Commission of Inquiry into Money Laundering in British Columbia

Application for Confidentiality Order – Ruling #8

Ruling of the Honourable Austin Cullen, Commissioner, issued September 18, 2020

INTRODUCTION

[1] These reasons address an application brought by the British Columbia Lottery Corporation ("BCLC") on July 15, 2020, seeking a confidentiality order in relation to certain documents which BCLC refers to as "Intelligence Interview Confidential Materials" (the "materials" or "material").

[2] The specific document requests made by commission counsel which have given rise to this application are those set out in paragraph 12 of BCLC's notice of application and read as follows:

> 12. To date, BCLC has received a number of requests from the Commission for documents that include information related to intelligence interviews, including for example:
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> (a) Request 01-18: "Correspondence, notes, interviews, or other records of meetings with ... players relating to money-laundering and/or relevant gaming integrity issues...";
>
> (b) Request 01-23(a): "Copy of a 2012 iTrak file related to a male suspected of refining cash at the River Rock casino, interviewed at the BCLC Vancouver office...";
>
> (c) Request 05-08: "All summaries of interviews conducted with players following the imposition of source cash conditions"; and
>
> (d) Request 11-01: the "contents of any BCLC player files and any other records of cash transactions" for a list of specific persons. In subsequent correspondence, the Commission accepted BCLC's proposal to respond to this request with the BCLC subject profiles for the persons on the list (which include a summary of all incident reports related to the individuals) and other non-iTrak records in respect of each player.

[3] The terms of the order which BCLC sought in its application originally are set out in Schedule A to its notice of application. The draft order reads as follows:

Terms of Confidentiality Order

(Notice of Application by BCLC re Intelligence Interviews)

The British Columbia Lottery Corporation ("BCLC") shall provide copies of documents containing information regarding intelligence interviews (the "Intelligence Interview Confidential Materials") to the Commission of Inquiry into Money Laundering in British Columbia (the "Commission") on the following terms:

(a) the Commission shall treat all Intelligence Interview Confidential Materials as strictly confidential;

(b) Pursuant to Rules 28 and 39, Commission counsel shall not show or provide copies of the Intelligence Interview Confidential Materials to the public, a witness or potential witness, an expert, a consultant, or to any participant except for the following participants: Robert Kroeker and James Lightbody (the "Permitted Participants");

(c) Pursuant to Rule 39, to the extent the Intelligence Interview Confidential Materials are discussed in an evidentiary hearing, the public and participants shall be restricted from attending, except for the Permitted Participants.

[4] Originally, BCLC sought an *in camera* hearing for this application without notice to the other participants in the gaming sector. Commission counsel informed counsel for BCLC that all materials in this application are "confidential" and it was subsequently agreed that the application would be conducted in writing and that the notice of the application would be given to all gaming sector participants.

[5] Of the respondents, the Gaming Policy and Enforcement Branch ("GPEB") provided an application response on August 17; the Government of Canada ("Canada") provided an application response on August 20; and commission counsel responded on August 23. On September 1, BCLC replied to the application responses and modified its position by agreeing that it would consent to an order including both Canada and GPEB along with Messrs. Kroeker and Lightbody as being "Permitted Participants," and permitting commission counsel, with notice to BCLC and the Permitted Participants, to apply for an order to provide copies of the materials to the public, a witness or potential witness, an expert, a consultant or any participant (other than a Permitted Participant).

BCLC'S POSITION

[6] BCLC rests its application on Rule 39(a),(b) and (c) of the Commission's Rules of Practice and Procedure. That rule reads as follows:

39. The Commissioner may, by order, prohibit or restrict a person or class of persons, or the public, from attending all or part of an evidentiary 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 of the Act;

    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 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; or

    c. if the Commissioner has reason to believe that the order is necessary for the effective and efficient fulfillment of the Terms of Reference.

[7] BCLC notes that while Rule 39 (when read in conjunction with Rule 38) appears to restrict this application to documents received in evidentiary hearings, when read in conjunction with section 15(1) of the *Public Inquiry Act,* S.B.C. 2007, c. 9 [*PIA*], it provides a broader discretion to prohibit access to information held by the Commission generally, and not only to the public. Section 15(1) of the *PIA* reads as follows:

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.

[8] BCLC also referenced and relied on Rule 28 of the Rules of Practice and Procedure which permits a participant to apply for an order that an exhibit or part of an exhibit be redacted, sealed, or otherwise made unavailable to the public. Rule 28 needs to be read in the context of Rule 27. Those rules read as follows:

27. Unless the Commissioner otherwise determines:

a. a record within the Commission's control that has not been entered as an exhibit is not available for public inspection, copying or publication; and

b. a record that has been entered as an exhibit may be made available to the public on the Commission's website including with redactions made by Commission counsel.

28. A participant or witness may apply to the Commissioner in accordance with Rule 60 (Applications) for an order that an exhibit, or parts of an exhibit, be redacted, sealed or otherwise made unavailable to the public.

[9] BCLC also relies on Rule 3 which gives the Commission a broad power to control its own process. Rule 3 reads as follows:

3. Subject to the Act and the Terms of Reference, the Commission has the power to control its own process.

[10] In sum, BCLC submits that Rule 3, 28 and 39 provide the Commission necessary discretion to grant the order sought and submits that the test at common law for restricting access to a court file "may be considered by analogy to the exercise of the Commissioner's discretion under Rules 3, 28 and 39". I understand that to mean that the common law test for restricting access to a court file ought to guide the exercise of my discretion in considering whether to grant the orders sought. The specific case relied on by BCLC is *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 [*Sierra*]. BCLC framed the test in *Sierra* as:

(a) Is the order necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk?

(b) Do the salutary effects of the sealing order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings?

