Commission of Inquiry into Money Laundering in British Columbia

Application for Answers to Certain Questions and Request for Certain Documents – Ruling #37

Ruling of the Honourable Austin Cullen, Commissioner

Issued January 18, 2022

A. INTRODUCTION

[1] Paul Jin has brought an application seeking "that answers to the following questions, and the documents requested be provided to the applicant."

[2] The questions posed and the documents sought by Mr. Jin in his application are as follows:

1. Were lawyers Wallace Wong, Zachary Ng, or any other lawyer who provided legal services to Mr. Jin delivered a summons?
2. If so, provide the applicant with a copy of the summons.
3. Was the Commissioner provided with something in writing to support the application for and justify the issuance [of] any summonses which were granted?
4. If so, provide a copy of the written materials.
5. Was the Commissioner provided with something verbally to justify the issuance of the summons?
6. If so, who had those verbal communications with the Commissioner and provide a summary of the communications that were had.
7. Does the Commissioner give individual consideration to [each] summons that is presented to him and applied for or are they presented and signed in bulk?
8. Provide a list of individuals/entities that were issued a summons regarding the applicant.
9. Provide copies of the notes, transcripts and/or recordings of the compelled interviews of Wallace Wong, Zachary Ng and any other lawyer who provided legal services to the applicant.
10. Advise whether the information provided to Commission investigators by Mr. Wong or Mr. Ng or any other lawyer who provided legal services to the applicant, or the notes or recordings of that information were disseminated to anyone outside of the Commission?

11. What is the total number of summonses that have been issued by the Commission?
12. Describe the circumstances under which the Commission or its counsel or investigators may share records and/or information with law enforcement.

[3] Commission counsel do not oppose providing the information sought in question 10 and have already answered that question. For the reasons that follow, I have determined that Mr. Jin is not presently entitled to any of the other information or documents sought in his application.

B. BACKGROUND

[4] Mr. Jin was granted participant status in this Commission of Inquiry on November 5, 2020 (see Ruling #14). In granting him participant status, I limited his participation to involvement:

> in the public hearing, questioning witnesses, making submissions and exercising the rights of a participant, but only insofar as it relates to evidence that affects his interests or engages him specifically. He is not granted a broader form of participant status that would permit him to address general topics.

[5] I also noted that Mr. Jin's participant status "is not based on topic area, but rather in relation to wherever the evidence being led gives rise to the possibility of having an impact on his rights."

[6] I summarized the foundation for Mr. Jin's application for participant status in Ruling #14. In applying for standing, Mr. Jin set out the limited manner in which he sought to participate:

> [10] Mr. Jin is looking ahead to the possibility of the Commission making findings of fact, and his need to be in a position to ask questions of a witness providing evidence about his activities as well as those associated with him. In short, he seeks the opportunity not to simply learn about what has been said, but to be involved in the process of evidence being tendered, including an ability to challenge witnesses and evidence as necessary.
>
> [11] Mr. Jin does not seek a broad grant of standing. He has expressed no interest in becoming involved in general policy issues. Instead, he says that the sole purpose of him questioning witnesses will be to address findings relating to him and those associated to him. Likewise, he seeks to make submissions on those issues but not more generally on policy and reform issues.

[7] On February 5, 2021, I issued Ruling #26, which addressed an application brought by Commission counsel for directions on Mr. Jin's access to records "which are germane to the Commission's Terms of Reference." In Ruling #26, I noted that:

> the Commission has the authority to receive non-privileged documents by request or by summons from participants and from other persons or agencies. Pursuant to Rule 17 of the Commission's *Rules of Practice and Procedure*, the documents are to be treated as confidential unless they are made public through the hearing process.

[8] In paragraph 82 of Ruling #26, I made it clear that "any findings in relation to allegations of misconduct against [Mr. Jin] will be confined to evidence to which he has access."

[9] As I noted in Ruling #26 at paragraph 4:

> Despite his grant of participant status, Mr. Jin made no efforts to become involved in any of the Commission's hearings until January 25, 2021. He has not responded to a Summons to Produce Documents under s. 22(1)(b) of the *Public Inquiry Act*, S.B.C. 2007, c. 9 [*PIA*], which was issued on November 9, 2020, nor has he complied with his obligations as a participant under R. 13 of the Commission's *Rules of Practice and Procedure*.

[10] As it turned out, Mr. Jin has not, to date, complied with his obligations as a participant or with the terms of a summons to produce documents under s. 22(1)(b) of the *Public Inquiry Act,* S.B.C. 2007, c. 9 [*PIA*].

