

THE HONOURABLE STEPHEN T. GOUDGE J.A.

IN THE MATTER OF an Application Under Rule 11(c) of the *Rules of Procedure* of the Elliot Lake Commission of Inquiry

BETWEEN:

THE ELLIOT LAKE COMMISSION OF INQUIRY

Applicant

– and –

EASTWOOD MALL INC., ROBERT NAZARIAN,
IRENE NAZARIAN and LEVON NAZARIAN

Respondents

<p>SUPPLEMENTAL APPLICATION RECORD OF THE APPLICANT</p>
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**ELLIOT LAKE COMMISSION OF
INQUIRY**

99 Spine Road, 2nd Floor
Elliot Lake, Ontario, P5A 3S9

Peter K. Doody
LSUC No. 224235S

Natalia Rodriguez
LSUC No. 60261F

T: (613) 749 6831
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Commission Counsel

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TAB 1

IN THE MATTER OF an Application Under Rule 11(c) of the *Rules of Procedure* of the Elliot Lake Commission of Inquiry

BETWEEN:

THE ELLIOT LAKE COMMISSION OF INQUIRY

Applicant

– and –

EASTWOOD MALL INC., ROBERT NAZARIAN,
IRENE NAZARIAN and LEVON NAZARIAN

Respondents

**AFFIDAVIT OF NADIA EFFENDI
Sworn on June 21, 2013**

I, Nadia Effendi, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am Commission Counsel for the Elliot Lake Commission of Inquiry (the “Commission”) and I have knowledge of the information to which I hereinafter depose, except where I state that I believe it to be true. In those cases, I will indicate the basis for my belief.
2. I am advised by Natalia Rodriguez, Commission Counsel, that on June 11, 2013, she caused to be served on the Respondents’ lawyers, the firm of Steinberg Morton Hope & Israel LLP, materials related to this Application.
3. The Respondents’ responding materials, served on Commission Counsel on June 19, 2013, consist of an affidavit sworn by Mr. Derrick Fulton.

4. At paragraph 11 of Mr. Fulton's affidavit, he deposes that on June 11, 2013, Commission Counsel provided the Respondents with a list of 15 documents and advised that these documents may be privileged. This is incorrect.

5. I am advised by Ms. Rodriguez and believe that on April 26, 2013, Mr. Fulton emailed Commission Counsel. The email contained an attachment entitled "Chart - Privilege Review(2).xls" listing 2,622 documents which his office had been reviewing since March 28, 2013, in order to determine whether to assert a privilege claim over any of them. The documents in the chart were labeled P (privileged), I (irrelevant), P/I (privileged and irrelevant) and OK (documents over which privilege was not claimed). Attached hereto as **Exhibit "A"** is the email from Mr. Fulton to Commission Counsel regarding these documents without the chart.

6. I am advised by Ms. Rodriguez and believe that on May 28, 2013, Commission Counsel emailed Mr. Fulton indicating that the Commission would be directing Yvette Bula, Commission Counsel's document management specialist, to release to Commission Counsel the 672 documents labeled "OK" or "I" in the chart provided by Mr. Fulton on April 26, 2013. Attached hereto as **Exhibit "B"** is the email from Ms. Rodriguez to Mr. Fulton indicating that said documents would be released forthwith.

7. I have been informed by Ms. Rodriguez and verily believe that she did not receive a response to that email.

8. Out of the 672 documents released to the Commission on May 28, 2013, Commission Counsel prepared a brief of 15 documents Commission Counsel considered relevant and intended to use when interviewing the Respondents. The brief was erroneously labeled "Potentially Privileged Documents".

9. I am advised by Peter Doody, Commission counsel, and believe that on the morning of June 4, 2013, just prior to an interview with Levon Nazarian, he started to read one document in the 15-document brief which appeared to be a legal opinion. As a result, Mr. Doody stopped reading past the first paragraph. Commission Counsel was prepared to assume, based on conflicting document information, that Mr. Fulton's office must have inadvertently provided the wrong document ID number in the list of documents over which he was not asserting a claim to

privilege. As a result, Commission Counsel destroyed all hardcopies of the document and blocked access to it in our database. Attached hereto as **Exhibit "C"** is an email thread between Commission Counsel and Mr. Fulton, in which he is notified of this fact and his response.

10. After removing the document in question from the brief, Mr. Doody and I presented Michael Title, Mr. Fulton's partner at Steinberg Morton & Israel LLP, with the disputed brief of now 14 documents just prior to commencing the interview of his client.

11. When we presented Mr. Title with the brief, we indicated that these documents were relevant to the Commission's mandate and were part of a group of documents to which Mr. Fulton had expressly given Commission Counsel access and over which privilege had been waived. We also indicated that one document had been removed from the brief on the basis that Commission Counsel believed that the document had been provided by Mr. Fulton in error.

