

**IN THE MATTER OF** the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6

**AND IN THE MATTER OF** The Elliot Lake Commission of Inquiry, established by Order in Council 1097/2012 dated July 19, 2012

**AND IN THE MATTER OF** the Corporation of the City of Elliot Lake

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**RESPONSE OF THE CITY OF ELLIOT LAKE TO  
PROCEDURAL ORDER NO. 9 AND PROCEDURAL ORDER NO. 11**

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Dated: June 13, 2014

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## OVERVIEW

1. On May 8, 2014, the Commission received an anonymous letter, accompanied by a report, allegedly commissioned by the Government of Ontario (“Province”) in the late 1980s, concerning the state of repair, maintenance and safety of parking structures in the province.
2. On May 20, 2014, the Province confirmed the authenticity of the report.
3. On May 30, 2014, the Province made submissions on the additional report, and enclosed appendices attaching numerous relevant documents in addition to the 1988 report.
4. On June 4, 2014, the Province found further relevant materials in their archived records which would have been beneficial to the Inquiry, including the draft report on recommended maintenance and enforcement of existing parking garages. All parties to the Inquiry were required to disclose relevant documents pursuant to the Commission’s Rules of Procedure.

## FACTS

### THE REPORT

5. The Report of the Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages was presented to the Province in July 1988.
6. The committee was tasked with addressing “the \$1 billion plus provincial problem of chloride-induced damage to existing parking garages.”<sup>1</sup>
7. The committee found that three courses of action were needed to deal with the problem:
  - a. Implement new Building Code standards;
  - b. Conduct a public education campaign; and
  - c. Develop a “comprehensive repair and restoration program which is affordable, effective and enforceable”<sup>2</sup> by 1992.

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<sup>1</sup> Report of this Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Ministry of Housing, July 1988, Page i.

<sup>2</sup> Report of this Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Ministry of Housing, July 1988, Page ii

8. An advisory panel later put forward recommendations on the best way to enforce and maintain these types of structures in the province. The recommendation within that proposal clearly indicates that province-wide standards are necessary for the comprehensive repair and restoration of parking garages:

*This Sub-committee views its mandate to consider enforcement as a province-wide goal in the context of province-wide standards.<sup>3</sup>*

9. Most notably, any of the three recommendations above may have resulted in a closer look at the parking deck structure at the Eastwood Mall.
10. Additionally, the three recommendations are further evidence that the City of Elliot Lake was not equipped nor would the City have the proper expertise to handle a problem that bewildered the Province's expert advisors and their significant resources.
11. Specifically, as it relates to special expertise, the Report states:

*Correct diagnosis of the types and extent of deterioration is essential. For procedures, refer to the Sub-committee document on "The Deterioration Problem and Inspection Techniques". It is important that repair methods be used that are appropriate to the design of the structure in question, the environment to which it is subjected, and the service life and functions required by the owner. The services described in the previous two paragraphs must be provided by a consulting engineer, with the appropriate structural and repair expertise and experience.<sup>4</sup>*

## **ANALYSIS**

### **DISCLOSURE REQUIREMENT**

12. The Province was a party with standing in both Phase I and Phase II of the Inquiry. In fact, the Inquiry was formed by the Province.

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<sup>3</sup> Province of Ontario Supplemental Submissions in Response to Procedural Order No. 9 – Appendix G, Page 12, Paragraph 5.6(1).

<sup>4</sup> Report of this Advisory Committee on the Deterioration, Repair and Maintenance of Parking Garages, Ministry of Housing, July 1988, Page 33

13. The process related to documentary discovery in preparation for the Inquiry commenced long before the Inquiry's start date of March 2013. It was almost immediately after the Eastwood Mall collapse occurred in July 2012 that the City of Elliot Lake received subpoenas to preserve and produce any evidence in their possession that may be relevant to the Inquiry.
14. The City of Elliot Lake took their legal obligations to continuously disclose relevant materials as paramount. The City of Elliot Lake produced all relevant materials, including archived documents to Commission Counsel.
15. Furthermore, during the inquiry, when relevant documents were discovered by the City of Elliot Lake or became relevant through the testimony of witnesses, the newly relevant documents were immediately disclosed to Commission Counsel, regardless of their benefit or hindrance to the City's position at the Inquiry.
16. For example, on Day 33 of the Inquiry, the City of Elliot Lake, as a result of cross-examination of a City witnesses, highlighted the existence of documents that had previously been disclosed to Commission Counsel but not included by Commission Counsel in the Relativity database.<sup>5</sup>
17. The City of Elliot Lake should be commended for their efforts in satisfying their continuing obligations of disclosure throughout the inquiry and the weight of the Province's submissions should be reduced substantially because of the non-disclosure of extremely relevant materials.
18. The Province was under the same obligation as other parties to the Inquiry were to preserve evidence.
19. Key word searches were used by the Inquiry to find any document that were relevant to the Inquiry. All these documents were placed in the database 'Relativity', which was open to all commission participants.

