

Elliot Lake Inquiry Order-in-Council 1097/2012

REPLY 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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Introduction

1. The PEO has reviewed the submissions filed in response to the PEO's Submissions. The PEO wishes to reply briefly to the issues raised that it believes are most relevant. These Reply submissions use acronyms as defined in the PEO's initial Submissions.
2. For the reasons set out in its Submissions, the PEO maintains that this Commission – to the extent it has not already done so – should provide notice to all identifiable persons to whom the information contained in the Confidential Documents in issue relates (the "Affected Persons"), before making any further disclosure or use of that information prior to or at the hearing.¹

The PEO has complied with the Summons

3. The submissions of several of the responding parties wrongly assume or suggest that the PEO has not complied with the Summons to Produce, dated September 21, 2012. In fact, the PEO has complied fully: by unconditionally producing all public documents

¹ The PEO agrees with the request of ELMAC and SAGE set out at paragraph 2 of their submissions that in addition to giving notice to those persons to whom the information contained in the Confidential Documents relates, the Commission ought to ensure that all parties with standing are given the opportunity to make submissions on the potential use or exclusion of documents from the public record.

encompassed by the Summons; and by producing to the Commission all the remaining non-privileged documents encompassed by the Summons (the Confidential Documents).

4. It is therefore incorrect to suggest that the PEO has failed to produce relevant, non-privileged documents. The PEO responded to the Commission's requests for information in a timely and transparent manner.

The PEO takes no position on whether any particular Confidential Document should or should not be made public

5. Nor is the PEO seeking any "secrecy". The PEO takes no position concerning any particular document. Rather, the PEO has asserted the general confidentiality mandated by ss. 38(1) of the *Professional Engineers Act* ("PEA"). The PEO administers the *PEA*, and is therefore obliged to make the request set out in its Submissions, in the absence of consent on the part of the Affected Persons. Giving or requiring notice to the Affected Persons, as requested in the PEO's Submissions, in no way offends the Commission's requirement for openness and transparency. To the contrary, it enhances the openness and transparency of the Inquiry process.

The PEO's Proposed Process has been largely fulfilled

6. Contrary to the submissions of the Media Organizations, the PEO's request that notice be given is not a "blanket confidentiality order". It is purely a procedural request. Moreover the procedure suggested by the PEO is not "lengthy and convoluted". In fact, the PEO's proposed process has been largely fulfilled, without causing any material interference or delay in the ongoing work of the Commission.

7. Since filing its Submissions on November 23, 2012, the PEO has worked with Commission Counsel to narrow the original list of Confidential Documents to those that have been identified as “responsive” by Commission Counsel and are not otherwise publicly available, and to provide contact information so that notice could be delivered to the engineers and complainants to whom the information contained in those documents relates.²
8. The PEO understands that those Affected Persons listed at paragraph 7(a)(i)-(iii) of its Submissions have now received notice. The PEO is pleased that its intervention has enabled those persons to receive notice, so that they can make submissions on any further disclosure or use of the documents that relate to them.
9. Contrary to the submissions of the Media Organizations, ELMAC and SAGE, and the Families, this process strikes a proper balance between public access to information relevant to the Commission’s mandate and fairness to those whose confidential information may be revealed. This is consistent with Justice Cory’s caution in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, 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.”³
10. Several responding parties have also wrongly suggested that the PEO’s proposed process runs afoul of the “open court” principle. The process proposed by the PEO is not inconsistent with the presumption of openness. It simply requests, as a matter of fairness,

2 These are the individuals identified at paragraph 7(a)(i)-(iii) of the PEO’s Submissions, dated November 23, 2012

3 See paragraph 32 and footnotes 19-20 of the PEO’s Submissions, November 23, 2012

that notice be given to the Affected Persons, and that they be given an opportunity to make submissions concerning whether the Confidential Documents relating to them be made publicly available.

11. The PEO is required to preserve the confidentiality of the information protected by section 38 of the *PEA*. In requesting that notice be provided to the Affected Persons, the PEO is simply discharging its obligations under the *PEA*.

Notice to the remaining Affected Persons

12. As stated above, with the assistance of the PEO, the Commission has now given notice of its intended public disclosure of the Confidential Documents to those individuals listed at paragraph 7(a)(i)-(iii) of the PEO's Submissions. However, to date, notice has not been given to the category of individuals described at paragraph 7(a)(iv). The PEO respectfully submits that, prior to any public dissemination of the Confidential Documents, the requested notice ought also to be provided to this last group of Affected Persons, and that they be given an opportunity to make submissions.
13. The PEO is prepared to further assist by reviewing the Confidential Documents that Commission Counsel wish to disclose in order to identify, to the extent possible, these remaining Affected Persons, and to search for and provide any available last known contact information, so that the Commission can give them notice. The PEO believes that the number of remaining Affected Persons is neither large nor unwieldy.
14. The PEO believes it can provide available names and contact information by no later than January 11, 2013.

All of Which is Respectfully Submitted

December 14, 2012

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