Commission of Inquiry into Money Laundering in British Columbia

Application for Certain Orders and Directions – Ruling #32

Ruling of the Honourable Austin Cullen, Commissioner

Issued May 5, 2021

A. INTRODUCTION

[1] This application is brought by Paul Jin, who was granted participant status in this Commission on November 5, 2020.

[2] Mr. Jin seeks the following orders and directions:

1. That Commission counsel be required to serve and file final submissions that may be made in relation to the Applicant and that the Applicant be permitted to respond to those submissions prior to the Commissioner beginning his deliberations or making any findings or recommendations.
2. That Commission counsel who have participated in investigations, including:
    a. through reviewing documents obtained through summons or otherwise, or,
    b. taking statements from persons who have been compelled by summons or otherwise;

    or, Commission counsel who have presented evidence during the course of hearings, not assist or participate in any way in the Commissioner's deliberations, fact finding, analysis of evidence, or in preparation of reasons, findings or recommendations.
3. That the Commission's reasons, findings or recommendations as they relate to the Applicant be solely based on evidence that was publicly presented and submissions made upon that evidence which have been made available to the Applicant and which the Applicant has been given the opportunity to respond to.
4. That this application be determined after a public hearing in which counsel may make submissions.

[3] In his notice of application, Mr. Jin outlined the factual basis for his application. In summary, he asserts that Commission counsel, in conducting investigations on behalf of the Commission, have compelled the production of documents and statements

through the use of summonses to advance those investigations (the “Investigative Materials”). Mr. Jin asserts that there is no public record of the Investigative Materials or the summonses which have been authorized by the Commission, that the evidence publicly presented is but a subset of the Investigative Materials, and that there is no record of the percentage of the Investigative Materials that have been publicly presented.

[4] Mr. Jin also asserts as part of his application that the Investigative Materials cannot be challenged unless a participant receives those materials and there is examination and cross-examination in the course of public hearings. He further asserts that he has only received a small fraction of the Investigative Materials.

[5] Mr. Jin notes that the Commission is required to make findings of fact relevant to the Terms of Reference and give reasons for those findings and that it may make findings of misconduct against a person. He also notes that paragraph 4(3) of the Terms of Reference requires the Commissioner to forward information to the appropriate authorities where he has reasonable grounds to believe that any information obtained during the Inquiry may be useful in the investigation or prosecution of an offence under the *Criminal Code*. That paragraph has since been repealed.

[6] Mr. Jin asserts there is evidence of at least one active criminal investigation that relates to the Commission's Terms of Reference, that Commission counsel has advised that it does not intend to make final submissions and that “it is understood” that Commission counsel will continue to assist the Commissioner at the close of public hearings after participants have made their final submissions by assisting and advising in the preparation of the final report.

[7] For the reasons that follow, I have declined to grant the relief sought in paragraphs 1-2 of Mr. Jin’s application. However, I have made an alternative order concerning the role of Commission counsel in the fact-finding process as it relates to Mr. Jin. I have also granted a modified version of the order sought in paragraph 3 of the application. As to the relief sought in paragraph 4 of Mr. Jin’s application, I do not consider it necessary to convene a public hearing to address the issues raised by the application and I decline to do so.

B. MR. JIN'S SUBMISSIONS

[8] Mr. Jin submits that the Inquiry must be conducted with fairness, the appearance of fairness and transparency. He contends that "in the totality of the circumstances" his rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* [*Charter*] are engaged. It is his contention that when the Commission issues a notice of an intention to make a finding of misconduct, the proceedings between the Commission and the person who receives such a notice become adversarial in nature.

[9] Mr. Jin submits that in that context, if Commission counsel offer post-submission assistance to the Commissioner, it "could include assistance in whether there is an evidentiary basis for findings of misconduct, what that evidentiary basis is and what findings might follow from the evidence." He submits "[w]ithout public rules that clearly define and limit the role of Commission counsel, there is an appearance that the advocacy that Commission counsel have engaged in so far could continue once the public hearings have concluded."

[10] Mr. Jin submits that fairness and transparency require that any "evidence and submissions that the Commission might use as a basis" for a finding of misconduct must be disclosed to him, otherwise it "creates the appearance that the process leading to the findings and recommendations will be neither transparent nor fair."

[11] Mr. Jin further submits that the Commission's "fact finding will be enhanced through the public process as is suggested through [his] application."

C. POSITION OF COMMISSION COUNSEL

[12] Commission counsel oppose the relief sought in paragraphs 1 and 2 of Mr. Jin's application. They do not disagree that the relief sought in paragraph 3 is appropriate, but note that it was addressed in an earlier ruling. Finally, they submit that the application for oral submissions with respect to this application is premature.

[13] Commission counsel set forth a number of considerations or facts said to be salient in disposing of the present application. They note that the Commission's powers as a hearing commission include compelling witnesses, ordering disclosure, holding

hearings, receiving evidence under oath and making findings of misconduct against a person. Commission counsel note that to advance the objectives of the Commission, Commission counsel may "pursue many lines of inquiry," conduct their own research, consult with experts, interview witnesses and receive documents. Commission counsel submit that they are responsible for determining what evidence should be adduced before the Commissioner, but they are not required to make the Commission's preparatory and Investigative Materials publicly available, if these matters do not "make it into evidence." The evidence that is adduced is publicly accessible, subject to redactions, limitations on access, or an order that it be heard *in camera*.

[14] Commission counsel note that on September 18, 2020, I made an order pursuant to s. 15(1)(c) of the *Public Inquiry Act,* S.B.C. 2007, c. 9 [*PIA*] that the Commission's Investigative Materials will not be available to the public until such time as it is adduced by Commission counsel as evidence (see Ruling #8).

[15] Commission counsel also note that in Ruling #26, I ruled that I would not rely on "documents put before the Commission in relation to Mr. Jin's activities which were not made public or provided to him… in considering whether or not to make a finding of misconduct in relation to Mr. Jin (unless they are favourable to him.)"

[16] Commission counsel have indicated to participants that they will not be making closing submissions. Commission counsel also note that any person who faces the prospect of a finding of misconduct will be served with a notice of misconduct to which they will have the opportunity to respond.

[17] It is Commission counsel's position that if they will not make closing submissions, Mr. Jin's application concerning the manner in which those submissions should be made is moot. Commission counsel submit that they are "better able to retain impartiality and neutrality by not engaging in final submissions to the Commissioner as to findings to be made and conclusions to be drawn."

[18] Commission counsel submit that in the event of a potential finding of misconduct, a notice of misconduct is sent to the person involved, but the process is "handled confidentially." If Commission counsel were to make closing submissions about the

alleged misconduct, such submissions may cause unnecessary reputational harm if ultimately no finding of misconduct is made. Commission counsel cites that potential circumstance as an added reason for them to avoid making closing submissions.

[19] With respect to Mr. Jin's application for an order to preclude Commission counsel who have reviewed documents, taken statements or presented evidence from assisting or participating "in any way in the Commissioner's deliberations, fact finding, analysis of evidence, or preparation of reasons, findings or recommendations," Commission counsel submit the weight of the authorities on the subject is "that such participation is permissible and not contrary to a fair and transparent process."

