ONTARIO
COMMISSION OF INQUIRY

THE ELLIOT LAKE COMMISSION OF INQUIRY

SUBMISSIONS OF THE ELLIOT LAKE MALL ACTION COMMITTEE ("ELMAC") AND THE SENIORS ACTION GROUP OF ELLIOT LAKE ("SAGE")

Opposing the requests for Orders under Sections 10(4) and 14(3) of the *Public Inquiries Act*, 2009

December 7, 2012

R. Douglas Elliott and Alexandra Carr, Roy Elliott O'Connor LLP
Jeff Broadbent, Feifel Broadbent Gualazzi LLP
Roland Henri Aubé, LLB

Part I: Decision Requested

1. The Elliot Lake Mall Action Committee ("**ELMAC**") and the Seniors Action Group of Elliot Lake ("**SAGE**") oppose the requests for confidentiality made by Eastwood Mall Inc., Robert Nazarian, and Levon Nazarian (collectively referred to as the "**Mall Owners**") and by the Association of Professional Engineers of Ontario (the "**APEO**").

2. With respect to the request for confidentiality of the APEO, the process suggested by the APEO at paragraph 33 of its submissions, must, at the very least, be amended so that subparagraph 33(e) provides for notice to be made to *all* parties of the public inquiry so that they may make submissions on the potential exclusion of documents from the public record prior to the Commission making any determinations as to further use or disclosure of such documents. The confidentiality of such documents could be maintained under similar terms as those outlined in Procedural Order No. 4, dated November 26, 2012.

3. ELMAC and SAGE represent citizens of Elliot Lake and victims of the collapse. Public inquiries have an educative and cathartic effect which is important in restoring public confidence after crises. The decision to call a public inquiry entails a public process. The principle of public access in a public inquiry should not be brushed aside lightly.

Part II: The Law

4. The purpose of the *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sched. 6 (the "***Act***"), is to "establish an effective and ***accountable*** process for public inquiries where there is a ***public interest*** to (a) independently inquire into facts or matters; (b) make recommendations regarding those facts or matters."[1]

[1] *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sched. 6, s. 1 [the "*Act*"].

5. The Supreme Court in the case *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraph 23, per Iaccobucci and Arbour JJ., stated that the "open court principle" was a hallmark of a democratic society and applied to all judicial proceedings.

6. In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Cory J. found that the "open court principle" applied to the proceedings of commissions of inquiry. He wrote at paragraph 117 that:

> "117. Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement. [...]"

7. Openness is particularly important in the context of this Inquiry, which is expected to provide the citizens of Elliot Lake with an understanding of how and why the tragedy occurred and work towards preventing similar tragedies in the future. There should be as few restrictions as possible to the public nature of the proceedings. Members of the public should also be able to obtain information about the proceedings of the Inquiry through the media.

8. A commission of inquiry is given broad powers under the *Public Inquiries Act,* 2009 to control its own process and collect information that is relevant to the subject matter of the inquiry.[2]

9. Pursuant to section 10(3) of the *Public Inquiry Act,* 2009, a commission may require the production of information that is considered confidential or inadmissible under another Act or regulation and that information shall be disclosed to the commission for the purposes of the public inquiry.

10. Sections 10(4) and 14(3) of the *Public Inquiries Act* provide the Commission with the discretion to make exceptions to the open court principle:

---

[2] See sections 6-8.

Protection of confidential information
10(4) A commission may impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information.

Exclusion of public
14(3) A commission may exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information if it decides that the public's interest in the public inquiry or the information to be disclosed in the public inquiry is outweighed by the need to prevent the disclosure of information that could reasonably be expected to be injurious to,

(a) the administration of justice;

(b) law enforcement;

(c) national security; or

(d) a person's privacy, security or financial interest.

11. The discretionary power to limit the publicity of the proceeding is subject to the *Dagenais/Mentuck* test, which can be outlined as follows:

> A publication ban or other discretionary order that limits freedom of expression and freedom of the press in relation to legal proceedings should be ordered only when:
>
> (a) such an order is necessary to prevent a serious risk to the proper administration of justice, or to an important interest, because reasonably alternative measures will not prevent the risk;
>
> (b) the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[3]

12. The *Dagenais/Mentuck* test applies to all discretionary orders that limit the freedom of expression and freedom of the press in relation to legal proceedings, and proceedings of commissions of inquiry.[4] In the context of the proceedings of this Inquiry, the *Dagenais/Mentuck*

[3] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, as summarized by Fish J. in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 26.
[4] See *Report of the Cornwall Public Inquiry, Directions on Process – Requests for Confidentiality of Victims' or Alleged Victims' Identities*, October 31, 2006 at 6; upheld at *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall (Public Inquiry)*, 2007 ONCA 20 at paras. 14 & 50.

test would apply to Eastwood's request to limit public access to its financial records and to the APEO's request to limit public access to its Disciplinary and Compliance Documents.

