

**THE HONOURABLE MR. JUSTICE PAUL R. BÉLANGER**

**IN THE MATTER OF** an Application under the *Rules of Procedure* of the Elliot Lake Commission of Inquiry and the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6

**BETWEEN:**

**ROBERT WOOD**

**Applicant**

**-and-**

**THE ELLIOT LAKE COMMISSION OF INQUIRY**

**Respondent**

**FACTUM OF THE RESPONDENT,  
ONTARIO BUILDING OFFICIALS ASSOCIATION**

June 13, 2014

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Leo F. Longo**  
Tel: 416.865.7778  
Fax: 416.863.1515  
Email: [llongo@airdberlis.com](mailto:llongo@airdberlis.com)

Solicitors for the Respondent,  
Ontario Building Officials Association

**TO: The Honourable Paul R. Bélanger  
Commissioner**

**Email: [info@elliottlakeinquiry.ca](mailto:info@elliottlakeinquiry.ca)**

**AND TO: Commission Counsel**  
Elliot Lake Commission of Inquiry  
  
Email: [counsel@elliottlakeinquiry.ca](mailto:counsel@elliottlakeinquiry.ca)

**AND TO: Heather Mackay**  
Ministry of the Attorney General  
  
Email: [heather.c.mackay@ontario.ca](mailto:heather.c.mackay@ontario.ca)  
  
Solicitors for the Province of Ontario

**AND TO: Peter Jacobsen**  
Bersenas, Jacobsen, Chouest, Thomson, Blackburn LLP  
  
Email: [pjacobsen@lexcanada.com](mailto:pjacobsen@lexcanada.com)  
  
Solicitors for the Canadian Broadcasting Corporation, The Globe and Mail Inc.  
and Canadian Press Enterprises Inc.

**AND TO: Rob MacRae**  
O'Neill DeLorenzi Mendes  
  
Email: [RMacRae@saultlawyers.com](mailto:RMacRae@saultlawyers.com)  
  
Solicitors for Robert Wood

**PART I – OVERVIEW & BACKGROUND**

1. The Ontario Building Officials Association [“OBOA”] was a participant in Phase 1 of the Inquiry; both the Part 1 evidentiary hearing and Part 2 roundtable discussions.
2. In establishing the procedure to consider the Robert Wood Application, the Commissioner wrote in Procedural Order No. 12:

“It would appear, at first blush, that I am bound by these terms, which dictate that I produce the report to the Attorney General who, in turn, will make it public. It may be argued that I do not have the authority to publicly disclose the report and that Mr. Wood's request should be directed to the Attorney General. As matters stand, the report remains entirely confidential. **I would welcome submissions on this jurisdictional issue.**” [emphasis added]

Procedural Order No. 12  
May 22, 2014  
p. 3

3. On a plain reading of the Inquiry's Terms of Reference, the Commissioner does not have any authority respecting any aspect of the public disclosure of his Final Report. He is simply to have it printed and delivered to the Attorney General.
4. For reasons outlined herein, it is in the public interest that an amendment or clarification of the Commission of Inquiry's Terms of Reference be made so as to permit the Commissioner to:
  - (i) release the Inquiry's Final Report to the public on a date, at a location and in a manner chosen by the Commissioner;
  - (ii) pre-release, within a prescribed period and only to those Inquiry Participants requesting, his Final Report in a confidential or “lock-up” manner; and
  - (iii) convene a public meeting to deliver a statement, issue a press release and conduct a press conference respecting the Final Report's findings and recommendations.

**PART II – FACTS**

5. The Inquiry was established by Order in Council 1097/2012 on July 19, 2012. An amending Order in Council 1873/2013 was issued on December 4, 2013.

6. Paragraphs 12, 14 & 15 of the amended Terms of Reference provide:

“Report and Recommendations

12. The Commission shall deliver a final report containing its findings, conclusions and recommendations to the Attorney General no later than October 31, 2014....

14. The Commission shall be responsible for translation and printing and shall ensure that the final report is delivered in both English and French in electronic and printed versions and available in sufficient quantities for public release.

