

**IN THE MATTER OF THE ELLIOT LAKE COMMISSION OF INQUIRY
The Honourable Paul R. Bélanger, Commissioner**

**AND IN THE MATTER OF a Request by the Association of Professional Engineers
of Ontario for an Order under Section 10(4) of the *Public Inquiries Act***

BETWEEN:

THE ELLIOT LAKE INQUIRY

- and -

THE ASSOCIATION OF PROFESSIONAL ENGINEERS OF ONTARIO

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SUBMISSIONS

INTRODUCTION

1. The Honourable Mr. Justice Paul R. Bélanger has been appointed as the Commissioner of the Elliot Lake Commission of Inquiry (“the Elliot Lake Inquiry”). Pursuant to the terms of its Mandate, the Commission will inquire into and report on events surrounding the collapse on June 23, 2012, of the Algo Centre Mall in Elliot Lake (“the collapse”), the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals as well as the emergency management and response.

2. Rejean Aylwin, Rachelle Aylwin, Stephane Alywin, Teresa Perizzolo, and Cindy Lee Allan are the family members of the two individuals who died in the collapse, namely Lucie Alywin and Doloris Perizzolo (“the Families”). These deaths will be examined by the Commission.

3. The Families submit that the Association of Professional Engineers of Ontario's ("APEO") request for an Order under Section 10(4) of the *Public Inquiries Act* ("PIA") should be denied based on the following submissions:

1. The very nature of public inquiries requires open and public disclosure of all relevant information.
2. The powers conferred upon the Commission under the *Public Inquiries Act* apply "despite any other Act." The *Public Inquiries Act's* purpose must be considered paramount to any provision of the *Professional Engineers Act*.
3. The *Professional Engineers Act's* purpose, under subsection 2(3), is to serve and protect the public interest. Under Subsection 38(1) of the *Professional Engineers Act*, the APEO may communicate matters as may be required in connection with the administration of that Act. Therefore, the APEO may communicate any documents in connection with the administration of the Act's purpose under section 2(3).
4. The prohibition against communication of documents addressed in subsection 38(1) of the *Professional Engineers Act* is in respect of voluntary disclosure and not court-ordered disclosure.
5. Subsection 38(2) of the *Professional Engineers Act* explicitly addresses the confidentiality of documents in relation to court proceedings. Subsection 38(2)

states that the confidentiality of such documents only applies to civil actions. The legislature did not intend to prevent evidence to be disclosed in the context of a public inquiry.

6. The materials that the APEO seek to withhold from the public are highly relevant to the Mandate of the Commission and, therefore, ought to be disclosed to the public in the course of the Elliot Lake Inquiry.
7. Sections 22 and 23 of the *Public Inquiries Act* operate to protect the documents to which the APEO is claiming confidentiality from being disclosed or used for any purpose other than for the purposes of this public inquiry.
8. Finally, the Commission is required to give the public access to all relevant information pursuant to subsection 14(2) of the *Public Inquiries Act*.

THE PURPOSE OF A PUBLIC INQUIRY

4. The Families submit that the Elliot Lake Inquiry is meant to be open and transparent. Its purpose is to inform the public of facts concerning a shocking incident that occurred in the Elliot Lake Community. The comments made by the Ontario Court of Appeal in *Re The Children's Aid Society of the County of York*¹ are especially helpful. Mr. Justice Mulock commented on the Commissioner's duty to avail himself of all reasonable sources of information:

. . . in answering the questions submitted it might be advisable to point out the nature of the inquiry in question. It is one to bring to light evidence or information touching matters referred to the Commissioner. . . . The Commissioner should avail himself of all reasonable sources of information, giving a wide scope to the inquiry. If, for example, some person were to inform the Commissioner where useful documents or other evidence could be obtained, it would seem reasonable

¹ *Re The Children's Aid Society of the County of York*, [1934] OJ No. 78

that he avail himself of such a source of information. . . . It is for the Commissioner, from all available sources, to bring to light such evidence as may have a bearing on the matters referred to him.²

5. Further, the remarks of the eminent Ontario jurist, Mr. Justice Riddell in the same proceeding are still equally applicable today:

