Commission of Inquiry into Money Laundering in British Columbia

Application for Witness Accommodation – Ruling #12

Ruling of the Honourable Austin Cullen, Commissioner

Issued October 23, 2020

October 25, 2020: A portion of this ruling has been redacted to ensure that no evidence received *in camera* forming part of my reasoning is revealed.

A. OVERVIEW

[1] Counsel for the British Columbia Lottery Corporation ("BCLC") has applied for accommodation for two former BCLC employees scheduled to give evidence before the Commission. The witnesses, Gordon Friesen and John Karlovcec, are each former RCMP officers who were closely involved with large-scale drug trafficking investigations and criminal prosecutions during their respective lengthy tenures in law enforcement. They each assert their former work [redacted] which brought them into contact with members of organized crime groups, engages the prospect of retribution from those whom they investigated and who were subsequently prosecuted, [redacted].

[2] Each of the two witnesses has provided some specifics of those gang members whom they investigated and came in contact with and the reasons why they believe those past encounters may continue to represent a threat to them and to their families' personal safety.

[3] Both Mr. Friesen and Mr. Karlovcec have provided affidavits detailing the measures that they have consistently taken during and following their tenure as police officers to guard their personal privacy, limit their internet presence to avoid publication of their images and avoid any participation on social medial platforms. The accommodation sought by these witnesses is an order directing that the public livestream of their testimony and any testimony of theirs that is posted online by the Commission (such as webcast archives) be limited to audio only. The application does not prevent both a video and audio stream for the Commissioner, commission counsel and all participants.

B. BASIS FOR THE ORDER SOUGHT

[4] The factual basis for the application was established by an affidavit sworn by Mr. Friesen on October 19, 2020, and an affidavit sworn by Mr. Karlovcec on October 20, 2020. The contents of those affidavits were mirrored by BCLC's letter of application dated October 14, 2020. I have directed that that portion of the application be redacted and that the affidavits be received by commission counsel *in camera* and *ex parte* the other participants.

[5] Counsel for BCLC acknowledge that both Mr. Friesen and Mr. Karlovcec have each previously given evidence in open court "on numerous occasions" in criminal prosecutions and in the discharge of their duties as law enforcement officers. BCLC acknowledges that those occasions require some public exposure and some risk to the witnesses' personal safety. In essence, the applicants argue that there is a quantum difference between testifying in a public setting in person and in a remote hearing that is made available to the public on the internet, where their image may be publicly and perpetually available online for anyone to see and where they have no ability to monitor who is accessing the images or why the images are being accessed. The applicants note that their past associations involved dangerous people involved in organized crime who are a subset of those who might have a particular interest in the proceedings.

[6] The applicants acknowledge the importance of the open court principle to public inquiries and on maintaining media and public access to the hearings but submit that where legitimate safety concerns exist, an appropriate balance favours limiting the medium of the witnesses' testimony to audio broadcast. The applicants point out that no issues of procedural fairness are affected as the participants, commission counsel and the Commissioner will be able to see as well as hear the witnesses to test and assess the credibility and reliability of their evidence. None of the participants opposes Mr. Friesen's or Mr. Karlovcec's application.

C. THE LAW

[7] Commission counsel take no position on the application but do take the position that in determining this application and any other similar applications, I should adopt a framework arising from the applicable test for orders restricting public access to evidence under s. 15 of the *Public Inquiry Act*, S.B.C. 2007, c. 9 [*PIA*]. Commission counsel submits the appropriate and applicable test is the so-called

Dagenais / Mentuck test developed by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*] and *R. v. Mentuck*, [2001] 3 S.C.R. 442 [*Mentuck*].

[8] There is no question that open and accessible court proceedings are of fundamental importance in the Canadian constitutional context (see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480). That same principle applies to provincial inquires (see *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97).

[9] Rules 38-40 of the Commission's Rules of Practice and Procedure deal with public and media access to evidentiary hearings in a manner consistent with ss. 25 and 15 of the *PIA*. Those sections of the *PIA* read as follows:

> **Hearings open to public**
>
> 25 Subject to section 15 *[power to prohibit or limit attendance or access]*, a hearing commission must
>
> > (a) ensure that hearings are open to the public, either in person or through broadcast proceedings, and
> >
> > (b) give the public access to information submitted in a hearing.
>
> **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,
>
> > (a) if the government asserts privilege or immunity over the information under section 29 *[disclosure by Crown],*
> >
> > (b) for any reason for which information could or must be withheld by a public body under sections 15 to 19 and 21 to 22.1 *[privacy rights, business interests and public interest]* of the *Freedom of Information and Protection of Privacy Act*, or
> >
> > (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.
>
> (2) In making an order under subsection (1), a hearing commission must not unduly prejudice the rights and interests of a participant against whom a finding of misconduct, or a report alleging misconduct, may be made.