15. The Attorney General shall table the report with the Legislature and make the report available to the public.”

O-in-C 1097/2012 as revised by O-in-C 1873/2013

7. Nothing in the Terms of Reference provides the Commissioner with any authority respecting the date, location or manner in which the Final Report is to be released to the public.

8. The Commissioner has publicly given his commitment that his Final Report would first be released in Elliot Lake and delivered to its citizens at that time.

Day 117 Transcript  
October 9, 2013  
pp. 29002-29003, lines 22-2

9. Nothing in the Terms of Reference provides the Commissioner with any authority to convene a public meeting to deliver a statement, issue a press release or conduct a press conference respecting the Final Report's findings and recommendations.

**PART III – LAW AND ARGUMENT**

10. The Commissioner has no inherent authority to publicly release his Final Report.

“The report of a commission of inquiry does not belong to the commission, but to the appointing government, which has the power to release it publicly and to determine the modalities of that release.”

Ruel, *The Law of Public Inquiries in Canada*  
p. 163

“There is no inherent authority in a commissioner to publish her final report. Its legal status is that of a memorandum presenting recommendations to the Governor in Council...Once received, the report belongs to the government, which has the complete power, whether, when and to what extent to make it public.”

Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice*  
p. 400

11. The *Public Inquiries Act, 2009*, under which this Inquiry was established, and the Inquiry’s Terms of Reference, make no express provision for the Commissioner to publicly release his Final Report.
12. The *Public Inquiries Act, 2009*, however, does require the Minister [here the Attorney General], at the request of the Commission of Inquiry, to share “administrative information” respecting the delivery of the Final Report.

“A commission and the Minister may at any time, or shall on the request of either, share with each other administrative information relating to the commission and the public inquiry, including information respecting,...

(d) the production and delivery of the commission’s report.”

*Public Inquiries Act, 2009*  
ss. 27(1)(d)

13. It is respectfully submitted that the relief requested in the OBOA’s Notice of Response to Application falls within the scope of subsection 27(1)(d) of the *Act*.

14. The relief requested by the OBOA is also consistent with previous Commissions of Inquiry practices.

“Practically, commissioners of inquiry have a substantial say in determining the fate of their reports, including the form of the reports, the length of time between transmittal of the reports to the government and the public release, as well as the circumstances of their release.”

Ruel, *The Law of Public Inquiries in Canada*  
p. 163

“The commissioner should control the preparation and distribution of the final report. While, arguably, an inquiry's duty, apart from statutory direction, is merely to report to the government (Cabinet) that created it, in practice commissioners have taken an active role in determining the fate of their report. If the report is a governmental responsibility, it may go unpublished a period of time or be published in a format or in numbers that unacceptable to the commissioner. On the other hand, if the commissioner retains control, he can be sure it is attractively printed contains photographs or coloured graphics to better convey ideas and make it readable for the public. He can have it printed sufficient numbers to respond to public interest and have it printed and distributed in timely fashion so it is released when the issue is still of public concern.”

Anthony & Lucas, *A Handbook on the  
Conduct of Public Inquiries in Canada*  
p. 147

15. Should the Commissioner secure the authority mentioned in the OBOA's requested relief, he will be better equipped to deal with the realities and expectations that come with his position.

“A Judge who is chosen to lead an inquiry will not be exercising his or her normal judicial functions, protected by customary “judicial independence” that attaches to such duties. Unlike the judicial role in hearing most cases, a commissioner will be the subject of intense media scrutiny, which is a function of establishing the commission of inquiry in the first place.”

Canadian Judicial Council,  
*Reference Guide for Judges  
Appointed to Commissions of Inquiry*  
p. 17

16. The failure of the Inquiry's Terms of Reference to mention any authority and procedures respecting the Commissioner's role in the public release of his Final Report is at best an oversight.
17. A CJC "checklist", available at the time this Inquiry was established, included the following items:
  - What does the OIC say about the process of revising (or expanding, or limiting) Orders-in-Council down the road?
  - What does the OIC say about filing the commission of inquiry's final report (or disclosure of interim reports or draft conclusions)?
  - What does the OIC say about the ability of the commissioner to comment publicly on his or her report, or the investigation and work that led to it?

