Decision on Anonymous Participation in a Consultation Panel

Introduction

1. In this decision, I explain why I have permitted an individual to participate in one of the Commission's public consultation panels on an anonymous basis.

Background

2. On October 2, 2024, the Commission held a series of consultation panels comprised of representatives of diaspora community members. One of the panels was entitled "Civil liberties, racism, and foreign interference narratives." Members of this panel spoke to their concerns about how discussions surrounding foreign interference, and attempts to counter it, can have negative consequences for members of diaspora communities.

3. A consultation panel differs from witness evidence in several ways. Individuals on consultation panels do not testify under oath. They are not subject to cross-examination. They do not, strictly speaking, provide evidence. Rather, they provide general background information that can assist in contextualizing other evidence that I do hear.

4. The Commission has heard from consultation panels at each state of its proceedings and will be using a similar procedure during its policy phase hearings.

"Person A"

5. The subject of this decision is an individual that I will refer to as "Person A".

6. Person A is a professor at a Canadian research university. Person A was born in the People's Republic of China ("PRC") and came to Canada to further their studies. They are currently a Canadian citizen. Person A is an active member of their local Chinese-Canadian community, as well as a society of Chinese descent university professors.

7. Person A engages in collaborative research with other academics, including academics based in the PRC.

8. Person A agreed to participate in a consultation panel in order to discuss their experiences of anti-Chinese sentiments, and the impact that this has had on their ability to engage in collaborations with institutions and colleagues in the PRC, including negative impacts on their ability to obtain funding for their research.

9. On September 29, 2024, Person A contacted Commission counsel to report concerns that they had about participating in the consultation panel. They asked to participate during an *in camera* hearing. This occurred after Person A had a meeting with their University, in which their University expressed concern about Person A's public participation. The University indicated that drawing attention to Person A could place their research funding in jeopardy as certain government agencies had the ability to veto funding from being provided. Person A's university suggested that Person A might seek to participate anonymously in the Commission's work.

10. Commission counsel discussed Person A's concerns with them in order to better understand the issues Person A was facing, and to discuss what measures short of an *in camera* hearing could address Person A's concerns. This approach is consistent with

the approach taken by at least one other commission of inquiry when witnesses are seeking protective measures.[1]

11. In the course of discussions with Commission counsel, Person A indicated that they believed that they could participate on an anonymous basis during a public hearing. This could be accomplished by participating using Zoom, with their camera turned off, and with their screen name anonymized.

Analysis

12. I agreed to permit Person A to participate on an anonymous basis during the October 2, 2024, consultation panel.

13. As a starting point, I note that Person A was not being called to provide sworn evidence during the course of the inquiry. Rather, Person A was scheduled to participate in a non-testimonial, public forum.

14. Because of the safety and security concerns expressed by many members of the public, the Commission has worked to provide a range of options to individuals to provide anonymous or non-public information. These include:

a. The ability to make confidential submissions to the Commission through a confidential email address or through the secure messaging app Signal;

b. The ability to anonymously respond to the Commission's online survey;

[1] Mass Casualty Commission, *Decision Regarding Rule 43 Accommodation Requests* (May 24, 2022), para. 7.

c. The ability to participate anonymously in a series of private consultation meetings with myself and my staff as part of the Commission's public consultation process.

15. The Commission has received hundreds of submissions that are either anonymous, or where the identity of the individual is known to the Commission but not to the public.

16. The request by Person A is essentially an extension of these measures. While a consultation panel may look like the taking of evidence from a witness, it is in fact an extension of the public consultations that the Commission has engaged in over the previous several months.

17. In light of this fact, it may well be that the legal framework governing limits on the open court principle do not apply here.

18. However, I do not believe that it is necessary for me to decide that point. Assuming that the open court principle does apply, I am satisfied that permitting Person A to speak anonymously is appropriate in the circumstances.

19. I discussed the application of the open court principle to this Inquiry in my *Decision on an Application to Disclose Standing Applications*.[2] In summary, I agreed with the decision of Commissioner Rouleau that the open court principle applies to public inquiries, and that the three-part analysis set out in *Dagenais*[3] and refined in

[2] Foreign Interference Commission, *Decision on an Application to Disclose Standing Applications* (February 8, 2024), paras. 9-14.
[3] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 ("Dagenais").

Sherman Estate[4] provides the appropriate framework to consider requests to limit the openness of a proceeding.

20. The three questions that guide the analysis are as follows:

a. Does court openness in this instance pose a serious risk to an important public interest?

b. Is the order sought necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk?

c. As a matter of proportionality, do the benefits of the order outweigh its negative effects?

Serious Risk to an Important Public Interest

21. The grounds on which the open court principle can be limited have broadened over time. While originally grounded in trial fairness, today any serious risk to an important public interest can, in appropriate circumstances, justify a departure from a fully open proceeding.[5]

22. Here, Person A has expressed a concern about the negative consequences to their ability to engage in continued research, including the risk that their research funding may be cut off by state actors that may arise from the fact that they are being seen participating in the inquiry and discussing their ongoing connections with Chinese researchers.

[4] *Sherman Estate v. Donovan*, [2021] 2 SCR 75, para. 30 ("Sherman Estate").
[5] *Sherman Estate*, para. 41.

