

Commission of Inquiry into Money Laundering in British Columbia

Applications for Standing – Ruling #5

Ruling of the Honourable Austin Cullen, Commissioner, issued January 6, 2020

A. Background

1. This ruling addresses the application for leave to participate in the Commission of Inquiry into Money Laundering in British Columbia (“**Inquiry**” or “**Commission**”) brought by Brad Desmarais.

2. Mr. Desmarais’s application for standing was originally considered along with 19 other applications, resulting in a ruling issued on September 24, 2019 (“**September 24 Ruling**”), granting participant status to 16 entities or persons.

3. Mr. Desmarais’s application was one of the four applications which I concluded required more information to permit a decision as to whether they met the criteria for participant status. Accordingly, I directed an oral hearing take place to explore the issues further.

4. That hearing was initially convened on October 18, 2019. At that time, Mr. Desmarais sought and was granted an adjournment of his application. The reasons for the requested adjournment were twofold. First, so that counsel for Mr. Desmarais could continue discussions with counsel for the British Columbia Lottery Corporation (“**BCLC**”) about documents and their relative roles in the Commission should Mr. Desmarais be granted standing. Second, Mr. Desmarais advised he was aware of documents that would bring more clarity to whether or not Mr. Desmarais was on a different trajectory than BCLC.

5. The hearing of Mr. Desmarais’s application therefore took place on December 19, 2019. It was put to Mr. Desmarais’s counsel that the upshot of his position at the previous hearing was that he may find documents that revealed a different trajectory from BCLC. He advised that he was not able to address that issue at this point.

B. The Relevant Law

6. As I noted in my September 24 Ruling, the statutory provisions that govern applications for participant status are found in ss. 11(4)(a)-(c) of the *Public Inquiry Act*, S.B.C. 2007, c. 9.

7. The considerations at play in determining whether to grant participant status were listed in the September 24 Ruling at para. 11. They are:

- a. the nature and extent of the applicant's rights or interest;
- b. why standing is necessary to protect or advance the applicant's rights or interest;
- c. whether the applicant faces the possibility of adverse comment or criticism with respect to its conduct;
- d. how the applicant intends to participate, and how this approach will assist the Commission in fulfilling its mandate;
- e. whether and how the applicant's participation will contribute to the thoroughness and fairness of process;
- f. whether the applicant has expertise and experience relevant to the Commission's work;
- g. whether and to what extent the applicant's perspective or interest overlaps or duplicates other applicants'; and
- h. whether the applicant may participate in another capacity — for example, as a witness who may testify — instead of being granted formal standing.

8. At this early stage, the Commission has made no finding on whether or how any applicant's rights or interests may be affected by the findings of the Commission. Instead, the Commission relies on the submissions of the applicants to understand

whether it is possible that those rights or interests may be affected over the course of the Commission process.

9. Consideration of whether the applicants' participation will contribute to the fairness of the process is informed by principles of procedural fairness. Procedural fairness is a basic value underpinning our constitutional order, and the factors affecting the procedural fairness required in a particular context have been developed in administrative law. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada listed five factors affecting the procedural fairness required, specifically:

- a. the nature of the decision being made, and the process followed in making it;
- b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- c. the importance of the decision to the individual;
- d. the legitimate expectations of the person challenging the decision;
- e. the choices of procedure made by the agency itself.

10. The *Baker* factors are not exhaustive. See *Baker v. Canada*, at para. 28.

C. Brad Desmarais

11. Mr. Desmarais is currently the Vice President of Casino and Community Gaming and the interim Vice President of Legal Compliance and Security of the BCLC. He has held other positions at the BCLC since February 2013.

12. Prior to joining the BCLC, he had 34 years policing experience with the Vancouver Police and RCMP.

13. Mr. Desmarais submits that he has been responsible for many major money laundering and organized crime investigations, has been qualified as an expert in

related matters by the court, and has also taught on related subjects. He submits that he has considerable expertise in money laundering investigations, and has played a significant role in the regulation of gaming and casinos for several years.