Canadian Judicial Council,  
*Reference Guide for Judges  
Appointed to Commissions of Inquiry*  
p. 4

18. Respecting the public release of an inquiry's final report, it has been noted:

"The commissioner should understand the responsibilities on the inquiry and the government with respect to the public release of the report. Usually the legislation that authorized creation of the inquiry will provide that the report is to be filed with the government....Will the report be made available to the public through government book stores and, if so, at what cost? Generally, however, there should be an understanding between the government and the commissioner as to the public distribution of the report.... In any case the commissioner should ensure that there is a clear understanding as to when and how the inquiry report will be made public and, where possible, he should retain

the authority and financial resources to handle the printing and distribution of the report.”

Anthony & Lucas, *A Handbook on the Conduct of Public Inquiries in Canada*  
pp. 147-148

19. On the issue of “pre-releasing” the Final Report, consideration should be given to the interests of Inquiry Participants as well as the government.

“The government and the commissioner must decide whether copies of the report are to be provided to the government in advance of public release. This is often a sensible gesture since it allows the government officials to review the report and recommendations and to be prepared to comment on them upon public release. If the commissioner decides to have the public release correspond with his filing the report with the government, there is a risk of an uninformed government response or, more likely, no response at all until the report is studied. Similar considerations apply in determining whether a “pre-release” to the major participants in the inquiry is appropriate. An additional problem here is that it is unlikely that the report can be kept confidential for very long once it is given to participants.”

Anthony & Lucas, *A Handbook on the Conduct of Public Inquiries in Canada*  
p. 147

20. Further to this factum’s paragraph 15 above, it is in the public interest that the Commissioner have the authority to convene a press conference and issue a press release.

“At the time the report is released, the commissioner may hold a press conference and arrange adequate media coverage to communicate the key elements of the report to the public. It may be necessary, in some cases, to obtain the services of people experienced in public relations to ensure that this final public act of the inquiry is given the prominence it deserves.”

Anthony & Lucas, *A Handbook on the Conduct of Public Inquiries in Canada*

21. Securing the relief requested in paragraph 22 will permit the Commissioner to fully and effectively discharge the Commission's mandate in a manner similar to previous commissions of inquiry.

See para. 14 above

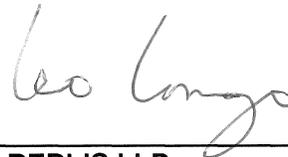
**PART IV – RELIEF SOUGHT**

22. That the Commissioner take all steps as are necessary and warranted to ensure that the Inquiry's Terms of Reference are amended or clarified to permit the Commissioner to:

- (i) release the Inquiry's Final Report to the public on a date, at a location and in a manner chosen by the Commissioner;
- (ii) pre-release, within a prescribed period and only to those Inquiry Participants requesting, his Final Report in a confidential or "lock-up" manner; and
- (iii) convene a public meeting to deliver a statement, issue a press release and conduct a press conference respecting the Final Report's findings and recommendations.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

June 13, 2014



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**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place, Suite 1800  
Box 754, 181 Bay Street  
Toronto, ON M5J 2T9

**Leo F. Longo**  
Tel: 416.865.7778  
Fax: 416.863.1515  
Email: [llongo@airdberlis.com](mailto:llongo@airdberlis.com)

Solicitors for the Respondent,  
Ontario Building Officials Association

## Appendix A – Authorities

Anthony, R.J. & Lucas, A.R., *A Handbook on the Conduct of Public Inquiries in Canada*, Butterworths (Toronto, 1985) - Extracts

Canadian Judicial Council, *Reference Guide for Judges Appointed to Commissions of Inquiry* Queen's Printer (Ottawa, 2011) – Extracts

Ratushny, Ed, *The Conduct of Public Inquiries: Law, Policy, and Practice*, Irwin Law Inc. (Toronto, 2009) – Extracts

Ruel, Simon, *The Law of Public Inquiries in Canada*, Carswell (Toronto, 2010) – Extracts

## Appendix B - Legislation

### I - *Public Inquiries Act, 2009, S.O. 2009, c.33, Schedule 6*

#### Purpose and Interpretation

##### **Purpose**

1. The purpose of this Act is to establish an effective and accountable process for public inquiries where there is a public interest to,

- (a) independently inquire into facts or matters;
- (b) make recommendations regarding those facts or matters. 2009, c. 33, Sched. 6, s. 1.

