Elliot Lake Inquiry
Order-in-Council 1097/2012

SUBMISSIONS of
ROBERT G.H. WOOD, P.Eng.

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

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

1. In response to a Summons to Produce, dated September 21, 2012 (the "Summons") received from the Elliot Lake Commission of Inquiry (the "Commission"), Mr. Robert Wood has produced to the Commission without restriction all such documents with regard to his involvement with the subject matter of the Commission.
2. Mr. Robert Wood accepts the submission of the Association of Professional Engineers of Ontario (the "PEO") in regard to their request for an Order under 10(4) of the *Public Inquiries Act*, concerning confidential documents of the PEO.
3. Mr. Wood submits that prior to the disclosure of the confidential documents of the PEO to other parties or the public, the Commission should grant the Order proposed by the PEO.
4. Further, Mr. Wood submit that prior to any dissemination of the contents of the confidential documents to the other parties involved in the inquiry or to the public, the Commission should make an evidentiary determination concerning the probative weight of the information contained in the documents and the prejudicial effect on

those parties to whom the confidential documents relate.

5. Mr. Robert Wood submits that this is consistent with the *Public Inquiries Act* and common law rules relating to the relevance and admissibility of evidence.

6. Section 10(4) of the *Public Inquiries Act*, entitled Protection of Confidential Information, empowers the Commission to impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information. Mr. Robert Wood submits that under these circumstances and with the confidential documents produced by the PEO, the Commission is required to make sure that the confidential information is dealt with in such a way that balances the probative value of the documents in relation to the needs of the inquiry process and its subject matter with the prejudicial or inflammatory impact to the parties to whom the information in the confidential documents relate.

7. In addition, M.R. Wright and Mr. Robert Wood submit that the Commission has the power through section 14(3) of the *Public Inquiries Act*, to exclude the public from all or part of a hearing *or take other measures to prevent the disclosure of information*[1] if it

[1] (emphasis added)

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 or (d) a person's privacy, security, or financial interest. The Supreme Court has acknowledged that an inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise, however, at the same time those individuals who played a role in the events being investigated are entitled to have their rights respected.[2]

8. Further, the Supreme Court stated that when witnesses must make disclosure of documents to the Commission, Commission counsel should, to the extent practicable, disclose to witnesses "any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into".[3]

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[2]Consortium Developments (Clearwater) Ltd. v. Sarnia (City), 1998 CarswellOnt 3948

[3]Consortium Developments (Clearwater) Ltd., v. Sarnia (City), 1998 CarswellOnt 3948 at para 41

9. It is well established in the common law that to be admissible evidence must be relevant and not subject to an exclusionary rule of law or policy. Even where evidence is otherwise logically relevant, it may be excluded if its probative value is exceeded by its prejudicial effect.[4] The Supreme Court has stated that "in general, nothing is to be received which is not logically probative of some matter requiring to be proved, and everything which is probative should be received, unless its exclusion can be justified on some other ground".[5] The Court went on to state that the "law of evidence deals with this problem by giving the trial judge the task of balancing the value of the evidence against its potential prejudice. Virtually all common law jurisdictions recognize a power in the trial judge to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it".[6]

10. The Court of Appeal in *R. v. Abbey,* stated that relevance can have two very different meanings in the evidentiary context.[7]

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[4]R. v. Jabarianha, 2001 CarswellBC 2500; see also R. v. Swietlinski, 1994 CarswellOnt 102

[5]R. v. Seaboyer, [1991] 2 S.C.R. 577 (S.C.C.)

[6]Id.

[7]R. v. Abbey, 2009 CarswellOnt 5008

11. Mr. Robert Wood acknowledges that section 8(1) of the *Public Inquiries Act* does grant the Commission the power to collect and receive information that it considers relevant and appropriate, whether or not the information would be admissible in court, and may accept the information as evidence at the public inquiry. The Commission should nevertheless do so in accordance with its power to protect confidential information under section 10(4) of the Act.

12. M.R. Wright and Mr. Robert Wood, submit then, that should the Commission not accept the Order proposed by the PEO, it should undertake to balance the probative value of the information contained in the confidential documents with the prejudicial effect on those involved in the documents of the dissemination of the information to the other parties and the public.

All of Which is Respectfully Submitted

December 6, 2012

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1998 CarswellOnt 3948, 40 O.R. (3d) 158 (headnote only), 230 N.R. 343, 48 M.P.L.R. (2d) 1, 165 D.L.R. (4th) 25, 114 O.A.C. 92, [1998] 3 S.C.R. 3, 8 Admin. L.R. (3d) 165, 1998 CarswellOnt 3949, 3 S.C.R. 3, [1998] S.C.J. No. 26

Consortium Developments (Clearwater) Ltd. v. Sarnia (City)

Consortium Developments (Clearwater) Ltd., Appellant v. The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board, Respondents

Kenneth MacAlpine, James Pumple and MacPump Developments Ltd., Appellants v. The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board, Respondents and The Attorney General for Saskatchewan, Intervener

Supreme Court of Canada

Lamer C.J.C., L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ.