23. There is an economic component to the concern being expressed by Person A. An individual economic interest, on its own, is unlikely to justify a departure from the open court principle. Only a public interest can justify such a departure.

24. However, the fact that an interest may have an economic component does not mean that it is not a public interest. For example, in *Sierra Club of Canada*, the Supreme Court accepted that commercial interests could, in appropriate circumstances, form part of a broader public interest:

> In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information.[6]

25. In this case, I view the type of concern raised by Person A as raising a concern about a broader public interest.

26. Person A was asked to discuss how foreign interference concerns can interfere with legitimate academic research and collaboration. Preserving the ability of academics to engage in collaborative scholarship is not simply a private interest of the scholars involved. Promoting academic collaboration and pursuing research is a matter of public interest.

[6] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522, at para. 55.

27. I also note that Person A's concerns about speaking publicly are the same as the harm that they wish to discuss during the public hearings: harm to their ability to continue to collaborate with PRC-based academic colleagues.

28. There is an analogy to be drawn between this situation, and the situation in *Bragg Communications*.[7] In that case, the plaintiff – a young victim of cyberbullying – sought an order to permit her to proceed anonymously in a defamation lawsuit against her harassers. Absent anonymity, the Plaintiff would have been exposed to the risk of further online harassment. The Supreme Court held that she should be permitted to litigate anonymously, noting that but for such an order, there was a real risk of perpetuating the very form of harm that she was seeking to vindicate through her lawsuit.[8]

29. The situation here is somewhat analogous. Indeed, it would be troubling if Person A were unable to express their concerns about the negative consequences of foreign interference narratives on academic research because those same dynamics made it too risky for them to participate in this Inquiry. There is, in my view, an important public interest in commissions of inquiry having access to relevant information and perspectives, even if they may be controversial or unpopular.

30. I must also consider whether the risk of harm identified by Person A is real, and not merely speculative. I conclude that it is.

[7] *A.B. v. Bragg Communications*, [2012] 2 SCR 567 ("*Bragg Communications*").
[8] *Bragg Communications*, at para. 10.

31. Person A did not come to their concerns on their own. Initially, they were prepared to participate in the work of the Commission publicly. It was only when their University expressed its own concerns, and cautioned Person A that their research funding could be placed in jeopardy that Person A sought to participate anonymously.

32. I should not be seen as suggesting that I believe that Canadian officials would target Person A and punish their professional career in retaliation for speaking publicly. However, I do recognize that international academic collaboration is a sensitive area, particularly for those doing work with scholars in the PRC. The Commission has heard evidence that the PRC may seek to exploit these relationships in order to engage in conduct that is detrimental to the interests of Canada. This is, of course, concerning. But it also explains why there could well be significant scrutiny focused on individuals who are engaged in such international collaborations. In my view, individuals who do this research, and who also challenge the government's view that such relationships are a potential vector of foreign interference, could become the subject of additional scrutiny. This, makes the risk of harm that Person A has identified more than speculative.

33. Ultimately, it may be that the concerns expressed by Person A and their University would not materialize. However, a certainty of harm is not required.

Is the Order Necessary?

34. Central to this analysis is whether lesser measures would be adequate to respond to the identified risk of harm. If lesser measures are available, then a more intrusive limit on the open court principle is not necessary.

35. Here, I conclude that speaking on the consultation panel anonymously is a necessary measure as lesser measures would not be adequate.

36. A lesser measure such as a publication ban on the individual's identity would not adequately mitigate the risk of harm identified by Person A, as the Government of Canada would still know their identity. Central to Person A's concerns is that state entities who have a role in reviewing and approving or denying research funding to Person A would react negatively to their participation in the Commission's consultation panel. In order to respond to this risk, Person A's identity must be shielded from at least the participants, as well as the public.

Proportionality

37. In my view, permitting Person A to speak anonymously is a proportionate measure that balances the public interests identified above with the fundamental and constitutional values that underpin the open court principle. I say this for three main reasons.

38. First, the measure was limited. The public was able to hear from Person A. While the public did not know Person A's identity, they had access to all of the information that Person A is providing to the Commission. Indeed, this provided significantly more openness than many of the ways in which the Commission has received information, such as confidential submissions or private consultation meetings.

39. Second, the Commission was fully aware of Person A's identity. To the extent that there was any concern that Person A was an unreliable source of information, or

that their perspectives should be viewed cautiously, the Commission would be well equipped to do so.

40. Finally, I note again the fact that Person A was not testifying or giving evidence. This was a consultation panel that was held for context purposes only. None of the participants were entitled to cross-examine Person A. I will not be making findings of fact based on what Person A told me. This is not like a traditional legal proceeding, and so some of the reasons why the open court principle exists have less force in this context.

41. Commissioner Rouleau wrote that "[t]o the extent that an Inquiry is different than a trial, those differences can be considered within the *Dagenais/Sherman Estate* framework itself."[9] I agree. This is a case where the unique procedures that are used by this Commission must be taken into account when assessing whether a departure from the open court principle is proportionate.

Conclusion

42. Person A is authorized to participate in the Commission's consultation panel anonymously.

Signed

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Commissioner Marie-Josée Hogue

October 4, 2024

[9] Public Order Emergency Commission, *Decision on Applications Under Rules 56 and 105 to 108 (Jeremy Mackenzie)* (November 3, 2022), para. 18.