[20] Commission counsel submit that in *Stevens v. Canada (Attorney Genera*l), 2002 FCT 2 at para. 68, the Court held that it is not a violation of procedural fairness for Commission counsel to assist with drafting if the Commissioner has reviewed the report, signed it and adopted it as his own.

[21] Commission counsel also rely on *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System),* [1997] 2 FC 36 (C.A.) at para. 102 [*Krever FCA*] which held as follows:

> We must be careful not to impose too strict standards on a commissioner who is conducting a public inquiry of the nature and scope of this Inquiry, in terms of the role he may assign to his counsel once the actual hearings have concluded. A final report is not a decision and the case law that may have developed in relation to decisions made by administrative tribunals, particularly in disciplinary matters, does not apply. We must be realistic and pragmatic. The Commissioner will not likely be able to write all of his report himself, or verify the accuracy of the facts set out in it on his own, any more than he could reasonably have asked all the questions during the examination of witnesses or sift through the hundreds of documents that were introduced. What is important is that the findings he makes in his report be his own. If, in order to make those findings, he considers it advisable to seek the assistance of one or more of his counsel, including those who conducted the examination of witnesses, in relation to questions of fact, evidence and law, he must have broad latitude to do so.

[22] Commission counsel submit that their role is not akin to a Crown counsel or a party to an adversarial process. Rather, their role is inquisitorial: they must "get to the bottom of what happened and why and not be deflected by witnesses or their counsel who have a particular interest in the outcome" (citing Justice Dennis O'Connor, *The*

Role of Commission Counsel in a Public Inquiry (2003) 22:1 Advocates' Society Journal 9 (QL) at para. 15).

[23] Commission counsel rely on the view expressed by Ronda Bessner in "Serving as Commission Counsel at a Public Inquiry" in Ronda Bessner & Susan Lightstone, eds, *Public Inquiries in Canada: Law and Practice* (Toronto: Carswell, 2017) 49 at 58, that Commission counsel may provide advice to the Commissioner on the weight to be given to testimony or documentary evidence and review the final report to ensure there are no statements that may present legal problems for the Commission.

[24] Commission counsel rely on the broad flexibility granted to commissioners in terms of how they carry out their inquiries and satisfy the requirements of procedural fairness, citing the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 [*Krever SCC*] which held: "the Commissioner enjoys considerable latitude, and is thereby permitted to use the method best suited to the needs of his inquiry" (at para. 70, quoting *Krever FCA* at para. 79). Commission counsel submit this flexibility "extends to the manner in which a commissioner staffs the drafting of the final report."

[25] In support of that submission, Commission counsel also cites s. 9(1) of the *PIA* which reads as follows:

> 9 (1) Subject to this Act and the commission's terms of reference, a commission has the power to control its own processes and may make directives respecting practice and procedure to facilitate the just and timely fulfillment of its duties.

[26] Commission counsel refer to the following statement by Justice Cory in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 [*Westray*] at para. 175:

> In my view, the nature and the purpose of public inquiries require courts to give a generous interpretation to a commissioner's powers to control their own proceedings under the Nova Scotia Act.

[27] Commission counsel cite a number of instances in which commissions of inquiry have relied on the "familiarity of commission counsel with the enormous amount of material put before the commissioner to assist in the preparation of the final report,"

repeating the observation of the Commissioner in the Commission of Inquiry into the Death of Frank Paul (the "Davies Commission"), in the Davies Commission Interim Report:

> … while others may act as impartial advisors to a commissioner in the drafting of the report, it is the commissioner alone who should make decisions about credibility, findings of fact and findings of misconduct. If, during final submissions, commission counsel does not go beyond presenting a balanced view of the evidence, commission counsel may act as an impartial advisor to the commissioner in the drafting of the report.

[28] Commission counsel also note that Professor Ed Ratushny, the author of a leading text on public inquiries, has taken a more restrictive view, opining that Commission counsel should not be "both a partisan advocate against a party [by engaging in cross examination at the hearings stage] and then assis[t] the commissioner in making adverse findings against the party in the deliberative stage," citing Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) at 227.

[29] In Professor Ratushny's view, Commission counsel may discuss the credibility of witnesses and suggest specific findings in closing submissions in the hearing room.

[30] Commission counsel contend that Professor Ratushny's views "are contrary to the weight of judicial and academic authority" and contest any suggestion "that Commission counsel have engaged in advocacy that would give rise to an apprehension of bias" if they were to participate in the deliberation stage of the Commission.

[31] Commission counsel summarize their position as follows:

> 1) First, and most critically, it is always the Commissioner, and only the Commissioner, who makes findings of fact. It is always and only the Commissioner who makes any findings of credibility. It is always and only the Commissioner who makes recommendations and determinations on the approach to be taken. In this way, the relationship between Commission counsel and Commissioner is akin to that between law clerk and judge: they provide assistance and may be involved in summarizing

evidence or conducting particular supporting research, but of course the clerk never decides the case, the judge does.

2) Second, the Commission, as set out above, is simply not an adversarial proceeding but rather a fact-finding, policy-orientated process aimed at obtaining relevant information and evidence to support the final report.

3) Third, it is the height of efficiency and practicality to have Commission lawyers, who have already put in significant work understanding the issues and mastering the evidence and voluminous record of documents, to also be involved in summarizing that body of evidence, identifying issues for the Commissioner to make determinations upon and assisting with drafting the final report.

4) Fourth, if the Commissioner were required to appoint new lawyers as he moves from the hearings stage to the report stage, it would entail inordinate and unacceptable delay and expense.

5) Finally, involvement of Commission counsel in the report stage of a Commission is consistent with the past practice of public inquiries.

[32] As to Mr. Jin's application for direction that "the Commission's reasons, findings or recommendations as they relate to [him] be solely based on evidence that was publicly presented and submissions made upon that evidence which have been made available to the Applicant and which the Applicant has been given the opportunity to respond to," Commission counsel submit such a direction is unnecessary given my ruling in paras. 62 and 78 of Ruling #26:

> [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.
>
> …
>
> [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).

[33] Commission counsel question the validity of Mr. Jin's assertion that the Commission engages his rights guaranteed by s. 7 of the *Charter,* noting that the potential effect of paragraph 4(3) of the Terms of Reference which Mr. Jin has cited in

his submissions has been mitigated by its repeal, and that apart from that, Mr. Jin has advanced no submissions as to which of his s. 7 rights have been engaged or what principle of fundamental justice has been implicated by the operations of the Commission.

D. POSITION OF THE PARTICIPANTS

i. The British Columbia Lottery Corporation

[34] The British Columbia Lottery Corporation ("BCLC") took no position with respect to the first order sought by Mr. Jin but requested that "if the Commissioner does direct Commission counsel to make final submissions 'in relation to [Mr. Jin]' BCLC requests that it also be permitted to respond to any such submissions that impact BCLC."