Part III: Application to the Current Confidentiality Requests

The Mall Owners

13. Contrary to the Mall Owners' arguments in seeking to obtain a confidentiality order, the Mall Owners' financial records are absolutely relevant to the matters to be considered during this Inquiry and the privacy interests of the Mall Owners are outweighed by the public interest in an open and transparent proceeding.

Relevance of Financial Records

14. There is no doubt that personal financial records are private and confidential in nature. Nevertheless, when a party seeks funding from the public, the financial resources of that party must be open to public scrutiny. The position of the Mall Owners is akin to a party seeking damages for personal injury whilst refusing to put his or her medical records before the Court. The Mall Owners themselves have raised the issue and placed it before the Commission. In these circumstances, there can no longer be any privacy or confidentiality attaching to the Mall Owners' financial records. The finances of other participants who have sought funding were publicized, including those of ELMAC and SAGE.

15. Furthermore, the financial wherewithal of the Mall Owners is bound to be an issue in Part I of the Inquiry as the Commission considers why repairs to the parking deck structure were not made. As outlined in its Application for Standing and Funding, ELMAC believes, based on the personal experience of its members, that there were numerous warning signs that the structural integrity of the Mall was in jeopardy.[5] ELMAC and SAGE submit that as the owners of the

[5] Application for Standing and Funding of ELMAC dated October 17, 2012.

Algo Center Mall, the Mall Owners had many chances to repair the parking deck and failed to do so. The Mall Owners' financial situation is relevant to understanding: (i) whether the Mall Owners had the financial means to make repairs that would have prevented the collapse; (ii) if so, the reasons that such repairs were not undertaken; and (iii) if not, what safeguards ought to have been in place to ensure that a lack of financial resources on the part of the owner of a public building does not jeopardize the safety of its occupants.

Public Interest in an Open and Transparent Proceeding

16. The Mall Owners' submission that the right to privacy in relation to personal financial information outweighs the public interest in an open and transparent proceeding is belied by the fact that personal financial information, including tax returns, financial statements and bank statements, are regularly put in the public record, for example in the context of family law or bankruptcy proceedings.

17. The disclosure of personal information is part-and-parcel of a fair, transparent and open proceeding. Every participant's privacy yields, to some extent, to the public nature of the Inquiry. Indeed, members of ELMAC will likely be required to divulge all kinds of personal information including their employment history, their medical records, and information regarding their psychological well-being.

18. The cases on which the Mall Owners rely to support the argument that financial records are owed protection are not helpful to the present analysis as they are decided under section 8 of the charter where the issue before the respective Courts was whether an individual was subject to an unreasonable search and seizure.[6] This is not a case where a charter breach gave rise to an unreasonable search and seizure. Moreover, even in the decisions cited by the Mall Owners, the

[6] *R. v. Plant*, [1993] 3 S.C.R. 281 (S.C.C.) ("*R. v. Plant*"); *Schreiber v. Canada (Attorney General)*, [1998] 2 S.C.R. 841 (S.C.C.); *R. v. Dyment*, [1988] 2 S.C.R. 417, *Le Comte v. British Columbia*, [1990] B.C.J. No. 870 (S.C.); *Alberta in Regina v. Warawa* (1997) 56 Alta. L.R. (3d) 67 (Alta. Q.B.).

Courts have not placed an outright shield on personal financial information. Instead, the Courts engage in "balancing the right of citizens to have respected a reasonable expectation of privacy as against the state interest in law enforcement."[7] In the present case, the relevance of the Mall Owners' financial records outweighs the deleterious effect on the privacy of those participants with respect to personal financial records, which are regularly placed in the public record.

The APEO

19. ELMAC and SAGE submit that in the present case the salutary effect of a confidentiality order on the "Confidential Documents" as defined in paragraph 4 of the Submissions of the APEO, are outweighed by the deleterious effects that a confidentiality order would have on the rights and interests of the parties and the public to an open and transparent inquiry.

