

**TAB 7**

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**IN THE MATTER OF THE ELLIOT LAKE INQUIRY  
THE HONOURABLE PAUL R. BÉLANGER, COMMISSIONER**

**AND IN THE MATTER OF an Application by Eastwood Mall Inc. for Standing and Funding  
AND IN THE MATTER OF an Application by Robert Nazarian for Standing and Funding  
AND IN THE MATTER OF an Application by Levon Nazarian for Standing and Funding**

**BETWEEN:**

**THE ELLIOT LAKE INQUIRY**

**- and -**

**EASTWOOD MALL INC.**

**- and -**

**ROBERT NAZARIAN**

**- and -**

**LEVON NAZARIAN**

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**APPLICANTS' SUBMISSIONS  
REQUESTING A CONFIDENTIALITY ORDER**

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October 22, 2012

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**NOTE:**

1. *The records/documents referred to in these submissions have been indexed and provided to the Commission along with these submissions.*

**PART 1: ORDER SOUGHT**

2. The Commission for the Elliot Lake Inquiry (the “Inquiry”) has the authority to impose conditions on the disclosure of information at the Inquiry in order to protect the confidentiality of that information.<sup>1</sup> In particular, the Commission may take certain and necessary measures to prevent the disclosure of information if it decides that the privacy interest in that information outweighs the public’s interest in the information to be disclosed.<sup>2</sup>
3. In applying for funding, applicants must provide evidence that demonstrates that they do not have adequate financial resources that enables it to represent its interest.<sup>3</sup>
4. Following the submission of the Applicants’ application for standing and funding in this matter, the Commission sent a letter dated October 15<sup>th</sup>, 2012 to the Applicants requesting evidence to establish that, if funding were not provided, they would not be able to participate in the Inquiry. In that letter, the Commission specifically requested financial statements, evidence as to the recent and current income of the individuals and income tax returns.
5. In order to comply with this request and as evidence to support their application for

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<sup>1</sup> See *Public Inquiries Act*, 2009, SO 2009, c 33, Sch 6, s 10(4).

<sup>2</sup> See *Public Inquiries Act*, 2009, SO 2009, c 33, Sch 6, s 14(3)(d).

<sup>3</sup> See paragraph 21(c) of the *Inquiry’s Rules of Standing and Funding*.

funding, the Applicants have provided, along with these submissions, the private and confidential financial records requested by the Commission.

6. **For the following reasons it is requested that the Commission make a Confidentiality Order pursuant to Sections 10(4) and 14(3) of the Act, preventing the dissemination of this confidential financial information to any parties, and particularly to the public; and further, preventing the use of this information by the Commission for any purpose other than in making a determination with respect to the Applicants' application for funding.**

### PART 2: THE GROUNDS

7. In seeking this Confidentiality Order, the Applicants will rely on the following grounds:
- I. there is a high expectation of privacy attached to the records/information;
  - II. with the exception of this application for funding, the records are not otherwise relevant to the business of the Inquiry;
  - III. the salutary effects of the Order outweigh its deleterious effects.

### PART 3: THE LAW

#### THE RELEVANT RULES AND PROVISIONS RE CONFIDENTIALITY

8. The Commission has the authority impose conditions on the disclosure of information at this inquiry in order to protect the confidentiality of that information, or to take other measures to prevent the disclosure of information if it decides that the privacy interest in that information outweighs the public's interest in the information to be disclosed.
9. Paragraph 17 of the Elliot Lake Inquiry's *Rules of Standing and Funding* (the

“Rules”) sets out that:

Where a participant objects to the disclosure of a document or information to other participants and/or to the public at the hearing or otherwise on the grounds of confidentiality, and seeks an order pursuant to subsections 10(4) or 14(3) of the Act, a copy of the document and/or the information in issue will be produced in an unedited form to the Commission. The participant shall provide, in writing, a submission setting out the order requested and the reasons for it. In determining whether to make the order, the Commissioner will consider, among other things, the duty of procedural fairness to the other participants and his obligation pursuant to section 17 of the Act.