#### ESTABLISHING A COMMISSION

##### **Commission**

3. (1) The Lieutenant Governor in Council may by order establish a commission to conduct a public inquiry into a matter that the Lieutenant Governor in Council considers to be in the public interest. 2009, c. 33, Sched. 6, s. 3 (1).

##### **Content of order**

- (3) The Lieutenant Governor in Council shall, in the order establishing a commission,
- (a) appoint one or more persons as commissioners and, if more than one commissioner is appointed, assign roles and responsibilities to the commissioners;
  - (b) set out the terms of reference for the public inquiry;
  - (c) set out any special provisions respecting the manner in which the public inquiry is to proceed;
  - (d) fix the date for the delivery of the commission's report;
  - (e) provide for any matters required if an agreement is made under section 4 to establish a joint commission; and
  - (f) if the Attorney General is not to be responsible for the public inquiry, designate the Minister who is to be responsible. 2009, c. 33, Sched. 6, s. 3 (3).

#### REPORT OF COMMISSION

##### **Commission's report**

20. (1) A commission shall deliver its report in writing to the Minister on or before the date fixed in the order establishing the commission for the delivery of its report. 2009, c. 33, Sched. 6, s. 20 (1).

##### **Interim report**

(2) A commission may prepare and deliver an interim report if the commission considers it to be appropriate for the public inquiry. 2009, c. 33, Sched. 6, s. 20 (2).

##### **Attachment of orders**

(3) Each order made by the Lieutenant Governor in Council under this Act must be included in or appended to the commission's report. 2009, c. 33, Sched. 6, s. 20 (3).

## LANGUAGES

**Languages of order**

**21.** (1) Each order made by the Lieutenant Governor in Council under this Act must be made in both English and French. 2009, c. 33, Sched. 6, s. 21 (1).

**Exception**

(2) Where an order is not ready in both English and French at the same time and the Lieutenant Governor in Council determines that the health or safety of the public would not be served by waiting, the order may be made in one language and the version in the other language shall be made as soon as practicable. 2009, c. 33, Sched. 6, s. 21 (2).

**Languages of report**

(3) The commission's report shall be delivered, in accordance with the order establishing the commission, in both English and French at the same time. 2009, c. 33, Sched. 6, s. 21 (3).

**Simultaneous public release**

(4) Where the commission's report is made available to the public, it shall be released in both English and French at the same time. 2009, c. 33, Sched. 6, s. 21 (4).

## Financial and Administrative Matters

**Administrative information**

**27.** (1) A commission and the Minister may at any time, or shall on the request of either, share with each other administrative information relating to the commission and the public inquiry, including information respecting,

- (a) the budget for the commission;
- (b) the commission's actual and projected expenditures;
- (c) the timing and progress of the public inquiry; and
- (d) the production and delivery of the commission's report. 2009, c. 33, Sched. 6, s. 27 (1).

**II - Order in Council 1097/2012 as amended by Order in Council 1873/2013**

12. The Commission shall deliver a final report containing its findings, conclusions and recommendations to the Attorney General no later than October 31, 2014. ...

14. The Commission shall be responsible for translation and printing and shall ensure that the final report is delivered in both English and French in electronic and printed versions and available in sufficient quantities for public release.

15. The Attorney General shall table the report with the Legislature and make the report available to the public.

**THE ELLIOT LAKE  
COMMISSION OF INQUIRY**

**FACTUM OF THE RESPONDENT  
[Ontario Building Officials Association]**

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place, Suite 1800  
181 Bay Street  
Toronto, ON M5J 2T9

**Leo F. Longo**  
Tel: 416.865.7778  
Fax: 416.863.1515  
Email: [llongo@airdberlis.com](mailto:llongo@airdberlis.com)

Solicitors for the Respondent,  
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