20. The requirement of confidentiality under section 38 of the *Professional Engineers Act*, R.S.O. 1990, c. P.28 and the public policy reasons described in *Watson v. Boundry*, [1997] O.J. No. 2500 (Gen. Div.), while important, are outweighed by the public interest to an open and transparent public inquiry. The purpose of such a section is to allow the complaints and discipline process under the *Professional Engineers Act* to function without fear that a participant or third party will use documents prepared for it for the collateral purpose of building or defending a civil case. The subsection is clearly not designed to protect the privacy interests of a participant in disciplinary proceedings since no such protection is offered in the discipline process itself where hearings are public.[8] Given this legislative intent, the prohibition cannot be read to extend to a public inquiry. A public inquiry does not decide upon public rights, including civil or criminal liability. Indeed, documents produced in a public inquiry are protected from

[7] *R. v. Plant, supra* at note 6, at paras. 16-19; *Schreiber v. Canada, supra* note 6, para. 21.
[8] See: *Professional Engineers Act,* R.S.O. 1990, c. P. 28, section 30(4).

collateral use under the codification of the deemed undertaking rule in section 12 of the *Public Inquiries Act*, 2009.

21. Subsection 10(3) of the *Act* confirms the legislative intent that the power to require production operates ***despite any other Act*** under which the document or thing could be considered confidential or otherwise inadmissible. Accordingly, pursuant to the plain language of *Public Inquiries Act,* the section 38 protection under the *Professional Engineers Act* is subordinate to section 10(3) of the *Public Inquiries Act.*

22. This is not an appropriate case for the Commission to exercise the discretion granted under subsections 10(4) and 14(3) of the *Public Inquiries Act*. Contrary to the submissions of the APEO, the order sought by the APEO in this case is not consistent with the *Cornwall Inquiry*, wherein the names of victims or alleged victims of abuse were reduced to monikers or non-identifying initials,[9] and the *Inquiry into Pediatric Forensic Pathology in Ontario*, wherein the names of young persons involved in infant death cases under review were to be identified using first names or initials only.[10]

23. In the *Cornwall Inquiry*, an issue arose as to whether, in addition to publication bans or orders for the use of monikers or non-identifying initials, orders should be made to prohibit or limit the public from seeking access to exhibits where the names of victims or alleged victims appear. The Commissioner refused to make a blanket order of such nature and was clear that an exhibit should not be marked as confidential in its entirety if only a portion of such exhibit needed to be protected. Commissioner Glaude indicated that in cases where he acceded to the

[9] See *Report of the Cornwall Public Inquiry, Directions on Process – Requests for Confidentiality of Victims' or Alleged Victims' Identities*, October 31, 2006, *supra* note 4.
[10] Appendix 22: *Ruling on Requests for Non-Publication Orders*, November 1, 2007, *Inquiry into Pediatric Forensic Pathology in Ontario*, Volume 4.

request to protect the name of the victim, or alleged victim, the proper method would be to edit the name of the person for the purpose of public consultation.[11]

24. The decisions made in the two foregoing inquiries, wherein the names of victims and children were protected, is not analogous to protecting the documents located in the files of the Discipline Committee and Regulatory Compliant department of the APEO. Moreover, there is no suggestion in either of those rulings that the protected information was kept confidential from the other parties to the respective inquiries, as would be the case in the order sought by the APEO. Indeed, in the *Inquiry into Pediatric Forensic Pathology*, Commissioner Goudge made note that none of the parties opposed the confidentiality orders being sought.[12]

25. Precluding the disclosure of relevant documents from the other parties to the Inquiry would interfere with the purpose of the *Act*, to establish an effective and accountable process. The Inquiry cannot be effective or accountable without the perspective of all parties on a given issue. It is for this reason that all participants and their lawyers are deemed to undertake not to use information obtained from another participant for any purpose other than that of the public inquiry until that information is disclosed to the public or referred to during a hearing.[13]

26. Counsel for ELMAC and SAGE have been unable to find any inquiry where relevant documents were excluded in their entirety from the inquiry's record on the basis of a prohibition against disclosure under another act.

