Decision on an Application to Disclose some Standing Applications (Bob Mackin)

Overview

1. Bob Mackin, a member of the media, seeks disclosure of the applications for standing submitted by the Government of Canada, the Office of the Commissioner of Canada Elections ("OCCE"), Michael Chan, Han Dong, Chauncey Jung, Elizabeth May, Erin O'Toole, Alykhan Velshi, Yuen Pau Woo, the Conservative Party of Canada ("CPC") and Canada's New Democratic Party ("NDP") (collectively, the "Named Applicants"). Mr. Mackin was granted leave to proceed with this application in my decision dated December 20, 2023.[1]

2. For the reasons set out below, I grant Mr. Mackin's application in respect of the Government of Canada, the CPC, and the NDP. I also grant Mr. Mackin's application in respect of a redacted copy of the standing application submitted by the OCCE, removing certain confidential information (together with the standing applications of the Government of Canada, the CPC, and the NDP, the "Public Applications"). I dismiss Mr. Mackin's application in respect of the remaining Named Applicants' applications for standing.

[1] Commissioner Marie-Josée Hogue, *Decision on Leave to Bring Application for Disclosure of the Applications for Standing*, December 20, 2023 (Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions).

Background to the Application for Disclosure

3. I issued my first *Decision on standing* on December 4, 2023. In that decision, among other things, I set out detailed descriptions of the basis upon which each applicant sought standing in the Inquiry, and my reasons for granting or denying standing in each case.[2] I followed the same approach in my subsequent decisions on standing.[3]

4. Mr. Mackin served his Notice of Application on December 15, 2023.

5. In accordance with Rule 64 of the Commission's Rules of Practice and Procedure,[4] the Named Applicants were first provided with the opportunity to respond to his application.

6. Given the interests potentially at stake and a comment made by a Named Applicant, and in accordance with the Commission's Guiding Principles of Fairness and Expeditiousness, I then also invited every person and entity that applied for standing with the Commission to provide their position on the disclosure of their standing applications. Although Mr. Mackin's application only sought disclosure of the standing applications of the Named Applicants, this decision is based on the premise that similar

---

[2] Commissioner Marie-Josée Hogue, *Decision on Standing*, December 4, 2023 (Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions), paras. 37 – 240.

[3] Commissioner Marie-Josée Hogue, *Second Decision on Standing*, December 14, 2023 (Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions), paras. 7 - 9; Commissioner Marie-Josée Hogue, *Fourth Decision on Standing*, January 8, 2024 (Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions), paras. 9 – 12.

[4] Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, Rules of Standing and Funding (edited Nov 16), Rule 64.

requests may be made for the disclosure of all of the applications for standing submitted to the Commission. This decision consequently considers all standing applicants although I am deciding the application only with respect to the applications for standings covered by it.

7. The Commission received a total of 34 responses from the standing applicants setting out their position on the question of whether their applications for standing should be disclosed. The responses received can be organized into the following groups:

a. Consent or no objection to disclosure of application: 14;

b. Consent or no objection to disclosure of application with certain information redacted: 4, including the OCCE;

c. Object to disclosure of application: 11; and

d. No position taken on disclosure of application: 5, including the Government of Canada.

8. The remaining standing applicants, including the CPC and the NDP, did not provide a response on the disclosure of their standing applications to the Commission.

Law and Rules

The Open Court Principle

9. There is a strong presumption in favor of open courts. The purposes of the open court principle include fostering a fair and accountable justice system.

10. The importance of this principle and the purposes it advances are reflected in the approach courts have taken when asked to depart from it. In a recent decision the Supreme Court has stated that, "[l]imits on the openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving the strong presumption that justice should proceed in public view".[5.]

11. The test to be applied when discretionary limits on court openness are considered was set out in *Dagenais v. Canadian Broadcasting Corp.*[6] and refined in *Sherman Estate v. Donovan*[7], cases in which orders preventing disclosure were sought (*Dagenais* dealt with a request for an order prohibiting the publication of the fact of an application, or any material relating to it, while *Sherman Estate* dealt with a request for a sealing order). The *Dagenais/Sherman Estate* test asks three questions:

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?[8]

---

5 *Sherman Estate v. Donovan*, 2021 SCC 25, para. 30 ("*Sherman Estate*").