C. THE APPLICANT'S SUBMISSIONS IN SUPPORT OF HIS APPLICATION

i. Solicitor-client privilege and the open court principle

[11] Mr. Jin submits that two propositions "cannot reasonably be disputed":

> There are two propositions which cannot reasonably be disputed. The first is that communications which are protected by solicitor-client privilege cannot lawfully be compelled by the Commission. It is outside the jurisdiction of the Commission to compel the production of such communications.
>
> The second is that the Commission must comply with the open court principle as guaranteed through s. 2(b) of the Charter. Section 2(b) guarantees that everyone

> has the “freedom of thought[,] belief, opinion and expression, including freedom of the press and other media of communication.”[1]

[12] Dealing first with solicitor-client privilege, the applicant has claimed privilege over “the information obtained through legal compulsion from Wallace Wong, Zachary Ng and any other lawyer who provided legal services to the applicant.” He submits that a summons that compels a lawyer to attend a meeting to “answer questions about the lawyer's client, posed by investigators who allege that the client was engaged in criminal conduct” would undermine the solicitor-client relationship. He further states that the harm done to the lawyer-client relationship would be exacerbated if he is denied “the information needed to understand what was compelled, through what process, and whether his lawyer-client privilege has been undermined.”

[13] The applicant relies on the prominence that solicitor-client privilege is afforded by the law, citing *R. v. McClure*, 2001 SCC 144 [*McClure*]; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 [*Descôteaux*]; *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61 [*Lavallee*]; and *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 [*Federation*]. In particular, he relies on the latter decision for the proposition that solicitor-client privilege “must remain as close to absolute as possible if it is to retain relevance.” In keeping with that principle, the Court in the *Federation* case noted that in the *Lavallee* case it was determined to be a constitutional infirmity in the legislation governing searches of law offices that “the scheme wrongly transferred the burden of protecting the privilege from the state to the lawyer… because under the scheme only the lawyer could assert the privilege and the client did not have to be given notice….”

[14] The applicant notes that “[i]n the present case, no notice was given by the Commission to the applicant that compelled interviews of lawyers were either proposed

[1] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

or had taken place." He submits "[t]here is no reason this could not and should not have been done."

[15] The applicant further submits that:

> there is no information available to the applicant which reveals that Commission investigators or the Commission recognized and implemented the "high level of protection" to solicitor-client privilege that the [Supreme Court of Canada] in *Federation* mandated as necessary, there is no evidence the Commissioner was "more demanding" in issuing a summons for the lawyers or that "special procedures" were imposed; there is no evidence that "stringent norms" were imposed to ensure the protection of privilege or that the investigators or Commissioner considered whether there were alternatives available to them.

[16] The applicant submits that there is:

> no information available to the applicant which reveals that the Commissioner was even made aware that summons were directed to lawyers, who provided legal services to the applicant, or that conditions were suggested, considered or imposed to protect the obvious risk to privilege that a compelled interview would pose.

[17] The applicant contends that if the Commissioner was not made aware that the summonses were for lawyers, and if no stringent restrictions were imposed to ensure the protection of solicitor-client privilege, then the Commission investigators were given a blank cheque "to demand answers from the lawyers in a private setting and the Commissioner [was] not given the opportunity to make an informed and independent decision" as to whether to issue the summonses.

[18] The applicant submits that, in the current context, he is unable to determine the validity of the process under which each summons was obtained and whether the "purpose and scope of the compelled interviews was lawful." In his view, it is incumbent on Commission counsel to demonstrate that "the law with respect to protection of solicitor-client privilege has been complied with."

[19] As for the applicant's second proposition, that the Commission must comply with the open court principle, the applicant submits the public nature of the inquiry—it was called for and its terms were set by a public official, it is being paid for by public funds and has a public purpose—weigh in favour of openness rather than secrecy.

[20] The applicant relies on the text of *Commissions of Inquiry* by the Honourable Stephen Gouge and Heather MacIvor (LexisNexis 2019) where the authors wrote that "the presumption that legal proceeding[s] should be open to the media and the public" applies with particular force in the hearings and reports of public inquiries which are designed to expose problems and "[help] to heal community trauma."

[21] The applicant also relies on *A.G. (Nova Scotia) v. MacIntyre,* [1982] 1 S.C.R. 175 in which Dickson J. (as he then was) wrote:

> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law.