[11] BCLC submitted that based on the evidence provided in an affidavit sworn by Kevin deBruyckere, the director of Anti-Money Laundering and Investigation in the Legal Compliance and Security Division at BCLC, it has established the requisite grounds for the exercise of the Commissioner's discretion to make the order sought, and that, in the circumstances, it meets both steps of the test in *Sierra*.

[12] As I understand BCLC's argument with respect to Rule 39(a), it is that BCLC has established a relationship with those persons participating in the so-called intelligence interviews that attracts a finding, either of a class-based informer privilege or of a case-by-case (*Wigmore*) privilege.

[13] In the alternative, under Rule 39(b), BCLC submits that there is a reasonable basis to assert that the information could be withheld under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*], sections 15(a),(c),(d),(e) and (f) and 19(1). Section 15 comes under the heading "Disclosure harmful to law enforcement" and reads as follows:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,
>
> …
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> (d) reveal the identity of a confidential source of law enforcement information,
>
> (e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person,

[14] Section 19 comes under the heading "Disclosure harmful to individual or public safety" and reads as follows:

> 19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health…

[15] According to BCLC, relying on Mr. deBruyckere's affidavit, it has obligations arising from its mandate under the *Gaming Control Act*, S.B.C. 2002, c. 14 [*GCA*] to conduct and manage gaming in British Columbia, requiring it to report to the Financial Transactions and Reports Analysis Centre of Canada ("FinTRAC") under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [*PCMLTFA*] and to GPEB under the *GCA*. Those obligations justify it in gathering its own intelligence and information with respect to suspected illegal or undesirable activity in its casinos.

[16] BCLC describes the intelligence and information gathering process at paragraphs 8 and 9 of its notice of application as follows:

> 8. In or around 2014, BCLC began to formalize a process whereby it would interview certain players in an effort to better understand how they

were obtaining their cash used to buy in at casinos, and to provide information to them as to risks associated with large cash buy-ins and the cash alternatives that were available to them. In some cases, individuals other than casino patrons or players have also been interviewed (for example, an associate of a casino patron or a former gaming facility employee). In the course of those interviews, BCLC investigators may also ask interviewees about suspected illegal activities related to gaming. The information obtained from these interviews is often highly sensitive, and may reveal information about suspected illegal activity including names and addresses linked to alleged organized criminal activities.

9. BCLC also collaborates with the RCMP and other law enforcement agencies to assist BCLC in identifying and barring certain individuals from casinos, including by sharing information about suspected illegal activity at its casinos or related to gaming with the RCMP. Since 2014, this collaboration has been conducted in part pursuant to an Information Sharing Agreement between BCLC and RCMP.

[17] In its reply dated September 1, BCLC clarifies that it "does not rely on the Information Sharing Agreement with RCMP as a basis for the Order sought". Reference to the agreement was meant to provide a context for the exchange of sensitive information between BCLC and the RCMP which may relate to ongoing investigations.

[18] BCLC notes that even under the original order it sought, the materials would be redacted for personal identifying information of casino patrons and other interviewees, gaming facility staff and BCLC investigators, and any information FinTRAC or any other law enforcement agency has requested be redacted, but would otherwise be unredacted. By way of example, on August 7, 2020, BCLC advised commission counsel that it would be providing some of the records referred to in this application because "essentially all of the substantive information in these records has now been redacted by the RCMP".

[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.

i. The Privilege Being Asserted

[20] In its notice of application, BCLC takes the position that the materials are subject to a claim of informer privilege as well as a case-by-case (*Wigmore*) privilege to the extent that BCLC did not guarantee or promise confidentiality in the course of the relevant investigation. This is a departure from its June 9, 2020 correspondence to the Commission, where it only asserted a "case-by-case (*Wigmore*) privilege over intelligence information which was collected from persons under express or implied conditions of confidentiality."

[21] In relation to class-based informer privilege BCLC submitted at page 7, footnote 2:

> Canadian courts have recognized informer privilege in similar, non-police circumstances: see e.g. *R v McLellan*, 2013 BCSC 175 (CRA informer) and *A v Drapeau*, 2012 NBCA 73 (Securities Commission informer). See also *Rogers v. Home Secretary*, [1973] A.C. 388, where the House of Lords recognized informer privilege in respect of a letter written in confidence to the Gaming Board of Great Britain.

[22] In relation to its assertion of case-by-case privilege, BCLC relied on the four-step *Wigmore* process as set out in *R. v. McClure*, 2001 SCC 14 at paragraph 29 as follows:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. [Emphasis deleted.]

ii. Rule 39(b) — For any reason for which information could or must be withheld by a public body under sections 15-19 and 21-22 of FOIPPA

[23] In support of its contention that Rule 39(b) is applicable, BCLC contends that it falls within the definition of law enforcement as contemplated in section 15 of *FOIPPA,* noting that law enforcement is defined in *FOIPPA* to include investigations that "lead or could lead to a penalty or sanction being imposed." BCLC contends that the contents of the intelligence interviews could reasonably be expected to be withheld from an applicant under *FOIPPA* for the reasons enumerated in sections 15(1)(a),(c),(d),(e) and (f).

[24] BCLC also argues that the contents of the intelligence interviews could reasonably be expected to be withheld from an applicant under section 19(1)(a) of *FOIPPA* on the basis that it could pose a threat to personal safety. BCLC submits that, in particular, personal information about casino patrons and other interviewees, BCLC investigators, gaming facility staff, and BCLC informants could be withheld under section 19(1)(a).

[25] BCLC also submits that Rule 39(c) was applicable in that it is in the public interest to protect informer (or at least quasi-informer) privilege, making it necessary "for the effective and efficient fulfilment of the Terms of Reference".

[26] BCLC argues that the order it is seeking is proportional to and balanced with the public interest in having the Commission fulfil its mandate.

