

Commission of Inquiry into Money Laundering in British Columbia

Application for Witness Safety Measures – Ruling #28

Ruling of the Honourable Austin Cullen, Commissioner

Issued February 23, 2021

A. INTRODUCTION

[1] This is an application brought by Commission counsel seeking that special measures be put in place to ensure the safety of two upcoming witnesses in the real estate hearings. The evidence of the two witnesses will focus on the negative impact of alleged money laundering activity on them and others close to them. The witnesses have expressed fear of reprisals if they testify against those said to be responsible for the relevant conduct. The witnesses will not testify voluntarily.

B. SUBMISSIONS OF COMMISSION COUNSEL

[2] Commission counsel submits, in the circumstances, it would not be appropriate to force the witnesses to testify against their will and accordingly, in the absence of measures that will ensure that their identities are not revealed to those whom they fear, the evidence will not be adduced.

[3] Commission counsel submits that it would be appropriate that these two witnesses testify individually in an *in camera* hearing with only counsel and participants, other than Mr. Jin or his counsel present, under a rule of confidentiality with respect to the evidence led. The hearings would not be publicly available by transcript or webcast and any exhibits filed would be sealed and not publicly available.

[4] Commission counsel submits that, apart from submissions participants involved with the evidence might make, the only use of the evidence would be in the

Commissioner's final report and only in a way that ensured that the identities of the witnesses are not revealed.

[5] Commission counsel stipulated that the use of the evidence “would be limited to illustrating the human toll of money laundering, and it could not be used to ground any findings of fact or misconduct against any person.”

[6] Commission counsel acknowledges that the hearings of a commission of inquiry are presumptively public but notes, however, that this Commission is both a study and a hearing commission and “as such has considerable flexibility as to how it receives information and evidence in the course of its work.”

[7] Commission counsel notes that s. 9(1) of the *Public Inquiry Act*, S.B.C. 2007, c. 9 [PIA] provides that the 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.” Commission counsel also references s. 14(1) of the *Act* which reads as follows:

Power to accept information

14 (1) A commission may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in any court.

[8] Commission counsel also cites s. 21(1) which enables a hearing commission to “engage in any activity necessary to effectively and efficiently fulfill the duties of the commission.”

[9] Despite the presumptive openness of the Commission's hearings, Commission counsel relies on s. 15(1)(c) of the *Act* as authority to permit, in appropriate circumstances, the exclusion of the public or a person or class of person from attending “all or part of a meeting or hearing, or from accessing all or part of any information provided to or held by the commission...” provided that “the commission has reason to believe that the order is necessary for the effective and efficient fulfilment of the commission's terms of reference.”

[10] Commission counsel relies on *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 175 in asserting that courts are required “to give a generous interpretation to a commissioner's powers to control their own proceedings...”

[11] The proposed evidence of the witnesses at issue in this application relates to the impact of money laundering activity on them and their families. Commission counsel seeks to introduce the evidence to counter a perception held by some that money laundering is a victimless crime, not one having severe personal consequences.

[12] Commission counsel submits given the limited use of the evidence of the witnesses—which he describes as “the human impact of money laundering”—conditions the analysis of whether introducing it *in camera* would be objectionable.

[13] Commission counsel has provided me with a sealed affidavit in support of this application which provides the names of the witnesses, the nature of and reasons for their fear, and their safety concerns.

[14] Commission counsel sets out the proposed special measures as follows:

- a. each of the two Witnesses would testify alone, in an *in camera* hearing, in the coming weeks;
- b. the only people attending the hearing (conducted by Zoom video conference) would be commission staff and counsel, the Commissioner, participants, and participants' counsel, excluding Mr. Jin and his counsel;
- c. all persons attending would agree to maintain full confidentiality over the identities of the Witnesses and the contents of the evidence led;
- d. the hearings would not be publicly available by webcast or transcript;
- e. any exhibits led would be sealed and not publicly available;
- f. the only permissible use of the evidence would be in the Commissioner's final report (though participants would be able to engage with the evidence at the hearing and make confidential submissions with respect to that evidence in their closing submissions to the extent it falls within their grant of standing and would otherwise be appropriate); and

- g. the evidence would be received on the express footing that its use would be limited to illustrating the human toll of money laundering; it could not be used to ground any findings of misconduct about any person.

[Underlining in original.]