27. Indeed, the only ruling found in which a similar issue was considered is that of Commissioner Goudge in the *Inquiry into Pediatric Forensic Pathology*, wherein the Commissioner considered the College of Physicians and Surgeons of Ontario (CPSO)'s motion

---

[11] See *Report of the Cornwall Public Inquiry, Directions on Process – Requests for Confidentiality of Victims' or Alleged Victims' Identities*, October 31, 2006, *supra* note 4 at page 9.
[12] Appendix 22: *Ruling on Requests for Non-Publication Orders*, November 1, 2007, *Inquiry into Pediatric Forensic Pathology in Ontario,* Volume 4, *supra* note 10 at 795.
[13] The *Act*, *supra* note 1, s. 12.

for directions.[14] The CPSO took the position that it was precluded from complying with a summons for the production of its relevant documents because of the provisions of s. 36 of the *Regulated Heath Professional Act,* 1991, S.O. 1991 c. 1 8 (“***RHPA***”)[15] which imposed a similar confidentiality requirement to that reflected under s. 38 of the *Professional Engineers Act.* Commissioner Goudge ruled that the plain meaning of section 36(1) of the *RHPA* was met by s. 7(1) of the former *Public Inquiries Act* (the predecessor to section 10(1) of the current Public Inquiries Act) and public production was required.[16] It is of note that although s. 36(1) of the *RHPA* contains an exception to the confidentiality requirement, “where disclosure of the information is required by an Act of the Legislature or an Act of Parliament”, where s. 38(1) of the *Professional Engineers Act* does not, the former *Public Inquiries Act* did not contain the stipulation under s. 10(3) of the current act that the Commission may require production of documents that are considered confidential under another act. In both cases, the legislative intent is clear: the production of relevant documents for the purpose of a public inquiry supersedes the requirement of confidentiality imposed under a professional regulatory act.

28. Accordingly, ELMAC and SAGE take issue with the APEO’s submission in its letter of December 3, 2012, that the “order” mandating confidentiality has already been made by the

---

[14] Appendix 16: *Ruling on the CPSO Motion for Directions*, October 10, 2007, *Inquiry into Pediatric Forensic Pathology in Ontario*, Volume 4, *supra* note 10.

[15] Section 36 of the *RHPA* provides, in relevant part:

36. (1) Every person employed, retained or appointed for the purposes of the administration of this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* and every member of a Council or committee of a College shall keep confidential all information that comes to his or her knowledge in the course of his or her duties and shall not communicate any information to any other person except,

[...]

(h) where disclosure of the information is required by an Act of the Legislature or an Act of Parliament;

[...]

(3) No record of a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the Drug and Pharmacies Regulation Act or a proceeding relating to an order under section 11.1 or 11.2 of the Ontario Drug Benefit Act.

[16] Appendix 16: *Ruling on the CPSO Motion for Directions*, October 10, 2007, *Inquiry into Pediatric Forensic Pathology in Ontario*, Volume 4, *supra* note 10 at 761.

Legislature in subsection 38(1) of the *Professional Engineers Act*. When viewed in conjunction with subsection 10(3) of the *Act*, it is clear that the legislative intention was to require documents that might be confidential under another act to be produced and disclosed.

29. With respect to the issue of whether the Commission is required to give the public access to the relevant documents that were produced by the APEO prior to the hearing, it is the submission of ELMAC and SAGE that although section 14(3) of the *Public Inquiries Act*, 2009 does not "require" public production of such documents until they are "collected or received in the hearing", the Commission certainly has the authority to provide the public with relevant documents prior to the hearing. This authority arises from sections 6 and 7 of the *Public Inquiries Act*, 2009. Section 6 provides that a commission may engage in any activity appropriate to fulfilling its duties, including, consulting with the public. Section 7 provides the commission with the power to control its own process and make rules governing its practice and procedure. The "open court principle" means that the restrictions on public access to documents should be limited. In the context of the present inquiry, ELMAC has already been required to publicly divulge the names of its membership, who were themselves victims of the collapse.

Part V: Conclusion

30. ELMAC and SAGE respectfully submit that in the present circumstances, the Commission should not exercise its discretion given under s. 10(4) or 14(3) of the *PIA* to grant the confidentiality orders requested by the Mall Owners or the APEO.

31. In the alternative, if it is found that this is an appropriate case for the Commission to exercise its discretion to impose the confidentiality order sought by the APEO at paragraph 33 of its submissions, ELMAC and SAGE submit that the process by which documents should be excluded must include notice to all of the parties of the Inquiry (not only to persons to whom

information in the documents relates) so that all parties may make submissions on the exclusion of such documents before the Commission makes any determinations as to further use or disclosure. The confidentiality of such documents could be maintained under similar terms as those outlined in Procedural Order No. 4, dated November 26, 2012.

All of which is respectfully submitted.

R. Douglas Elliott and Alexandra Carr

Jeff Broadbent

Roland Henri Aubé