Heard: March 16, 1998
Judgment: October 22, 1998
Docket: 25604

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Proceedings: affirming (1996), 34 M.P.L.R. (2d) 291, 30 O.R. (3d) 1, 138 D.L.R. (4th) 512, 92 O.A.C. 321 (Ont. C.A.); affirming (1995), 27 M.P.L.R. (2d) 157, 83 O.A.C. 241, 23 O.R. (2d) 498 (Ont. Div. Ct.)

Counsel: *Harvey T. Strosberg, Q.C.*, and *Susan J. Stamm*, for the appellants.

George H. Rust-D'Eye, *Barnet H. Kussner* and *Valerie M'Garry*, for the respondent the City of Sarnia.

Thomson Irvine, for the intervener.

Subject: Constitutional; Public

Municipal law --- Powers of municipal corporation --- Extent of powers — General

City passed resolution under s. 100(1) of Municipal Act to establish judicial inquiry concerning propriety of land transactions predecessor town had entered into with applicant land developers — Developers' application for judicial review of resolution was dismissed by Divisional Court and appeal to Court of Appeal was dismissed — Developers appealed — Aspects of procedural fairness should not defeat judicial inquiry at outset unless it is concluded that in particular circumstances of case fair inquiry could not be had based upon wording of particular resolution under consideration --- Appeal dismissed --- Municipal Act, R.S.O. 1990, c. M.45, s. 100(1).

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2001 CarswellBC 2500, 2001 SCC 75, 159 C.C.C. (3d) 1, 206 D.L.R. (4th) 87, 47 C.R. (5th) 97, 96 B.C.L.R. (3d) 211, [2002] 2 W.W.R. 599, 158 B.C.A.C. 82, 258 W.A.C. 82, 277 N.R. 388, 88 C.R.R. (2d) 1, 2001 CarswellBC 2501, [2001] 3 S.C.R. 430

R. v. Jabarianha

Ashkan Jabarianha, Appellant v. Her Majesty the Queen, Respondent

Supreme Court of Canada

Iacobucci, Major, Binnie, Arbour, LeBel JJ.

Heard: May 15, 2001
Judgment: November 15, 2001
Docket: 27725

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Proceedings: affirming (1999), 1999 CarswellBC 2582, 140 C.C.C. (3d) 242, 131 B.C.A.C. 82, 214 W.A.C. 82, 70 C.R.R. (2d) 245, [1999] B.C.J. No. 2634, 1999 BCCA 690 (B.C. C.A.)

Counsel: *Gil D. McKinnon, Q.C.*, for Appellant

William F. Ehrcke, Q.C., for Respondent

Subject: Evidence; Criminal; Constitutional

Evidence — Examination of witnesses — Cross-examination — Of accomplice

Accused's appeal from conviction for break and enter dismissed — Crown counsel cross-examined witness on his knowledge of protection afforded by s. 13 of Charter, which prohibits incriminating evidence from being used to incriminate that witness in any other proceeding — Without independent evidence of motive for witness to lie or obtain favours, prejudicial effects of testimony outweighed its low probative value — Witness should not have been cross-examined on his knowledge of s. 13 — Despite error, trial judge's minimal reliance on his testimony demonstrated that no substantial wrong or miscarriage of justice occurred — Trial judge did not disbelieve witness on basis that he knew s. 13 protected him, but because his demeanour demonstrated signs of untruthfulness — Curative proviso in s. 686(1)(b)(iii) of Criminal Code applied — Canadian Charter of Rights and Freedoms, s. 13 — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

Evidence — Cogency — Credibility — Duty of judge in assessing

Accused's appeal from conviction for break and enter dismissed — Crown counsel cross-examined witness on his

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1994 CarswellOnt 102, 33 C.R. (4th) 295, 92 C.C.C. (3d) 449, 24 C.R.R. (2d) 71, [1994] 3 S.C.R. 481, 119 D.L.R. (4th) 309, 172 N.R. 321, 75 O.A.C. 161, J.E. 94-1584, EYB 1994-67666

R. v. Swietlinski

ROMAN SWIETLINSKI v. ATTORNEY GENERAL FOR ONTARIO

Supreme Court of Canada

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: May 27, 1994
Judgment: September 30, 1994
Docket: Doc. 23100

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Counsel: *Mark J. Sandler* and *Sandra G. Leonard*, for appellant.

Gary T. Trotter, for respondent.