[15] Commission counsel submits that the exclusion of Mr. Jin and his counsel from the hearing is warranted in light of the reasoning which I employed in Ruling #24, excluding him from an earlier *in camera* hearing and Ruling #26 which restricts his entitlement to access to documents. Commission counsel particularly relies on the fact that the limited use to which the witnesses' evidence would be put "could not implicate Mr. Jin's limited grant of standing... [or] have any effect on his interests or rights."

[16] Commission counsel cites and relies upon paragraphs 4 and 5 from Ruling #24 which articulates the test for departing from the general proposition in s. 25 of the *PIA* that hearings are public. Those paragraphs read as follows:

[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*].

[17] Commission counsel argues that given the limited utility of the witnesses' evidence it would be inappropriate to force them to testify and given the evidence they would be testifying about it would not be possible to otherwise shield their identities through measures short of an *in camera* hearing.

[18] In Commission counsel's submission, conducting the hearing with these measures in place is necessary to prevent a serious risk to the administration of

justice: putting vulnerable witnesses at risk. Moreover, the deleterious effects are relatively small given the limited nature of the evidence and given the prospect that the final report can reveal to the public what the essence of the evidence was without disclosing any compromising details.

[19] Commission counsel submits weighing the factors mandated in *Dagenais / Mentuck* favours granting the order sought, emphasizing that without the special measures the evidence of the witnesses is out of reach.

[20] None of the participants have opposed Commission counsel's application.

C. DISCUSSION AND CONCLUSION

[21] I accept that the evidence which is the subject of this application may be of interest to the public. The subject of money laundering is often referred to in the abstract. Any evidence which is capable of illuminating it as an activity with real consequences to real people adds a dimension to it which deepens our collective understanding of the nature of its criminality.

[22] Although that is an important insight to have, it is not the central focus of this Inquiry, which does not concern individual instances of alleged money laundering except insofar as they might identify trends or methods.

[23] Accordingly, while I consider the evidence to have some probative value, it is not something that is crucial for the public to see first-hand to understand the issues arising out of the Commission's Terms of Reference. I accept that, as argued by Commission counsel, it would not be appropriate to attempt to force the witnesses to testify without the protection of the special measures in the particular circumstances of this case.

[24] Although it is an option to simply forgo the evidence altogether, or to inform myself of the evidence using some method other than in the hearing process, I have concluded that rather than hearing from the witnesses through a private interview or

in the context of a hearing where only Commission counsel are present, it is preferable to have the evidence heard (and tested) by other participants and subject to some rigour. I have considered the *Dagenais / Mentuck* test, the situation of the witnesses, the fears they have expressed and the reasons for them. I have considered the situation of Mr. Jin which I have outlined in Ruling #24 and Ruling #26 and I conclude that on balance the circumstances weigh in favour of having the witnesses testify, subject to cross-examination, but with the special measures identified by Commission counsel put in place.

[25] While I generally accept Commission counsel's submission that any public reference to the evidence should be limited to the final report, I am mindful that this is a public Inquiry and I will release a synopsis of the witnesses' evidence shortly after they testify to ensure that the public has as much information as possible about the testimony of these witnesses without compromising their safety.

[26] I accordingly make the following orders:

- a. each of the two witnesses will testify alone, in an *in camera* hearing, in the coming weeks;
- b. the only people attending the hearing (conducted by Zoom video conference) will be Commission staff and counsel, the Commissioner, participants, and participants' counsel, excluding Mr. Jin and his counsel;
- c. all persons attending will agree to maintain full confidentiality over the identities of the witnesses and the contents of the evidence led;
- d. the hearings will not be publicly available by webcast or transcript;
- e. any exhibits led will be sealed and not publicly available;
- f. the only permissible use of the evidence will be in participants' submissions, in a synopsis released by the Commissioner shortly after the witnesses' testimony and in the final report, providing that in no case will

any reference to the witnesses' testimony reveal any identifying information;

- g. all participants, except Mr. Jin, will be entitled to cross-examine these witnesses and make confidential submissions with respect to that evidence in their closing submissions to the extent it falls within their grant of standing and would otherwise be appropriate; and
- h. the evidence will be received on the express footing that its use would be limited to illustrating the human toll of money laundering; it will not be used to ground any findings of misconduct about any person.

A handwritten signature in cursive script, appearing to read "Cullen".

Commissioner Austin F. Cullen