[27] More specifically, it submits that:

a) it will reduce or eliminate any concern that disclosure will result in a breach by BCLC of any implied or express condition of confidentiality;

b) it will ensure the safety of its casino patrons and other interviewees, gaming facility staff and informants; and

c) it will maintain the confidentiality and thus the effectiveness of its information gathering techniques and processes.

[28] BCLC submitted that by drafting the order in a manner which allows commission counsel and Permitted Participants to review the documents in largely unredacted form (excepting personal information of people involved in the interviews and the information which law enforcement entities or FinTRAC request be redacted) is much more beneficial than the alternative of extensive redactions or being withheld completely.

CANADA'S POSITION

[29] Canada consented to the granting of a confidentiality order as attached in Schedule A to BCLC's notice of application so long as paragraph (b) is modified to enable commission counsel to seek authorization from the Commissioner to show or provide copies of the materials to the public, a witness or potential witness, an expert, a consultant or any participant, by application and on notice to BCLC, Canada, and GPEB (so they are afforded an opportunity to make representations in respect of commission counsel's proposed disclosure).

[30] Canada opposed the exclusion of all other participants from a hearing of the present application.

[31] Canada takes the position that it would be premature to grant the order sought by BCLC in paragraph (c) of Schedule A "in the absence of any indication that Commission counsel or others intend to discuss specific Intelligence Interview Confidential Materials at the evidentiary hearings."

[32] In its written submissions Canada "agrees generally with BCLC's position that the Intelligence Interview Confidential Materials meet the applicable legal tests for the issuance of some form of a confidentiality order." Beyond noting that the information at issue is "highly sensitive and its disclosure could cause prejudice to individuals and to the public interest" Canada did not offer any analysis of BCLC's grounds for claiming that the test to justify a confidentiality order under the Commission's Rules of Practice and Procedure or under the common law has been met.

GPEB'S POSITION

[33] GPEB opposed BCLC's application. It contends that no restrictions should be put on its access (and likely the other participants with standing in the gaming sector); and no order should be made restricting the openness of the hearing. If BCLC wishes to obtain a sealing order or an order excluding participants, the media, or the public from the hearing, this application should be made during the hearing in respect of the specific documents or evidence sought to be tendered.

[34] GPEB points out that under the *GCA*, it is responsible for the overall integrity of gaming in British Columbia and it is responsible for undertaking investigations under and enforcing the *GCA*. GPEB provides assistance to law enforcement agencies with certain *Criminal Code* investigations and has both investigations and intelligence teams to fulfill its purpose.

[35] GPEB has a role to monitor BCLC's compliance with the *GCA* and its regulations. Section 86(2) of the *GCA* requires BCLC to immediately notify GPEB of any potential offences under the *GCA* or *Criminal Code*. BCLC is obligated to provide comprehensive details of the conduct, activity or incidents it reports on to GPEB.

[36] GPEB points out that the risks that BCLC has identified as flowing from public disclosure of the materials apply to some but not all of the material, and in any event, none of the risks would result from a disclosure to GPEB given its mandate and BCLC's obligation to provide information to it. GPEB further submits in light of BCLC's proposed redactions to the materials before disclosure and given the confidentiality obligations cast on all participants under the Commission's Rules of Practice and Procedure, the risks envisaged by BCLC will not arise by disclosure to the gaming participants.

[37] GPEB makes the point that it is entitled by statute to any materials related to a gaming integrity issue which would include money laundering.

[38] As to the other participants, GPEB cites the provisions of Rule 18 requiring signed undertakings from counsel for a witness or participant that the records disclosed will only be used for the Inquiry. GPEB also cites Rule 19 which requires a participant to sign a confidentiality agreement and deliver it to his or her counsel before receiving the record.

[39] GPEB emphasizes the importance of the "open court principle" and submits that it has equal force in relation to public inquiries. The presumption of openness is codified in section 25 of the *PIA*:

> **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.

[40] GPEB notes the discretion given to a commissioner in section 15 to limit attendance and access and agrees with BCLC that the exercise of that discretion ought to be guided as set out in *Sierra*.

[41] GPEB does not agree, however, that BCLC has advanced sufficient grounds to support the order it seeks.

[42] It characterizes the scope of the order being sought, ("all documents containing information regarding intelligence interviews,") as overbroad and vague.

[43] It further submits that BCLC's use of the term "strictly confidential" is unnecessary and prejudicial as other participants have already produced sensitive documents to the Commission in reliance on the Commission's confidentiality obligations in the Rules. Introducing another layer of confidentiality sows confusion and potential prejudice.

[44] GPEB submits there is no justification to exclude it from those to whom commission counsel can show the documents given GPEB's relationship with BCLC and the latter's obligation to the former.

[45] GPEB submits that at best BCLC's application should only be brought when and if some of the materials are being tendered so they can be dealt with on a case-by-case basis.

[46] In respect of BCLC's reliance on Rule 39(a) class-based informer privilege and/or case-by-case privilege, GPEB notes that "[i]t is difficult to understand how BCLC is able to provide such assurances of confidentiality given its statutory obligations [to GPEB]." GPEB submits there is no evidence that BCLC has ever relied on informer privilege in its dealing with GPEB which raises the issue of how frequently it arises in the intelligence interviews.

[47] GPEB submits that BCLC's assertion of either class-based or case-by-case privilege over the materials is not supported in the evidence and the Commission does not have discretion under Rule 39(a) to restrict access to the materials "in the broad manner sought by BCLC".

[48] With respect to Rule 39(b) and the application of *FOIPPA,* GPEB submits it is important to note that BCLC is not proposing to produce unredacted copies of the materials; that there will be redactions for personal information and for information for which law enforcement agencies or FinTRAC request redactions. GPEB submits that the evidence does not demonstrate in those circumstances that BCLC would be entitled to withhold all documents subject to the *FOIPPA* provisions.