12. I am advised by Mr. Doody and believe that during the course of Levon Nazarian's interview by Commission Counsel, Mr. Title objected to another document included in that brief. I am advised by Ms. Rodriguez and believe that Ms. Rodriguez emailed Mr. Fulton on that day to indicate that he had until June 11, 2013 at 5 p.m. to assert a privilege claim over the document and to set out the basis for the privilege claim, after which time Commission Counsel would assume that all privilege claims over that document had been waived. Attached hereto as **Exhibit "D"** is the email from Ms. Rodriguez to Mr. Fulton on June 4, 2013.

13. I have been informed by Ms. Rodriguez and verily believe that she did not receive a response to that email.

14. On June 12, 2013, after the deadline for asserting privilege over the disputed document had passed, Mr. Title sent an email to Commission Counsel in which he appeared to assert privilege over all of the documents contained in the brief. Mr. Doody responded, reminding him again that Mr. Fulton had waived privilege over those documents. Mr. Fulton denied this and requested to see the basis on which Commission Counsel asserted otherwise. In response, Ms. Rodriguez sent Mr. Title and Mr. Fulton an email attaching the communications between their office and Commission Counsel that demonstrated a waiver of privilege over the documents in

question. Attached hereto **Exhibit "E"** is the email thread among Mr. Title, Mr. Doody, Mr. Fulton and Ms. Rodriguez on June 12, 2013.

15. I have been informed by Ms. Rodriguez and verily believe that she did not receive a response to that email.

SWORN BEFORE ME at the
City of Ottawa,
in the Province of Ontario,
this 21st day of June, 2013.



A Commissioner, etc.

)
)
)
)
)



Nadia Effendi

This is Exhibit A
to the Affidavit of Nadia Effendi
sworn this 21st day of June, 2013.



Commissioner for Taking Affidavits, etc.

Rodriguez, Natalia

From: Derrick M. Fulton <dfulton@smhilaw.com>
Sent: April-26-13 3:20 PM
To: Peter Doody
Cc: mtitle; Counsel; Marc-Andre Bernard; Daria Krysik
Subject: RE: Elliot Lake Inquiry - Claim to privilege over 2,623 documents
Attachments: Chart - Privilege Review (2).xls

Dear Mr. Doody

Please be advised that we have now completed our review of the additional 2,623 documents.

Please find attached our chart setting out our conclusions of the review. You will note that we have marked those documents we consider privileged with a P; these documents are all communications passing between our clients and their legal counsel for the purpose of obtaining legal advice and or receiving instructions.

We have marked documents with an I if we concluded they are not relevant to the issues raised by the commission.

We have marked some documents with a P-I if we have concluded that the document is both privileged but as well as irrelevant.

We have marked all documents with an OK if they are relevant documents and we do not claim any privilege over them.

You are free to release those documents that we have marked with OK.

I trust that this is satisfactory.

If you have any further questions or concerns, please let me know.

Have a good weekend.

Regards,

Derrick Fulton



Derrick M. Fulton, B.A., B.A. (hons), dip. J.S., LL.B., LL.M., C.S.*

***Certified Specialist (Civil Litigation)**

Steinberg Morton Hope & Israel LLP

Yonge Norton Centre, 5255 Yonge Street | Suite 1100

Toronto | Ontario | Canada | M2N 6P4

Tel: 416-225-2777 (ext. 216) | Fax: 416-225-7112

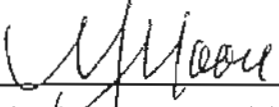
email: dfulton@smhilaw.com

Website: www.smhilaw.com

CONFIDENTIALITY: This email message (including attachments, if any) is confidential and is intended only for the addressee. Any unauthorized use or disclosure is strictly prohibited. Disclosure of this email to anyone other than the addressee does not constitute waiver of privilege. If you have received this communication in error, please notify us immediately and delete this. Thank you for your cooperation.

Visit our website at www.smhilo.com for information about our firm and the services we provide.

This is Exhibit B
to the Affidavit of Nadia Effendi
sworn this 21st day of June, 2013.



Commissioner for Taking Affidavits, etc.

Rodriguez, Natalia

From: Natalia Rodriguez <NRodriguez@elliottlakeinquiry.ca>
Sent: May-28-13 2:15 PM
To: Derrick M. Fulton; Peter Doody
Cc: mtitle; Counsel; Marc-Andre Bernard; Daria Krysik
Subject: RE: Elliot Lake Inquiry - Claim to privilege over 2,623 documents

Dear Mr. Fulton,

Please be advised that we will be requesting that Yvette Bula, our data management specialist, make available to Commission counsel all of the documents which you have identified as being "OK".

