

Commission of Inquiry into Money Laundering in British Columbia

Application for Protective Measures – Ruling #19

Ruling of the Honourable Austin Cullen, Commissioner

Issued December 2, 2020

A. INTRODUCTION

[1] The British Columbia Lottery Corporation (“BCLC”) has brought an application for protective orders over certain BCLC intelligence interviews. This application ensues from an earlier application in which BCLC sought a confidentiality order with respect to documents referred to as “Intelligence Interview Confidential Materials” (the “materials”). The effect of the order sought was to compel Commission counsel to treat the materials (received from BCLC pursuant to a request for disclosure) as confidential and not to disclose them to the public or any participants except Mr. Kroeker, Mr. Lightbody, Canada, and the Gaming Policy and Enforcement Branch (“GPEB”). The order sought included the following term:

- c) That the Application Interview Documents not otherwise be made public by the Commission.

[2] The concerns which underpinned BCLC’s application for a confidentiality order were reflected in para. 19 of my ruling in relation to that application (Ruling #8) as follows:

[19] BCLC rests its application for a confidentiality order on four express concerns:

1. Some of the interviews acquiring the information are given in circumstances in which there is either an implied or express assurance of confidentiality and disclosing details may lessen the willingness of patrons or other potential interviewees to cooperate with BCLC in future. (In his affidavit in support of the notice of application, Kevin deBruyckere attested that assurances were made to interviewees, “that information obtained in the course of the interviews will not be shared outside of BCLC”.)

2. Some interviews may reveal information about suspected illegal activities including suspected organized criminal activity and the protection of the identities of the interviewees, BCLC informants, gaming facility staff and BCLC investigators is important to protect their safety.
3. Some intelligence interviews may reveal information relevant to ongoing investigations conducted by the RCMP.
4. Some intelligence interviews may provide insight into BCLC's investigative techniques and may in turn impact the integrity and success of BCLC's anti-money laundering program and process.

[3] In the result I declined to make the confidentiality order sought by BCLC. With respect to subparagraph (c) of the draft order sought, I concluded it was premature to make such an order but granted leave to BCLC "to apply for additional orders in the event that commission counsel (or any other party) seeks to tender any of the material into evidence at a public hearing."

[4] This current application stems from that order in Ruling #8 and relates to Exhibit 149 ("Tottenham Affidavit #2") and Exhibit 78 ("Beeksma Affidavit #1"). The specific documents over which a protective order is being sought are exhibits 15, 22, 26, 37, 62, 121, 126, 152, 186 and 190 of Tottenham Affidavit #2 and exhibits X and BB of Beeksma Affidavit #1 which are duplicates of exhibits 186 and 190 of the Tottenham Affidavit.

[5] The terms of the order sought are set out in BCLC's application letter, subparagraphs 1, 2 and 3 under the heading "Orders Sought." They read as follows:

1. That the Application Interview Documents be redacted in full in the publicly available copies of Exhibit 78 (Affidavit #1 of Steve Beeksma) and Exhibit 149 (Affidavit #2 of Daryl Tottenham) of this Inquiry.
2. In the alternative, that BCLC be permitted to make additional redactions to the Application Interview Documents to increase the degree of anonymity of the interviewees and their family members in these documents, prior to being made publicly available.
3. That the Application Interview Documents not otherwise be made public by the Commission.

[6] BCLC also seeks an order "that all application materials relating to the within application be and remain confidential and not be publicly posted."

[7] BCLC's submission in support of its application is set out in its November 13 application letter as follows:

In Ruling 8, the Commissioner ruled that BCLC intelligence interviews should be produced in a form to "protect personal identifying information" (para 132(a)), and the Application Interview Documents are in that form. However, BCLC is concerned that, given the specific and sensitive information shared during the interviews in question, a knowledgeable person could, even with the redactions made for personal identifying information, determine the identity of the source of that information (i.e. the name of the interviewees).

BCLC is further concerned that given the nature of the information shared by the interviewees as recorded in these interviews (e.g. specific information relating to underground casinos and the identities and practices of alleged cash facilitators), the interviewees' personal safety could be compromised if a protective order is not granted. BCLC notes that in some of the Application Interview Documents, the interviewee and/or the investigator express concern for the interviewee's safety (see e.g. Exhibits 15, 62 and 152 of Affidavit #2 of Daryl Tottenham). BCLC is prepared to provide an affidavit in regard to this concern if necessary.

BCLC submits that the protection of interviewees' safety is a social value of superordinate importance which justifies the orders sought (Ruling 8, para 85). The order sought is not a blanket order over all BCLC intelligence interviews, but is a surgical order for the specific documents identified in this application. [footnote omitted.]

[8] Counsel for GPEB informed the Commission on November 23 that GPEB takes no position on BCLC's application. Counsel for the Great Canadian Gaming Corporation ("GCGC") has informed the Commission that GCGC supports BCLC's application as amended on November 13 for the reasons set out in BCLC's application.

[9] Commission counsel oppose the relief sought by BCLC in subparagraph (1) of its submissions, support BCLC's alternative submission in subparagraph (2) of its submissions, and oppose BCLC's submission in subparagraph (3) of its submissions.

[10] Commission counsel does not oppose BCLC's request that the application materials related to the present application remain confidential and not be publicly posted.

[11] Commission counsel note that the documents at issue in this application have all been redacted to protect personal identifying information. Commission counsel also note that in total Tottenham Affidavit #2 has 190 exhibits – all summaries of interviews

of casino patrons – only 10 of which are the subject of this application. Commission counsel also note that Beeksma Affidavit #1 has 11 summaries of interviews of casino patrons conducted by BCLC investigators, only two of which are the subject of this application.