[49] GPEB submits that BCLC has not established a basis for the broad prospective order it seeks. Rather, an analysis must be conducted on a case-by-case basis once the redactions are known and the sensitivity of the unredacted information can be assessed.

[50] GPEB argued in the alternative, that if BCLC "has proven a reasonable assertion of privilege or the application of [*FOIPPA*] so as to trigger the Commission's exercise of discretion under Rule 39" then the Commissioner's exercise of discretion is guided by the test in *Sierra*.

[51] GPEB submits that on the first branch of the test, that of necessity, restricting its access to the materials is clearly not necessary. GPEB takes no position on BCLC's application to restrict access by the other participants.

[52] GPEB does, however, submit that in its present form the order is overbroad as it applies to all documents containing information regarding intelligence interviews whereas the evidence demonstrates that although some disclosure of materials may risk harm, others may not. GPEB submits BCLC does not show a real and substantial risk to an important interest well grounded in the evidence.

[53] GPEB also submits that BCLC's position ignores the confidentiality obligations which bind all the participants in the Commission. GPEB submits unless and until the materials are tendered into evidence in the hearings, the disclosure is not public. GPEB says restrictions on access within the Commission's pre-hearing process should not be decided by the prospect of risks arising from disclosure to the public at large.

[54] GPEB emphasizes that any prospective order restricting access at the hearings is entirely premature and should be assessed on a case-by-case basis when and if the issue of tendering them arises.

[55] GPEB further submits if the order sought would restrict media and public access it should be brought with notice to the public and the media.

[56] As to the second stage of the *Sierra* test, if the test of necessity is met, GPEB submits that the deleterious effects of the order sought are significant. Given the broad scope of the fact-finding mandate of the Commission and its responsibility to make recommendations across a wide range of sectors, restricting the access of participants in a particular sector from materials that could help in understanding any issues in that sector deprives the Commission of the involvement of those participants in potentially important aspects of the evidence touching on fact finding and on recommendations.

[57] GPEB submitted that the deleterious effect of granting a prospective class-wide order significantly outweighs any salutary benefits.

[58] As a final note, GPEB raised a concern that the five-day notice period under Rule 56 by which a participant must provide five days' notice to the Commission of an intent to put a record to that witness is insufficient. GPEB "would be supportive extending the current 5-day notice period under Rule 56 … for documents sought to be tendered during the gaming sector hearings".

COMMISSION COUNSEL'S POSITION

[59] Commission counsel opposed the terms of the confidentiality order as set out in Schedule A. Commission counsel opposed the restriction of public access to the application materials that have so far been filed, but take no position on whether an additional affidavit not yet delivered should be sealed and otherwise restricted from public access. Commission counsel agree that the provisions of the *PIA,* the Commission's Rules of Practice and Procedure and the common law test set out in *Sierra* which was cited by BCLC "articulate … the exercise of discretion in this case."

[60] Commission counsel essentially adopt GPEB's application response with respect to the overbroad scope of documents captured by the proposed order.

[61] Commission counsel submit that BCLC's reliance on section 39(a) (section 15(1)(a) *PIA*) is misplaced. Commission counsel adopt GPEB's argument that only some but not all of the materials could be subject to privilege or *FOIPPA* concerns. With respect to the privilege argument, commission counsel submits that there must be an explicit or implicit promise of confidentiality and it must be essential for the full and satisfactory maintenance of the relationship between the parties. Commission counsel argued that in the present case those circumstances could not exist given BCLC's role under the *GCA* and its relationship and obligations to GPEB; and given its role under the *PCMLTFA* and obligations to FinTRAC. In those circumstances, commission counsel argued that there can be no suggestion of confidentiality, much less confidentiality that is essential to the full and satisfactory maintenance of the relation between the parties.

[62] Commission counsel question BCLC's "expansive understanding of 'law enforcement'" but emphasize in any event that BCLC has no authority to enter into any informer privilege contract. Commission counsel submit this is a far cry from the circumstances which give rise to the almost absolute nature of informer privilege.

[63] Commission counsel submit that BCLC's position that materials could be shared with commission counsel, Mr. Kroeker and Mr. Lightbody is inconsistent with informer or *Wigmore* privilege.

[64] Commission counsel also submitted that given GPEB's statutory entitlement to the materials and its opposition to the order sought, BCLC's assertion of privilege must fail. The records could equally be sought from GPEB.

[65] As to Rule 39(b) (section 15(1)(b) *PIA*) which raises the concern about withholding the material under *FOIPPA*, sections 15(1)(a),(c),(d),(e) and (f) and section 19(1)(a), commission counsel submit that "context is everything and the context here is not disclosure to the world or publication; it is disclosure only to participants governed by strict rules." Commission counsel submit that the risks identified by BCLC arise in the context of disclosure within the Commission before the materials might be tendered in evidence.

[66] Commission counsel go further and submit that in light of the obligations and protections in the Rules, BCLC should not be permitted to redact materials as they propose because it will hinder the Commission from pursuing its investigations. Commission counsel note that redactions by RCMP and FinTRAC will substantially allay any concerns.

[67] Commission counsel rely on the effect of Rules 17,18 and 19 which establish the need to treat the records as confidential.

[68] Commission counsel submit that it is redundant to require the Commission to treat them as "strictly confidential" (emphasis added), in any event. Commission counsel submit that restricting the balance of those with standing in the gaming sector from having pre-hearing access to the materials could undermine the effective and efficient fulfillment of the Commission's Terms of Reference by limiting those participants' ability to contribute to fact finding and making recommendations.

[69] Commission counsel submit that the application to exclude the public and participants from future hearings is premature. Commission counsel take essentially the same position as GPEB in connection with that order.