10. The corresponding provisions from the *Public Inquiries Act*<sup>4</sup> (the “Act”) state:

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

s. 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 considerations outlined in these provisions relevant to this Application are the following:

- I. the Applicants’ privacy interests;<sup>5</sup>
- II. the duty of procedural fairness to the other participants;<sup>6</sup> and
- III. the Commissioner’s obligations pursuant to s. 17 of the Act<sup>7</sup>

<sup>4</sup> 2009, SO 2009, c 33, Sch 6.

<sup>5</sup> See *Public Inquiries Act*, 2009, SO 2009, c 33, Sch 6, s 14(3)(d).

<sup>6</sup> See paragraph 17 of the *Inquiry’s Rules of Standing and Funding*.

<sup>7</sup> This section of the *Act* addresses findings of misconduct made by the Commissioner, and the obligations of the Commissioner to give notice of such a finding and a reasonable chance to respond.

## PART 4: ARGUMENT

### THE APPLICANTS HAVE A SIGNIFICANT PRIVACY INTEREST IN THE MATERIAL

12. There is a high expectation of privacy in relation to personal financial information. The courts have sought to “protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.”<sup>8</sup> Financial records are precisely this type of information.<sup>9</sup>

13. As made clear in *R. v. Dyment*, the privacy interest in information is based on the dignity and integrity of the individual. In that case, the Supreme Court stated:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it: “This notion of privacy derives from the assumption that all information about a person is in a fundamental way his won, for him to communicate or retain for himself as he sees fit.” In modern society, especially, retention of information about oneself as he sees fit.” We may, for one reason or another, wish or be compelled to reveal such information but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.<sup>10</sup>

14. Privacy interests with respect to financial records in particular has been considered by the courts. One of the the leading cases on this issue is *Le Comte v. British Columbia* wherein Madam Justice Haddard stated as follows:

I am of the view that a person's expectation of the privacy of his personal financial records should not be less worthy of protection than his oral communication by telephone (*R. v. Finlay and Grellette* (1985) 23 C.C.C. (3d) 48, Ont. C.A) or the contents of his rented post office box (*R. v. Guiller* (1985), 25

<sup>8</sup> *R. v. Plant*, [1993] 3 S.C.R. 281 at para. 20.

<sup>9</sup> See *Schreiber v. Canada* (Attorney General), [1998] 1 S.C.R. 841 at para. 22. Lamer C.J. stated the following: “The information at issue consists of personal financial records, obtained from a bank. It is clear that these records are of the sort that the respondent would expect would remain confidential, as they are part of what Sopinka J. referred to as the “biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.”

<sup>10</sup> *R. v. Dyment*, [1988] 2 S.C.R. 417 at 429-430.

C.R.R. 273 supra). The common law has always inferred a term of confidentiality in every bank/customer contract. That implied term persuades me that a customer of a bank gives information to that bank with the ordinary expectation that the bank will keep it private unless he consents to its disclosure for a particular purpose or a court otherwise orders.<sup>11</sup>

15. For the preceding reasons, the Applicants respectfully submit that there is a high expectation of privacy attached to the records/information they have submitted to the Commission. As a result, and in combination with the reasons below, the information should be protected from disclosure and from any use other than by the Commission for the limited purpose of determining the Applicants' application for funding.

***THE MATERIAL IS NOT OTHERWISE RELEVANT***

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16. The Applicants further submit that, with the exception of the Commission's determination with respect to this application for funding, the records submitted are not otherwise relevant to the business of the inquiry. As such, the records should certainly not be disseminated to members of the public.

17. The mandate of the Inquiry is:

To inquire into and report on events surrounding the collapse on June 23, 2012, of the Algo Centre Mall in Elliot Lake, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals as well as the emergency management and response. Furthermore, the Commission is to review relevant legislation, regulations and bylaws, policies processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity of the Algo Centre Mall and the emergency management and response. The Commission is to make recommendations to prevent such occurrences in the future.