[12] In previous rulings (Rulings #12 and #13) I accepted that ss. 15(1),(2), s. 25 of the *Public Inquiry Act*, S.B.C. 2007, c. 9 and Rules 28, 38 and 39 of the Commission's Rules of Practice and Procedure enable me to restrict access to exhibits such as those at issue in this application, but that the default position favours open and accessible proceedings. In those previous rulings I also accepted that the framework governing the exercise of discretion to limit openness or accessibility is set out in the so-called *Dagenais / Mentuck* test adopted in *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835 [*Dagenais*] and *R. v. Mentuck*, 2001 SCC 76 [*Mentuck*].

[13] The test requires an applicant seeking to restrict access and openness to demonstrate that:

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

[14] Commission counsel submits, based on *Toronto Star Newspapers Ltd. v. Ontario* 2005 SCC 41 at para. 4 that the *Dagenais / Mentuck* test is met only when a decision-maker concludes that disclosure would subvert the ends of justice or unduly impact its proper administration.

[15] Commission counsel submits that in the circumstances, BCLC has demonstrated that absent some additional measures, the exhibits at issue “could plausibly be used to determine the identity of an interview subject” which could “give rise to a reasonable prospect that the personal safety of the interviewees may be at risk.”

[16] On the other hand, Commission counsel also submit that some information in the summaries do not carry such a risk, is significant, and “may be of interest to the public.” Commission counsel contend that accordingly it would be appropriate for the Commission to adopt a lesser “reasonably alternative [measure]” than full redaction to meet the requirements of the *Dagenais / Mentuck* test.

[17] As to BCLC’s application that “That the Application Interview Documents not otherwise be made public by the Commission,” Commission counsel take the position that the appropriate order to make is that the Commission “not make public any version of the Application Interview Documents that does not bear the redactions applied in accordance with any order made in response to the present application” in the absence of notice to participants and with reasonable opportunity to apply to the Commissioner for an order in accordance with Rule 60. It is Commission counsel’s submission that framing the order in this way would enable further public disclosure of the documents in the event there was agreement between Commission counsel and the participants that they could be disclosed while ensuring that if there were no such agreement, the issue would need to be resolved by application and order.

[18] Commission counsel submitted the appropriate order to make in the present circumstances is as follows:

- a) BCLC may propose and provide to Commission counsel additional redactions to the Application Interview Documents to increase the degree of anonymity of the interviewees and their family members in these documents prior to Exhibits 78 and 149 being made publicly available.
- b) Following receipt of any additional redactions proposed by BCLC, Commission counsel may seek directions from the Commissioner regarding BCLC’s proposed redactions to the Application Interview Documents.
- c) In the event that Commission counsel does not seek directions from the Commissioner regarding BCLC’s proposed redactions to the Application Interview Documents, the Commission shall make Exhibits 78 and 149 available to the public on the Commission website with the redactions proposed by BCLC.
- d) All parties have liberty to apply for any additional orders with respect to redactions to the Application Interview Documents after Exhibits 78 and 149 are made available to the public on the Commission website.
- e) All materials related to the present application remain confidential, subject to an application by any party.

[19] In reply to Commission counsel's submissions, counsel for BCLC disputed the general assertion that the redaction in full of the documents at issue would undermine the open court principle or the ability of the public to follow the proceedings. BCLC notes that Tottenham Affidavit #2 exhibits at issue represent only 5% of the total BCLC interview summaries that were made exhibits in the Inquiry and none of the 10 at issue were specifically identified or discussed during Mr. Tottenham's three days of testimony. BCLC submits in those circumstances, and given Commission counsel's concession that disclosure of some unredacted portions of the interviews could be used to identify the interviewees and supports a reasonable prospect of a risk to their personal safety, that an application of the *Dagenais / Mentuck* test favours "the more robust order sought in paragraph 1 of BCLC's November 13, 2020 application."

[20] BCLC submits that if I grant the alternative order in subparagraph 2 of the order sought in BCLC's November 13 letter, then "the proposed procedure set out at paragraphs 37(a)-(c) of Commission Counsel's submissions would be appropriate."

B. DISCUSSION AND CONCLUSION

[21] I have reviewed all of the interview summaries at issue and I accept both that the documents do contain information that warrants further redaction to abate the prospect of a risk to the interviewees' personal safety and that the documents also contain information that is likely to be of interest to the public.

[22] I accept that the personal safety of the interviewees cannot be made subordinate to the public's interest in access to the documents, but I agree with Commission counsel that there is a lesser reasonable alternative measure that can adequately abate any personal risks.

[23] The contents of the documents provide insight into the connections between and among loan sharking, gambling, and money laundering. They also illustrate, with specific examples, the gap between what could have been done in response to the events detailed in the intelligence summaries and what actually was done by the appropriate authorities.

[24] In my view, the documents have some significant value in revealing to the public some fairly stark examples of the nature and extent to which criminal activities intersected with the world of legal gaming.

[25] Although the 10 documents at issue represent a small percentage of the total number of interview summaries, it is not the relative number which determines their value, but rather the extent to which they are illustrative of the various issues which surfaced in the gaming sector and which were being dealt with by BCLC investigators “on the ground.”

[26] I accordingly agree with Commission counsel’s submissions that ordering a full redaction of all the documents would be neither necessary nor proportional, provided redactions which abate the risk to the interviewees’ personal safety are made. I therefore decline to make the order sought by BCLC in subparagraph (1) of its application, but will make the order as set forth in subparagraph (2).

[27] In addition, I will make the orders sought by Commission counsel in subparagraphs (b),(c),(d) and (e). I am satisfied that such orders logically follow from the order which I have made and provide a practical mechanism for ensuring none of the information to be redacted will otherwise be made public without agreement of all counsel or further order by me.



Commissioner Austin F. Cullen