We will also be asking her to make available to us all documents which you have identified as being irrelevant, which you have labelled "I". I note that the firm Wortzman Nickle had already deemed all 2,623 documents to be relevant to the Commission's mandate.

At this time, we will not be asking Ms. Bula to release to us those documents over which you are claiming privilege i.e. those labelled "P" (privileged) or "P-I" (privileged and irrelevant). Please note that this does not mean that we accept the claim of privilege you have asserted over these documents.

Your truly,

Natalia Rodriguez
Commission Counsel
Elliot Lake Commission of Inquiry
99 Spine Road, 2nd Floor
Elliot Lake, Ontario, P5A 3S9
T: 705-848-5068
nrodriguez@elliottlakeinquiry.ca

From: Derrick M. Fulton [<mailto:dfulton@smhilaw.com>]
Sent: April-26-13 3:20 PM
To: Peter Doody
Cc: mtitle; Counsel; Marc-Andre Bernard; Daria Krysik
Subject: RE: Elliot Lake Inquiry - Claim to privilege over 2,623 documents

Dear Mr. Doody

Please be advised that we have now completed our review of the additional 2,623 documents.

Please find attached our chart setting out our conclusions of the review. You will note that we have marked those documents we consider privileged with a P; these documents are all communications passing between our clients and their legal counsel for the purpose of obtaining legal advice and or receiving instructions.

We have marked documents with an I if we concluded they are not relevant to the issues raised by the commission.

We have marked some documents with a P-I if we have concluded that the document is both privileged but as well as irrelevant.

We have marked all documents with an OK if they are relevant documents and we do not claim any privilege over them.

You are free to release those documents that we have marked with OK.

I trust that this is satisfactory.

If you have any further questions or concerns, please let me know.

Have a good weekend.

Regards,

Derrick Fulton



Derrick M. Fulton, B.A., B.A. (hons), dip. J.S., LL.B., LL.M., C.S.*

***Certified Specialist (Civil Litigation)**

Steinberg Morton Hope & Israel LLP

Yonge Norton Centre, 5255 Yonge Street | Suite 1100

Toronto | Ontario | Canada | M2N 6P4

Tel: 416-225-2777 (ext. 216) | Fax: 416-225-7112

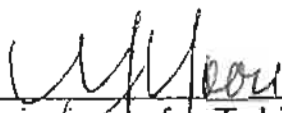
email: dfulton@smhlaw.com

Website: www.smhlaw.com

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Visit our website at www.smhlaw.com for information about our firm and the services we provide.

This is Exhibit C
to the Affidavit of Nadia Effendi
sworn this 21st day of June, 2013.



Commissioner for Taking Affidavits, etc.

From: Derrick Fulton [<mailto:dfulton@smhilaw.com>]
Sent: June-04-13 12:23 PM
To: Natalia Rodriguez
Cc: mtittle; Georgina Cairns; Peter Doody; Nadia Effendi
Subject: RE: Privileged document

Thank you.

Derrick Fulton

STEINBERG MORTON HOPE & ISRAEL LLP

Derrick M. Fulton, B.A., B.A. (hons), dip. J.S., LL.B., LL.M., C.S.*

***Certified Specialist (Civil Litigation)**

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Website: www.smhilaw.com

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Visit our website at www.smhilaw.com for information about our firm and the services we provide.

From: Natalia Rodriguez [<mailto:NRodriguez@elliottlakeinquiry.ca>]
Sent: June-04-13 9:04 AM
To: Derrick M. Fulton (dfulton@smhilaw.com)
Cc: mtittle; GEORGINA CAIRNS (georgina@smhilaw.com); Peter Doody; Nadia Effendi
Subject: Privileged document

Dear Mr. Fulton,

As you know, on March 28, 2013, we authorized Ms. Bula, our document management specialist, to release to the Commission all documents you had labelled as "OK" or "I" (irrelevant) in the spreadsheet you provided to us. In total, this amounted to 671 documents.

In the course of reviewing these documents, we encountered one that appeared to be clearly privileged. Commission Counsel stopped reading past the first paragraph of that document upon determining that it consisted of a legal opinion. The document in question is Doc ID NAZ_E000003274, dated August 28, 2012, drafted by a lawyer to Mr. Title.

We checked the list of documents you provided to us and found that you had labelled the document as irrelevant. However, we noticed that the details of that document did not match the document we had before us. This is the information you provided to us regarding that document:

I	NAZ_E000003274	9/27/2012	[FWD: FW: Eastwood Mall - Insurance coverage review]	Levon Nazarian < levon@remaxinfinite.com >	Fabio Brussolo < fabio@bgs.ca >
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Since the information does not match, we assume there must have been a typo when you identified the Doc ID. Consequently, we have destroyed all hardcopies of this document and have asked Ms. Bula to remove our access to this document from the database.