6 *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 ("*Dagenais*").

7 *Sherman Estate*, para. 30.

8 *Sherman Estate*, para. 38.

12. All three questions in the test must be answered affirmatively before a discretionary limit can be placed on court openness.[9]

13. The open court principle applies to commissions of inquiry.[10] As Justice Rouleau observed during the Public Order Emergency Commission, "[t]o the extent that an Inquiry is different than a trial, those differences can be considered within the *Dagenais/Sherman Estate* framework itself."[11]

14. In this instance, considering the Commission's Rules of Standing and Funding,[12] and particularly Rule 19 set out below, the order sought by Mr. Mackin is not an order restricting disclosure, but an order compelling disclosure. As a result, the same test applies, but the questions must be phrased differently:

a. Would granting the order pose a serious risk to an important public interest?

b. Could reasonable measures prevent this serious risk to the identified interest if the materials were released?

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

---

9 *Sherman Estate*, para. 38.

10 *Sherman Estate*, para. 44; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 116; Commissioner Paul S. Rouleau, *Decision on Applications Under Rules 56 and 105 to 108 (Jeremy Mackenzie)*, November 3, 2022 (Public Order Emergency Commission), para. 18.

11 Commissioner Paul S. Rouleau, *Decision on Applications Under Rules 56 and 105 to 108 (Jeremy Mackenzie)*, November 3, 2022 (Public Order Emergency Commission) at para. 18.

12 Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, Rules of Standing and Funding (edited Nov 16).

The Commission's Rules of Standing and Funding

15. Rule 19 of the Commission's Rules of Standing and Funding provided that,

> Any material or information filed in support of an Applicant's standing application **may be** made available to the public on the Commission's website or cited in a publicly available document, including in a decision on standing, except where this raises national security concerns or other legitimate confidentiality concerns, in which case certain material or information may not be made public.[13] [Emphasis added]

16. This language can be contrasted with the language used in the rules governing applications for standing in other commissions of inquiry, most notably the Cullen Commission, which Mr. Mackin references in his submissions in support of his application. The Cullen Commission's rules presumptively required the public disclosure of standing applications filed:

> All applications for standing will be available to the public on the Commission's website unless otherwise ordered by the Commissioner.[14]

17. There are good reasons for this difference in the Commission's Rules of Standing and Funding. The subject matter of this inquiry engages serious issues of

---

[13] Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, Rules of Standing and Funding (edited Nov 16), Rule 19.

[14] Commission of Inquiry into Money Laundering in British Columbia, Rules for Standing, Rule 6.

national security, which in turn can trigger, among other things, serious risk to the physical and psychological security of certain individuals with particular interest in the matters under investigation. Rule 19 is intended to mitigate that risk where appropriate.

The Commission's Rules of Practice and Procedure

18. Rule 11 of the Commission's Rules of Practice and Procedure requires the Commission to conduct its work in accordance with five Guiding Principles, including Transparency and Fairness.[15]

19. The Transparency Principle, as defined, requires the Commission to take the requirements of "national and personal security and other applicable confidentialities and privileges" into account, while the Fairness Principle requires a balancing of the interests of the public, the interests of individuals and the interests of national security.[16]

20. In the context of this application, the Commission's Guiding Principles require that I make a decision respecting as much as possible the open court principle while assuring the Standing Applicants' personal security, national security, and confidentiality.

Serious Risks to Personal Safety and Risks to Operations

21. Several standing applicants objected to the disclosure of their standing applications on the basis that such disclosure would expose them (and in certain cases

[15] Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, Rules of Practice and Procedure, Rule 11.

[16] Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, Rules of Practice and Procedure, Rule 11.

persons associated with them) to personal safety and security risks, including retribution and reprisal.

A Serious Risk to Public Interests

22. Physical and psychological safety are recognized important public interests[17] and, as it was written in *Sherman Estate,* "[t]he administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects."[18]

23. In addition to those safety and security risks, certain organizations representing diaspora communities that sought standing objected to the disclosure of their standing applications on the basis that such disclosure would open them up to the risk of interference with their operations to prevent them from supporting efficiently the communities they represent.