[35] With respect to the second order sought by Mr. Jin precluding Commission counsel who participated in marshalling and presenting evidence from assisting or participating in any way in the deliberation phase of the Commission, BCLC also "takes no position, [leaving] this to the Commissioner's discretion." BCLC does, however, make some comments in response to Commission counsel's contention that they have not engaged in advocacy nor trespassed into an adversarial role and are hence able to serve as impartial advisors "akin to the relationship between law clerk and judge."

[36] BCLC submits that "at least as it pertains to the Gaming Sector," Commission counsel's involvement in the examination of witnesses was, at times, in the nature of cross-examination. While BCLC does not dispute the legitimacy or necessity of that level of involvement, it notes that the practice may "have the trappings of advocacy or [adversariness]." Accordingly, BCLC submits the analogy between the roles of Commission counsel and a law clerk "would not appear to be apt." Nevertheless, while "[r]ecognizing the realities of this dual role," BCLC accepts Commission counsel's commitment to neutrality as advisor in the report-writing phase and has confidence Commission counsel will be fair and impartial in that role.

[37] BCLC also expresses confidence that Commission counsel will not base their advice to the Commissioner upon information which Commission counsel learned in their investigations but which are not part of the evidentiary record.

[38] BCLC opposes the third order sought by Mr. Jin as it is expressed, but accedes to an order that comports with Ruling# 26, para. 78, which already restricts the Commissioner from making a finding of misconduct in relation to Mr. Jin. BCLC submits that as worded, the order sought by Mr. Jin is too broad and would preclude "any findings" in relation to Mr. Jin, separate and apart from whether he may or may not have committed misconduct. BCLC notes that a great deal of evidence, some of it restricted from public view, concerning BCLC's anti-money laundering ("AML") measures concerns or is in relation to Mr. Jin and is relevant to the Commission's mandate insofar as making findings about BCLC are concerned. BCLC contends that the Commission's use of such evidence should not be foreclosed if it is not directed towards finding whether Mr. Jin engaged in misconduct.

[39] Accordingly, BCLC submits that the third order, if made, should be modified to comport with Ruling #26 and be made in the following terms:

> That the Commission's reasons, findings or recommendations as to whether or not to make a finding of misconduct in relation to [Mr.] Jin be solely based on evidence that was publicly presented and submissions made upon that evidence which have been made available to the Applicant and which the Applicant has been given the opportunity to respond to.

[40] BCLC relies on the same reasons to submit that if order #1 is made, BCLC be given leave to respond to any submissions by Commission counsel made in relation to Mr. Jin.

[41] Insofar as Mr. Jin's submission that this application be determined after a public hearing in which counsel may make submissions is concerned, BCLC takes no position and leaves it to the Commissioner's discretion.

ii. The Great Canadian Gaming Corporation

[42] The Great Canadian Gaming Corporation ("GCGC") submits that closing submissions should be made publicly by Commission counsel; that the submissions should be neutral and balanced, "regarding what they perceive to be the relevant issues and evidence"; and that making such submissions "would not preclude Commission counsel from playing a role in the preparation of the final report."

[43] GCGC thus takes no position on Mr. Jin's relief sought in paragraph 2 of his notice of application.

[44] GCGC also submits that the closing submissions of Commission counsel would not constrain the Commissioner from determining there are other relevant issues and facts. GCGC takes no position on any of Mr. Jin's other relief being sought in his notice of application.

[45] GCGC argues that in the Gaming Sector specifically, there is "an extraordinary volume of records and testimony" and some of the voluminous records have not been canvassed with witnesses in oral testimony. In GCGC's view, this distinguishes the present case from other public inquiries.

[46] GCGC submits as well that participants have led some responsive evidence that has been contrary to that led by Commission counsel.

[47] GCGC submits given the profuse flow and counterflow of evidence, participants need to know with certainty what issues and evidence Commission counsel assert are relevant and need to be addressed by participants.

[48] GCGC submits such submissions need not be partisan, need not address notices of misconduct in an adversarial way, and need not prevent Commission counsel from performing an advisory function at the report-writing stage. GCGC submits that Commission counsel's work of summarizing and identifying issues for the Commissioner to make determinations upon should be made public through closing submissions rather than "[assisting] the Commissioner only behind closed doors."

[49] GCGC notes that the application response filed by Commission counsel does not identify any case authority or secondary sources to support the position that Commission counsel must not make *any* closing submissions in order to maintain their impartiality. GCGC submits that in inquiries where commissioners required commission counsel to express their advice to the commission publicly (such as Commissioner Estey's Inquiry into Certain Bank Failures and Commissioner Berger's Mackenzie Valley Pipeline Inquiry), it was to ensure "that commission counsel are not allowed to put their arguments privately to the commissioner."

[50] GCGC cites the Davies Commission as an example of Commission counsel declining to make submissions regarding what findings of fact should be made, but providing a new neutral recitation of the facts and chronology and identifying the issues.

[51] GCGC submits inquiries must be as public as possible and both be and appear to be independent and impartial.

[52] GCGC submits that I should issue a direction that Commission counsel be required to serve and file closing submissions in relation to all participants (not just Mr. Jin) and that all participants be permitted to respond to those submissions prior to the Commissioner beginning his deliberations or making any findings or recommendations.

[53] GCGC took no position on any other relief sought by Mr. Jin.

iii. Robert Kroeker

[54] Mr. Kroeker does not take a position in respect of the orders sought by Mr. Jin. While expressing concerns that Commission counsel have trespassed into an adversarial role in the proceedings, he accepts "Commission counsel's apparent undertaking to 'act as impartial advisors' to the Commissioner in the deliberation and report writing phase of the Inquiry," and does not object to counsel who have participated in the gathering and presentation of evidence ("hearing counsel") being involved in the drafting of the report.

[55] Mr. Kroeker, however, disagrees that if Commission counsel were to make closing submissions it would prevent them from adopting such an impartial role. Counsel for Mr. Kroeker submits that given the:

> very broad scope of the evidence and issues canvassed by the Inquiry to date, Commission counsel should minimally articulate the issues that they will be addressing or considering before participants make closing submissions, so participants are able to directly address [those] issues and better assist the Commissioner in his deliberations.

iv. Brad Desmarais

[56] Counsel for Mr. Desmarais adopts the comments of BCLC, GCGC and Mr. Kroeker and is "in agreement that hearing closing submissions from Commission Counsel is especially important."

v. The Province

[57] The Province of British Columbia (the "Province") has indicated they take no position on Mr. Jin's application.

E. MR. JIN'S REPLY

[58] Mr. Jin submits that Commission counsel's response raises four issues to be addressed:

a) impartiality and neutrality as part of the role of Commission counsel as that relates to final submissions;

b) fairness, transparency and the participation of Commission counsel in preparation of the final report;

c) concerns about delay and expense; and

d) s. 7 of the *Charter*.