[22] The applicant submits the remarks on the importance of transparency apply to the Commission as well as Commission counsel through whom the Commission operates. He says that any summons authorized and issued must be conducted in accordance with the law. He contends that it is necessary for the Commission to demonstrate that it acted in accordance with the law and provide the information sought to enable the applicant to review the conditions under which the summons were authorized and issued. He says that limits on public access can only be justified "where there is present the need to protect social values of superordinate importance."

[23] The applicant acknowledges the order which I issued on September 18, 2020; paragraph 2 of which reads as follows:

> Commission counsel may provide access to the Records to participants, witnesses, and/or other persons where they determine that doing so is appropriate and that this will not undermine the integrity of the Commission's investigative process.

[24] The applicant submits, however, that the test of what is "appropriate" is not defined and Commission counsel are delegated "the task of implementing a rule, or test or guideline for denying access that is both expensive and vague." He says that Commission counsel should not be the gatekeepers for deciding whether providing records is "appropriate."

[25] The applicant submits no social value of superordinate importance has been identified to the applicant "which could possibly justify the denial of the information sought." He contends:

> it is difficult to conceive of a social value that would justify keeping secret both the process in law which was used by Commission investigators to ask for a summons for lawyers, and the manner in which the authorization for the summons, and the execution of the summons recognized and protected solicitor-client privilege.

[26] The applicant submits that the issuance of a summons under s. 22 of the *PIA* has *Charter* implications and that the prospect that a summons may be issued in the absence of grounds for belief that a person has relevant information or documents to provide "creates the risk of an arbitrary use of the statutory authority." He contends that issuing a summons is a quasi-judicial act which "must only be exercised by a Commissioner who is impartial, neutral and independent and through a process that is fair, transparent and reviewable."

[27] Given the foregoing, the applicant says there must, at least, be a process in which the Commissioner considers and determines on the basis of the

> application materials presented, whether it is appropriate in law for the summons to be issued… there must as well be a record of this process so [the] decision can meaningfully be reviewed… [and] so that the process is demonstrably transparent, fair and in accordance with law.

[28] The applicant submits, in the alternative, that if the Commissioner does not "act as a gatekeeper between the investigators and the proposed target of a summons, then … Commission counsel should clearly and plainly explain its position with respect to what it believes the law requires."

ii. The order issued September 18, 2020

[29] On September 18, 2020, I issued the following order following receipt and review of Commission counsel's submissions in support of an order under s.15(1)(c) of the *PIA*:

> 1. Pursuant to ss. 9(2)(f), 9(5) and 15(1)(*c*) of the *Public Inquiry Act*, subject to paragraph 2, persons other than Commission staff and contractors

must not access the records produced and information obtained by the Commission in the course of its investigative work preparatory to public hearings (the “Records”).

2. Commission counsel may provide access to the Records to participants, witnesses, and/or other persons where they determine that doing so is appropriate and that this will not undermine the integrity of the Commission’s investigative process.

3. The process for providing access to the Records will be as set out in the Commission’s *Rules of Practice and Procedure*, pursuant to s. 9 of the *Public Inquiry Act*.

4. This Order shall remain in effect unless and until varied by the Commissioner in accordance with the *Public Inquiry Act*.

[30] Section 15(1)(c) of the *Public Inquiry Act* reads:

> Power to prohibit or limit attendance or access
>
> **15** (1) A commission may, by order, prohibit or restrict a person or a class of persons, or the public, 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,
>
> …
>
> (c) if the commission has reason to believe that the order is necessary for the effective and efficient fulfillment of the commission's terms of reference.

[31] In his undated notice of application brought October 22, 2021, the applicant comments on the September 18, 2020 order, a copy of which was served on the applicant after he was granted participant status on November 5, 2020.

[32] The thrust of the applicant's submissions with respect the September 18 order is as follows:

1) That the order is not accompanied by reasons why it is necessary for the effective and efficient fulfilment of the Commissioner's Terms of Reference;

2) Although the order provides for access to records of Commission counsel if Commission counsel determine it is “appropriate” to do so and that doing so “would not undermine the integrity of the Commission's investigative process,” the applicant submits that this process is a delegation of “a broad, imprecise and almost completely unfettered discretion to deny access to a record”;

3) The order as drafted does not apply to or govern “information” which is not a record, and much of what the applicant seeks is information rather than records;

4) The order refers to the integrity of the Commission’s investigative process. The applicant submits the investigation has now been completed. Accordingly, its integrity cannot be compromised, and in any event, no evidence has been presented of any compromise of the integrity of the investigation;

5) The applicant also submits that while s. 15(1)(c) of the *PIA* permits access to information to be restricted where “the Commission has reason to believe that the order is necessary for the effective and efficient fulfilment of the Commission's Terms of Reference,” the September 18, 2020 order allows Commission counsel to grant access where they “determine” that it is appropriate to do so and where access will not undermine the integrity of the investigation.

