at para. 46 of Ruling #13 that naming the patrons in the public versions of the documents "may cause unfair or unwarranted reputational harm by linking the patrons to criminal activity which they may or may not be complicit of."

[10] Gateway contends that, in light of that reasoning, none of the patrons whose names were referred to in the evidentiary hearings were put on notice after Ruling #13 was issued that they might be "outed" during the hearings, and they might have taken comfort from Ruling #13 that their privacy would be respected.

[11] Gateway notes none of the patrons were interviewed about their state of knowledge about the source of the cash they were using and "[hence] Commission counsel has not established that mere reference to a patron's name in oral evidence renders the patron's name germane to the Commission's mandate."

[12] Gateway argues the fact that the references were made to certain patrons does not "establish that the deleterious effects of naming them outweighed the salutary effects of maintaining their privacy or that maintaining their privacy was not necessary to prevent a serious risk to the proper administration of justice."

[13] Gateway submits:

> The fact that patrons were named during the evidentiary hearings, risking their being unfairly associated with criminal activity of which they may not have been complicit, cannot be undone. Nor can the fact that the names of such patrons were widely reported in the media after those evidentiary hearings. But the fact

> that occurred cannot by itself justify further unfair and unwarranted reputational harm to the patrons by exposing their names yet again (and with greater detail associated) in public facing documents.
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> Accordingly, for precisely the same reason the Commissioner decided that patron's names ought to be redacted in Ruling #13, they should remain redacted now.
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> [Footnote omitted.]

[14] Canada too supports BCLC's position with respect to the redaction of names. Canada does not agree "that the mere mention of a name in oral evidence ought to automatically mean that that name remain unredacted in all public-facing copies of exhibits."

[15] Canada supports the order sought by BCLC permitting a name to be left unredacted in an exhibit "only to the extent that the name is expressly stated by a witness in *viva voce* evidence in relation to the exhibit."

[16] The Gaming Policy and Enforcement Branch ("GPEB") supports BCLC's position and in particular supports the form of direction suggested by BCLC, set out at para. 8 of this ruling.

[17] Great Canadian Gaming Corporation ("GCGC") submits it is inconsistent with my direction in Ruling #13 respecting the names of patrons "to give a blanket direction that any casino patron whose name is mentioned during the course of oral hearings will no longer have his or her name redacted from exhibits posted publicly on the Commission website." Counsel for GCGC submits that such a mention may be inadvertent and may be by Commission counsel, a lawyer for a participant, or by a witness. GCGC submits "[t]he mere mention of a casino patron's name during the course of the oral hearings should not invalidate [my] previous [ruling]" concerning the potential for "reputational harm by being linked to alleged money laundering in casinos."

[18] GCGC submits the direction sought by Commission counsel amounts to "a blanket exception for an unknown number of casino patrons whose names have, or may in the future, be mentioned." GCGC submits that any such direction would be arbitrary.

[19] GCGC submits “[i]f Commission counsel (or a Participant) [consider that particular] patron names should not be redacted … then an application with respect to [that] patron should be advanced so that the deleterious and salutary effects may be weighed.”

[20] Counsel for GCGC also submits there are practical problems with the proposed order as “it is unclear who will track all casino patrons whose names have been mentioned orally at the hearings both previously and prospectively” and it would be an unnecessarily onerous procedure for participants to be “continuously required to re-assess past redactions of exhibits… to determine whether patron names have been subsequently mentioned orally.”

[21] In reply to the submissions of BCLC, Gateway and GCGC, Commission counsel opposes BCLC’s proposed formulation of the direction applicable when a gaming patron whose name has been redacted in exhibits is discussed in oral evidence.

[22] In their submission, Commission counsel clarifies that the direction sought is as follows:

> Subject to further direction of the Commissioner, to the extent an individual is named in a document that is tendered as an exhibit in these proceedings, and that individual is discussed by name (whether by counsel or by the witness) in oral evidence, that individual's name will not be redacted on the basis of Ruling #13 from the publicly facing version of exhibits, including those exhibits already posted online and those that will be posted in the course of future hearings.

[23] Commission counsel relies on a different portion of para. 46 from Ruling #13 than do Gateway and GCGC in opposition to any change in the redactions. Commission counsel submits that the crux of the issue is whether discussion of a patron by name in oral evidence changes the balance between the deleterious and salutary effects of having the patron’s name redacted in the public facing versions of the exhibits. Commission counsel emphasizes the portion of para. 46 in Ruling #13 which states:

> Where in the view of commission counsel, other participants, the media or the public, the evidentiary context establishes either that the redactions are not necessary to prevent a serious risk to the proper administration of justice, or the deleterious effects of the redactions to the public or the parties outweigh their

> salutary effects, then directions may be sought to set them aside if there is no agreement.

[24] Commission counsel submits that whether a patron's name is expressly stated by a witness in *viva voce* evidence, or by counsel in examining the witness "has no bearing on whether the redaction is necessary to prevent a serious risk to the proper administration of justice, or whether the deleterious effects of the redactions to the public on the parties outweigh their salutary effects."

