

**Elliot Lake Inquiry
Order-in-Council 1097/2012**

**SUBMISSIONS OF the
ASSOCIATION OF PROFESSIONAL ENGINEERS OF ONTARIO (“PEO”)**

Request for Order under Section 10(4) *Public Inquiries Act, 2009*

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Overview

1. In response to a Summons to Produce, dated September 21, 2012 (the “Summons”) received from the Elliot Lake Commission of Inquiry (the “Commission”), the Association of Professional Engineers of Ontario (“PEO”) has reviewed its documentary files relating to any complaints received and/or disciplinary action taken by the PEO in relation to the work and/or practices of [REDACTED] [REDACTED] (together, the “Members”).
2. The PEO has produced to the Commission without restriction all such documents with regard to each of the Members for which no claim of privilege is made, and which are not covered by section 38(1) of the *Professional Engineers Act* (the “PEA”).¹
3. The PEO has also produced to the Commission all non-privileged documents located in confidential files held by the PEO, to which section 38(1) of the *PEA* applies, but it has done so subject to a claim of confidentiality pursuant to that section. It is the position of the PEO that, while section 10 the *Public Inquiries Act, 2009* (“PIA”)² operates to require “production” to the Commission, the *PIA* does not otherwise automatically abrogate the confidentiality mandated by section 38(1) of the *PEA*.

¹ *Professional Engineers Act*, R.S.O. 1990, Chapter P. 28

² *Public Inquiries Act, 2009*, S.O. 2009, Chapter 33, Schedule 6

4. The PEO has provided to the Commission a list of the documents to which section 38(1) of the *PIA* applies.³ The documents at issue were located either in the Discipline Committee's files, or in files maintained by the Regulatory Compliance department at the PEO, and do not appear on their face to be public. For the purposes of these submissions, those documents will be referred to as the "Confidential Documents".
5. The Summons was served pursuant to section 10(1)(b) of the *PIA*, which requires a person to "produce for the public inquiry any information, document or thing under the person's power or control". Subsection 10(3) confirms that the Summons operates "despite any other Act" to require that the Confidential Documents be "disclosed to the commission for the purposes of the public inquiry". In providing the Confidential Documents to the Commission, the PEO has fully complied with its obligations under section 10 of the *PIA* and the Commission's *Rules of Procedure*.⁴
6. Nonetheless, the PEO submits that section 38(1) of the *PEA* still applies and requires steps to "preserve secrecy with respect to all matters" referred to therein, subject to the listed exceptions which include "the consent of the person to whom the information relates". That section requires the PEO, and (it is submitted) the Commission, to ensure that persons to whom information contained in the Confidential Documents relates are given notice of any further use or disclosure of that information that the Commission intends to make, and that they have the opportunity to make submission as to such intended use or disclosure.

³ There may be some of those documents that are in fact public themselves, or that contain information that is publicly available. The claim of confidentiality made by the PEO is not intended to apply to all such documents, and the PEO is prepared to work with the Commission to identify any that may be suitable for their immediate release to the parties.

⁴ Rule 9 of the Commission's *Rules of Procedure* require participants to provide copies of all relevant documents to the Commission at the earliest opportunity

7. To that end, the PEO seeks an order pursuant to sections 10(4) and 17 of the *PIA* and Rule 17 of the Commission's *Rules of Procedure* as follows:

a. Prior to the disclosure of the Confidential Documents to other parties or the public, the following persons be given the opportunity to review the Confidential Documents and make submissions to the Commissioner as to the appropriateness of any further disclosure and/or use of such documents by the Commission:

i. PEO;

ii. Each of [REDACTED] in respect of all Confidential Documents relating to them;

iii. The following complainants, in respect of Confidential Documents from the files relating to complaints by them;

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

iv. Anyone else to whom information contained in any of the Confidential Documents relates.

The persons listed above are members of the PEO, or individuals or organizations who were involved in the making or investigation of complaints as against the Members.

8. The PEO submits that the order sought is consistent with the statutory framework under which both the Commission and the PEO operate and will ensure procedural fairness to all participants at the Inquiry. Further, the order sought is consistent with the intent of section 38 of the *PEA* - that documents or information collected in the course of the administration of that Act are to be kept strictly confidential.

9. The PEO has also claimed privilege for a small number of documents, either as solicitor-client communications, or documents covered by deliberative secrecy, or both (the

“Privileged Documents”). The PEO will provide a sworn Affidavit in support of the privilege claims. If necessary, the PEO proposes that any Privileged Documents in issue be submitted for review by Mr. Justice Goudge in accordance with the Commission’s *Rules of Procedure*.