[33] The applicant submits there is a gap between restrictions on access to information imposed by s. 15(1)(c) of the *PIA*, which requires “reason to believe” that denial is justified, and paragraph 2 of the order, which allows Commission counsel to grant access where they “determine” it is appropriate to do so and where to do so will not undermine the integrity of the investigation:

> 66. Finally, while s.15(1)(c) permits a restriction on access where the “commission has reason to believe that the order is necessary for the effective and efficient fulfillment of the commission's terms of reference”, by

contrast, the Order permits Commission counsel to grant access where they "determine" that it is appropriate to do so and access will not undermine the integrity of the investigation. (Emphasis added.)

67. The test of "reason to believe" is evidence based. The decision may not be made arbitrarily or upon conjecture. Under s.15(1)(c), access may be denied only where there is evidence which provides the Commission with a "reason to believe" that the denial is justified.

68. In contrast, under the Order, Counsel for the commission must simply make a "determination."

69. Finally, whereas s.15(1) permits access to be prohibited or restricted under specific circumstances, and is therefore based on a presumption of openness, the Order is the opposite and presumes the denial of access unless Commission counsel make a determination that it should be granted.

70. If it is submitted that it is not proper or lawful to delegate to Commission counsel the task of determining whether the applicant may receive the information he has requested. Alternatively, if that delegation is permitted in law, Commission counsel must apply the same test the law would require the Commissioner to apply.

[34] The applicant submits that the structure of the Commission is such that Commission counsel may play dual roles by acting as investigators and as the Commissioner's counsel. The applicant submits the effect of the order may be to place Commission counsel in the role of pursuing an investigation of the applicant's activities, compelling his lawyers to attend interviews and furthering the investigation into the applicant, while at the same time determining that the applicant's request for information should be denied.

[35] The applicant submits:

74. At its worst, the investigator who obtained a summons for one of the lawyers may wish to shield the process by which the summons was obtained and "determine" for that reason that the request for the summons should be denied.

75. The denial of the requests for information has implications for the transparency and fairness of these proceedings and also has constitutional dimensions because of the open court principle and solicitor-client privilege.

[36] I note that while the applicant has made submissions in respect of the s. 15 order, he has not sought any relief in respect of the order.

D. THE POSITION OF COMMISSION COUNSEL ON THE ORDER SOUGHT BY THE APPLICANT

[37] Commission counsel oppose granting the relief sought by the applicant except for providing an answer to item 10 of the list of questions and documents sought by the applicant in this application for disclosure. Commission counsel advise that they have provided to Mr. Jin the information sought in item 10.

[38] With respect to the remaining 11 items sought in the application, Commission counsel oppose providing the information or documents sought. With respect to items 1, 2, 8 and 9, Commission counsel are opposed on the basis that “third-party privacy interests would be affected, and the information sought has no impact on the Applicant's rights in the Inquiry.”

[39] Insofar as items 3, 4, 5, 6, 7, 11 and 12 are concerned, Commission counsel oppose disclosure of the requested information because the information sought “relates to specific questions of Commission procedure that are irrelevant to the Applicant's interests in procedural fairness in this inquiry process.”

[40] Commission counsel note that an agreed statement of facts (“ASF”) prepared by the applicant and Commission counsel has been filed on this application. The ASF sets out Commission counsel's position and the rationale for that position taken on each of the applicant's requests for information/documents.

[41] Commission counsel note that their submissions seeking the s. 15 order dated September 18, 2020 express the reasons for seeking “a zone of confidentiality” in relation to the Commission's investigative and preparatory work in order to protect the integrity of the Commission's information-gathering process; safeguard privacy interests; foster an effective and open information-gathering process; and promote the highest quality of information gathering.

[42] Commission counsel note that once the information gathered is adduced before the Commissioner, it is, except in rare circumstances, made public. They further submit that with respect to Mr. Jin specifically, evidence put before the Commissioner of his

activities will not be used in considering whether to make a finding of misconduct against him (unless the evidence is favourable to him) as a result of Ruling #26.