14. Mr. Desmarais submits that he can assist the Commission with:

- a. evidence of the growth, evaluation, and methods of money laundering generally;
- b. the barriers to effective law enforcement respecting money laundering in BC; and
- c. the acts or omissions of regulatory authorities or individuals and the police with powers and duties respecting gaming and casinos.

15. Mr. Desmarais submits that he has a personal interest in the mandate of the Commission to determine whether the acts or omissions of regulatory authorities or individuals have amounted to corruption, and whether any information gathered in the Inquiry may be useful in an investigation or prosecution of an offence.

16. Based on Mr. Desmarais's initial application and submissions, it appeared that he would be able to provide evidence of interest to the Commission. However, given that much of his participation, contribution, expertise, experience and perspective arise from his position at BCLC, it was not apparent that his interests were sufficiently distinct from those of BCLC to justify a separate grant of standing. His involvement and evidence could be presented effectively as part of that organization's participation in the Commission, or indeed, independent of any participant status, as a witness with relevant expertise. It was for that reason that I considered an oral hearing necessary to learn more about Mr. Desmarais's distinct circumstances. The question is whether, in light of Mr. Desmarais's particular rights or interests; the possibility he will face individual adverse comment or criticism with respect to his conduct; and what his approach to his participation will entail, there is a realistic prospect that he will be at odds with the rights, interests, or intended approach of BCLC.

17. On this point, Mr. Desmarais contends that his application is on a similar footing with those of Mr. Kroeker and Mr. Lightbody who were both granted standing to participate in the Inquiry.

18. Mr. Desmarais emphasizes that unlike the reports referenced in the Commission's Terms of Reference ("**TOR**"), and in particular, *Dirty Money: An Independent Review of Money Laundering in Lower Mainland Casinos Conducted for the Attorney General of British Columbia*, Peter M. German, Q.C., March 31, 2018 (the "**First German Report**"), the Commission is tasked with making findings of fact respecting the acts or omissions of "individuals with powers, duties or functions in respect of" the sectors referenced in the TOR and to "determine whether those acts or omissions have contributed to money laundering in British Columbia and whether those acts or omissions have amounted to corruption".

19. As an individual with such powers, duties or functions, Mr. Desmarais contends these are strong words capable of raising concern for one in his position. Mr. Desmarais concedes, however, that his concerns are entirely theoretical at this stage. There are no current allegations against him. He was unable to point to any potential or anticipated evidence that may be critical of him or adversely affect his reputation. This weighs against his application for participant standing and distinguishes Mr. Desmarais's application from Mr. Kroeker's who submitted that he had already been the subject of specific reproaches and complaints in the media and had information to provide in response including some that contradicted the assertions made. Mr. Kroeker is no longer with BCLC.

20. Mr. Desmarais contends that he has a view about the nature and extent of the alleged problem of money laundering that is different from Mr. German's. He was not, however, able to identify any area or issue on which he expects his position to be at all different from that of the BCLC, which has already been granted standing at the Inquiry. This also weighs against his application for participant standing and distinguishes Mr. Desmarais's application from that of Mr. Lightbody who pointed to a conflict between his personal and reputational interests, and BCLC's corporate interests. This

asserted conflict is outlined in my ruling granting Mr. Lightbody's application issued October 25, 2019 at paras. 11-12 where I noted Mr. Lightbody's submission that counsel for BCLC could not represent Mr. Lightbody's personal interests when they conflict with those of the corporation or other BCLC officials. Further, unlike Mr. Desmarais, Mr. Lightbody asserted that he had a perspective or information to offer that is not only different from BCLC, but that BCLC is not privy to. I regard those as significant distinctions between Mr. Desmarais's circumstances and those of Mr. Lightbody.

21. I am not satisfied that Mr. Desmarais has met the criteria for participant status.

22. As with any potential witnesses, should it become apparent that Mr. Desmarais's individual rights or interests may be affected by the findings of this Inquiry, or that his interests are at odds with BCLC he may seek leave to reapply for participant status having regard for the provisions of s. 11(4) of the *Public Inquiry Act* and the related considerations set forth in my rulings.

Commissioner Austin Cullen