18. The records submitted to the Commission consist of the following records:<sup>12</sup>
- I. financial statements and accompanying documents of the Applicants,

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<sup>11</sup> *Le Comte v. British Columbia* [1990] B.C.J. No. 870, (S.C.) at para. ; See also *Alberta in Regina v. Warawa* (1997) 56 Alta. L.R. (3d) 67 (Alta. Q.B.).

<sup>12</sup> For a detailed list, see the index attached to the documents submitted to the Commission.



- II. income tax returns of the Applicants; and
  - III. personal banking records, i.e. account activities and balances.
19. While these records contain very private and personal financial information about the Applicants, none of these documents contain information pertinent to the Mandate of the Commission as laid out above. For instance, financial information effectively demonstrating the net worth of the Applicant Robert Nazarian, could not possibly assist in determining how the collapse occurred on June 23, 2012.
20. Issues as to the emergency management and response and the policies and procedures with respect to the integrity of the Mall, as well as how to prevent such occurrences in the future, have absolutely nothing to do with the current and recent financial status of the Applicants as contained in these records. Rather, the only relevance which these documents have in these proceedings is as evidence in this Application for funding. As such, it is submitted that their use must be limited for that purpose, and that the records be protected from dissemination to the public and other parties, other than the Commission.
21. In essence, a sealing order would permit the Applicants to provide the Commission with the information that it requires to consider, and possibly permit, the central figures in this Inquiry to meaningfully participate.
22. Finally, it follows that if the records are not otherwise relevant to the mandate of the Commission, the records are also not relevant to the other parties. Their respective positions are not prejudiced in any way by a sealing order.

**THE SALUTORY EFFECTS OF A CONFIDENTIALITY ORDER OUTWEIGH ANY DELETERIOUS EFFECTS**

23. The rights and interests at stake with respect to this application are addressed by the

relevant portions of *Rules* and the *Act* themselves. As outlined above, the main considerations for the Commissioner include the privacy interests involved and the duty of procedural fairness to/right to procedural fairness of other litigants.

24. The Applicants have been subpoenaed to this Inquiry. They possess exclusive knowledge, of and insight into issues relating to this Inquiry, which is vital to its success and mandatory for the satisfaction of its mandate.
25. The Inquiry will have a significant impact on the reputation of the Applicants. As a result of various media reports relating to this Inquiry, the reputations of the Applicants have already been affected negatively. There can be no doubt that as the Inquiry progresses, their reputations will continue to be significantly impacted. Participating fully in this Inquiry is crucial to safeguarding the reputational interests of the Applicants.
26. As owners, operators and administrators of Eastwood Mall Inc., and consequently the Algo Centre Mall, the Applicants each have a real and substantial interest in the Inquiry and its findings, and are likely to be notified of possible findings of misconduct pursuant to section 17 of the *Act*. As noted, they have an exclusive viewpoint on the events in question before the Inquiry and can provide exceptional assistance to the Inquiry in its totality.
27. As such, the Applicants have the right and a strong interest in having proper legal counsel for the purposes of this Inquiry as well.
28. As the records must be submitted to the Commission as evidence in relation to its determination on the issue of funding, a confidentiality order is the only means by which these significant rights and interests can be safeguarded in this matter. There

are no viable alternatives which would adequately safeguard those rights and interests. As a result, the Applicants submit that such an order is necessary in the circumstances of this case.

29. A confidentiality order would also have substantial salutary effects on the Applicants rights and interests with respect to full participation. Making this order would allow the Applicants to apply for funding without disseminating very private personal information to the public. Consequently, it might even be argued that a confidentiality order, would actually promote the open court principle.

**PART 5: DECISION REQUESTED**

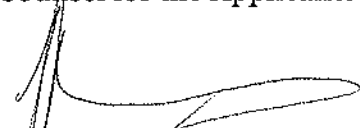
30. For the reasons above, the Applicants request that the Commission impose a Confidentiality Order with respect the records/information submitted, preventing their dissemination to the public, and preventing their use for any reason other than for by the Commission for the limited purpose of making a determination on this application for funding.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**  
**THIS 24 DAY OF OCTOBER, 2012**



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**PETER THORNING**  
Counsel for the Applicants



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**PRADEEP CHAND**  
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