24. In my view, protecting the provision of supports and services to members of diaspora populations, particularly those vulnerable to foreign interference, is in the public interest. The specific requirement that the Commission examine "the supports and protections in place for members of a diaspora who may be especially vulnerable and may be the first victims of foreign interference in Canada's democratic processes"[19] illustrates the importance of this public interest.

---

17 *Sherman Estate*, para. 48, 72, 96.

18 *Sherman Estate*, para. 72.

19 Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions, Terms of reference, clause (a)(i)(C)(II).

25. Although I cannot at this stage reach a definitive conclusion, I am of the view that disclosing, now, the standing applications filed by individuals and organizations representing diasporas may pose a serious risk to their safety and, in certain cases, persons related to or associated with them.

26. I note that direct evidence is not necessarily required to establish that there is a serious risk to an important public interest, and that it is possible to conclude that there is objectively discernible harm by applying logic and reason.[20] That being said, the possibility of proceeding by logical reasoning should not be seen as permission to engage in pure speculation. Any inferences drawn must be based on objective facts "that reasonably allow the finding to be made inferentially."[21]

27. I recognize that, under normal circumstances, the real possibility that disclosure would entail a serious risk is insufficient to satisfy the first prong of the *Dagenais/Sherman Estate* test. As a general rule, a person requesting that the open court principle be limited must demonstrate that the openness of the proceedings would indeed pose a serious risk to an important public interest. However, in the particular context of the present Commission, it would be virtually impossible for vulnerable people and the organizations representing them to satisfy this requirement, since foreign interference and the reprisals that may be associated with it are, by their very nature, the work of powerful and sophisticated actors who have the means to escape detection. Given the imbalance of power between these vulnerable individuals and organizations, on the one hand, and state actors with considerable resources, on the

---

20 *Sherman Estate*, para. 97; *A.B. v. Bragg Communications Inc.*, 2012 CSC 46, paras. 15-16.

21 *Sherman Estate*, para. 97; *R. v. Chanmany*, 2016 ONCA 576, para. 45 (CanLII).

other, requiring direct proof of the feared harm here would have the effect of increasing the burden of proof beyond the threshold envisaged by the *Dagenais/Sherman Estate* test.

28. Given the grave nature of these alleged risks, which I discuss further below, I am of the view that declining to order the disclosure of the standing applications filed by individuals and organizations representing diasporas is justified and consistent with the purpose of the *Dagenais/Sherman Estate* test, despite the fact that I have not yet made any findings as to the extent of foreign interference and, consequently, as to the seriousness of the risk that it gives rise to reprisals.

29. The seriousness of the risk posed by the disclosure of private personal information may be exacerbated by (1) the expected extent of dissemination of the impugned information,[22] (2) the likelihood that the anticipated dissemination will actually occur,[23] and (3) the gravity of the feared harm.[24] In my view, those factors also exacerbate the seriousness of the feared risk of physical and psychological harm vis-à-vis vulnerable individuals.

30. Here, the disclosure of the standing applications was sought by a member of the media in the context of a federal public inquiry into matters that have attracted significant public attention, strongly suggesting that the standing application information will be widely disseminated.

---

22 *Sherman Estate*, para. 80.

23 *Sherman Estate*, para. 82.

24 *Sherman Estate*, para. 98.

31. The gravity of the feared harms (those being harm to the physical and psychological integrity of individuals, and harm to the operations of organizations that serve diasporas) is amplified by the subject matter of the Commission's investigation.

32. In light of the feared harms and of the subject matter of this inquiry, I am also of the view that limiting disclosure to the applications of the standing applicants who did not object or take a position on the issue of disclosure would put the spotlight those who did object, thereby undermining the protective effects of such an order.

Reasonable Alternative – Summaries of the Standing Applications

33. Turning to the second stage of the test, I must consider whether an absolute prohibition on the disclosure of the standing applications, other than the Public Applications, is necessary, or whether reasonable alternatives exist that would avoid the risks identified above while still promoting maximal openness. In my view, a reasonable alternative does exist, and it has already been implemented through the release of the standing decisions that I have issued.