BCLC'S REPLY

[70] In its reply, BCLC conceded its reporting responsibilities to GPEB and consented to GPEB being included in the list of "Permitted Participants" accepting that "there is no risk in disclosing Intelligence Interview Confidential Materials to GPEB."

[71] BCLC made the same concession with respect to Canada and acceded to Canada's suggested form of order which included a term permitting commission

counsel to apply for authorization to the Commissioner to show or provide copies of the materials to the public, a witness, a potential witness, an expert or a consultant, or any other participant (other than the Permitted Participants) with notice to the Permitted Participants.

[72] BCLC submitted that the use of the term “strictly confidential” is warranted to distinguish it from the default confidentiality process under the Rules which enables commission counsel to provide copies of the documents to a witness or a potential witness, an expert, a consultant, or a participant.

[73] BCLC disagreed with the proposition that there would be no risk of harm in disclosure of the materials to other gaming participants even with redactions. It argues that the risks cannot be eliminated and given “the gravity of the potential harms at play” the proper calibration of the risks require more significant restrictions on disclosure.

[74] BCLC, while acknowledging the Rules provide for confidentiality, submitted there are gaps which court “a real risk of inadvertent disclosure”. For example, there is a gap in the Rules as to whether experts and consultants are required to sign undertakings prior to receipt of records from commission counsel; and whether unrepresented witnesses or participants will be required to receive records without signing a confidentiality agreement. BCLC contended that even if the risk of inadvertent disclosure is low, the potential consequences are severe and the need to avoid risk of harm to personal safety “has been considered a ‘social value of superordinate importance’” citing *X. v. Y.*, 2011 BCSC 943 at paragraphs 17-25.

[75] BCLC agrees with GPEB’s concern about the “insufficiency of the 5-day notice period” and further raises the concern that it is not clear that the party who first disclosed the record to be put to a witness will be provided with notice in order to apply for redactions.

[76] BCLC submitted that it is impossible to assess the potential risk on a document-by-document basis and hence the only way to manage the risk is on a categorical basis to “all documents containing information regarding intelligence interviews”.

[77] BCLC accepts the importance of the open court principle to public inquiries but does not agree that the order sought would undermine that principle in relation to “a discrete subset of documents” given the countervailing interest is “a social value of superordinate importance”.

[78] In response to commission counsel's submission that there can be no implied condition of confidentiality in BCLC's patron interviews because BCLC is required to disclose certain information to GPEB, FinTRAC and other law enforcement agencies, BCLC argued that the application is based on a concern about the potential for "public dissemination" (underlining in original) and that *Wigmore* privilege can apply even though BCLC is required to disclose certain information to GPEB, FinTRAC and other law enforcement agencies.

[79] BCLC contended that a restriction on disclosure must be calibrated to account for the type and risk of harm at issue and in the present circumstances, warrants a restriction to the extent sought.

DISCUSSION AND CONCLUSION

[80] I accept BCLC's submissions as to the legal framework within which this application is brought. My task is to determine whether the application of Rule 39(a) and/or 39(b) to the circumstances before me engage my discretion to issue the broad-based and comprehensive confidentiality order sought by BCLC. Under Rule 39(a) the issues for consideration are whether informer privilege applies between BCLC and the interviewees, or whether case-by-case *Wigmore* privilege is so engaged. Under Rule 39(b) the issue is whether sections 15(1)(a),(c),(d),(e),(f) and/or 19(1)(a) of *FOIPPA* could apply to the materials.

[81] In the event that I find that there is a reasonable expectation that one or more of those provisions are engaged, then I have the discretion to make the order sought. (In the case of informer privilege, it is near absolute and to the extent it is established, I have no discretion to do other than enforce confidentiality.)

[82] The guide for the exercise of my discretion is that set out in relation to restricting access to a court file as articulated in *Sierra* at paragraph 53:

> A confidentiality order … should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, … in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, … outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[83] The only part of this application that directly implicates the open court principle and the corresponding importance of maintaining openness in the context

of a public inquiry is BCLC's application for an order, "Pursuant to Rule 39, to the extent the Intelligence Interview Confidential Materials are discussed in an evidentiary hearing, the public and participants shall be restricted from attending except for the Permitted Participants."

[84] I agree with the shared position of Canada, GPEB and commission counsel that such an order is premature. There is simply no present basis to conclude that the need for such an order exists. There is no current indication that the materials will be discussed in a future hearing, or if they are, what they will consist of, whether they would animate safety concerns which can only be resolved by the order sought, or whether some lesser action or order would substantially eliminate those concerns. In my view, to make the order sought by BCLC at this stage would essentially be restricting public and media access and restricting participant involvement in hearings in which they have an established interest in an evidentiary vacuum. Making such an order in such circumstances will deprive the Commission of the involvement of some of the participants with respect to some of the issues for which they have been granted standing, without knowing what contribution they could make and without any indication that their involvement would imperil any countervailing interest.

[85] It would similarly deprive the public of its opportunity to hear and see evidence that they may very well be entitled to hear and see without hindrance. If some evidence is tendered at a hearing which raises what BCLC has referred to as "a social value of superordinate importance" favouring a restriction on access, that is a circumstance which can be dealt with at the time and in the context in which it arises. I thus decline to make that order sought by BCLC.

[86] The balance of the order sought by BCLC requires a consideration of its statutory mandate, its role, its relationship and obligations to GPEB, its relationship and obligations to FinTRAC and, as well, a consideration of the procedural rules governing its participation in this Commission of Inquiry.

[87] In addition to the rules under which BCLC has brought this application (Rules 3, 28 and 39), the other salient rules at play are Rules 17,18,19,20,21 and 27. Those Rules read as follows:

> 17. Subject to Rule 18 (Undertaking), the Commission shall treat all records it receives as confidential unless and until they are made part of the public record in accordance with Rule 27. This does not preclude Commission counsel from showing or providing a record to a witness or potential witness, an expert, a consultant or a participant.