Review of Statutory Framework with Respect to the Confidential Documents

(i) The PEO and Section 38 of the PEA

10. The PEO is the licensing and regulatory body for professional engineering in Ontario.

Section 2(3) of the *PEA* provides that the principal object of the PEO is:

“...to regulate the practice of professional engineering and to govern its members, holders of certificates of authorization, holders of temporary licenses, holders of provisional licenses and holders of limited licences in accordance with the Act, the regulations and the by-laws in order that the public interest may be served and protected.”

11. As noted, section 38(1) of the *PEA* provides that those engaged in the administration of the *PEA* must maintain as confidential, all information received in the course of their duties. This absolute requirement of confidentiality is subject to limited exceptions, explicitly set out in the statute.

12. In *Watson v. Boundry*, Justice Boland considered the meaning of section 38(1) in the context of a motion for production for purposes of a civil action. The plaintiff, a member of the PEO, commenced an action against two employees of the PEO alleging malicious prosecution. The plaintiff sought information and documents from the PEO relating to the investigation. The Court concluded that, pursuant to section 38, the PEO did not have to disclose the documents or information at issue. Justice Boland held that section 38(1)

“expresses a clear intent on the part of the legislature to protect the investigation and deliberation process of professional regulatory bodies. It promotes full and impartial investigation and sensibly ensures the confidentiality of complaints and the independence of investigators and decision makers”⁵.

13. Cases interpreting s. 38 of the *PEA* have applied the Ontario Court of Appeal’s decision in *Cook v. Ip*,⁶ in recognizing the clear, complete, specific and precise character of the prohibition against disclosure mandated by such statutes.
14. The PEO relies on the voluntary cooperation of complainants and its professional members in fulfilling its investigative functions.⁷ Such cooperation is generally facilitated by the expectation that the information gathered will be kept confidential.

(ii) Section 10 Public Inquiries Act – Confidentiality, Production and Disclosure

15. Section 10 of the *PIA* empowers the Commission to compel a person to make production for the purposes of the public inquiry. Subsection 10(3) confirms that the power to require production operates despite any other Act under which the document or thing would be considered confidential or otherwise inadmissible.
16. However, this extraordinary power to require **production** of otherwise confidential documents and information does not dispose of the issue. It is tempered by subsection 10(4), which explicitly recognizes that issues of **confidentiality** nevertheless remain. Subsection 10(4) therefore authorizes the Commission to impose conditions on the **disclosure** of information at a public inquiry to protect the confidentiality of that information. The PEO submits that in these circumstances, the Commissioner is required

⁵ *Watson v. Boundry*, [1997] O.J. No. 2500 at para. 5

⁶ *Cook v. Ip et al.*, (1985), 52 O.R. 2d. 289 (C.A.)

⁷ Unlike other professional regulation statutes, the PEA does not require members to respond to complaints being investigated by the PEO. If members choose to do so, it is on a voluntary basis.

to ensure that the Confidential Documents are dealt with in a manner that fairly balances the needs of the inquiry process with the right to confidentiality of those to whom the information contained in the Confidential Documents relates.

17. The ability to impose confidentiality measures pursuant to section 10(4) only makes sense given that the Confidential Documents, which were compelled pursuant to the Summons, are nevertheless protected under the *PEA*, a separate statutory scheme. For example, in the November 1, 2007 ruling of Justice Goudge, Commissioner of the Inquiry into Pediatric Forensic Pathology in Ontario, he ordered that the young persons involved in the cases under review were to be identified using first names or initials only. This ruling extended the protection already afforded under child welfare and youth criminal justice legislation.⁸ Justice Goudge was satisfied that this protective measure satisfied the aim of such legislation, while at the same time ensuring that the Commission could function efficiently and fulfill its mandate.⁹
18. The approach and order proposed by the PEO are consistent with this ruling. The order proposed by the PEO similarly achieves the dual goal of fairness to those to whom the Confidential Documents relate, and the obligation of the Commission to fulfill its mandate.
19. The issuance of confidentiality measures are clearly matters that the Commissioner must consider in the context this Inquiry. In addition to section 10(4) of the *PIA*, section 14(3) confers on the Commissioner a discretion to conduct hearings in private, and/or issue orders prohibiting the disclosure, publication, broadcast or communication of any

⁸ *Youth Criminal Justice Act*, S.C. 2002, c.1; *Young Offenders Act*, R.S.C., 1985, c. Y-1; *Child and Family Services Act*, R.S.O. 1990, c. C. 11; *Child Welfare Act*, R.S.O. 1980, c. 66

⁹ Appendix 22: Ruling on Requests for Non-Publication Orders, November 1, 2007, Inquiry Into Pediatric Forensic Pathology in Ontario, Volume 4

evidence at the Inquiry, when the general principle that the hearings should be open to the public is outweighed by the need to keep the matters private.