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<sup>5</sup> See the exchange between Mr. Cassan, Mr. Doody and the Commissioner on Day 33, April 25 beginning at page 6798.

20. It is unclear why, and questionable that the word “parking garages” would not have been used in the keyword searches conducted by the Province.
21. Even if the documents were not searchable by keyword, it is unknown how a report titled, “Deterioration, Repair and Maintenance of Parking Garages” was not ultimately discovered by the Province.
22. The deterioration, repair and maintenance of parking garages is the primary issue the Commission was tasked with examining in Phase I.
23. For The 1988 Report to not be disclosed and subject to cross-examination calls into question the entirety of the Province’s submissions as against the other participants, namely the City of Elliot Lake. It also begs the question, “what other documents exist which are relevant to the inquiry and were not produced and subject to rigorous cross-examination?”
24. Other potential keywords that could have discovered this Report include: structural deterioration, reinforced steel, garage roof slabs, precast concrete slabs, to say nothing of the fact that individuals within the Province’s bureaucracy would have historical knowledge of the work done to complete this Report.
25. It is also concerning that the Province did not abide by the Commission’s Rules of Procedure. Specifically, the Rules of Procedure issued on the production of documents states the following:

*Copies of all relevant documents must be produced to the Commission by any participant at the earliest opportunity, in a format acceptable to the Commission. Prior to taking part in the Commission, each participant, if a natural person, or the chief executive officer of each participant, if a corporation, must certify in writing that this obligation has been complied with.*

26. Document is defined within the Rules of Procedure to include:

*“Document” is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, microfiche and any data and information recorded or stored by means of any device.*

27. Given the broad definition of document that the Commission chose, which states that “any data and information recorded or stored by means of any device” must be produced, it is clear that the Province did not abide by the Rules of Procedure.

28. Had the Province abided by the Rules of Procedure, floppy disks, though perhaps obsolete at this time, would have been produced to the Commission and thus available for all participants to review. Furthermore, the floppy disks could always be transferred to more modern storage devices and converted to a searchable form.

### **THE 1988 REPORT**

29. The Province’s committee on parking garages was made up of numerous experts in the field. Noteworthy panel members (for the purposes of these submissions) are Mr. J. Bickley of Trow and Mr. Halsall of Halsall Robt & Associates Ltd.

30. Trow and Halsall were obviously considered to have a certain expertise on the issue of parking garages in order to be included on this committee.

31. It should therefore come as no surprise that, when the mall owners needed an opinion on the state of repair of the parking deck at the Eastwood Mall, they turned to those same experts to draft reports.

32. As the City of Elliot Lake has previously submitted, they had never received a copy of either the Halsall or Trow reports on the condition of the parking deck, nor did they ever receive the Report on the Deterioration, Repair and Maintenance of Parking Garages.

33. As the City of Elliot Lake has further submitted, the engineers or engineering technicians who examined the parking deck at the Eastwood Mall would have been under an obligation under their respective codes of conduct to report to the proper authorities any dangerous situation presented by the parking deck.

34. At no time did Trow nor Halsall deem the state of the parking garage to be so significant of a threat to public safety that the City of Elliot Lake was alerted of the situation.

35. Mr. Dell'Aquila, under cross-examination by Mr. Cassan, stated that he never contacted the City Building Department with regard to the mall parking deck.

Q. Did you ever contact the Building Department at the City?

A. No.<sup>6</sup>

36. Similarly, Mr. Albert Celli of Halsall said that the building's condition did not warrant a call to the City.

Q: Did this building in any way at the time when you were looking at it present a public safety hazard?

A. No.

Q. And did the fact that you were leaking from what you saw cause in your opinion a public danger?

A. No. As long as it was being addressed as per one of our recommendations.

Q. And I assume that you did not provide your report to the City of Elliot Lake or the chief building official?

A. No. Our report was provided to Nicholls Yallowega Bélanger.

Q. And why would you not have provided it to the City?

A. Like you mentioned, we were not worried about structural safety at the time. If we were, then absolutely we'd go to the city and the chief building official before the report was written.<sup>7</sup>

37. In addition to Mr. Celli or Mr. Dell'Aquila, the following witnesses worked for either Trow or Halsall, Remy Iamónico, Michael Buckley and Jeff Truman. Yet, oddly enough, none of these individuals recalled or were notified, during their many hours preparing for their attendances or during their examination as witnesses, that their corporate employers were involved in the commissioned of a provincial Report regarding parking garages.

38. The point has been previously stated but bears repeating: if the engineers and engineering technicians who inspected the mall did not see a problem with the structural integrity of the mall, there could be no expectation that the Chief Building Official or his inspectors, with their limited training and limited resources, would or even could determine that a safety hazard existed.