18. Commission counsel shall not provide a record to counsel for a participant or counsel for a witness until counsel has delivered to Commission counsel a signed undertaking, in a form approved by the Commission, that all records disclosed by the Commission will be used solely for the purpose of the Inquiry.

19. Counsel for a participant or a witness may provide a record to the participant or witness or expert or consultant only if that person has delivered to counsel a signed confidentiality agreement in a form approved by the Commission, that all records disclosed by the Commission will be used solely for the purpose of the Inquiry, and counsel has delivered the signed confidentiality agreement to Commission counsel.

20. Witnesses or participants who are unrepresented by counsel may be required to sign a confidentiality agreement, in a form approved by the Commission, before being provided records.

21. The Commissioner may:

    a. impose restrictions on the use and dissemination of records;

    b. require that a record that has not been entered as an exhibit in the evidentiary proceedings, and all copies of the record, be returned to the Commission; and

    c. on application, release counsel, a participant or a witness, in whole or in part, from the undertaking or confidentiality agreement in relation to any record, or may authorize the disclosure of a record to another person.

…

27. Unless the Commissioner otherwise determines:

    a. a record within the Commission's control that has not been entered as an exhibit is not available for public inspection, copying or publication; and

    b. a record that has been entered as an exhibit may be made available to the public on the Commission's website including with redactions made by Commission counsel.

[88] An important part of the context of this application is that it is not brought in the face of the imminent prospect that any of the records at issue are being made available to the public under Rule 27(b); rather, all the records are subject to Rule 27(a) and are "not available for public inspection, copying or publication".

[89] Indeed, although BCLC's initial notice of application did not refine the concern which animated it to bring the application, in its September 1 reply, it made it clear that "the primary concern that is the basis of its application is the potential for <u>public</u> dissemination" (emphasis in original).

[90] BCLC submits that Rule 39 does not require it to conclusively establish a privilege or the application of *FOIPPA* to the information over which confidentiality is sought. Rather, it need only assert a privilege, or satisfy the Commissioner that the information could be withheld under *FOIPPA*.

[91] It does, however, recognize that there must be a reasonable basis for any such assertion and I have assessed the privilege claims in that light.

i. Class-based Informer Privilege

[92] Police and informer privilege has long been part of the criminal law. The modern formulation was stated in Sopinka, Lederman & Bryant in the *Law of Evidence in Canada* (4th ed, 2014) as follows:

> The court cannot compel the disclosure of the identity, or information which might disclose the identity, of persons who have given information to the police acting in the course of their investigative duties. The rule does not protect any other information communicated by the informant (although a more general claim for Crown immunity may apply).

[93] That the privilege attaches only in narrow circumstances involving the police and/or prosecution is reinforced in *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, 2005 FCA 213. In that case, at issue was the breadth of the definition of the term “Crown”, in other words, who may and should be entitled to share an informer’s privileged information.

[94] Counsel for the respondent argued that a narrow view, definition and concept of the Crown should prevail, and that the notion of Crown “refers to police officers and Crown prosecutors who assume responsibilities for enforcing and administering criminal law” (paragraph 41).

[95] In that case, the Court agreed with the respondent’s submissions, noting at paragraph 43:

> I agree with counsel for the respondent that, in the context of the police informer privilege, the notion of "Crown" should be narrowly defined and refers to those persons who are directly involved in the enforcement of the law.

[96] At paragraph 48, the Court summarized the existing law starting with the proposition that:

> … police informer privilege is a legal rule of public order designed to promote efficiency in enforcement and implementation of the criminal law.

[97] In the present case there is no suggestion that BCLC is a police agency or that its investigators perform in the role of police or that they are directly involved in the enforcement of the law.

[98] Although BCLC relied on *R. v. McLellan* and *A. v. Drapeau* as examples where informer status was found in the context of "non-police circumstances" a review of those cases does not support that submission. In *R. v. McLellan*, the circumstances involved CRA investigators who conducted a civil and criminal investigation of the accused. There was no dispute about the authority of the CRA investigators to conduct a criminal investigation into "accusations of criminal violations of the *Income Tax Act*" and there was nothing to suggest they were not acting as peace officers.

[99] In *A. v. Drapeau,* the issue was whether an informant to an investigative authority (the New Brunswick Securities Commission) ought to be protected as a confidential source. In finding that he should, the New Brunswick Court of Appeal observed at paragraph 20:

> Of significance in this case is the fact that Mr. LeBlanc had been appointed as an investigator pursuant to s. 171(1) of the Act with various powers, including those contained in s. 174:
>
> > 174 Every investigator in carrying out his or her duties under this Act and the regulations is a person employed for the preservation and maintenance of the public peace and has and may exercise all the powers, authorities and immunities of a peace officer as defined in the Criminal Code (Canada).
>
> Having been appointed by the Commission, Mr. LeBlanc has all the powers of a peace officer, including the power at common law to promise secrecy, expressly or by implication, in exchange for information necessary to assist him in an investigation.

[100] I have no evidence before me that any of the BCLC employees involved in the intelligence interviews have the status of peace officers or are authorized to conduct investigations into criminal or quasi-criminal offences.

[101] The *GCA* is a statue under which BCLC and GPEB operate. As noted by GPEB and commission counsel in their respective submissions, it is GPEB, not BCLC which has the investigative and enforcement mandate under that Act, and GPEB has the power to investigate BCLC which has the corresponding obligation to

report to GPEB. BCLC's responsibility under the Act is for the conduct and management of gaming; GPEB's responsibility is for the overall integrity of gaming.

