Commission of Inquiry into Money Laundering in British Columbia

Application for *In Camera* Hearing – Ruling #24

Ruling of the Honourable Austin Cullen, Commissioner

Issued January 15, 2021

A. INTRODUCTION

[1] Commission counsel applies for an order pursuant to Rule 60 of the Commission's *Rules of Practice and Procedure* that a portion of the evidence to be heard on January 19, 2021 be heard *in camera*.

[2] The authority to proceed *in camera* is found in s. 15(1)(c) of the *Public Inquiry Act,* S.B.C. 2007, c. 9 [*PIA*] which allows an *in camera* hearing "if the commission has reason to believe that the order is necessary for the effective and efficient fulfilment of the commission's terms of reference."

[3] Section 15 operates as an exception to the general rule reflected in s. 25 of the *PIA* providing that a hearing commission must:

> (a) ensure that hearings are open to the public, either in person or through broadcast proceedings, and
>
> (b) give the public access to information submitted at a hearing.

[4] A decision to apply s. 15 to restrict or deny public access to the hearing requires consideration of the test developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*] and *R. v. Mentuck*, [2001] 3 S.C.R. 442 [*Mentuck*]. That involves a two-step assessment: (1) whether the order is necessary to prevent a serious risk to the administration of justice because reasonably alternative measures will not prevent the risk; and (2) whether the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the

right to free expression and the efficacy of the administration of justice (the "*Dagenais / Mentuck* test").

[5] The test is flexible and contextual and focuses on the circumstances giving rise to the application: see *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 [*Toronto Star*].

[6] Commission counsel submits that the present circumstances meet the test articulated in *Mentuck* and developed in *Toronto Star*.

[7] In essence the evidence sought to be heard *in camera* consists of a panel of witnesses from each of the Bank of Nova Scotia, the Royal Bank of Canada and HSBC. As I understand it, these witnesses will be testifying about money laundering typologies as well as countermeasures utilized by "the most sophisticated and largest financial institutions in the country." Commission counsel submits the evidence will be highly sensitive and will describe typologies and methods of money laundering in detail "including new and cutting-edge techniques." The evidence will also detail what the banks are doing in response and the measures they are taking to identify, prevent and address money laundering risks and activity.

[8] The damage which Commission counsel seeks to prevent is the disclosure of both the clandestine means of laundering money through financial institutions and the publication of the methods institutions are using to discover and prevent the money laundering activity. The banks are understandably loath to permit such disclosures for fear of providing assistance to criminals seeking to launder money through financial institutions and overcome efforts to detect and prevent those activities.

[9] Commission counsel contends that given the nature of the evidence anticipated, a claim akin to that of public interest immunity might be advanced to prevent the evidence from being called in the absence of an order such as that being sought.

[10] Commission counsel leans on s. 9 of the *PIA* which affords the Commission "the power to control its own processes" and to "make directives respecting practice and procedure to facilitate the just and timely fulfilment of its duties."

[11] Commission counsel notes that although to date the Commission has avoided closed hearings, there have been parts of the hearing process which have been modified to avoid publication of information that might assist those seeking to launder money or impede those attempting to thwart it. Commission counsel cites Exhibit 76, an Overview Report attaching excerpts of the British Columbia Lottery Corporation's ("BCLC") standards, policies and procedures which have been redacted to avoid undermining BCLC's anti-money laundering ("AML") efforts.

[12] Commission counsel also notes that because the banks are federally regulated entities "there is some constitutional complexity to the nature of their involvement in a provincial commission of inquiry."

[13] As I understand it, Commission counsel's contention is that without ameliorating conditions protecting against the disclosure of information damaging to the banks' AML efforts, they may be unwilling and non-compellable to offer important evidence to the Commission.

[14] In light of those circumstances and concerns, Commission counsel seek an order that "the evidence of the bank CAMLOs [chief anti-money laundering officers] panel should be received through an *in camera* hearing process, in order to best fulfil the mandate of the Commission."

[15] The original order sought by Commission counsel was as follows:

> [P]ursuant to s. 15(1)(c) of the *Public Inquiry Act*, the banks' CAMLO panel evidence on 19 January 2021 proceed in an *in camera* hearing, allowing for attendance on the video hearing for all participants with standing on the financial institutions sector, but not permitting public attendance. There would be no webcast of the hearing, nor any transcript or archive of the hearing, made public. The Commissioner would determine, in his Final Report, what could be said publicly about the evidence of this panel.

[16] Commission counsel subsequently altered its position in response to a submission made by counsel for BCLC. In essence, BCLC sought to broaden the order to allow it to attend the hearing. In its submission, the exclusion of BCLC is not "necessary to prevent a serious risk to the administration of justice" and there is no

indication that “the salutary effects of such an order would outweigh the deleterious effects on BCLC’s rights or interests.”

[17] BCLC submits that evidence of the banks’ AML practices may intersect with the evidence of BCLC witnesses concerning their understanding of banking practices as they may relate to the vulnerability of casinos to money laundering practices.

[18] BCLC also made the point that its ability to formulate submissions may be enhanced if it is able to hear and understand the banks’ AML practices.