A Royal Commission is not for the purpose of trying a case or a charge against anyone, any person or any institution -- but for the purpose of informing the people concerning the facts of the matter to be enquired into.³

6. And finally, the extremely helpful comments of Mr. Justice Middleton:

. . . It is an inquiry not governed by the same rules as are applicable to the trial of an accused person. The public, for whose service this Society was formed, is entitled to full knowledge of what has been done by it and by those who are its agents and officers and manage its affairs. What has been done in the exercise of its power and in discharge of its duties is that which the Commissioner is to find out; so that any abuse, if abuse exist, may be remedied and misconduct, if misconduct exist, may be put an end to and be punished, not by the Commissioner, but by appropriate proceedings against any offending individual.

This is a matter in which the fullest inquiry should be permitted. All documents should be produced, and all witnesses should be heard, and the fullest right to cross-examine should be permitted. Only in this way can the truth be disclosed.⁴

7. In *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*⁵, Cory J. held that open hearings “function as a means of restoring the public confidence”⁶ and act as a “type of healing therapy for a community shocked and angered by a tragedy.”⁷ He described the purpose of public inquiries and emphasized the importance of their “open and public nature”:

² Ibid at para 8

³ Ibid at para 12

⁴ Ibid at paras 17-18

⁵ *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97

⁶ Ibid at para 117

⁷ Ibid

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth" ... In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.

They are an excellent means of informing and educating concerned members of the public.⁸

8. The Families submit that the very nature of the Elliot Lake Inquiry is to apprise the Canadian public of the conditions pertaining to this shocking incident. The public needs to be involved and be a part of the recommendations aimed to resolve the problem. The purpose of the Elliot Lake Inquiry is to restore public confidence in those involved in the collapse and in the government process as a whole. This will not be accomplished with secrecy and the non-disclosure of important and relevant documents.

THE PUBLIC INQUIRIES ACT TRUMPS THE PROFESSIONAL ENGINEERS ACT

7. The purpose of the PIA, as stated in section 1, is to “establish an effective and accountable process for public inquiries where there is a public interest to independently inquire into facts or matters and make recommendations regarding those facts or matters.”

8. Subsection 10 (3) of the PIA states that “subject to the order establishing it and despite any other Act, a commission may require the provision or production of information that is considered confidential or inadmissible under another Act or a

⁸ Ibid at para 62

regulation and that information shall be disclosed to the commission for the purposes of the public inquiry.”

9. The Families submit that subsection 10(3) of the PIA operates to ensure that the production of documents under subsection 10(1) is required despite the operation of any other Act. This includes the *Professional Engineers Act* (“PEA”).

10. The Families submit that the wording of subsection 10(3) of the PIA should be read in a way that is consistent with the PIA’s stated purpose under section 2 and with the general purpose of public inquiries as has been articulated by the courts. A public inquiry, by its very nature, should keep all relevant documents pertaining to the collapse open and transparent to all affected, including the Families, the Elliot Lake community, and the public in general. Therefore, the phrase “purposes of the public inquiry” should be read to include informing the public.

THE PROFESSIONAL ENGINEERS ACT’S PURPOSE: THE PUBLIC INTEREST

11. Subsection 2 (3) of the PEA states that “the principal object of the Association is to regulate the practise of professional engineering and to govern its members...in accordance with this Act, the regulations and the by-laws in order that the public interest may be served and protected.”

12. Subsection 38 (1) of the PEA states that “every person engaged in the administration of this Act...shall preserve secrecy with respect to all matters that come

to his or her knowledge in the course of his or her duties, employment, examination, review or investigation and shall not communicate any such matters to any other person except... as may be required in connection with the administration of this Act and the regulations and by-laws.”

13. The Families submit that subsection 38(1) does not require the APEO to preserve secrecy with respect to the documents to which it is claiming confidentiality. Subsection 38(1) states that the APEO may be required to communicate such documents in connection with the administration of the PEA. The Families submit that subsection 2(3) of the PEA confers an obligation on the APEO to ensure that the public interest is served and protected. This is the very purpose of the public inquiry into the collapse. Therefore, the documents may be disclosed to the public in the administration of section 2(3) of the PEA.

