Commission of Inquiry into Money Laundering in British Columbia

Application to Admit Evidence Through a Panel – Ruling #29

Ruling of the Honourable Austin Cullen, Commissioner

Issued March 12, 2021

A. INTRODUCTION

[1] On February 8, 2021, the B.C. Government and Service Employees' Union ("BCGEU") brought an application to admit the evidence of a panel consisting of "some or all of" BCGEU President Stephanie Smith; Component Vice-President Dave MacDonald; and Coordinator and senior staff member Lisette Trolland. The evidence which BCGEU seeks to introduce is summarized in a will-say statement said to reflect the feedback of BCGEU's "members" regarding money laundering in casinos, the efficacy of measures taken to date, and the impact of money laundering and associated regulations on vulnerable "front line workers."

[2] BCGEU relies on ss. 9(1) and 14(1) of the *Public Inquiry Act,* S.B.C. 2007, c. 9 [*PIA*], which read as follows:

> **Power to make directives**
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> 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.
>
> …
>
> **Power to accept information**
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> 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.

B. BCGEU'S SUBMISSIONS

[3] BCGEU submits that the proffered evidence "goes to the very heart of the Commission's mandate and its ability to carry forth its responsibility to make recommendations to prevent money laundering."

[4] In its submission, BCGEU avers the evidence will refer to the anti-money laundering ("AML") measures undertaken by casinos; the casino workers' observations of the effectiveness of the measures; management's enforcement of the measures; how accountability has been "downloaded" to casino workers; the prevalence of loan sharks in casinos; casino workers' work and safety concerns; and casino workers' suggestions to improve AML measures. BCGEU asserts in its submission that the "wellbeing [of casino workers] is being ignored in favour of 'bottom-line' considerations."

[5] BCGEU contends that it made "far-reaching and exhaustive efforts" to canvass its membership but "has been unable to identify a single union member who is willing to publicly testify on money laundering as observed in casinos." (Underlining in original.)

[6] BCGEU summarizes its ultimately unsuccessful efforts "to secure a willing witness for the Commission," starting in September 2019 and continuing through to February 2020, in Ms. Trolland's affidavit affirmed in support of BCGEU's application on January 28, 2021.

[7] Ms. Trolland deposes that she and Mr. MacDonald canvassed and engaged workers on an individual, face-to-face basis from January to June 2020, canvassing five casinos and "personally [speaking] with approximately 20 casino workers." According to Ms. Trolland, those casino workers expressed fears of speaking on money laundering, perceiving that they would face their employers' "increased scrutiny and tallying of minor work errors" resulting in unjust discipline and dismissal. Ms. Trolland further says the workers told her that they were told by their employers that any talk regarding money laundering "would ruin the casino industry and thereby their livelihood." The workers privately informed BCGEU of their concerns "in the hopes that a spokesperson would advocate for them."

[8] BCGEU submits the member evidence is relevant, necessary, and appropriate to enable the Commission to fulfil its mandate. BCGEU submits that: in the circumstances, to do otherwise would "[render] voiceless" its members; there is no significant evidence from casino workers regarding money laundering before the Commission; and BCGEU's members' evidence "contains information which uniquely reflects on the lives of everyday people."

C. COMMISSION COUNSEL'S SUBMISSIONS

[9] In response, Commission counsel takes no position on whether BCGEU's application to have the panel evidence admitted should be granted, but submits there are some considerations which I may wish to take into account in determining whether to admit the evidence or not.

[10] Commission counsel submits that there are matters bearing on the appropriateness of making the order sought by BCGEU, namely: the reliability of the evidence and the opportunity participants will have to challenge and respond to the evidence; the potential impact of the evidence on the reputations of participants and other entities and the appropriate use of the evidence; the availability of the evidence from other sources; and the timing of the application.

[11] Commission counsel notes that the anticipated evidence of the proposed panel relates to alleged deficiencies in current AML measures in British Columbia casinos; inadequate training and mismanagement in British Columbia casinos relating to AML measures; the prioritization of VIP relations over AML measures; the continued presence of loan sharks in British Columbia casinos; and customer dissatisfaction related to AML measures.

[12] As to reliability and other participants' opportunity to challenge and/or respond to the evidence, Commission counsel notes that the proposed evidence will consist of statements made by unidentified BCGEU members outside the Commission's hearings and, as such, there is little way to test the reliability of or respond to the evidence.