Subject: Criminal

Criminal Law --- Sentencing — Sentencing hearing — Victim impact statement

Criminal Law --- Prisons and prisoners — Release — Parole — Eligibility

Sentencing — Procedure — Murder — First degree murder — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — New hearing ordered because of prejudicial and inflammatory remarks and questions by Crown counsel — Remarks based on suggestions that process unfair or unduly favourable to prisoner, that Parliament ought not to have provided for leniency, that replacement of death penalty with 25 years was sufficient bargain — References to isolated cases of murder by released persons improper.

Sentencing — Procedure — Murder — First degree murder — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — Admissibility of evidence of impact on victims within discretion of presiding judge — Judge should be cautious before admitting — Focusing on victims 15 years after event may distract jury from matters properly encompassed by s. 745.

Parole — Eligibility for parole — First degree murder — Judicial review of 25-year period of parole ineligibility pursuant to s. 745 — New hearing ordered because of prejudicial and inflammatory remarks and questions by Crown counsel — Admissibility of victim impact testimony within discretion of presiding judge.

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1991 CarswellOnt 109, 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, (sub nom. R. v. S.) 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 48 O.A.C. 81, 4 O.R. (3d) 383, J.E. 91-1312, EYB 1991-67624

R. v. Seaboyer

STEVEN SEABOYER v. R.; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADIAN CIVIL LIBERTIES ASSOCIATION and WOMEN'S LEGAL EDUCATION AND ACTION FUND et al. (intervenors); NIGEL GAYME v. R.; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADIAN CIVIL LIBERTIES ASSOCIATION and WOMEN'S LEGAL EDUCATION AND ACTION FUND et al. (intervenors)

Supreme Court of Canada

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

Heard: March 26 and 27, 1991
Judgment: August 22, 1991
Docket: Docs. 20666 and 20835

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Counsel: *Marc Rosenberg* and *Keith E. Wright*, for appellant Seaboyer.

Jan-Paul Waldin and *Allan Herman*, for appellant Gayme.

Jeff Casey and *Rosella Cornaviera*, for the Crown.

J.E. Thompson, Q.C., and *Adelyn L. Bowland*, for intervenor Attorney General of Canada.

Jacques Gauvin, for intervenor Attorney General of Quebec.

Ross MacNab, for intervenor Attorney General for Saskatchewan.

Daniel V. MacDonald, for intervenor Canadian Civil Liberties Association.

Elizabeth Shilton and *Anne Derrick*, for intervenor Women's Legal Education and Action Fund et al.

Subject: Criminal

Criminal Law --- Sexual offences — Sexual assault — General offence — Evidence — Sexual conduct of complainant

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2009 CarswellOnt 5008, 2009 ONCA 624, 246 C.C.C. (3d) 301, 68 C.R. (6th) 201, 97 O.R. (3d) 330, 254 O.A.C. 9

R. v. Abbey

Her Majesty the Queen (Appellant) and Warren Abbey (Respondent)

Ontario Court of Appeal

Doherty, J.C. MacPherson, S.E. Lang JJ.A.

Heard: January 13-14, 2009
Judgment: August 27, 2009
Docket: CA C47020

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Counsel: Randy Schwartz for Appellant

Christopher Hicks, Catriona Verner for Respondent

Subject: Evidence; Criminal

Evidence --- Opinion — Experts — Admissibility — Miscellaneous

Accused associate of gang was charged with first degree murder — It was agreed at trial that member of gang had killed victim believing that he was member of rival gang — Accused had teardrop tattoo inscribed on his face few months after murder — Crown attempted to elicit evidence from expert in culture of street gangs that teardrop tattoo signified one of three things including that wearer of tattoo had murdered rival gang member — Opinion was based on research studies involving detailed interviews with gang members, 25-year clinical practice involving long-term relationships with gang members, and academic literature — Trial judge excluded expert's evidence on basis that it was not sufficiently reliable to warrant its consideration by jury — Jury acquitted accused — Crown appealed — Appeal allowed; new trial ordered — Trial judge erred in excluding expert's evidence — Trial judge did not properly delineate nature and scope of expert's evidence — Trial judge assumed expert would speak directly to reason accused put teardrop on his face, rather than to potential meanings of tattoo within street gang culture — There was no significant risk that jury, having heard expert's opinion in properly limited form, would have moved directly from accepting expert's opinion to conviction of accused — Trial judge relied on concepts and criteria that were inappropriate to assessment of reliability of expert's opinion and failed to consider relevant criteria — Scientific validity is not condition precedent to admissibility of expert opinion evidence — Proper question to be answered was whether research and experiences permitted expert to develop specialized knowledge about gang culture and symbology that was sufficiently reliable to justify placing opinion before jury — In examining methods used by expert to enhance reliability of his opinion, trial judge imposed too high standard of reliability, misapprehended parts of evidence and considered evidence that was irrelevant to reliability of opinion — Trial judge went beyond questions of threshold reliability and considered features of evidence that should have been left to jury in their ultimate assessment of that ev-