[43] Commission counsel contend that since the applicant claimed solicitor-client privilege over information provided to Commission counsel via interviews with his lawyers retained to enforce his debt claims, the information at issue was sealed until the privilege claim is resolved. They note that the applicant has declined to permit his debt enforcement counsel to have access to the information to confirm with the applicant that there had been no breach of privilege. They also indicate that the information has not been provided to the Commissioner.

[44] Commission counsel submit that items 1, 2 and 8 involve the Commission's use of summonses and engage the interests of the recipients who may have received summonses. They contend that the process by which preliminary information obtained by the Commission which never became evidence before the Commissioner is generally entitled to confidentiality to ensure fairness and avoid reputational damage. Commission counsel cite Gouge and MacIvor in their authoritative text on *Commissions of Inquiry*: "The coercive powers conferred on fact-finding inquiries raise serious issues of procedural fairness, self-incrimination and reputational damage."

[45] Commission counsel point out that as a result of Ruling 26, no finding of misconduct can be made with respect to Mr. Jin based on any information obtained through his debt enforcement counsel that is not known to him. In those circumstances, it is "inconceivable that the pre-hearing information obtained by Commission counsel, or the procedure by which [it] was obtained, will engage the Applicant's interest in procedural fairness in the Commission process."

[46] Commission counsel submit that if the applicant's interest in obtaining the information sought relates to interests he has in extraneous proceedings, this is the wrong forum. They state that "[t]he Commission process should not be invoked to grant… remedies for use in other or future legal proceedings." Rather, "if remedies are [sought] in other processes, they should be sought there."

[47] Commission counsel submit that given the presumption of confidentiality of pre-hearing investigations and the fact that the applicant has no procedural fairness interest in receiving this information, there should be no departure from the presumption of confidentiality of the information requested in items 1, 2, 8 and 9.

[48] Commission counsel further submit it would be inappropriate to provide the applicant with transcripts of the interviews of third parties as they are entitled to confidentiality and, as with the summonses issued, there are reputational and privacy interests at stake. They note that "[t]hose interviewed by Commission counsel may, of course, have been interviewed on various matters, including their own practices and processes generally."

[49] Insofar as the implicit suggestion in the applicant's submissions that the interactions between Commission counsel and the applicant's debt enforcement counsel implicated solicitor-client privilege, Commission counsel say that "no privileged information was obtained and there was no breach of privilege."

[50] Commission counsel point out that the applicant could obtain the information he is seeking about the content of the interactions from his debt enforcement counsel. They note that they have offered to provide records of their interviews to the debt enforcement counsel, but the applicant has refused to allow this. Commission counsel submit that "[t]his would confirm that no privileged information moved to the Commission, without a destructive effect on third-party privacy interests." They continue:

> The Applicant's request for the notes, transcripts and/or recordings of the Impugned Interviews assumes that the entirety of these interviews focused on the Applicant, and the Applicant only. As noted, it is commonplace that interviews address a number of issues and general points of practice or experience. Interviews may also, of course, touch on different factual matters or dealings. To provide one client — the Applicant — with access to the full record of a confidential interview which may have involved other people and issues, is overbroad and unjustified.

[51] As for items 3, 4, 5, 6 and 7, which “concern information relating to Commission counsel's role when the Commission issues summonses,” Commission counsel say that the applicant’s submissions are at odds with s. 9 of the *PIA*, “which affords the Commission ‘the power to control its own process’ and to ‘make directives respecting practice and procedure to facilitate the just and timely fulfilment of its duties.’”

[52] Commission counsel submit the pre-hearing activities of the Commission are not subject to the same presumption of openness as are the evidentiary hearings. The Commission is entitled to conduct its preparatory work within a zone of confidentiality. It is appropriate that at the preparatory stage, where “reputational, privacy and security interests are to be safeguarded,” the work is undertaken in a confidential manner.

[53] Commission counsel further submit the applicant's submissions with respect to items 3-7 do not engage with any of the applicant's legitimate interests in this Commission “including his interest in procedural fairness.” If there is any concern about a summons that was issued, the recipient of the summons may apply to set aside the summons.

[54] Commission counsel note that no evidence was led before the Commission arising from the issuance of the summonses at issue. As a result, the applicant’s submissions have “no connection to the Inquiry hearings, nor the Applicant's legal interests in the Commission process.”

[55] Insofar as item 11 is concerned (“What is the total number of summonses that have been issued by the Commission?”), Commission counsel take the position that this information is irrelevant to the applicant's interests and would provide “no insight relating to [his] legal position.” Commission counsel submit there is “no compelling reason to require that the Commission furnish this statistic for the Applicant.”