SECTION 38 (1) SPEAKS TO VOLUNTARY DISCLOSURE

14. The Families further submit that subsection 38(1) is only intended to prohibit the voluntary disclosure of matters that become a part of the knowledge of a person engaged in the administration of the PEA during the course of his or her duties.

15. In the decision of *R v Snider*⁹, the Supreme Court of Canada considered the right of the Crown to subpoena the Director of Taxation to give evidence and to produce the income tax returns of the accused. The Minister of National Revenue objected to the production of the documents based on section 121 of the *Income Tax*

⁹ *R v Snider*, [1954] SCR 479

Act, which prohibited such communications to any person other than a person “legally entitled thereto.”¹⁰

16. When considering the effect of section 121 on the disclosure of relevant documents in a court proceeding, Rand J held that the section operates to ensure administrators keep information confidential from people other than the departmental staff. The section does not operate to prevent the administrators to produce evidence in judicial proceedings:

The prohibition of the statute is against disclosure to others than the departmental staff charged with the assessment but since the public interest in the administration of justice transcends that of any individual in the details of his ledger account, the ban is to be taken to be directed against a voluntary disclosure only and has no application to judicial proceedings.¹¹

17. Estey J made further comment on the effect of such provisions in statutes:

Sections 81 of the Income War Tax Act and 121 of the Income Tax Act, 1948 would appear to have been placed in the statutes to assure that those charged with the administration of the foregoing statutes would treat as confidential the information contained in or filed in relation to these documents. The reason and basis therefor is quite different and has no bearing on or relation to the above-discussed rule founded upon the necessity of public safety and security.¹²

18. The wording of subsection 38 (1) of the PEA is clear. It states that every person engaged in the administration of this Act shall preserve secrecy with respect to all matters that come into his or her knowledge in the course of his or her duties under the PEA. The Families submit that this section is meant to prohibit the voluntary disclosure of information of those charged with the administration of investigations

¹⁰ Ibid at pages 4-5

¹¹ Ibid at page 5

¹² Ibid at pages 13-14

under the PEA. It is not meant to prohibit the disclosure of pertinent and relevant documents in important judicial proceedings.

SECTION 38(2) APPLIES TO CIVIL ACTIONS ONLY

19. Further, the Families submit that the PEA makes explicit comment on the disclosure of documents in relation to court proceedings in subsection 38(2). Subsection 38(2) of the PEA prohibits those to whom subsection 38(1) applies to produce any documents in any civil action. If the legislature had also intended such documents to be confidential in criminal or public proceedings, the legislature would have said so in subsection 38(2) of the PEA. The fact that subsection 38(2) specifically references civil proceedings suggests that legislature intended to keep such documents confidential in civil proceedings only.

20. In *R v VTC Industrial Coatings Ltd.*¹³, two witnesses applied to the Court for an Order quashing a summons issued to them in the prosecution of the accused. The witnesses were engineers and relied on section 38 of the PEA.

21. The Court held that subsection 38(2) of the PEA only operates to bar disclosure in civil actions:

...the Court has a responsibility to do everything possible to get at the truth of the matter, and I believe it would be wrong to deny defence counsel access to these witnesses. And as I have already said, I further do not believe that the intent of the legislation was to stop witnesses from being summonsed or subpoenaed, whichever term you prefer, to give evidence in a prosecution or in a truly criminal matter. Therefore, I am denying the application for the summons of the witnesses to be quashed.¹⁴

¹³ *R v VTC Industrial Coatings Ltd.*, [1995] OJ No. 4978

¹⁴ *Ibid* at para 7

22. The Families submit that this Public Inquiry is analogous to the criminal matter in the above case. While the Commission cannot establish either civil or criminal liability, the Elliot Lake Inquiry was established by the Government of Ontario and is meant to investigate into all matters of the collapse and make important recommendations. It was established to get at the truth of the matter, specifically the truth behind the collapse. A Public Inquiry, in general, is meant to be open, transparent and public, much like the criminal justice system. Its role and purpose is far too significant to the public to be held in the same esteem as a civil proceeding.

23. Further, Commissioner Goudge in his *Ruling on the CPSO motion for directions*¹⁵ found that “a public inquiry does not decide upon private rights...The role of a public inquiry is quite different.”¹⁶ Commissioner Goudge concludes that a public inquiry is not a civil proceeding and that a similar provision in the *Regulated Health Professions Act* clearly refers to civil proceedings and explicitly distinguishes such proceedings from an inquiry established under the PIA.