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<sup>6</sup> Transcript of Evidence, Day 12, Page 2356, Line 11

<sup>7</sup> Transcript of Evidence, Day 21, Page 4345, Line 16

## PROPOSED ENFORCEMENT REGIME

39. The 1988 Report recommends that a regime be developed for the maintenance and repair of parking structures that is affordable, effective and enforceable.
40. The Province, in their initial submission on The 1988 Report dated May 30, 2014, states that the draft policy proposal on this issue could not be found within their documents.

*Copies of the impact study and policy paper, and documents related to them, have not been located. Given the length of time that has elapsed from the receipt of the Report, it has been challenging to find records about any additional steps that were considered or taken. Records relating to the Report and steps taken by the Province in response to the Report, other than those included with these submissions, appear to have been destroyed in accordance with ministry record retention schedules at the time.<sup>8</sup>*

41. In supplementary documents submitted by the Province on June 4, 2014, the draft policy proposal was ultimately found and provided for the review of participants.
42. It is critical to note that, the committee considered the role of municipalities in enforcing the new proposed standards and then clearly expressed its preference for provincial enforcement.
43. The recommendation of the sub-committee is contrary to the Province's submissions for Phase I which emphasize that municipalities are capable of dealing with issues of this nature.

*The responsibility for enforcing the Building Code Act, 1992, the Building Code and property standards by-laws lies with municipalities, not with the MOL.<sup>9</sup>*

44. Clearly, whether a municipality could deal with such enormous issues was considered, and rejected, by the Province's own advisory panel.

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<sup>8</sup> Ontario Government Submissions in Response to Procedural Order No. 9, Submitted May 30, 2014, Page 7.

<sup>9</sup> Phase I Written Submissions of the Province of Ontario, Page 13, para 36.

45. The Province states, at Paragraph 190 of their Phase I submissions that:

*Under the BCA, municipal councils have discretionary authority to establish property standards by-laws governing maintenance and occupancy of property, including buildings and structures.<sup>10</sup>*

46. The City of Elliot Lake submits that, had this draft policy been pursued, the necessary provincial standards would have been developed and ultimately led to safer major infrastructure across the province, including parking garages such as that at the Eastwood Mall in Elliot Lake. This policy, with revisions, should now be recommended as the proper course of action by the Commissioner.

47. Furthermore, the Report lends further credence to the City of Elliot Lake's Phase I submissions that the expertise and significant resources to investigate the structural integrity of parking garages is more appropriately uploaded to the province and its unlimited resources than the City of Elliot Lake and its ongoing financial restraints.

*RECOMMENDATION: The Ministry of Labour has expertise in all areas of health and safety as well as engineers on staff from a variety of engineering fields. The Ministry of Labour should be responsible for the future safety and security of the public in commercial structures, whether that is leakage from maintenance issues, structural issues or health/safety legislation.<sup>11</sup>*

## CONCLUSION

48. The Province is the entity with the greatest ability and resources to implement and enforce a regime of standards and maintenance related to the upkeep of parking structures. This was clear to a committee of experts in the 1980s, and it should still be so today when recommendations are being developed by the Commission.

49. Had the state of repair of the mall been deemed a safety concern by the same experts who were involved both in drafting this report, and in inspecting the Eastwood Mall, those experts would have been under an obligation to report that safety concern to the municipality, which then could have taken action.

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<sup>10</sup> Phase I Written Submissions of the Province of Ontario, Page 52, para 190.

<sup>11</sup> Phase I Written Submissions of the Corporation of the City of Elliot Lake, Page 115, para 181.

50. The fact that the Province did not locate these documents as required by the Rules of Procedure raises questions as to what other evidence exists from other sources involved in the Commission that were not disclosed and not subject to the influence of cross-examination.

51. Certainly, the City of Elliot Lake would have been interested in these documents as Commission Counsel asked a number of pointed questions to City witnesses and took an offensive approach against the City's inspection, maintenance and remediation efforts.

***52. Importantly, had the Report been provided to all parties, including Commission Counsel in advance of the Inquiry, either:***

***a. Commission Counsel may have taken a different approach against the City of Elliot Lake, since the Province's recommendations clearly indicated that the ideal solution to the deterioration of parking garages was provincial standards; or***

***b. City of Elliot Lake witnesses would have had another strong defence available to them to bolster their responses in light of the very pointed questions from Commission Counsel that often highlighted the exact issues considered in the Report.***

***53. Ultimately, the failure to disclose this document during the Inquiry greatly prejudices the City of Elliot Lake.***

54. The City of Elliot Lake respectfully submits that any recommendations made by the Commissioner should carefully consider:

a. The fact that the Province's own report concluded that provincial wide standards were recommended in 1988; and

b. The recommendation from The 1988 Report should minimize or eliminate any potential finding of past misconduct against City witnesses or contemplation of future enforcement by City generalists.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

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