[56] Item 12 seeks a description of “the circumstances under which the Commission or its counsel or investigators may share records and/or information with law enforcement.” Commission counsel submit this question ought not to be answered. In the first place, there is no basis to suggest that any records have been shared with law

enforcement. Indeed, in responding to item 10, Commission counsel have confirmed that no information that may have been obtained through an interview with Mr. Jin's debt enforcement counsel has been shared with anyone.

[57] In the second place, Commission counsel submit that to attempt to answer this hypothetical question gives rise to the risk that some circumstance where it may be appropriate to provide information to law enforcement may be overlooked. It would therefore be inappropriate to give an answer to the question which may be inaccurate or incomplete.

[58] Commission counsel confirmed, in their submissions, that no information from the interviews with the applicant's lawyers "has been disseminated to anyone outside the Commission," nor led as evidence in the Commission's hearings, nor conveyed to the Commissioner. I have not, in fact, seen or received transcripts of the interviews of Mr. Jin's debt enforcement lawyers.

[59] In the result, Commission counsel submit that items 1-9, 11 and 12 should not be disclosed to the applicant and that item 10 has already been provided to him.

[60] Commission counsel submit that although much of the applicant's argument focuses on solicitor-client privilege, he has not established any breach of privilege nor sought any such declaration or finding.

[61] Moreover, Commission counsel note that, although Mr. Jin has critiqued the foundation for the s. 15 order, he has not sought to have it set aside.

E. MR. JIN'S REPLY

[62] The applicant replied to Commission counsel's submissions on November 2, 2021. In his reply, he points to a part of Commission counsel's submissions in which they state that Mr. Jin "has not even established the simple proposition that such lawyers spoke with Commission counsel. It would, presumably, have been a straightforward matter for the Applicant to establish such facts through his own lawyers." The applicant contends that there is an "inconsistency" in Commission counsel's

submissions in that while submitting that Mr. Jin has not referred to or advanced any evidence that his lawyers were summonsed or interviewed, Commission counsel refer to “the interviews” or “records of the interviews” throughout the course of submissions. Mr. Jin submits that Commission counsel's statement that he “has not even established the simple proposition that such lawyers spoke with Commission Counsel" suggests that “it is Commission Counsel's position that Mr. Jin's lawyers were not compelled and were not interviewed.”

[63] It is the applicant's position that “[t]he Commission is attempting to withhold the very records that would show the compelled interviews took place.”

[64] The applicant submits that the coercive powers granted to Commission counsel can be exercised in secrecy and without accountability. He contends that the “zone of confidentiality” claimed by Commission counsel “would act as a shield against inquiry as to whether the rule of law has been complied with in their fact-finding inquiries.”

[65] The applicant submits that whether Commission counsel “recognized the principles of lawyer-client privilege can only be decided on a review of what actually took place.” While acknowledging that Commission counsel were willing to provide records of the interviews with his debt enforcement counsel, the applicant raises the spectre that the interviews may have “had an intimidating effect on the lawyers.” He also raises the issue of whether the interviews compelled “answers or the disclosure of documents in relation to a criminal investigation, suspicions or allegations of money laundering… loan sharking, real estate… or the outstanding civil forfeiture proceedings…”

[66] The applicant submits that even if Commission counsel chose not to publicly use the information, “it is unknown how that information has otherwise been used or who has had access to it.” Furthermore, “[i]t is not fanciful to conclude that the effect of the compelled interviews divided the lawyer-client relationship.”

[67] The applicant submits that Commission counsel's contention that “there is an easy answer available to the Applicant by asking the interviewees, his lawyers, about

any interviews and what pertained to him," is "giving evidence in the disguise of a submission and Mr. Jin does not accept that this submission constitutes confirmation as is suggested."

[68] The applicant says that "it is extraordinary that Commission [counsel]… will not state what, in their position, the law requires of them in obtaining a summons."

[69] The applicant further submits "[s]uch a secretive approach is contrary to the rule of law and any possible measure of accountability." He contends that the process under which the summonses were issued "should not be a secret."

[70] Further, the applicant casts doubt on Commission counsel's submission that "how summonses were processed… are procedural issues which may properly remain internal to the Commission," submitting that "[t]he exercise and limits upon coercive powers… [are] not merely 'procedural' such that secrecy is somehow justified." He submits that the "open court" principle "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law… thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice." He relies on *Sherman Estate v. Donovan*, 2021 SCC 25.