[102] To the extent that BCLC employees have given assurances to interviewees "that information obtained in the course of interviews will not be shared outside of BCLC" as asserted by Mr. deBruyckere in his affidavit, it is an assurance in conflict with BCLC's obligations to GPEB under the *GCA* and to FinTRAC under the *PCMLTFA.*

[103] In my view, given all the circumstances including BCLC's concession that the materials can be shared with GPEB, Canada, commission counsel and Messrs. Kroeker and Lightbody, there is no reasonable basis for BCLC to assert a class-based informer privilege in relation to the intelligence interviewees or to cloak the materials with confidentiality. Indeed, if there were such a privilege, it could not be waived by BCLC unilaterally (see *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45 at paragraph 11).

[104] Although it was not argued by the parties, there is some doubt that BCLC as a crown corporation falls within the scope of Rule 39(a) which requires the assertion of privilege to be made by "government". In light of my resolution of the matter, I do not find it necessary to address this issue but do not wish this ruling to be taken as an implicit acceptance that a crown corporation is "government" for purposes of section 15 of the *PIA* or Rule 39(a) of the Commission's Rules of Practice and Procedure.

ii. The Case-by-case Privilege

[105] I have come to the same conclusion with respect to BCLC's contention that the materials are subject to the case-by-case (*Wigmore*) privilege. A case-by-case *Wigmore* privilege (set out in *R. v. McClure* at paragraph 29) assumes as a starting point a confidential relationship such as doctor/patient, psychologist/patient, journalist/informant, and religious communications.

[106] There is nothing inherently confidential about the relation between BCLC investigators and a casino patron, gaming facility staff or other interviewees. What has introduced the prospect of confidentiality into the relationship is BCLC's assumption of the function of intelligence gathering as part of its management and control role and its related assurances of confidentiality.

[107] With respect to the first criteria of the *Wigmore* test, it is not clear from BCLC's notice of application to what extent the materials at issue "originate in a

confidence they will not be disclosed". In his affidavit, Mr. deBruyckere only deposes that "in certain cases" BCLC provided assurances of confidentiality and that "in some cases, casino patrons … have expressed a concern for their physical safety…."

[108] Thus, it does not appear that all the materials originated in a confidence that they would not be disclosed.

[109] Moreover, according to the affidavit of Kenneth Ackles, Manager of Investigations at the Joint Illegal Gaming Investigations Team ("JIGIT"), and an employee of GPEB, BCLC has not refused to provide identity information (of any interviewees or otherwise), or of the details of any interview because of any assurance of confidentiality.

[110] Thus, it does not appear that intelligence interviews are considered confidential on a broad basis. There is simply no evidence that BCLC has sought to limit the dissemination of the intelligence interviews to GPEB or to limit GPEB from any further dissemination.

[111] I thus do not find the first criteria in the *Wigmore* test to favour the existence of a case-by-case privilege.

[112] As to the second criteria, in my view, where one party to a conversation is under an obligation to report it to a third party, the element of confidentiality cannot be regarded as essential to the full and satisfactory maintenance of the relation between the parties.

[113] For much the same reason, I find that the relation is not one which in the opinion of the public needs to be sedulously fostered. To create confidentiality would hobble BCLC in its obligation to report to GPEB and FinTRAC and would hobble GPEB and FinTRAC in the fulfillment of their respective duties and obligations.

[114] As to the final criteria, I am not satisfied that it favours BCLC's position. The relations it seeks to impress with a privilege are idiosyncratic. It is unlike those relationships referred to in *R. v. McClure* which are all cut from the same cloth woven with threads of privacy.

[115] BCLC's current position is that it is "public dissemination" it is concerned with, not disclosure to the Permitted Participants. In my view that position is at odds with criteria four. If it is a given that the communications at issue are not confidential and

BCLC has no control over their dissemination by GPEB or FinTRAC (for example) it is difficult to see how not imposing a privilege would cause any injury to the relation which would outweigh the benefit of the Commission of being able to deal with the information without hinderance.

[116] Accordingly, I am not satisfied that BCLC has established even a reasonable basis for the creation of any privilege in relation to the communications at issue. However, if I am wrong in that determination, I would not accede to BCLC's application for the reasons set out in paragraphs 122 to 127 below.

RULE 39(B) – *FOIPPA* SECTION 51(A), (C), (D), (E) AND (F)

[117] BCLC's reliance on Rule 39(b) which provides the Commissioner with discretion to restrict attendance at a hearing or access to information held by the Commission in circumstances in which sections 15-19 and 21-22.1 of *FOIPPA* is in play, depends to some extent on whether BCLC is involved in law enforcement. Section 15 appears under the heading "Disclosure harmful to law enforcement ".

[118] BCLC's contention, as I understand it, is that its activities fall under the heading of law enforcement for the purpose of *FOIPPA* as that term is defined in Schedule 1:

> **"law enforcement"** means
>
> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[119] Specifically, BCLC referenced the definition in subparagraph (b) ("investigations that lead or could lead to a penalty or sanction being imposed").

[120] As I read Mr. deBruyckere's affidavit, the interviews which generate the information at issue are conducted because BCLC regards it as supportive of its reporting functions to GPEB and FinTRAC to undertake its own information and intelligence gathering with respect to activity in its casinos. There is no evidence that the intelligence and information gathering are part of targeted investigations in which penalties or sanctions are at play. In those cases where interviewees have been assured that information obtained "will not be shared outside of BCLC" or where confidentiality is implied, it is difficult to see any purpose for the interviews other than intelligence gathering.

[121] In those circumstances, I do not see a reasonable basis on which to conclude that as a general matter BCLC is acting in a law enforcement capacity so as to engage section 15(1)(c). I am satisfied that subsections 15(1)(a),(d),(e) and (f) do engage my discretion, as does section 19(1)(a).