[59] Mr. Jin argues that the Commission is taking place in three stages: the investigative stage, which includes the use of the summons power (Stage 1); the public hearings (Stage 2); and the deliberation and report-writing stage (Stage 3). He submits

that only the hearings are public and the first and third stages “take place behind closed doors.” He further submits that the Commission's Rules of Practice and Procedure are extensive. However, “they are silent with respect to the manner and extent to which Commission counsel have been or will provide assistance to the Commissioner outside of the Commission’s processes which are public.” He notes the *PIA* is also silent on this issue. Mr. Jin submits that this silence “leads to uncertainty, and invites speculation as to the extent or nature of the assistance that Commission counsel have and will provide.” He relies on principles expressed in *Named Person v. Vancouver Sun*, 2007 SCC 43, which emphasize the importance of the open court principle. He submits that Commission counsel making public closing submissions or providing a summary would fulfil that principle and would “enhance the fairness and transparency of the Inquiry process and enhance the legitimacy of the final report and recommendations.”

[60] Mr. Jin submits that, as Commission counsel are funded by the government and have the power to compel document production and evidence, there is an imbalance between Commission counsel and participants which should be recognized and ameliorated in the context of this application. He submits there is a duty on Commission counsel “to assemble and advance, with equal care and diligence, that which… is favourable and that which is unfavourable to a particular individual or agency.”

[61] Mr. Jin submits that if Stage 3, the deliberative and writing stage, involves Commission counsel at all, the only way to mitigate concern about the appearance of Commission counsel assisting “behind closed doors” is for “their presentation upon the evidence to be made public,” and there should be “a publicly stated rule which sets out the role of Commission counsel during Stage 3.”

[62] Mr. Jin likens the circumstances at issue to a prosecutor in a criminal trial entering a judge's chambers to assist the judge after the evidence has been called. He raises a concern that Commission counsel might press a position in the absence of a participant in Stage 3. He relies on the view of Professor Ed Ratushny, who gives the opinion that it is inappropriate for Commission counsel to both “be a partisan advocate

against a party and then assis[t] the commissioner in making adverse findings against that party at the deliberation stage."

[63] Mr. Jin agrees with Commission counsel that only the Commissioner can make findings of fact and findings of credibility, but argues that is separate from whether Commission counsel might suggest or even urge that certain findings of fact or credibility be made. He argues: "it would be unseemly for Commission counsel to press a witness through cross-examination, and then suggest to the Commissioner, during Stage 3, and in the absence of the participant, that the answers given in response to Commission counsel's cross-examination should be preferred to those given to counsel for a participant."

[64] Mr. Jin questions what role Commission counsel will play in Stage 3, noting it is quite different to ask about transcript references as compared to asking Commission counsel to "analyse issues that relate to [Mr. Jin] and then draft a section dealing with whether the Applicant Mr. Jin was in possession of the proceeds of crime." Mr. Jin submits Commission counsel's response is incomplete because it does not address what Commission counsel suggest as being their appropriate role during Stage 3.

[65] Mr. Jin submits that even in the absence of the former paragraph 4(3) of the Terms of Reference, his privacy, legal, and reputational interests are still engaged and at risk through the Commission process and so are his s. 7 *Charter* interests. Mr. Jin submits that the investigations conducted by Commission counsel would be of clear interest to the police and the Director of Civil Forfeiture and notes that, at the conclusion of the Inquiry, "the Minister has primary responsibility for the final report and all records of the Commission" (underlining in original), citing s. 30 of the *PIA*. He submits that such records could be obtained by law enforcement through the execution of a production order or search warrant. He further notes that Commission counsel can be compelled to testify or produce evidence in criminal proceedings, citing s. 31 of the *PIA*.

[66] He submits in those circumstances, Commission counsel should not be involved in Stage 3 as a potential witness should not be privy to the thoughts and deliberations of the Commissioner.

[67] He notes that Commission counsel submit that the appointment of new lawyers "would entail inordinate and unacceptable delay and expense." Mr. Jin submits there is no suggestion that public submissions would delay the current deadline for the final report and in any event the original deadlines have already been extended. He also submits that the work of organizing the evidence needs to be done in any event and there is therefore no additional work or expense associated with final submissions. He submits the issue of costs is not one which should be allowed to compromise fairness or transparency. He submits that there is more at stake in this final fact-finding stage than there has been through the interim applications. Fairness and transparency at this stage will be enhanced through public submissions. He submits the public would be served by public submissions by Commission counsel as well as the participants.

[68] He also submits that whatever the outcome of this application, the Commission should use it as an opportunity to fill a gap in the rules and clearly and fully define the role, if any, of Commission counsel at Stage 3.

F. COMMISSION COUNSEL'S SUR-REPLY

[69] Commission counsel submit that to some extent, the propositions advanced by Mr. Jin regarding Commission counsel's involvement at the report-writing stage conflate a commission of inquiry with a criminal trial. They submit that while a criminal trial is adversarial, public inquiries are better understood as inquisitorial processes.

[70] Commission counsel contend that in an inquiry setting without the strictures of formal court rules of evidence, when a Commission lawyer asks a leading or suggestive question, this does not entail a sort of "steering" or confrontation that it does in an adversarial trial context.

[71] Commission counsel submit that that they are not adversaries and are not opposed to anyone. Their role is to assist the Commissioner in fulfilling his mandate by adducing relevant and reliable evidence and ensuring that the best analytical information is presented. Commission counsel submit that the following functions may properly be filled by Commission counsel at the Commissioner's direction:

- advising the Commissioner on questions of fact, evidence, and law;
- advising the Commissioner on the weight to be given to testimony or documentary evidence;
- preparing for and drafting the final report; and
- ensuring that there are no statements within the final report that are inaccurate or may expose the Commission to a legal challenge.

[72] Commission counsel submit that it is clear that the Commissioner and only the Commissioner should "make decisions about credibility, findings of fact and findings of misconduct. Those are the quasi-judicial functions and responsibilities that are the Commissioner's alone." Commission counsel submit that this application provides a useful opportunity for the Commissioner to articulate a view of their proper role in the report preparation phase of the process. Commission counsel repeat their submission that it is unnecessary for an oral hearing in respect of this application and note that neither the application reply nor responses of other participants have articulated why the time and expense for an oral hearing of this application is necessary. Commission counsel maintain the position that the order sought in paragraph 3 of the applicant's notice of application is unnecessary; however, if that order is to be made, the modification proposed by BCLC in its response at paragraphs 9-13 is well-founded.

G. DISCUSSION AND CONCLUSION

[73] In determining Mr. Jin's application and the responses of Commission counsel and the participants, it is necessary to consider the larger context in which the relief is being sought.

[74] This Commission of Inquiry was not established to respond to a single event or a series of events. Although it focuses on a particular form of criminal activity, it is unlike those inquiries which received judicial attention in *Nelles v. Grange* (1984), 46 O.R. 210 (C.A.), *Starr v. Houlden*, [1990] 1 S.C.R. 1366, or *Westray*, all of which dealt with specific incidents and specific individuals during the course of a criminal investigation.

As with any inquiry, this Inquiry is not a criminal trial nor a civil action for determination of liability: *Krever SCC* at para. 34.

[75] The impetus for this Inquiry is the widespread belief that criminals and criminal organizations benefit or have benefitted from institutional and/or individual laxity in British Columbia, and enjoy the profits of their criminality in a way that may injure the community, distort the economy and erode trust in the responsible authorities.

[76] The Commission's principal objectives are to illuminate this worrisome public issue, to advance public and institutional understanding of it, and to suggest or recommend measures to deal with it effectively and over the long term.