[71] The applicant further submits that Commission counsel rely on "unsubstantiated claims," which eliminates any guarantee that the summonses were issued in accordance with law and that compelled interviews of counsel respected lawyer-client privilege.

[72] On the whole, the applicant submits that Commission counsel have "shown no factual or legal basis which would justify the denial of Mr. Jin's application."

[73] On December 20th, 2021, the applicant filed an addendum to his reply submissions of November 12th, 2021 to which he appended a summons which "was delivered to one of the lawyers." Mr. Jin submits that "the significance of the summons to the application is that the person to whom the summons was directed was identified by name and address but there is no reference to the fact that the person is a lawyer."

[74] Mr. Jin further submits that the summonses do not "limit the scope of the investigation or what was compelled by the investigators and contends that the 'scope or limits of the investigation, if any,' was left entirely to the discretion of the investigator conducting the compelled interview."

[75] Mr. Jin contends that the summons does not in any way refer to solicitor-client privilege nor does it restrict the investigation to those issues which are not privileged and it did not require that notice be given to Mr. Jin or to the Law Society so that measures could be put in place to protect Mr. Jin's privilege.

[76] Mr. Jin submits that in the absence of the Commissioner imposing any limits on the meeting, the protection of solicitor-client privilege was left to hope that the investigator "would not press into such issues and if they did that the lawyer would assert the privilege which belongs to the applicant." The applicant submits that "hope of this sort" is an insufficient safeguard of solicitor-client privilege.

F. DISCUSSION AND CONCLUSION

[77] As I noted above, as Commission counsel have provided the information sought in item 10, I need not deal with this item. With respect to the remaining 11 items, I am not satisfied that the applicant has established a basis for the relief he seeks.

[78] The applicant has articulated no foundation for a conclusion that his rights are at stake. Although he has framed Commission counsel's interviews of his debt enforcement counsel as acquiring information obtained "through legal compulsion" which is "protected by solicitor-client privilege" and "cannot lawfully be compelled by the Commission," he has offered not even a shred of evidence that Commission counsel have obtained privileged information through their interviews with his lawyers.

[79] In *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009) by Ed Ratushny, the author notes at page 342 that:

> [solicitor-client] privilege applies to communications made between a lawyer and a client in the course of obtaining legal advice. Even though there is a lawyer-client relationship between them, the privilege does not apply to communications

> beyond the scope of legal advice. Once disclosed to a third party, the client no longer has control of their use. Nor does the privilege apply to communications that have as their purpose the facilitation of commission of a crime. Nor does it apply to documents or other articles merely placed with the lawyer since these are not communications.

[80] Although it is manifest that the applicant's lawyers have an ongoing duty of loyalty to him, the applicant has furnished no evidence that he has been in communication with them to discuss or discover the content or context of their interviews with Commission counsel. In his reply submissions, Mr. Jin wafts the suggestion that his lawyers were intimidated, without making any attempt to ground that submission with any evidence.

[81] Mr. Jin seeks to stand on the prominence of solicitor-client privilege in Canadian law to advance his argument, while remaining oblivious to the need to furnish any evidence to support his contention that, in fact, a breach of his privilege occurred in the present case. Instead, he appears to reason that as “no information” has been provided to him to show that Commission lawyers “recognized and implemented the ‘high level of protection’ to solicitor-client privilege that the SCC in *Federation* mandated as necessary…”, a breach of privilege occurred and he is entitled to the information he seeks in items 1 to 12.

[82] In my view, the applicant's application, insofar as it rests on an allegation of a breach of his solicitor-client privilege, is not well-founded. He has made no effort to establish that his privilege was, in fact, breached, and indeed, he has even prevented Commission counsel from supplying his own lawyers with transcripts of their interviews so that he could determine whether anything that transpired between Commission counsel and his lawyers could be characterized as a violation of his privilege.

[83] Moreover, the suggestions in Mr. Jin’s reply submissions that “[t]he Commission is attempting to withhold the very records that would show the compelled interviews took place,” and that “the zone of confidentiality” claimed by Commission counsel would impede a determination “whether the rule of law has been complied with in their fact-finding inquiries,” are, in my view, misplaced. The fact that Commission counsel have

offered to provide the records to the applicant's debt enforcement counsel shows that they are not attempting to withhold the records to avoid scrutiny. To the contrary, the offer to provide these records to the applicant's debt enforcement counsel gives Mr. Jin access to the very documents he seeks on this application.