[122] On balance, however, I am not satisfied that the order sought by BCLC is appropriate or necessary. It is clear that BCLC's animating concern is with public dissemination of the materials. In light of my findings on this application there is no reasonable prospect that any privilege needs to be protected by a broadly proscriptive order, and the concern which underlies section 15(b) of the *PIA* and Rule 39(b) of the Commission's Rules of Practice and Procedure has been confined by BCLC's reply to "public dissemination." Therefore, the necessity for such an order is abated. BCLC has not provided any basis, other than the risk of inadvertent disclosure created by the "gaps" in the Rules, to restrict disclosure of the materials to the other participants, apart from the proposed Permitted Participants. BCLC has not provided any assessment or analysis of the risk or how it could be mitigated short of the all-encompassing order it seeks. It relies on *X. v. Y.* to submit that "…in certain cases the public interest in the open court principle must yield to the preservation of 'a social value of superordinate importance'". It submits that this is one of those cases.

[123] In my view, BCLC's reliance on *X. v. Y.* is misplaced. That was a case in which the application for an anonymity order and sealing order was brought at the conclusion of a trial. In other words, the trial was conducted in public and without any restriction or limitations on who could attend. What the applicant was seeking was that he and his family be referred to by initials in the reasons for judgment and that the court file, including the transcripts, be sealed. The reason underlying the application was the applicant, who was a plaintiff in a personal injury action, was a police officer investigating gang violence. He deposed that publication of his name and the names of his family members and residential address would put them at a high security risk. In that case, the Court granted the application and made the order sought. While I understand that BCLC has cited *X. v. Y.* for the principle that it advances, it is clearly distinguishable. In the present circumstances, BCLC is seeking to equate an asserted but uncalibrated risk of the inadvertent disclosure of redacted materials in pre-hearing procedures subject to confidentiality rules, with the risk that the posting of an RCMP gang investigator's personal information in reasons for judgment on the Internet would bring to him and his family. In my view while the principle in *X. v. Y.* is an important one, it has limited application in the present case.

[124] Having regard for the test in *Sierra*, I am not, in the circumstances, satisfied that the order sought by BCLC is necessary to prevent a serious risk to an important interest, because reasonable alternative measures will not prevent that risk. In the present case there are confidentiality rules in place that in my view are sufficient to prevent that risk.

[125] As I see it, in addition to the pre-hearing confidentiality provisions provided by the Rules, there are additional reasonable alternative measures which can be imposed to prevent or at least substantially abate the risks identified by BCLC. These measures include a requirement that commission counsel obtain a signed confidentiality agreement in a form approved by the Commission before showing or providing copies of the materials to witnesses, a requirement that commission counsel show or provide witnesses with copies of these materials with any personal identifying information redacted, and a requirement that the materials be provided to participants who are not represented by counsel only if they have signed a confidentiality agreement in a form approved by the Commission.

[126] In my view, those additional restrictions placed on commission counsel's use of the materials, together with the cloak of confidentiality which otherwise covers the materials under the Rules are sufficient to avert the necessity of the broad-based indiscriminate order sought by BCLC and I make each of the orders set out above.

RULE 39(C) – EFFECTIVE AND EFFICIENT FULFILLMENT OF THE TERMS OF REFERENCE

[127] I would reach the same conclusion under Rule 39(c) as I have under Rule 39(b).

ANCILLARY MATTERS

[128] I agree with commission counsel's submission that BCLC should not redact materials for personal identifying information of the interviewees, gaming facility staff and BCLC investigators. The Terms of Reference of the Commission are very broad and commission counsel have the difficult task of conducting investigations into a challenging array of issues as set out in the Terms of Reference (which need not be repeated here). Given the cloak of confidentiality which covers the pre-hearing processes of the Commission, given my findings with respect to privilege, and given the opportunity for redactions by law enforcement agencies, I conclude it would be an unnecessary obstacle to put in commission counsel's path to permit additional redactions by BCLC (except that in circumstances where commission counsel will be showing the materials to a witness, they must use BCLC redacted copies). I

accordingly order that BCLC provide commission counsel with materials which have been redacted by BCLC for personal identifying information as well as unredacted copies of those materials. I do not make a similar order with respect to the other participants, except GPEB which in any event is entitled to those materials.

[129] In the course of submissions, counsel for Canada, GPEB and BCLC identified certain "gaps" in the rules respecting pre-hearing disclosure. Those gaps included insufficient notice being provided to a witness prior to documents being tendered into evidence at the hearings; and a lack of such notice to the party that initially disclosed the records.

[130] Should it be necessary to make any ancillary orders with respect to those asserted gaps in order to buttress the Commission's pre-hearing confidentiality regime with respect to the materials at issue in this application, I will do so after counsel have discussed and come to an agreement as to what, if anything, is necessary. If counsel are unable to agree, there is liberty to apply.

SUMMARY

[131] In summary, I have concluded that I have the discretion to make the confidentiality order sought by BCLC under Rule 39(b) of the Commission's Rules of Practice and Procedure but have declined to make the requested order.

[132] I have also made the following ancillary orders:

a. BCLC shall produce to the Commission unredacted copies of the material as well as copies that have been redacted to protect personal identifying information;

b. With the exception of GPEB, commission counsel may not provide unredacted copies of the material to any witness or participant;

c. If commission counsel wish to show or provide copies of the material to a witness, they must obtain a signed confidentiality agreement from the witness in a form approved by the Commission;

c. If commission counsel wish to show or provide copies of the material to a participant who is not represented by counsel, they may only do so upon receiving a signed confidentiality agreement;

e. BCLC has leave 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; and

f. All parties have liberty to apply for any additional orders with respect to notice if counsel are unable to agree.

[133] While this ruling will be made public, all application materials will remain confidential subject to an application by any party.

Commissioner Austin Cullen