Decision on Applications Under Rules 56 and 105 to 108

(Jeremy MacKenzie)

1. Jeremy MacKenzie is currently scheduled to testify before me on November 4, 2022. He has filed two application related to his testimony. The first is for an order that his evidence be taken *ex parte* and *in camera*, or in the alternative, an order for a publication ban and related orders. The second is for an order that his evidence be led by his own counsel rather than Commission Counsel.

2. This decision explains why I would dismiss both applications.

Background to the Applications and Applicable Rules

3. Mr. MacKenzie has been served with a summons under Rule 48 of the Commission's Rules of Practice and Procedure ("Rules"). He is expected to testify on November 4, 2022 at 2 p.m.

4. On October 31, 2022, Mr. MacKenzie served an application under Rules 105 to 108. These rules provide:

> 105. In exceptional circumstances, a witness's personal private interests may require the Commissioner, in the exercise of his discretion, to deviate from the general principle that all information relating to that witness be disclosed to the public, either through testimony or through documents made available.
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> 106. In the exercise of the Commissioner's discretion, he may, among other measures:
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> a. Direct or permit the redaction of irrelevant personal information from otherwise public documents;
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> b. Direct that certain information be subject to a non-publication order, although otherwise contained in public documents;

c. Direct the extent to which such information should be referred to in testimony;

d. Direct that a witness not be identified in the public records and transcripts of the hearing except by non-identifying initials, and that the public transcripts and public documents be redacted to exclude any identifying details;

e. Permit a witness to swear an oath or affirm to tell the truth using non-identifying initials;

f. Use non-identifying initials and exclude any identifying details in his report; and

g. Hold an in camera hearing, as a last resort, in circumstances in which the desirability of avoiding disclosure outweighs the desirability of adhering to the general principle that hearings should be open to the public.

107. If the Commissioner has exercised his discretion pursuant to Rule 106d, no photographic or other reproduction of the witness that might lead to his or her identification shall be made at any time and there shall be no publication of information that might lead to the identification of the witness.

108. All media representatives shall be deemed to undertake to adhere to the rules respecting personal confidentiality as set out herein. A breach of these rules by a media representative shall be dealt with by the Commissioner as he sees fit.

5. Mr. MacKenzie sought an order that his evidence be taken *ex parte* and *in camera*. This would mean that his evidence would be taken in the absence of either the parties or the public. In the alternative, Mr. MacKenzie orders that his evidence not be published, and that the Commission not release records that would identify him.

6. Mr. MacKenzie relies on ss. 7 and 11 of the *Charter of Rights and Freedoms* ("*Charter*"). Mr. MacKenzie is currently facing criminal charges. He expresses several concerns about the potential impact of publicity surrounding his testimony before the Commission on his criminal proceedings. He maintains that the anticipated evidence to be led at the inquiry is irrelevant to his trials, but consists of prejudicial, inflammatory,

and incendiary assertions that will paint him in an unfavourable light. He submits that fairness "means that the desirability of avoiding disclosure outweighs the desirability of adhering to the general principle that hearings should be open to the public".

7. Mr. MacKenzie draws an analogy between his circumstances and those of an accused person during a bail hearing, who has a statutory right to a publication ban under s. 517 of the *Criminal Code*. The Supreme Court, in *Toronto Star Newspapers Ltd.*[1] described the important interests that s. 517 protects. Mr. MacKenzie submits that his situation is similar, and the same considerations discussed in *Toronto Star* apply to him.

8. In accordance with the Commission's Rules, Mr. MacKenzie's application was circulated to the parties, who were given an opportunity to respond. The Commission received responses from the Ottawa Coalition of Businesses and Community Associations ("Ottawa Coalition"); the Criminal Lawyers' Association & the Canadian Council of Criminal Defence Lawyers ("CLA/CCCDL"); and the Government of Canada. The Ottawa Coalition opposed the application. Both the CLA/CCCDL and Canada opposed the request for an *ex parte* hearing.

9. In accordance with *Dagenais v. Canadian Broadcasting Corporation*,[2] the Commission also gave notice of this application to the media. The Commission received submissions from a consortium of media outlets that opposed the application.

10. On November 2, 2022, Mr. MacKenzie served a second application. This application was for an order under Rule 56. Rule 56 provides:

> The legal representative for a Party may apply to the Commissioner to lead a particular witness's evidence in-chief. If the representative is granted the

[1] *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 SCR 721.
[2] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 ["*Dagenais*"].

> right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner. In addition, prior to that witness's evidence in chief, the witness's legal representative shall provide the Parties and Commission counsel with reasonable notice of the areas to be covered in the witness's anticipated evidence in chief and a list of the documents associated with that evidence.

11. In his application, Mr. MacKenzie's counsel relied on the "trusting and positive relationship" between his client and him, which he submits would "foster full, frank, and fair testimony" by Mr. MacKenzie.

12. None of the parties filed a response to this application

Analysis

13. For the reasons that follow, I would dismiss both applications.

Application under Rules 105 to 108

14. In *Sherman Estate v. Donovan*, Supreme Court of Canada has described the open court principle as follows:

> [1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
>
> [2] Accordingly, there is a strong presumption in favour of open courts.[3]

15. In *Dagenais*,[4] the Supreme Court of Canada established that a publication ban should only be ordered when two criteria are met:

[3] *Sherman Estate v. Donovan*, 2021 SCC 25, at paras. 1-2 ["*Sherman Estate*"].
[4] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 ["*Dagenais*"].

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[5]

16. In *Sherman Estate*, the Supreme Court reformulated this into a three-part test:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.[6]

17. A publication ban – or another limit on court openness – can only be imposed where all three prerequisites have been met.