[77] While it is accurate to state that the Commission has the power to make findings of misconduct against an institution or an individual, as I interpret the Terms of Reference, that is not the Commission's primary focus. The only paragraph in the Terms of Reference which specifically calls on me to review the acts and omissions of authorities or individuals is paragraph 4(1)(b) and it limits me to review the acts or omissions of "regulatory authorities or individuals with powers, duties or functions in respect of the sectors referred to in paragraph (a), or any other relevant sector."

[78] Mr. Jin does not fall into the class of persons whose acts or omissions the Commission has specifically been mandated to review. That, of course, does not mean that he is insulated against a finding of misconduct, as his activities have come under scrutiny within the Commission's mandate to inquire into the extent, growth, evolution and methods of money laundering in the gaming and real estate sectors. The point to be made, however, is that potential findings of misconduct generally—and specifically in the case of Mr. Jin—are secondary and subordinate to a larger objective of assessing, explaining and seeking solutions to the problems which they may be an aspect of. Finding misconduct may be necessary as part of the fact-finding function of this Inquiry, but it is not at the forefront. This is in line with the Supreme Court's guidance in *Krever SCC* at para. 53: "Findings of misconduct should not be the principal focus of this kind of public inquiry. Rather, they should be made only in those circumstances where they are required to carry out the mandate of the inquiry."

[79] In this case the Commission's mandate is extensive. It reaches across many sectors of the economy and engages with many agencies, professions, individuals and other legal entities on a provincial, national and international level. The Commission to date has heard from a wide variety of witnesses from many backgrounds and types and levels of experience and expertise. It has received many volumes of exhibits comprised of reports, affidavits, communications, data collections, video recordings, analyses and expert opinions.

[80] In my view, this Inquiry fits comfortably with the description set out in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 FC 527 (C.A.), at para. 23 [*Beno*] cited with approval in *Krever SCC* at para. 34, where the Court stated

> 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.

[81] In *Westray*, the Court touched on some other functions and features of public inquiries (at para. 62):

> …these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the [actions] pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem.… They are an excellent means of informing and educating concerned members of the public.

[82] I view the features of inquiries thus expressed in *Westray* as apposite to this Inquiry. The Commission has heard abundant evidence not only about the level of concern of British Columbians about the issue of money laundering but also about the level of concern that exists in Canada and indeed around the world. Interest in and concern with money laundering is not confined to those who hear of the issue in the media. It is also prevalent across a wide range of people who study it, are responsible

to prevent it, or who must deal with its consequences—governments, academics, law enforcement and various professions.

[83] There is of course another important dimension of public inquiries generally and of this Inquiry in particular. That dimension is described in *Krever SCC* at para. 31:

> The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. The need for the careful balancing was recognized by Décary J.A. when he stated at para. 32 "[t]he search for truth does not excuse the violation of the rights of the individuals being investigated". This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.

[84] As I see it, the nature, purposes and limitations of public inquiries articulated in *Krever SCC*, *Beno* and *Westray* and the significant dimensions of this Inquiry establish an important context in determining the appropriate role for Commission counsel in the post-evidentiary stage of the Commission's work.

[85] As pointed out by Commission counsel and counsel for Mr. Jin, Professor Ratushny suggests in his text *The Conduct of Public Inquiries: Law, Policy and Practice* that the involvement of Commission counsel at the post-evidence stage of the inquiry process is proscribed.

[86] Commission counsel submit, however, that Professor Ratushny's view has not been followed in subsequent decisions.

[87] In his text, Professor Ratushny takes issue with the observations of the Federal Court of Appeal in the *Krever FCA* case where Décary J.A. for the Court held as follows at paras. 100-103:

> 100 The Red Cross is the only one of the appellants that is asking the Court to prohibit Commission counsel from participating in the preparation of the final report. It is no longer arguing in this Court that Commission counsel exhibited bias during the Inquiry. Rather, it is arguing, first, that counsel for the Commission contributed to the preparation of the notices and thereby took a position against the appellants, and second, that they had access to confidential submissions made by the parties in response to the invitation sent to them on October 26, 1995, that some of that information was not brought to the attention of the Commissioner or of the appellants (which was confirmed by Commission

> counsel at the hearing) and that accordingly there is a risk that the Commissioner may base certain findings in his report on evidence that is not in the record.
>
> 101 With respect to the first argument, the notices state no finding by the Commissioner or his counsel and cannot be said, at this stage, to disclose any bias whatever on their part. With respect to the second argument, I am of the view, like Mr. Justice Richard, that this argument is premature in that the Commissioner has not, to our knowledge, made a final decision as to the role, if any, that he intends to assign to his counsel in the preparation of the final report.
>
> 102 We must be careful not to impose too strict standards on a commissioner who is conducting a public inquiry of the nature and scope of this Inquiry, in terms of the role he may assign to his counsel once the actual hearings have concluded. A final report is not a decision and the case law that may have developed in relation to decisions made by administrative tribunals, particularly in disciplinary matters, does not apply. We must be realistic and pragmatic. The Commissioner will not likely be able to write all of his report himself, or verify the accuracy of the facts set out in it on his own, any more than he could reasonably have asked all the questions during the examination of witnesses or sift through the hundreds of documents that were introduced. What is important is that the findings he makes in his report be his own. If, in order to make those findings, he considers it advisable to seek the assistance of one or more of his counsel, including those who conducted the examination of witnesses, in relation to questions of fact, evidence and law, he must have broad latitude to do so.
>
> 103 This being said, it is one thing to seek the assistance of counsel who participated in the examination of witnesses and it is another to seek the assistance of counsel who have reviewed confidential submissions that were not disclosed to the appellants. The method adopted at the very end of the hearings for inviting submissions from the parties was particularly dangerous in that it opened the door to the possibility that a person in respect of whom unfavourable findings of fact would be made in the final report might not have had knowledge of all of the evidence relating to that person. Since the harm has been done, I am satisfied that the Commissioner will not seek advice from those of his counsel who know things of which he and the appellants do not have knowledge.

[88] In relation to para. 102 in particular, Professor Ratushny notes:

> In light of the subsequent decision of the Supreme Court, [*Krever SCC*], it is doubtful how valid these observations may be. The Court rejected the distinction between a “report” and a “decision” by emphatically stating that procedural fairness applied to the hearings of a commission of inquiry. The Court also noted that the potential consequences for a person's reputation were serious.

[89] I am not persuaded that Professor Ratushny’s view is correct. In the first place, the Court in *Krever SCC* did not discuss any of paras. 100-102 in its decision. In the second place, it explicitly endorsed another statement by the Federal Court of Appeal emphasizing the flexibility required by the commissioner, quoting with approval from *Krever FCA* at para. 79 which reads in part: “the Commissioner enjoys considerable

latitude, and is thereby permitted to use the method best suited to the needs of his inquiry."