[84] Moreover, the reputational and privacy interests of the applicant's debt enforcement lawyers may be implicated by the release of the transcripts insofar as they were interviewed about matters unrelated to Mr. Jin. The applicant has provided no foundation to conclude that he is entitled to the unabridged transcripts regardless of their content, without allowing his lawyers to review them to shield confidential disclosures (unconnected to Mr. Jin's legitimate interests).

[85] Further, as I read Commission counsel's submissions, they do not amount to a denial either that Mr. Jin's debt enforcement counsel were summonsed to appear at an interview or that an interview was conducted. Rather, Commission counsel's submissions commented on the applicant's failure to establish the "simple proposition" that his lawyers spoke with Commission counsel, which Commission counsel described in their submissions as "a straightforward matter for the Applicant to establish… through his own lawyers." (Emphasis added.)

[86] In other words, Commission counsel was not calling into question whether Mr. Jin's lawyer were, in fact, interviewed by Commission counsel; rather, they were questioning why Mr. Jin made no effort to establish either the fact of the interviews or their content or context, which would have been "a straightforward matter." Given the nature of Mr. Jin's application, it seems it would have been a relatively straightforward matter for Mr. Jin to have furnished evidence from his lawyers of the passage of privileged information if in fact this had occurred.

[87] Finally, Mr. Jin's addendum to his reply submissions adds no substance to his contention that he is entitled to answers to the questions he poses and to the documents he is seeking. Mr. Jin's application has avoided mention of any attempt to obtain evidence from his lawyers to the effect that his privilege was violated. In the absence of that evidence, and indeed without any explanation for its absence, it is not

reasonable to conclude that his contention has genuine merit as opposed to mere superficial attractiveness. Accordingly, in the result, there is no basis established on which to conclude or even speculate that Commission counsel may have breached the applicant's solicitor-client privilege.

[88] As to the applicant's second proposition which he claims is "beyond dispute," namely, that the Commission must comply with the open court principle as guaranteed by s. 2(b) of the *Charter of Rights and Freedoms*, I have concluded that it has no better foundation than the first proposition. The open court principle is rooted in the openness of hearings, not in the openness of pre-hearing preparation which may or may not crystallize into evidence called in hearings. The applicant's reliance on the open court principle in the absence of any evidence tendered in any proceeding renders the presumption of the open court principle that "legal proceeding[s] should be open to the media and the public" nugatory. The applicant's submission invoking the open court principle in the present circumstances strains both its meaning and its purpose. I am unable to give effect to the applicant's submission on this point.

[89] Accordingly, I am unable to conclude that there is a foundation either to establish a violation of solicitor-client privilege or a violation of his or any other party's right to an open hearing. To the extent that Mr. Jin's application relies on those asserted defaults, it must fail.

[90] Further, I am not satisfied that Mr. Jin has established any other basis upon which to make any of the orders he seeks.

[91] Insofar as items 1 ─ 7 are concerned, apart from raising the spectre of a violation of solicitor-client privilege and a violation of the presumption of open proceedings, the applicant has not submitted or established there is any basis for the orders he is seeking.

[92] Insofar as item 8 is concerned, the applicant has provided no foundation for receiving the information sought. He is engaged in a fishing expedition with respect to that item.

[93] With respect to item 9, had any evidence been called in the hearing arising from the interviews, and that evidence related to Mr. Jin, he would have been entitled to the transcripts from Commission counsel, subject to applications for redactions. No such evidence was called. Had Mr. Jin permitted his debt enforcement counsel to receive those transcripts from Commission counsel, he would not have been foreclosed from access to them. Mr. Jin has provided no foundation to conclude that he is entitled to copies of the transcripts and certainly no basis to conclude he is entitled to unabridged transcripts regardless of their content, without allowing his lawyers to review them to shield confidential disclosures (unconnected to Mr. Jin's legitimate interests). As I note above, Mr. Jin has made no effort to furnish any evidence to ground his suggestion that solicitor-client privileged information was communicated by his lawyers to the commission. Mr. Jin's application with respect to item 9 is accordingly dismissed.

[94] Insofar as item 11 is concerned, the number of summonses that have been issued by the Commission are irrelevant to the applicant's grant of standing.

[95] Insofar as item 12 is concerned, I consider that the question posed invites a speculative answer, rather than one that is rooted in a specific factual context. There may well be circumstances justifying disclosure to third parties which are not presently within anyone's contemplation. In those circumstances it would not be justified to provide an answer.

Commissioner Austin F. Cullen