[13] Commission counsel also submits the evidence, if admitted, will likely have a negative impact on the reputations, employment and business interests of individuals and businesses associated to gaming. Commission counsel submits the potential for reputational harm, together with limitations on participants' ability to respond, is a relevant consideration. Commission counsel notes that there is a lack of specificity to the concerns which the proffered evidence seeks to address, and that may have the effect of tainting those service providers which are not the subject of concern and will also cause potential damage to the reputations of the British Columbia Lottery Corporation ("BCLC") and the Gaming Policy and Enforcement Branch ("GPEB").

[14] Commission counsel submits that, while an order could be made limiting access to the evidence to avoid the potential for unwarranted reputational harm, such an order would have an impact on the principle favouring the openness of the hearings.

[15] Commission counsel also submits it might be appropriate to consider whether the evidence, if admitted, could be used to make findings of misconduct.

[16] Commission counsel notes that, without the evidence proposed to be entered by the BCGEU panel, the Commission is not likely to hear evidence from the perspective of the front-line casino workers.

[17] As to timing, Commission counsel notes that BCGEU first raised the issue of front-line casino workers offering evidence detailing their experiences and insights in the summer of 2020. By December 10, 2020, BCGEU advised Commission counsel that it intended an application to lead the evidence anonymously. An initial version of BCGEU's application was first submitted on January 29, 2021, but following discussions with Commission counsel, the current version was submitted on February 8, 2021.

[18] In the meantime, on October 5, 2020, Commission counsel established the schedule of witnesses without regard for any proposed evidence from BCGEU or its panel. The portion of the hearings devoted to the gaming sector occurred in two three-week blocks: the first commencing on October 26, 2020; the second commencing January 21, 2021. In the result the witnesses who have testified in the gaming hearings

have done so without notice of, and without an opportunity to provide evidence responsive to, the proposed BCGEU evidence.

D. POSITION OF GREAT CANADIAN GAMING CORPORATION

[19] Great Canadian Gaming Corporation ("GCGC") opposes BCGEU's application to adduce evidence through a panel. GCGC agrees with BCGEU that the test for the admission of evidence is whether it is relevant, necessary, and appropriate, but submits in addition a further consideration is its inherent reliability.

[20] GCGC submits that, even in a context where the rules of evidence do not apply, an adjudicator is still expected to consider reliability and necessity before admitting hearsay evidence. GCGC cites in support of its argument *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316, where the court held at para. 32:

> This does not mean that a tribunal may admit clearly unreliable evidence to decide central issues… Tribunals are generally expected to consider reliability and necessity in ruling on questions of admissibility…

[21] GCGC submits the proposed evidence fails to satisfy any of the tests for admissibility.

[22] GCGC submits that the proposed evidence is not necessary, as BCGEU:

> …has failed to provide any evidence to substantiate the concerns regarding the consequences of testifying publicly suggested to them by the 20 anonymous union members with whom BCGEU spoke.

[23] GCGC submits the necessity requirement is analogous to the standard for the redaction of information which requires "convincing" evidence that must meet "rigorous standards" to prevent "a real and substantial risk," not one that is "speculative and remote." In support of that submission, BCGEU cited Ruling #23, issued December 15, 2020 at para. 15.

[24] GCGC submits the concerns raised by BCGEU are speculative and remote. GCGC says there is no evidence that "GCGC (or other employers) could reasonably be

expected to discipline employees" or that, if they did, it could not be remedied through the grievance and arbitration process.

[25] As to relevance, GCGC submits that the proposed evidence is simply "too vague, and too devoid of meaningful particulars, to allow it to be assessed at all."

[26] GCGC similarly submits that the vagueness of the evidence and its lack of particularity render it essentially irrelevant and not capable of contributing to the Commission's mandate.

[27] GCGC points out that BCGEU did not seek to cross-examine any of the witnesses from the service providers or other entities who testified about buy-in procedures and AML systems. GCGC submits that, in the face of that evidence not being contested by BCGEU, there is little utility to admitting second-hand, vague, contradictory evidence.

[28] GCGC questions the appropriateness of the evidence based on the lateness of BCGEU's application, the BCGEU will-say's vagueness and lack of particularity, and BCGEU's failure to cross-examine witnesses "who could reasonably have been expected to provide evidence that is responsive to BCGEU's allegations," including not only GCGC's witnesses, but as well "any number of BCLC witnesses."