[90] Moreover, in my view, the effect of the Court's decision in *Krever SCC* was resonant with, and in fact somewhat less restrictive than, that of the Court in *Krever FCA* with respect to the issue of whether commission counsel could assist in the post-evidence phase of the inquiry. The Supreme Court of Canada found that apart from the issue of prematurity, there was no merit to the complaint "if the [confidential] submissions were composed merely of suggested allegations" as opposed to "new, undisclosed and untested evidence": para. 72. That finding is in distinction to the Court's finding in *Krever FCA* that "the Commissioner will not seek advice from those of his counsel who know things of which he and the appellants do not have knowledge": para. 103. To put it succinctly, the SCC judgment appears more permissive towards commission counsel's involvement in the post-evidence phase of the inquiry than that of the Court of Appeal.

[91] In the circumstances, I am not persuaded that the decision of the SCC derogates in any way from the principles established in paras. 100-102 of *Krever FCA*.

[92] It is clear that in many inquiries held subsequent to *Krever SCC*, as pointed out by Commission counsel in their response to Mr. Jin's application, commission counsel have played a role in the post-evidence phase of the work of a commission.

[93] In the Davies Commission, the Commissioner held at page 32 of his interim report:

> …while others may act as impartial advisors to a commissioner in the drafting of the report, it is the commissioner alone who should make decisions about credibility, findings of fact and findings of misconduct. If, during final submissions, commission counsel does not go beyond presenting a balanced view of the evidence, commission counsel may act as an impartial advisor to the commissioner in the drafting of his report.

[94] As to what role Commission counsel would play in the post-evidence phase of the Commission's work, as I see it, it falls into two parallel categories.

[95] The first category relates to drafting notices of misconduct. In his text, Professor Ratushny sets out a possible procedure describing hearing counsel's involvement in the drafting of notices of misconduct and how they should be dealt with by a commission at pages 394 to 395:

> 1) After closing submissions have been completed, commission hearings counsel will prepare draft letters giving notice to parties against whom adverse findings might possibly be made by the commissioner;
> 2) The commissioner will review the draft letters and may receive advice from commission advisory counsel in order to determine whether there is a reasonable possibility that she might make a finding as suggested by hearings counsel.
> 3) The commissioner may adopt, revise, reject, or hold in abeyance any such draft letters.
> 4) Where the commissioner adopts or revises any such draft letters, she will direct commission hearings counsel to send the (revised) draft letters to the proposed recipients in the form of a notice letter.
> 5) Any such notice letter will not represent any conclusions reached by the commissioner nor even “tentative” findings that she will consider in the context of any further response from the recipient, further analysis, and deliberation.
> 6) Every recipient is invited to write directly to the commissioner (with a copy to commission hearings counsel) and to provide written submissions in response to the notice letter.
> 7) Commission hearings counsel may respond in writing to the commissioner with a copy to the recipient in question, who my reply.
> 8) If the recipient wishes to make oral submissions or introduce further evidence, full justification for doing so must be provided in the light of the opportunity already provided for full participation in the hearing and related “actual notice.”
> 9) Notice letters will be treated in strict confidence and not provided to the other parties, unless disclosure is required by considerations of fairness.
> 10) The commissioner will make findings that reflect adversely on individuals only when they are necessary to fulfill the purposes established by the terms of reference.
> 11) The commissioner will not make any findings of civil or criminal responsibility and, in assessing conduct, will not apply legal criteria that would lead to such a conclusion.

[96] At page 396, Professor Ratushny describes and counsels against the process employed in the *Krever Inquiry* which led to the application to preclude commission counsel from acting as impartial advisors in that inquiry:

> In the Krever Inquiry, the commissioner invited the parties to make confidential submissions as to what findings of misconduct he should consider for the purpose or providing section 13 notices. In my view, such a practice is undesirable. Any such allegations against a party by another party should be made openly, during the investigative stage, at the hearings, in closing submissions, or at all three stages. There is an appearance of unfairness in receiving confidential allegations. It is the responsibility of the commissioner, with the assistance of her counsel, to identify any possible adverse findings and to provide notice accordingly. In this respect, care should also be taken to provide notice where generalizations could apply to individuals even though they are not named.

[97] As is apparent from *Krever FCA*, paras. 101-102, the involvement of commission counsel in the preparation of notices of misconduct does not disclose a disqualifying bias where the notices "state no finding by the Commissioner or his counsel." The notices simply indicate potential findings subject to responses by the recipients.

[98] I will now turn from the general principles which govern the issues raised by Mr. Jin's application and the responses to it, to the specific relief sought.

i. That Commission counsel be required to serve and file final submissions that may be made in relation to the applicant and that the applicant be permitted to respond to those submissions prior to the Commissioner beginning his deliberations or making any findings or recommendations.

[99] In the case of Mr. Jin, I granted narrow participant status in keeping with his previous counsel's submission in support of an application for standing which read as follows (Ruling #26, para. 2):

> 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.

[100] I accordingly granted Mr. Jin participant status (in Ruling #14) "only insofar as it relates to evidence that affects his interests or engages him specifically."

[101] It seems clear from Mr. Jin's notice of application and submission that the core of his concern is the potential that he will face a notice of misconduct and ultimately a

finding of misconduct. As I earlier noted in these reasons, although Mr. Jin does not fall into the class of persons whose acts or omissions I have been specifically mandated to review, it is possible adverse findings may be made in other contexts. It is clear that significant issues of procedural fairness are engaged when a commissioner may make a finding that reflects adversely on a person or agency.

[102] Section 11(2) of the *PIA* provides:

> (2) If a hearing commission intends to make a finding of misconduct against a person, or intends to make a report that alleges misconduct by a person, the hearing commission must first provide the person with
>
> (a) reasonable notice of the allegations against that person, and
>
> (b) notice of how that person may respond to the allegations.

[103] Under s. 12(3) of the *PIA*, persons provided with notice of allegations which may lead to a finding misconduct must have "a reasonable opportunity to be heard."

[104] The Commission's Rules of Practice and Procedure mirror the provisions of the *PIA* respecting findings of misconduct and read as follows:

> NOTICES OF ALLEGED MISCONDUCT
>
> 66. The Commissioner will not make a finding of misconduct against a person or make a report that alleges misconduct by a person unless that person has had reasonable notice under s. 11(2) of the Act of the allegations against him or her and has had opportunity during the Inquiry to respond.
>
> 67. Any s. 11(2) notices will be delivered on a confidential basis to the persons or participants to whom they relate. Supplementary notices may be delivered from time to time by the Commission as warranted by the information before it.
>
> 68. If a person in receipt of a notice under s. 11(2) of the Act believes that it is necessary that additional evidence be received to respond to the allegations of misconduct, he or she may seek to have such evidence placed before the Commissioner in accordance with Rules 46 and 47.

[105] It is clear that notices of misconduct should be sufficiently detailed to allow the recipient to understand the conduct at issue and meaningfully respond. In particular, notices should identify which "aspects of… conduct are being considered that might lead to an adverse finding" (see Ratushny at p. 396; Hon. Stephen Gouge & Heather MacIvor, *Commissions of Inquiry* (Toronto: LexisNexis Canada, 2019) at 192). They

should direct the recipient to the relevant evidence and potential reputational effect or potential adverse conclusion that may be drawn (see *Bentley v. Braidwood,* 2009 BCCA 604 at paras. 70-71). However, the notices need not present particulars of a "case to meet" or notice of charges, as in a criminal proceeding (see *Krever SCC* at para. 69).