18. As a preliminary matter, I find that the *Dagenais/Sherman Estate* framework applies to proceedings before me. Although this Commission is not a court, the concerns about openness and transparency discussed in those cases apply to an inquiry as well.[7] To the extent that an Inquiry is different than a trial, those differences can be considered within the *Dagenais/Sherman Estate* framework itself.

19. I pause to note that an *in camera* hearing has a more deleterious effect on the open court principle than a publication ban. An *in camera* hearing constitutes the

[5] *Dagenais*, at p. 878.
[6] *Sherman Estate*, at para. 38.
[7] See *Toronto Star v AG Ontario*, 2018 ONSC 2586.

greatest possible infringement to the open court principle. Therefore, if Mr. MacKenzie is not entitled to a publication ban, he is not entitled to an *in camera* hearing either.

20. Because Mr. MacKenzie has not established a basis to have a publication ban, I do not need to separately consider his request for an *in camera* hearing.

21. Mr. MacKenzie's request for a publication ban is rooted in trial fairness. Trial fairness is an important public interest that may satisfy the first requirement of the *Dagenais/Sherman Estate* framework. However, there are several reasons why I conclude that he has not in fact satisfied the elements of the framework.

22. First, I note that the evidentiary record that Mr. MacKenzie has put before me is limited. A party seeking to limit the open courts principle has an onus to adduce concrete evidence demonstrating a real risk of harm to their fair trial rights or some other interest.[8] I recognize that in some circumstances a decision-maker can rely on reason and logic in considering whether the whole of the evidence discloses a serious risk of harm exists.[9] I am also sensitive to the compressed timelines that this Commission is operating under, and the impact that it has on counsel's ability to adduce evidence. However, I do believe that I should take into account the fact that the evidence put forward on this application is scant.

23. Second, Mr. MacKenzie acknowledges that he has already been the subject of widespread public allegations and condemnation. As a result, any alleged prejudice resulting from his testimony at the Commission is attenuated.

24. Third, there are reasonably available and effective alternative measures to protect Mr. MacKenzie's interests short of a publication ban. These include limiting

[8] For example, see *MEH v. Williams*, 2012 ONCA 35; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41.
[9] *AB v. Bragg Communications Inc.*, [2012] 2 SCR 567.

instructions to the juries, as well as challenge for cause if the evidence supports such a challenge based on pre-trial publicity.

25. Fourth, the evidence does not support the likelihood that any pre-trial publicity resulting from his testimony at the inquiry will have an impact at Mr. MacKenzie's trials. Trial dates have not yet been set for his trials and there is reason to believe they will not occur for some time. The passage of time between Mr. MacKenzie's testimony before me and his trials is a relevant consideration.

26. Fifth, a public inquiry is designed to fully explore relevant issues, to the extent possible, in a public setting. In the case of this Commission, transparency and openness are of particular importance. One of my functions is to promote and maintain public confidence, which is best pursued though an open process. I find that the limited speculative risk of harm to Mr. Mackenzie's interests does not outweigh the serious and certain harm that a restriction on public access to these proceedings would entail.

27. Finally, during Mr. MacKenzie's testimony, I retain discretion to limit the scope of questions posed to him. This is reinforced by the Order-in-Council that requires me to "perform [my] duties in such a way as to ensure that the conduct of the Public Inquiry does not jeopardize any ongoing criminal investigation".[10] If any unanticipated situations arise that presents a risk to Mr. MacKenzie's fair trial rights, I have the procedural tools necessary to address them.

28. I do not agree that Mr. MacKenzie's analogy to bail hearings is apt. There are many differences between bail proceedings and the present Commission, and the concerns raised by Mr. MacKenzie have been fully addressed by the analysis above.

[10] Order in Council PC 2022-0392, clause (a)(vi)(B).

29. For these reasons, I find that there is no serious risk to trial fairness, that the remedy of a publication ban (or anonymizing Mr. MacKenzie's initials) is not necessary, and that the benefits of a publication ban would not outweigh its negative effects.

Application under Rule 56

30. I would also dismiss Mr. MacKenzie's application to have his counsel lead his evidence in chief. In reaching this conclusion, I rely on the same considerations as I did in a similar application made by Benjamin Dichter.[11]

31. In this case, I have also considered the following factors:

a. The fact that Mr. MacKenzie is in custody and that he will testify via video from a correctional facility is not, in and of itself, sufficient to displace the presumption that Commission Counsel lead the evidence of the witnesses.

b. Mr. MacKenzie's counsel states that he has a "trusting relationship" with Mr. MacKenzie. This, too, is insufficient to displace the presumption that Commission Counsel will lead the evidence. Mr. MacKenzie and his counsel may speak or meet with Commission Counsel prior to Mr. MacKenzie's testimony, to discuss the topics on which Commission Counsel intend to examine Mr. Mackenzie and to ensure that Commission Counsel canvass all relevant issues and documents in their examination.

32. I remind Mr. MacKenzie that under Rule 58(c), his counsel will have an opportunity to examine him at the conclusion of the parties' cross-examinations.

[11] Commissioner Paul S. Rouleau, *Decision on Application Under Rule 56 (Benjamin Dichter)*, November 2, 2022. See also Commissioner Stephen T. Goudge, *Ruling on the Application by Dr. Charles Smith to be Examined by his Own Counsel*, November 20, 2007.

33. Mr. MacKenzie can also apply under Rule 59 if, at the end of Commission Counsel's examination, Mr. MacKenzie still believes there are relevant issues upon which he ought to examined by his own counsel.

Disposition

34. I dismiss these applications, without prejudice to Mr. Mackenzie's counsel's right to seek leave under Rule 59 following Commission Counsel's examination.

Signed

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The Honourable Paul S. Rouleau
Commissioner

November 3, 2022