20. The PEO submits that the proposed order offers a reasonable balance between the rights of the persons affected and the public interest in a open and transparent inquiry process.

(iii) Implications of Section 38(1) of the PEA for the Commission

21. The PEO submits that the clear legislative intent of s. 38(1) of the *PEA* requires that the integrity of the Confidential Documents must also be maintained by this Commission. Any encroachment on the presumption of secrecy and confidentiality must be approached cautiously. At a minimum, adequate notice and an opportunity to make submissions must be given to those whose interests are engaged by the disclosure and/or public use of the Confidential Documents.
22. The principle that documents and information obtained pursuant to a legal process may be held subject to restrictions based upon considerations of privacy, confidentiality and the integrity of the process in which they were obtained is firmly established in our law.
23. For example, our courts at common law dealing with civil actions have developed and enforce an “implied undertaking”, which restricts persons who obtain information through the discovery process or otherwise as a result of the civil proceedings, from using them for other proposes or proceedings. Notably, this rule, as originally developed by our Court of Appeal in *Goodman v. Rossi*, does not even require that the information and documents be otherwise “confidential”. Rather, it is based upon the protection of

interests related to privacy and to maintaining the integrity of the civil litigation process.¹⁰ It is now partially codified by Rule 30.1 of the *Rules of Civil Procedure*.

24. A similar rule prohibiting the use of information obtained in a Crown disclosure brief in criminal proceedings, for purposes other than the prosecution in which it was disclosed, operates even though there is no statute compelling the Crown to produce the brief.¹¹
25. Even where documents are filed as exhibits in a proceeding, the courts' continuing role in managing the use of such exhibits is set out by the Supreme Court of Canada, in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*.¹² The Supreme Court held that the court, as custodian of the exhibits filed with it, is bound to inquire into the use that is to be made of them and is fully entitled to regulate that use. In *Vickery*, a journalist sought access to an illegally obtained video confession that had been excluded by the appeal court in overturning a conviction. The majority of the Supreme Court found that curtailment of public accessibility was justified where there was a need to protect the innocent.¹³
26. Similarly, while copies of the Confidential Documents are now in the custody of the Commission, the PEO submits that the Commission, like the courts, has an obligation as the custodian of these documents to regulate their dissemination and use. In light of the protection afforded to the Confidential Documents by section 38(1) of the *PEA*, the persons to whom they relate have a legitimate expectation that the Confidential Documents will not form part of the public record, unless and until they are given reasonable notice and the opportunity to make submissions regarding the intended use.

10 *Goodman v. Rossi*, (1995) 24 O.R. (3d) 359 (C.A.); *Orfus Realty v. D.G. Jewelry* (1995), 240 O.R. (3d) 379 (C.A.); *Kitchenham v. AXA Insurance*, 2008 ONCA 877

11 See for example *N.G. v. Upper Canada College*, [2004] O.J. No. 1202 (C.A.)

12 *Vickery v. Nova Scotia Supreme Court (Prothonotary)* [1991] 1 S.C.R. 671

13 *Supra*, at pages. 15-16. The principles set out in *Vickery* have been considered in more recent cases including, *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)*, [2002] O.J. No. 1141

(iv) Confidentiality and the Broader Role of Public Inquiries

27. Recognizing this obligation on the part of the Commission to protect legitimate interests of confidentiality, and balance them against other interests at stake, is not in itself inconsistent with the broader purposes of a **public inquiry**.
28. In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*¹⁴ the Supreme Court of Canada addressed a commissioner's power to control inquiry proceedings,¹⁵ in the context of orders for *in camera* hearings, to delay or ban publication of certain evidence or to delay the release of the commission's conclusions. In finding that the commissioner possessed the authority to make such decisions, Cory J. stated:

In my view, the nature and the purpose of public inquiries require courts to give a generous interpretation to a commissioner's powers to control their own proceedings under the Nova Scotia Act. One of the functions of an inquiry is to insulate an investigation from both the legislative and the judicial branches of government. It is crucial that an inquiry both be and appear to be independent and impartial in order to satisfy the public desire to learn the truth. It is the commissioner who must be responsible for ensuring that the hearings are as public as possible yet still maintain the essential rights of the individual witnesses.