[106] As I see it in, insofar as Mr. Jin is concerned, given his limited and narrow grant of participant status, if he receives a notice of misconduct, it will amply inform him of what he needs to know to fully respond and to protect his interests. I thus am satisfied that in relation to Mr. Jin there is no need for Commission counsel to serve and file final submissions that may be made in relation to him. If there is a notice of misconduct, he will receive it and have a chance to respond to it prior to any deliberations or findings.

[107] As I noted earlier in these reasons, only three participants joined in with Mr. Jin in seeking to have Commission counsel make closing submissions. In particular, GCGC submits that Commission counsel should make final closing submissions "regarding what they perceive to be the relevant issues and evidence" and that making such submissions "would not preclude Commission counsel from playing a role in the preparation of the final report."

[108] GCGC seeks a direction that Commission counsel be required to serve and file closing submissions in relation to all participants and that all participants be permitted to respond to those submissions prior to deliberations or making any findings or recommendations. GCGC cited the "extraordinary volume of records and testimony" as a reason why it would be of assistance to have Commission counsel identify the relevant issues and evidence in submissions. Mr. Kroeker and Mr. Desmarais joined with GCGC in submitting that closing submissions from Commission counsel are important given the very broad scope of evidence and issues.

[109] In my view, the submissions of Mr. Kroeker and Mr. Desmarais in relation to the issue of whether I should direct Commission counsel to serve and file closing submissions in relation to all participants, although based on a different foundation from Mr. Jin's, nevertheless attract similar reasoning.

[110] Neither Mr. Kroeker nor Mr. Desmarais were granted broad participant status. In relation to Mr. Kroeker, his grant was “limited to matters involving consideration of his personal conduct and with respect to which his position diverges from that of BCLC and GCGC.” In other words, apart from responding to submissions concerning his personal conduct, Mr. Kroeker has no interest in the broad issues which may be addressed by the Commission in the final report.

[111] As I noted earlier in these reasons, if there is a potential for a finding of fact that reflects adversely on any person or agency, a notice of misconduct that is sufficiently detailed to allow for a meaningful response must be served on that person or agency. In my view, given his limited grant of participant status, Mr. Kroeker's interests are sufficiently protected by such a requirement and he is not entitled to receive closing submissions which contemplate a broader canvass of the issues which will be addressed in the final report.

[112] Mr. Desmarais is in the same position as Mr. Kroeker. He too was granted participant status but “limited to matters involving consideration of his personal conduct and with respect to which his position diverges from that of BCLC.”

[113] In those circumstances, I am not satisfied that either Mr. Kroeker or Mr. Desmarais require that Commission counsel make closing submissions. In short, if either Mr. Kroeker's or Mr. Desmarais’s personal conduct is potentially subject to adverse comment, they will receive adequate notice and an opportunity to respond to the notice in accordance with the *PIA* and the provisions of the Commission's Rules of Practice and Procedure.

[114] Insofar as GCGC is concerned, in my view its submission goes far beyond the scope of its grant of participant status. GCGC seeks an order that Commission counsel be required “to serve and file closing submissions in relation to all participants (not just Mr. Jin), and that all participants be permitted to respond to those submissions prior to the Commissioner beginning his deliberations or making any findings or recommendations.”

[115] It is important to note that GCGC's grant of participant status is limited to the gaming and horse racing sector. In Ruling #1 in which I granted participant status to GCGC, I ruled that "[GCGC's] interests may be affected by… findings" with respect to its operational services to BCLC which are likely to be the subject of evidence before the Commission. I also granted GCGC participant status "to address issues arising from the First and Second German Reports to the extent those reports make recommendations that affect GCGC's interests and/or touch upon GCGC's role with respect to prevention of money laundering in the gaming and horse racing sector."

[116] In my view, GCGC's grant of participant status does not endow it with standing to seek the broad order which it does. As with Mr. Kroeker and Mr. Desmarais, if GCGC's concern is with the potential for an adverse finding, then the procedures in place to provide adequate notice and an opportunity for a response addresses that concern.

[117] If GCGC's submission seeks some other benefit or advantage from closing submissions from Commission counsel, it is not clear what that benefit or advantage is or why GCGC considers it necessary that Commission counsel make submissions in relation to all participants. I agree with GCGC's submission that if Commission counsel were to make neutral and balanced closing submissions, it would not preclude them from participation in the post-evidence phase of the Commission's work. As I see it, however, GCGC's grant of participant status is to enable it to take a position and make submissions on how potential findings may affect its interests or how the First and Second German Reports' recommendations may affect its interests or touch upon its role with respect to prevention of money laundering in the gaming and horse racing sector.

[118] In other words, the Commission is relying on GCGC to provide it with its perspective on the evidence to help shape the Commission's conclusions in the final report. It is only if the potential findings of fact may reflect adversely on GCGC that notice need be given to GCGC to enable a comprehensive response. As I have earlier noted, to avoid the prospect of prejudice, that notice will not be made the subject of public submissions. Commission counsel's involvement in drafting the notice will allow them to provide limited assistance in the post-evidence phase of the Commission's work

by flagging relevant evidence and by reviewing the final draft to ensure accuracy, but will not permit making submissions bearing on whether or not a finding of misconduct should be made.

[119] Accordingly, for the reasons I have given, I decline to make the order sought by GCGC, Mr. Desmarais and Mr. Kroeker requiring Commission counsel to serve and file closing submissions in relation to all participants.

[120] Although I have declined to make the specific orders sought by Mr. Desmarais and Mr. Kroeker and by GCGC, I accept that GCGC's interests are broader than those participants whose status is limited to issues relating to their personal conduct. I also accept that there are other participants whose interests are similarly engaged by broader issues than simply their past conduct. In those circumstances, I accept that it would be beneficial to the orderly presentation of closing submissions to have Commission counsel provide an outline of the issues which they regard as necessary to be addressed in the final report. The form and length of the outline should be flexible and it should not address any potential findings of misconduct or express any opinion on factual findings.

[121] Commission counsel's outline will not limit what submissions participants choose to make so far as it falls within their grant of participant status, nor will it confine the matters which may be addressed in the final report. To be useful, the outline of issues should be filed and served before final submissions. I therefore direct that it be completed, filed and served on or before May 28, 2021.

[122] Commission counsel are entitled but not required to make oral submissions, but those submissions, if made, should not address any potential findings of misconduct, or express any opinion on factual findings.

ii. That Commission counsel who have participated in investigations or presented evidence in the hearings not assist or participate in any way in the Commissioner's determinations, fact-finding, analysis of evidence or in preparation of reasons, findings or recommendations.

[123] Mr. Jin is alone among the participants in seeking an order precluding Commission counsel from assisting or participating in any way in the Commissioner's deliberations, fact-finding, analysis of evidence or in the preparation of reasons, findings or recommendations.