[29] GCGC submits in the circumstances it would be unfair to allow the evidence outlined in the BCGEU will-say. GCGC cites in particular:

a. paragraphs 39, 41-43 and 58-62 of the will-say as being "so general and non-specific that GCGC cannot call rebuttal evidence nor … cross-examine [the source of the evidence];"

b. paragraphs 44-45, which GCGC submits relate to who is best suited to performing certain AML functions: employees or management, which GCGC contends it is not a decision which "the Commissioner can be expected to deal with in his findings;" and

c. paragraphs 46-57, which GCGC characterizes as “particularly prejudicial,” relating to allegations that rules were ignored, loan sharks tolerated, and that potential money laundering occurred in VIP rooms.

[30] GCGC submits the conclusory and anonymous nature of this evidence renders its probative value low and its prejudicial effect high. As such, and for the reasons advanced in its submissions, GCGC submits the application should be dismissed.

E. GATEWAY CASINOS & ENTERTAINMENT LTD.’S SUBMSSION

[31] Gateway Casinos & Entertainment Ltd. (“Gateway”) also opposes BCGEU’s application to adduce the evidence set out in the will-say through the proposed panel.

[32] Gateway submits that the evidence lacks reliability because it is hearsay and not attributed to any individual, any job function or even any employer. Gateway also submits that there is no indication of what questions prompted the employees’ responses or in what context the views of the employees were canvassed. In those circumstances, Gateway submits, the evidence will not further the truth-seeking function of the Inquiry or the public's understanding of matters within the Commission's mandate.

[33] Gateway contends that there is a prospect that it will experience reputational harm from the evidence, due to its generalized nature, despite the absence of any specific connection between the evidence and Gateway itself.

[34] Gateway submits that BCGEU could have cross-examined witnesses who were called about the matters of concern outlined in its opening statement in paragraphs 119-125 and in the BCGEU will-say. The panel, therefore, Gateway says, is not the only source of the evidence on the matters of concern available to BCGEU.

[35] Gateway submits the evidence proposed does not meet the low threshold of reliability and necessity applicable to public inquiries, and says that I should decline to admit it. Gateway also indicates that, should the evidence be admitted, Gateway would likely seek leave to call rebuttal evidence.

F. BRITISH COLUMBIA LOTTERY CORPORATION'S SUBMISSIONS

[36] BCLC takes no position on BCGEU's application but submits that, should the Commissioner admit this hearsay evidence through the proposed panel, it should be subject to two conditions:

> (a) BCLC be granted leave to lead evidence in response, should BCLC consider that to be necessary. BCLC notes this application has essentially been brought after the conclusion of the Gaming Sector hearings, and after all of BCLC's operational witnesses have testified. BCLC should be afforded some ability, despite the lateness of the within application and the conclusion of the Gaming hearings, to respond to this proposed gaming industry-related hearsay evidence if considered necessary; and
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> (b) BCLC reserves all of its rights to make submissions to the Commissioner as to the weight, if any, to be accorded to the proposed casino gaming worker hearsay evidence.

G. BCGEU'S REPLY

[37] In its reply, BCGEU submits that the permissive approach to the admission of evidence in commissions of inquiry, articulated in *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617 (C.A.), should prevail in the situation. BCGEU, citing *Bortolotti*, submits that admitting the proposed evidence assists the Commission in conducting "a full and fair inquiry in the public interest… in order to elicit all relevant information pertaining to the subject matter of the inquiry."

[38] As to the issue of the reliability of the evidence and the ability of participants to respond to it, BCGEU emphasizes that the format of the evidence is to provide a different perspective from that of casino executives and management, and the purpose of the evidence is to "bring attention to the lived experience of frontline workers and how they are affected by money-laundering."

[39] BCGEU submits the authorities relied on by GCGC and Gateway, challenging admissibility on the basis of reliability and necessity, are taken from criminal court and specialized tribunal proceedings "where… the interests and rights at issue are markedly different."

[40] BCGEU argues that the evidence tendered by the gaming participants "[had no] direct perspective from front-line workers" and that is why BCGEU did not cross-examine witnesses on that subject.

[41] BCGEU submits its purpose is not to adversely affect the financial viability of the gaming industry and, by extension, the livelihood of its membership, but only "to provide constructive feedback from the worker perspective to ensure a sustainable gaming industry for the … casino workers as well as British Columbians generally."