[25] Commission counsel notes that once names have been alluded to in oral evidence, either by counsel or a witness, "they will have been broadcast and archived on the website". Commission counsel submits in those circumstances "[the] salutary effects [of the redactions] are so far diminished that they are outweighed by the deleterious effects of the redactions to the public."

[26] With respect to BCLC's contention that any document other than the document or documents in relation to which the patron's name has been discussed in oral evidence should remain unredacted, Commission counsel submits once the name of the patron has been discussed in oral evidence, any reputational harm that might be caused has already occurred on the public record. Commission counsel submits continuing to redact that name from other documents "would deprive the media and the public of insights into or understanding of the nature and extent of interactions and relationships between and among those individuals whose activities are under consideration by the Commission." To unredact only some of the exhibits bearing the patron's name may result in a misleading or incomplete narrative, which may work a substantial unfairness on the individual in question or upon those charged with the responsibility of dealing with them diligently.

[27] Commission counsel submits the presumption of open and publicly accessible proceedings is a principle of fundamental and constitutional importance. In those circumstances, Commission counsel submits, once some documents mentioning a particular individual have been unredacted, it is appropriate to shift the burden to the

participants “to meet the *Dagenais / Mentuck* [test]” to justify maintaining redactions of the other documents.

[28] Commission counsel does not oppose the direction sought by BCLC that any direction arising from this application “not supersede any other privilege or Ruling, and in particular does not require any document to be unredacted which has been [ordered] redacted pursuant to Ruling 8, for reasons of privilege or immunity or any other reason … or pursuant to any other Ruling or Direction of the Commissioner …”.

[29] Commission counsel submits that all the participants should be responsible for making (and removing) their own redactions for the same reasons set out at paras. 65-71 of Ruling #13.

B. DISCUSSION AND CONCLUSION

[30] As I see it, the fundamental question raised by this application is whether there is a continued justification for redactions of the names of individuals in exhibits once those persons have been identified and linked to relevant events and activities in oral evidence.

[31] It is important to understand that the purpose of the redactions directed in Ruling #13 was to prevent the indiscriminate disclosure of the names of an unknown number of patrons in unknown circumstances. In other words, a context in which it was simply not possible to consider or apply the so-called *Dagenais / Mentuck* test, as set forth in *R. v. Mentuck*, 2001 SCC 76 at para. 32 as follows:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
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> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[32] Ruling #13 does not in any way restrict Commission counsel or counsel for the participants from leading relevant and probative oral evidence of the identities and

activities of particular patrons, or of linking them to people and events of obvious interests to the Commission.

[33] As Commission counsel submits, once a patron's identity has been revealed in oral evidence of relevant events and interactions, there is a fundamental shift in the balance between the salutary effects of the redaction and its deleterious effects. Indeed, the need for the redactions is eclipsed by the imperative of permitting counsel to lead relevant and probative evidence of interest to the Commission.

[34] It is not the mere act of naming patrons referenced in the exhibits which is the catalyst for removing the redactions of their names. Rather, it is the fact that certain patrons' activities and interactions are considered salient enough to be explored in testimony. Identifying a patron in oral evidence and in the reports marked as exhibits enables a better understanding of the nature and extent of his or her relevant interactions and activities in connection with large cash buy-ins, interactions with cash facilitators, and it enables a better understanding of the extent to which the service providers, BCLC investigators/managers, GPEB investigators/managers and law enforcement authorities knew of the patrons' reported interactions and activities, and what, if anything, was done to inquire into or address the activities which caused them to be reported.

[35] It would be an error to treat the direction in Ruling #13 as a reallocation of the burden in connection with limiting public access to relevant and probative evidence. The default position favours open and accessible proceedings. As I earlier explained, my direction to redact the names of the patrons in Ruling 13 was made in the absence of any contextual evidence about the patrons or why they were identified in reports.

[36] The names which have emerged in oral evidence are of patrons whose activities are manifestly significant and of interest to the Commission. Maintaining a redaction in exhibits which may help to explain or even amplify the oral evidence about the patrons and their activities and interactions would, in my view, run counter to the principle that open and accessible court proceedings (and provincial inquiries) are of fundamental importance in the Canadian constitutional context (see: *Canadian Broadcasting Corp. v.*

New Brunswick (Attorney General), [1996] 3 S.C.R. 480; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97).

[37] In light of that principle and having regard for the *Dagenais / Mentuck* test which, in effect, requires a conclusion that “disclosure would subvert the ends of justice or unduly compromise its proper administration,” I can see no persuasive rationale to justify limiting the public's ability to access and understand only part of the evidentiary record in relation to matters falling within the scope of the Commission's mandate.

[38] Accordingly, I grant the order sought by Commission counsel. As with the redactions, and for the same reasons, I direct that participants are responsible for removing redactions from their own documents. I would expect Commission counsel or other counsel who led or wishes to lead evidence concerning a patron whose name had been redacted as a result of Ruling #13 would assist the participant in identifying the patrons at issue.

Commissioner Austin F. Cullen