[124] As I understand Mr. Jin's submission, it is that Commission counsel's role as investigators and as advocates in the hearings have put them in a position which is incompatible with serving in an impartial post-hearing role because it would give rise to a reasonable apprehension of bias. Mr. Jin also cites concern about the imbalance between him and Commission counsel, who have the power to compel document production and evidence. He submits, in effect, that granting this application is a way to ameliorate that imbalance. Mr. Jin also submits it would "be unseemly" for Commission counsel to press a witness in the hearing through cross-examination and then suggest to the Commissioner that Commission counsel's view of the witness' evidence should be preferred to that of a participant. As I earlier noted, Mr. Jin submitted that role would be akin to a prosecutor going into a judge's chambers after submissions to assist the judge.

[125] As I see it, Mr. Jin has approached this issue as though this Inquiry was akin to a criminal trial. He has only identified a theoretical apprehension of bias rather than one grounded in evidence. None of the procedures or powers Mr. Jin cites as creating an imbalance are applicable to him.

[126] In the first place, although Mr. Jin is obliged to provide a list of documents and to produce the documents if required by the Commission's Rules of Practice and Procedure, he has not done so. Secondly, although he has been served with a summons to produce documents, he has not complied with it. In the third place, Mr. Jin has neither been interviewed by Commission counsel, nor has he testified. Finally, although Mr. Jin asserts that Commission counsel have engaged in an advocacy role

against him in the hearings, he has given no indication or examples of what he is referring to by those submissions.

[127] The point is simply that Mr. Jin has not been exposed to any of the processes he has expressed concerns about that require the relief he seeks to ameliorate an ostensible imbalance. Had he been cross-examined vigorously by Commission counsel, had his documents been compelled and used against him, had he furnished Commission counsel with information in a compelled interview, his position might be more viable. As it is, however, I do not see the basis for the far-reaching prohibition which Mr. Jin seeks against hearing counsel's participation in the post-evidence phase of the Commission's work.

[128] In my view, Mr. Jin's submissions have misconstrued the nature of the inquiry process, and have mis-cast himself as an accused in a criminal trial. In effect he has conflated the distinction between what procedures must govern the conduct of a criminal trial with its potential to affect an individual's liberty and what is meant in the context of an inquiry such as this by the phrase "the fundamental right of each citizen to be treated fairly."

[129] As I have attempted to explain earlier in these reasons, a substantial majority of the final report will not be concerned with findings of misconduct. I anticipate the report will represent an attempt to distill the evidence received by the Commission into a comprehensive yet comprehensible explanation of what the Commissioner finds to be the facts regarding all the Terms of Reference in paragraphs 4(1)(a)-(d); to make, analyze and explain recommendations respecting those matters in paragraph 4(2)(a)(i)-(iv), in light of those findings of fact; and to relate the Commissioner's findings and recommendations to the four matters set out in paragraph 4(2)(b)(i)-(iv).

[130] In light of how I have interpreted the Commission's Terms of Reference and the task which awaits of producing a final report which comprehensively and comprehensibly addresses those Terms of Reference, and in light of the very substantial body of evidence that has been received by the Commission, I see no principled reason why it is necessary or desirable to preclude Commission counsel from making useful contributions after the close of evidentiary hearings, simply because they

were involved in the investigations or presented evidence in the hearings. Commission counsel who marshalled the evidence are better placed than others to advise on the evidence. Their participation will enhance the prospect that the final report will both inform and educate the public. It will not implicate Mr. Jin's right to be treated fairly.

[131] In that context, however, it is clear that I and only I will make decisions about credibility, findings of fact, and findings of misconduct.

[132] It is also clear that it is I and only I who will decide what recommendations will be made flowing from the Commission's investigations.

[133] I do conclude, however, that Mr. Jin is in an anomalous position insofar as a potential finding of misconduct is concerned, in part, because he has been denied access to evidence that is before the Commission but not made public.

[134] Although I have ruled that any potential finding of misconduct against Mr. Jin will only be determined on the basis of evidence he is aware of or has access to (unless it is favourable to him), I think procedural fairness requires a further direction.

[135] Insofar as I am considering any findings of misconduct against Mr. Jin, I will limit the role of counsel who have participated in the gathering and presentation of evidence to the following:

a. Organizing and bringing forward evidence relevant to those issues; and

b. Reviewing relevant sections of the final report after they have been drafted to ensure that there are no inaccuracies or statements that may expose the Commission to a legal challenge.

[136] Any evidence brought forward by hearing counsel will be limited to evidence that is accessible to Mr. Jin (or that is favourable to him) and should be presented in a fair, complete and impartial manner without urging a particular finding or result.

[137] Should the need arise, I may also seek written submissions from hearing counsel with respect to potential findings of misconduct against Mr. Jin.

[138] Any such submissions will be limited to evidence that is accessible to Mr. Jin and will be provided to Mr. Jin (through his counsel) to allow him to respond.

[139] I will not seek any other form of advice or assistance from hearing counsel with respect to these matters including any advice with respect to issues of credibility, the weight to be given to specific pieces of evidence or any findings and conclusions to be drawn from the evidence.

[140] Nor will I make any findings of misconduct that go beyond the specific allegations set out in any notice of misconduct issued to Mr. Jin.

iii. That the Commissioner's reasons, findings or recommendations as they relate to the applicant be based solely on evidence that was publicly presented and submissions made upon that evidence which have been made available to the applicant in which the applicant has had an opportunity to respond to.

[141] In Ruling #26, I concluded in para. 62 that "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 he is unaware of…."

[142] I therefore ruled as follows in para. 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).

[143] Although, as I see it, the relief sought by Mr. Jin has effectively been granted in Ruling #26 and in my ruling on the relief sought in paragraph 2 of Mr. Jin's notice of application, I will, for the sake of clarity, make the order sought in paragraph 3 of his notice of application, but not in the terms as drafted. As I see it, given Mr. Jin's limited grant of participant status in relation to whether "the evidence being led gives rise to the possibility of having an impact on his rights" (Ruling #14, para. 16), and given the focus of Ruling #26, it is too broad to preclude "reasons, findings or recommendations as they relate to [Mr. Jin]."

[144] Counsel for BCLC submit “it is unnecessary and undesirable to restrict the Commissioner from making *any* findings ‘in relation to the Applicant’, other than on the basis of evidence that has been made public and provided to Mr. Jin” (italics in original). I agree. The thrust of Ruling #26 was to protect Mr. Jin from the unfairness of potential findings of misconduct based on evidence unknown to him. There may well be evidence in relation to Mr. Jin that he is unaware of but which addresses some other issue that does not implicate Mr. Jin in a potential finding of misconduct.

[145] Accordingly, I will make the order sought in paragraph 3 of Mr. Jin's notice of application but in the terms suggested by counsel for BCLC.

iv. That this application be determined in a public hearing after counsel have had a chance to make submissions.

[146] Mr. Jin did not make any submissions as to why he is seeking this relief. No other participant who responded to this aspect of his application supports it.

[147] In the circumstances, I do not consider it necessary to convene a hearing to address Mr. Jin’s application and I decline to do so.

[148] In keeping with Mr. Jin’s submission on the point, in deciding this application, I have not sought nor received advice or assistance from counsel involved in the investigation or preparation of evidence received by the Commission.

Commissioner Austin F. Cullen,