[42] BCGEU submits it is important to have the evidence of those persons implementing AML measures, not just those who direct casino workers.

[43] BCGEU further submits that, without the panel's evidence, the Commission will have an incomplete picture of the industry, focussed primarily on the executive, managerial and regulatory perspective. BCGEU says that the limited evidence called thus far from the gaming floor is either decades old (Ms. Labine) or very narrow (Ms. Chiu). BCGEU submits the casino workers originally canvassed have "honestly held fears" about their future, which have been exacerbated by being out of work as a result of the COVID-19 public health order.

[44] BCGEU acknowledges the issue raised by Commission counsel relating to the timing of its application arising from:

> …the exceptional difficulty of securing a first-hand witness despite the BCGEU's consistent and repeated efforts over the past year… to secure a worker willing to give such evidence.

[45] BCGEU submits that any prejudice resulting from the delay "is greatly outweighed by the prospect of the Inquiry being conducted without hearing of the real-life experiences of those workers on the casino floor." BCGEU urges the admission of the proffered evidence.

H. DISCUSSION AND CONCLUSION

[46] I have reviewed the BCGEU will-say, which outlines the evidence being proffered by BCGEU through its proposed panel.

[47] In my view, although the subject matter of the will-say, insofar as it presents concerns on the floor from the workers, represents an important perspective for the Commission to have, there are significant deficiencies in both the form and the substance of the evidence.

[48] In the first place, none of the sources of the evidence are identified even as to job description, employer, tenure (experience) or location. There is no way of assessing what perspectives, experiences, opportunities to observe or environments have shaped the observations which have been made.

[49] In the second place, it is not clear whether the observations made are common to all, many, or only a few of the casino workers, or whether they are more prevalent in some locations as opposed to others.

[50] In the third place, the evidence asserted is too generalized to permit findings of fact. For example, in paragraph 46 of the BCGEU will-say it is asserted as follows:

> After approximately 2013, management developed and perpetuated a culture of doing anything for VIPs to keep them playing. This was an unwritten rule that was often communicated verbally.

[51] There is no way of knowing whether this is an industry-wide issue, or specific to one service provider in one location. There is no way of knowing if it is an observation of one casino worker or 20 casino workers. There is no explanation of what “doing anything for VIPs to keep them playing” means or what constituted the verbally communicated unwritten rule. The statement in paragraph 46 is couched in the past tense and is not clear whether it is asserted to be a past or a present problem.

[52] At paragraphs 49-52 of the BCGEU will-say, the assertions read as follows:

> 49. Workers feel that management prioritize VIP players over AML measures. Workers feel that management perpetuates a culture of letting VIP players do whatever they want.
>
> 50. To elaborate, casino workers have noticed that managers sometimes override the Denomination Return Rule.
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> 51. The Denomination Return Rule stipulates that, for example, if a player cashed in with $6,000 in twenties, and cashes out with $6,000 or less, the player is to receive the $6,000 back in twenties.
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> 52. Managers override supervisors, and sometimes do not follow the Denomination Return Rule if the player has a bigger winning.

[53] These allegations are similarly general and conclusory rather than specific and descriptive. There is no indication of where, how, or with what frequency management prioritized VIP players over AML measures, and there is no indication how many of the casino workers made this observation.

[54] Paragraphs 53-57 of the BCGEU will-say then assert:

> 53. Loan sharks are still clearly noticeable in casinos and casino workers are concerned.
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> 54. Predominantly, casino workers notice loan sharks engaged in potential money laundering in VIP rooms.
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> 55. For example, at times, a casino player in the VIP room who lost everything will leave their table. Workers would see this casino player enter the washroom with a known loan shark.
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> 56. There are no cameras within washrooms.
>
> 57. The player would then return to the table with money for a buy-in.

[55] There is similarly no way to assess how widespread or frequent these observations are, what locations or service providers are implicated, and whether any reports were made to management, BCLC or GPEB as a result of those observations.

[56] As was pointed out by Commission counsel, GCGC and Gateway, there was no attempt by BCGEU to cross-examine any of the witnesses called during the gaming portion of the hearings to elicit any evidence from service provider management, BCLC or GPEB to either verify, refute, or contextualize the assertions in the BCGEU will-say.