23. The Families submit that the Elliot Lake Inquiry must do everything possible to get at the truth of the matter. This includes ensuring that all relevant documents are available for public scrutiny. Legislation did not intend for these documents to be protected from the public in the inquiry of such a shocking tragedy. It would be wrong to withhold this relevant information from those affected by the collapse, including the Families, the Elliot Lake Community, and the public in general.

¹⁵ *Ruling of Commissioner Goudge on the CPSO motion for directions*, October 10, 2007 (Appendix 16 of volume 4 of the Goudge Report)

¹⁶ *Ibid* at pages 12-13

MATERIALS ARE HIGHLY RELEVANT TO THE MANDATE OF THE COMMISSION

24. The Families further submit that the materials to which the APEO is claiming confidentiality are highly relevant to the business of the inquiry. The materials contain information pertinent to the Mandate of the Commission, specifically the Commission is “to review relevant...policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity of the Algo Centre Mall.”

25. The principal object of the APEO is “to regulate the practise of professional engineering and to govern its members...in accordance with the [PEA], the regulations and the by-laws...” The APEO conducted an investigation into two engineers in relation to this collapse. The APEO’s records in relation to these two engineers and their past professional conduct are entirely relevant to the Mandate of the Commission. Withholding such information from the public would be wholly wrong and inappropriate given the Commission’s Mandate and purpose.

SECTION 22 AND 23 OF THE *PUBLIC INQUIRIES ACT* AFFORDS THE APEO WITH SUFFICIENT PROTECTION

26. The Families submit that sections 22 and 23 of the PIA afford the APEO with sufficient protection in relation to the confidentiality of the impugned documents. The APEO and its agents are not compellable witnesses in a proceeding concerning anything done under this Act, other than a proceeding under the Criminal Code.

27. In addition, the Commissioner or any person acting on behalf or under the direction of the commission shall not disclose to any person during the public inquiry any information obtained in the public inquiry, except for the purposes of the public inquiry.

28. Lastly, no action or other proceeding lies or shall be instituted against any person acting pursuant to the PIA for any act done in good faith in the exercise or performance of any power or duty under the PIA.

29. Therefore, the Families submit that the impugned documents will only be used in relation to the inquiry. They will not be disclosed for any purpose other than the inquiry and the APEO and its agents will not be compelled to disclose further information outside of the inquiry.

COMMISSION REQUIRED TO GIVE THE PUBLIC ACCESS TO RELEVANT INFORMATION UNDER SUBSECTION 14(2) OF THE PUBLIC INQUIRIES ACT

30. Finally, the Families submit that the Commission is required to give the public access to the information collected or received in relation to a hearing under subsection 14(2) of the PIA.

31. The Families submit that to argue that this subsection does not apply because a hearing has not yet been heard is not a valid argument. The Elliot Lake Inquiry has been established to inquire into the events surrounding the collapse. It is

common knowledge that a hearing will inevitably take place. The fact that some relevant information is received prior to the hearing should not displace the requirement that all information be accessible to the public.

CONCLUSION

32. The Families submit that the Commission must ensure the open and public nature of the Elliot Lake Inquiry. The public should be apprised of all relevant facts pertaining to the collapse. The Families submit that this is a matter in which the fullest inquiry should be permitted. All documents should be produced and disclosed to the public. In the words of Mr. Justice Middleton, “only in this way can the truth be disclosed.”

33. The Families further submit that the powers conferred on the Commission by the PIA apply “despite any other Act” and that the PIA’s purpose must be considered paramount to any provision of the PEA.

34. The Families further submit that the PEA does not require confidentiality of the impugned documents. Subsection 38(1) operates as a ban against voluntary disclosure and subsection 38(2) makes explicit remark on the use of documents in a court proceeding. Subsection 38(2) states that documents shall be confidential in civil actions only.

35. The Families further submit that these documents are highly relevant and must be disclosed to the public by virtue of subsection 14(2) of the PIA. Sufficient protection is afforded to these documents under section 22 and 23.