[10] Rule 41 of the Commission's Rules of Practice and Procedure enables me to "impose restrictions on the video and audio recording of the evidentiary hearing

proceedings and [I] may, on application, order that there be no video or audio recording of some or all of a witness's testimony."

D. SUBMISSIONS

[11] I accept commission counsel's submission that the *Dagenais / Mentuck* test has broad application and applies to "all discretionary decisions that affect the openness of proceedings" (see *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65 at para. 13).

[12] I also accept that the *Dagenais / Mentuck* test is stringent, met only when a decision-maker concludes that disclosure would subvert the ends of justice or unduly compromise its proper administration (see *Toronto Star Newspapers Ltd. v. Ontario,* [2005] 2 S.C.R. 188 [*Toronto Star*] at para. 4).

[13] I agree with the submissions of commission counsel that the *Dagenais / Mentuck* test establishes the applicable framework for determining this and similar applications.

[14] The test requires an applicant seeking a restriction of public access to surmount two barriers:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative 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 on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> (*Mentuck* at para. 32)

[15] The evidentiary basis for the order sought – that is to establish its necessity to prevent a serious risk – must be "convincing" and meet "rigorous standards" (see *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at para. 65; *Toronto Star* at para. 41).

[16] To put it another way, the objective of such an order is to prevent a real and substantial risk, not one that is speculative or remote (see *R. v. Esseghaier*, 2017 ONCA 970 at para. 27). However, the risk need not meet a standard of "predictive certainty" (see *Toronto Star* at para. 42).

[17] The test is “a flexible and contextual one” which focuses on the circumstances giving rise to the application (see *Toronto Star* at para. 31).

[18] Any order made must be crafted in a minimally restricted way (see *N.E.T. v. British Columbia*, 2018 BCCA 22).

E. DISCUSSION

[19] In this case, I have read the affidavits of the witnesses who seek to restrict the video broadcasting of their images. The circumstances giving rise to their applications do not entail specific threats from specific individuals. The risks at issue do not have their roots in any particular identifiable past event. They are necessarily somewhat speculative in nature.

[20] What the affidavits do establish, however, is that the past involvement of both applicants in serious investigations puts them in a position of antagonism to [redacted] criminal organizations. It is not unlikely that those criminal organizations will have some interest in this Commission’s evidentiary hearings. Both Mr. Friesen and Mr. Karlovcec regard the risk to their and their families’ safety as serious enough to have taken steps to avoid publication of their images on the internet, to guard their privacy and to avoid social media platforms.

[21] What is primarily at issue in this application is whether the risks are real and substantial or speculative and remote.

[22] In my view, while the risks to the witnesses may not be high in the sense of being imminent or obvious, they are not without a reasonable foundation and to ignore them would court a real and substantial risk to the proper administration of justice. Both applicants had roles that required them to deal with serious criminals [redacted]. While the passage of time may have abated the risk to them of their past activities, I do not think it could be said that the risks no longer exist. As I see it, to the extent that the risks to the witnesses may be somewhat attenuated, that goes to the question of the scope and nature of the order being sought, not whether it is necessary to make it.

[23] In this case, the order sought is not one which impinges on the rights or interests of any of the participants. It is not envisaged that there would be any

limitations on participants' abilities to fully hear and see the witnesses. Insofar as the media and the public is concerned, they will not be able to see the witness, but they will be able to hear them and will be able to see any exhibits or documents shown to or relied on by the witnesses. In other words, the restrictions on the media and the public do not deprive them of access to the evidence being advanced by the witness. The media and the public are not prevented from forming opinions based on the evidence nor are they deprived of hearing and seeing those conducting direct and cross-examination to enable them to form opinions of the conduct of the proceedings generally. In short, the access of the media and the public are only minimally impaired and not in such a way as to undermine the integrity of the hearing process or the efficacy of the administration of justice.

F. CONCLUSION

[24] I conclude, therefore, that the risk to the proper administration of justice in the present case meets the criteria of being real and substantial as opposed to speculative and remote. I also conclude that it is necessary to make an order to address that risk. I am satisfied that the order being sought is minimally restrictive and accordingly I will grant the order as sought.

Commissioner Austin Cullen