[19] Commission counsel conceded the validity of BCLC’s submissions and submitted that “[t]here is no need to exclude participants such as BCLC from this *in camera* hearing. Such participants are governed by rules of confidentiality (undertakings and/or confidentiality agreements) and can be trusted to treat the sensitive evidence led at the January 19 hearing confidentially.”

[20] Commission counsel submits that the order should be amended to permit all participants, except Paul King Jin, to attend the *in camera* hearing.

[21] In relation to Mr. Jin, Commission counsel submits at paragraphs 3 and 4 as follows:

> 3. Different considerations arise in relation to Paul King Jin. As described in the Commissioner’s ruling granting Mr. Jin standing (Ruling #14, at para. 7): “his name has been identified as allegedly involved in money laundering activity, in particular in relation to a large criminal investigation by the RCMP which led to charges, albeit charges that ultimately did not proceed to trial”. Mr. Jin is presently without counsel and has yet to engage with the commission as a result. There are obvious potential risks that arise from Mr. Jin attending the *in camera* hearing, and permitting a person alleged to be involved in significant money laundering to obtain “the playbooks” of the federal banks. Given Mr. Jin’s lack of standing in the sector of financial institutions, the risk identified, and his lack of engagement with the commission process to date (neither he nor his counsel have sought to attend any hearings), he should not be permitted to attend this hearing. Given that his lawyer could not maintain secrets from him (*R. v. Basi*, 2009 SCC 52, at paras. 45-46), his counsel likewise cannot attend.
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> 4. Taking account of the concerns identified by BCLC, Commission counsel therefore supports an order enabling all participants other than Mr. Jin to attend the *in camera* hearing. This approach — applicable both to counsel and to

participants who have provided confidentiality agreements — would let them attend the hearing if they wish, or obtain transcripts otherwise.

B. DISCUSSION AND CONCLUSION

[22] The prospect of proceeding *in camera* in a public inquiry is, in general, undesirable. In the present circumstances the issues being addressed by the evidence – the methods being used by criminals to launder money through Canada's major financial institutions and the measures taken to detect and prevent them – are important ones.

[23] The question which this application raises calls for precisely the kind of judgement and balance reflected in the *Dagenais / Mentuck* test: is the order necessary to prevent a serious risk to the administration of justice? And do the salutary effects of the order sought outweigh the deleterious effects on, in this case, the public?

[24] In my view it would imperil the administration of justice if the evidence were to be made publicly available for the reasons outlined by Commission counsel in their submissions. Evidence illustrating well-developed methods of laundering money may provide information useful for criminals seeking to launder proceeds of crime through financial institutions that are not as well-equipped to detect or resist them as are Canada's major banks. Even more importantly, publicizing advanced strategies and methods used by the banks to detect and deter money launderers are likely to undermine the success of those strategies by providing notice to those who are being, or are otherwise likely to be targeted.

[25] I have also concluded that there is no practical way of ameliorating those risks short of conducting an *in camera* hearing. In balancing the salutary and deleterious effects of the order, I note that it will be of significant benefit to the Commission to hear evidence with respect to the methods and strategies used by money launderers and the methods and strategies used by the banks to combat them. If the order is not made, there is a prospect that admission of the evidence might be resisted. I do not propose to decide whether such a resistance would be successful or not. It is sufficient to observe it may lead, at least, to delays in the hearing schedule. There are also good reasons to

ensure that information with respect to these matters does not fall into the hands of those engaged in money laundering activity. The salutary effects of hearing the evidence while avoiding the risks attendant on public access to the hearing in which it is led are accordingly high.

[26] At the same time there are deleterious effects which hearing the evidence *in camera* create. The public is understandably concerned with the way in which money laundering affects important economic institutions such as the major chartered banks and equally concerned in knowing and understanding that the banks are responding to the threats posed by money laundering.

[27] Another factor to consider is that even if the evidence is heard *in camera*, it does not mean that it cannot be distilled and summarized in the final report in a way that abates the risk of potential harm to the administration of justice, while giving the public an understanding of what attempts to launder money in Canada's major banks consists of, and of what the banks' responses entail. In other words, the public's legitimate interest in the subject matter of this evidence can be addressed without disclosing the kind of details likely to undermine anti-money laundering efforts. In my view, the *Dagenais / Mentuck* test favours making the order sought and I will grant it.

[28] I also order that all participants in the Inquiry, except for Mr. Jin, are entitled to be present for the hearing.

[29] Mr. Jin's participation stems from the allegations that he was engaged in a range of criminal conduct including facilitating money laundering. He was not granted participant status except to enable him to protect or advance his own rights or interests. To date he has shown little inclination to engage with the Commission or respond to summonses issued for his documents.

[30] Mr. Jin's participant status provides him with no mandate to engage with issues arising in other sectors or in circumstances unconnected to his own, and his presence at the hearing, covered by this order, would be both unnecessary and incongruous with the purpose of the order.

[31] The order will be granted in the terms sought by Commission counsel. It will not enable Mr. Jin or his counsel to be present at the hearing. All other participants will be permitted to attend.

Commissioner Austin F. Cullen