[57] As I understand it, BCGEU has had the fruits of its interviews since June 2020, which would have enabled them to bring those issues to the attention of the Commission through cross-examination of a variety of witnesses, including BCLC and GPEB investigators, and service provider executives and management. BCGEU's explanation that it did not elect to cross-examine the evidence tendered by the gaming industry because it "was entirely bereft of any direct perspective from front-line workers" is difficult to understand. The way to introduce or include the perspectives of front-line workers through the "gaming industry" witnesses is to introduce those perspectives in examinations of those various witnesses. Even if no front-line worker was willing to testify, it would at least introduce that perspective and the associated factual basis for it to the Commission and enable some context for it to be established.

[58] The difficulties which arise in the context of this application are threefold.

[59] First, BCGEU's application seeks admission of unattributed, non-specific evidence which has the capacity to harm the reputation of individuals and organizations without giving them the opportunity to respond to it in any meaningful way.

[60] Second, it seeks admission of evidence which is, in both form and substance, too attenuated to ground any finding of fact.

[61] Third, because there is no cross-examination of the gaming sector witnesses on any aspect of the proposed evidence, it leaves service providers, BCLC, and potentially GPEB in the position of seeking to call rebuttal evidence in response to allegations which, because of their generality, are difficult to address.

[62] Added to those issues is the complication of timing and the extent to which it exacerbates the procedural fairness concerns identified by Commission counsel, the service providers, and BCLC.

[63] As I see it, in light of the combination of the factors which I have identified in connection with BCGEU's application, admitting the evidence would lower the threshold of reliability below what is acceptable even in light of the permissive approach to the admission of evidence in public inquiries articulated in *Re Bortolotti et al*. It is clear from

the court's reasoning in that case that the evidence admitted must be “reasonably relevant” to the subject matter of the inquiry in the sense that it “is evidence that in some degree advances the inquiry, and thus has probative value ….”

[64] In a subsequent decision, *Ontario Provincial Police v. Cornwall Public Inquiry Commissioner*, 2008 ONCA 33 [*OPP*], the court relied on the definition of relevant evidence from *McCormick on Evidence*, 2nd ed., at p. 438 adopted by the court in *Bortolotti*: “Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value…”

[65] In the *OPP* case, the court concluded that it is an error of jurisdiction if a commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. In that case, the court held that evidence that had only marginal probative value, which was “greatly outweighed by its prejudicial effect,” would not pass the reasonably relevant test.

[66] In the present case, the evidence proffered by BCGEU is not unreliable for any inherent reason, but it lacks any means of testing its reliability. It is so lacking in detail and context that it could not be used as a foundation for finding any facts, or making any findings of misconduct. In that circumstance, it could not be said that the evidence “advances the inquiry,” “has probative value” or is “reasonably relevant.” It is simply too vague.

[67] I also note that if the evidence were admitted, it could injure the reputation of individuals or organizations who would have difficulty in mounting a successful response to the evidence, even in the wake of calling rebuttal witnesses, simply because the allegations are so non-specific.

[68] In my view, therefore, these considerations weigh against admitting the evidence. Its lack of specificity robs it of the probative value necessary to enable the kinds of findings of fact which would advance the Inquiry. The same lack of particularity or specificity in the evidence would render its admission procedurally unfair because it

cannot be responded to in a meaningful way by those whose reputations may be put at risk.

[69] The issue of the timing of this application is not a stand-alone reason to decline to admit the evidence. It is, however, a factor that exacerbates the procedural fairness concerns to which this application gives rise because the witnesses who would likely have evidence to give in response to BCGEU's panel evidence have already testified without any opportunity to address the issues which it proposes to cover.

[70] I do accept that the absence of evidence from the perspective of front-line casino workers is a gap in the Commission's evidentiary foundation. The difficulty is that admitting the evidence proffered by BCGEU would not fill that gap meaningfully because of the deficiencies which I have identified above.

[71] I accordingly decline to admit the evidence proffered by BCGEU.

[72] The issue that has been inferentially raised by this application, the apparent reticence of casino workers to publicly discuss issues of money laundering or anti-money laundering measures, or to use the whistleblower processes in place for reporting their observations is a matter of concern to the Commission and does engage its mandate.

[73] It may be appropriate to consider how best to address those issues after consultation with the relevant participants, but this ruling is not the means to do so.

Commissioner Austin F. Cullen