...

In an inquiry it is the commissioner who should first determine whether such exceptional orders should be issued. The authority to make those orders derives from and relates to the conduct of the inquiry hearings. This authority should be given a reasonable and purposeful interpretation in order to provide commissions of inquiry with the ability to achieve their goals. It is appropriate that the Commission should be the first body to determine whether any of the

¹⁴ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2 S.C.R. 97 at paras. 175-176

¹⁵ *The Nova Scotia Public Inquiries Act*, R.S.N.S. 1989, c. 372, s. 5 stated: "The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court."

exceptional orders concerning publicity bans or in camera hearings should be made.

29. The Commissioner's discretion to make orders as to confidentiality are a significant component of his ability to be able to control the conduct of the Commission.
30. As Cory J. has observed the task of any commissioner is to balance the commission's investigative and inquiring roles with the rights of those being investigated. Here, the Terms of Reference warrant a probing examination of the events surrounding the collapse of the Algo Centre Mall (the "Mall") in Elliot Lake.¹⁶ The PEO recognizes that such examination will include an examination into the building and maintenance of the Mall, and of those involved in such endeavours. The Commissioner ought to ensure that procedural fairness is afforded to not only those whose conduct may be under examination, but also third parties whose privacy interests may be at stake. This right to fairness must be balanced with any public access to the Confidential Documents.

(v) Balancing Confidentiality and Other Interests

31. The PEO's request for caution with respect to the Confidential Documents recognizes that the interests protected by section 38(1) at least require a balance be struck between the interests of confidentiality and other interests in the public inquiry process. This is akin to the "*Wigmore*" analysis adopted by the Supreme Court in *A.M. v. Ryan*,¹⁷ and applied, for example in *Steep (Litigation guardian of) v. Scott*,¹⁸ in the context of a professional review and disciplinary process. The question will be whether there are "purposes of the public inquiry" referred to in subsection 10(3) of the *PIA* requiring the further use or disclosure of the Confidential Documents, that justify overriding the

¹⁶ The Terms of Reference are set out in the Order in Council, dated July 19, 2012

¹⁷ *A.M. v. Ryan*, [1997] 1 S.C.R. 157, at para. 20

¹⁸ *Steep (Litigation guardian of) v. Scott*, [2002] O.J. No. 4546

statutory protection of section 38(1) of the *PEA*. This, essentially, requires a balancing that is properly undertaken case by case, document by document, between the parties asserting the relevant interests in the Confidential Documents and the Inquiry process.

32. Finally, the PEO submits that the right of those whose confidential information is protected by the *PEA*'s confidentiality provisions should not lightly be displaced by blanket arguments favouring early public access to information, presumably based on the "open court" principle reflected in for example, ss. 134-136 of the *Courts of Justice Act*. Those arguments simply have no application in the face of the statutory requirements of subsection 38(1) of the *PEA*, at least unless and until information or documents are made part of the "record" of the Inquiry proceedings by Commission counsel or another party. As Justice Cory held in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*¹⁹:

The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated...This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly"²⁰

Summary

33. The PEO submits that the Commission must exercise the discretion given to it by s. 10(4) of the *PIA* on a principled basis, and after an adjudicative hearing process that is fair to the persons affected. In the PEO's submission, that requires the following steps:

¹⁹ *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)* [1997] 3 S.C.R. 440

²⁰ *Supra*, at para. 31

- a. That Commission counsel identify those documents that it believes are irrelevant to the public inquiry and the work of the Commission, and exclude them from consideration²¹;
- b. That Commission counsel work with the PEO to identify any relevant documents that contain only information that is public in another form, with a view to making them available without restriction or excluding them as duplicative;
- c. That Commission counsel work with the PEO to identify any person to whom information in the remaining Confidential Documents relates, and who should therefore be given notice of the request to further use or disclose that information;
- d. That the Commission then make the order proposed in paragraph 8 of these submissions; and
- e. That the Commissioner receive submissions in writing or hold a hearing or hearings, *in camera*, on notice to all persons to whom information in the Confidential Documents relates, before making determinations as to the further use or disclosure of such documents, including any conditions or restrictions upon such use or disclosure, under subsection 10(4) of the *PIA*.

All of Which is Respectfully Submitted

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²¹ The PEO notes that Commission counsel has already provided a preliminary list of the Confidential Documents it considers relevant.