34. As noted above, I have provided a summary of the relevant positions and arguments each standing applicant advanced in support of their application in a series of public decisions. In reaching and drafting those decisions, I considered both the substance of the applications themselves, as well as the presence of any particularly sensitive information that may, if publicly disclosed, put the applicant at risk of harm. The descriptions contained in my decisions were designed to ensure that the public understood the basis upon which each applicant argued their case. Frequently, my decisions adopted the very language used by the applicants themselves in their applications. In effect, my standing decisions represent a robust summary of the

information contained in the applications, framed in a manner that does not, in my view, give rise to a risk of serious harm.

The Risks of the Order Outweigh the Benefits

35. The arguments advanced in favour of the order included arguments focused on:

    a. The importance of the Commission's Guiding Principle of Transparency;

    b. The public interest in reporting on public institutions and figures;

    c. Ensuring the fairness of the decision-making process; and

    d. Promoting confidence in the justice system.

36. These benefits already flow from the summaries of the standing applications set out in my standing decisions and the disclosure of the standing applications would not materially bolster these benefits.

37. In contrast, the risks that would flow from ordering the disclosure of all of the standing applications may be real and grave. For those vulnerable applicants who objected due to the serious risks of harm posed by public disclosure of their standing applications, the risk is foreseeable and direct.

38. Further, refusing disclosure of the standing applications, other than the Public Applications, also serves the public interest since it is in the public interest that the Commission hear from members of the public who have been affected by the foreign interference described in the Terms of Reference. Disclosing the standing applications of vulnerable people in the face of claims that such disclosure will expose them to harm is likely to dissuade persons who have been affected by foreign interference, and who

fear for their safety, from providing evidence and information to the Commission, despite the protections built into the Commission's Rules of Process and Procedure.

39. The balancing required at this stage of the test also involves consideration of whether the information in question, "is peripheral or central to the judicial process."[25] Here, the specific details pertaining to the applications for standing that will not be disclosed are peripheral to the issues that are the focus of the Commission's Terms of Reference – interference by China, Russia and other foreign states or non-state actors and any related impacts on the 43rd and 44th general elections (2019 and 2021) at the national and electoral district levels, the flow of information in relation to it and the capacity of relevant federal departments, agencies, institutional structures and governance processes to permit the Government of Canada to detect, deter and counter any form of foreign interference directly or indirectly targeting Canada's democratic processes.

40. Furthermore, as previously mentioned, my standing decisions include a summary of the information contained in the applications.

41. The disclosure of the Public Applications does not, however, pose the same risk given the nature, affiliation, and mission of those who filed them, and I am therefore of the opinion that the open court principle should prevail.

42. In that context and after having carefully weighed the competing interests, I am convinced that the other applications for standing shall not be divulged and as such that

---

25 *Sherman Estate*, para. 106.

the Application for disclosure in relation to individual Named Applicants must be dismissed.

Confidential Information – the OCCE

43. The OCCE, one of the Named Applicants, requests that, in the event of disclosure, specific and limited information in its standing application be redacted on the grounds that such information is non-public and engages national security concerns (the "Confidential Information").

Serious Risk to a Public Interest

44. First, I am of the view that disclosure of the Confidential Information would give rise to a recognized risk to the public interest in respect of national security matters. Moreover, the subject matter of the Confidential Information, at least arguably, falls under a statutory rule that provides for confidentiality.

Reasonable Alternative – Redactions

45. Furthermore, the OCCE is not seeking to have the entirety of its application withheld from Mr. Makin. Rather, the narrow redactions the OCCE has requested are tailored to protect the interest in question while otherwise maximizing the information made available to the public.

The Risks Outweigh the Benefits

46. Finally, the risk to the public interest in question outweighs the benefits of ordering the disclosure of an unredacted copy of the OCCE’s application for standing. The proposed redaction covers only a minor aspect of the OCCE's application.

Withholding the information in question from the public does not, in my view, impair in any way the public's ability to understand the basis on which I granted the OCCE standing or the OCCE's interest in the subject matter of the inquiry.

Conclusion

47. Therefore, I order the disclosure of the Public Applications: those filed by the Government of Canada, the CPC, and the NDP, as well as a redacted copy of the standing application filed by the OCCE. Such disclosure will be made on February 14th, 2024, by publishing the Public Applications on the Commission's website and providing, on the same day, a copy to Mr. Mackin.

Signed

_____

Commissioner Marie-Josée Hogue

February 8, 2024