I trust the foregoing is satisfactory.

Yours truly,

Natalia Rodriguez

Commission Counsel

Elliot Lake Commission of Inquiry

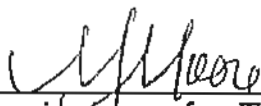
99 Spine Road, 2nd Floor

Elliot Lake, Ontario, P5A 3S9

T: 705-848-5068

nrodriguez@elliotlakeinquiry.ca

This is Exhibit D
to the Affidavit of Nadia Effendi
sworn this 21st day of June, 2013.



Commissioner for Taking Affidavits, etc.

Rodriguez, Natalia

From: Natalia Rodriguez <NRodriguez@elliottlakeinquiry.ca>
Sent: June-04-13 5:54 PM
To: Derrick M. Fulton (dfulton@smhilaw.com)
Cc: mtittle; Peter Doody; Nadia Effendi; GEORGINA CAIRNS (georgina@smhilaw.com); Marc-Andre Bernard
Subject: Privilege claim re: NAZ_E000002744

Dear Mr. Fulton,

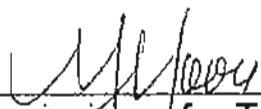
In the course of interviewing Levon Nazarian, Mr. Title objected to Commission Counsel being in possession of Doc NAZ_E000002744 on the basis of privilege. This is one of the documents that was labelled "OK" in the spreadsheet you provided to us on April 26, 2013, and to which we consequently requested access from our document management specialist Ms. Bula.

Given the foregoing, we are giving you until June 11, 2013 at 5:00 pm to provide us with a letter explaining the basis on which this document is privileged and why you previously deemed it as "OK" for Commission Counsel to view. If we do not receive a satisfactory explanation by then, we will assume you have abandoned any and all privilege claims associated with this document.

Yours truly,

Natalia Rodriguez
Commission Counsel
Elliot Lake Commission of Inquiry
99 Spine Road, 2nd Floor
Elliot Lake, Ontario, P5A 3S9
T: 705-848-5068
nrodriguez@elliottlakeinquiry.ca

This is Exhibit E
to the Affidavit of Nadia Effendi
sworn this 21st day of June, 2013.



Commissioner for Taking Affidavits, etc.

Rodriguez, Natalia

From: Natalia Rodriguez <NRodriguez@elliottlakeinquiry.ca>
Sent: June-20-13 10:05 AM
To: Rodriguez, Natalia
Subject: FW: Interview with Bob Nazarian
Attachments: RE Elliot Lake Inquiry - Claim to privilege over 2,623 documents; RE Elliot Lake Inquiry - Claim to privilege over 2,623 documents; Privilege claim re NAZ_E000002744 ; Privileged document

From: Natalia Rodriguez
Sent: June-12-13 7:52 PM
To: 'Derrick Fulton'
Cc: Peter Doody; mttitle
Subject: RE: Interview with Bob Nazarian

Dear Mr. Fulton,

Further to my email of today's date, please find attached the communications between you and Commission Counsel setting out the basis on which Commission Counsel is making use of the documents Mr. Title is disputing.

First of all, I should clarify that all of the documents in the disputed brief are document that were labelled "OK" or "I" (irrelevant) in the excel spreadsheet you provided to Commission Counsel on April 26, 2013. As you know, Commission Counsel was granted access to these documents and you received an email to that effect on May 28, 2013, which I am attaching.

Despite the fact you had indicated that no privilege was being claimed over any documents so labelled, Commission Counsel encountered one such document which appeared to be a legal opinion and stopped reading past the first paragraph. Commission Counsel was prepared to assume, based on conflicting document information, that you must have inadvertently provided the wrong document ID number. As a result, we have destroyed all hardcopies of the document and we no longer have access to it in our database as set out in my email to you dated June 4, 2013, which I have attached.

Further, on June 4, 2013, Mr. Title objected to a different document included in said brief. I emailed you on that day to indicate that you had until June 11, 2013 at 5 p.m. to assert a privilege claim over the document and to set out the basis for the privilege claim, after which time Commission Counsel would assume that all privilege claims over that document had been waived. I did not receive a response to that email, which I have also included.

I trust this resolves any confusion regarding the basis on which Commission Counsel assert that you have no privilege claim over the documents in the disputed brief.

Yours truly,

Natalia Rodriguez
Commission Counsel
Elliot Lake Commission of Inquiry
99 Spine Road, 2nd Floor
Elliot Lake, Ontario, P5A 3S9

T: 705-848-5068
nrodriguez@elliottlakeinquiry.ca

From: Derrick Fulton [<mailto:dfulton@smhilaw.com>]
Sent: June-12-13 12:08 PM
To: Peter Doody; mtitle
Cc: Natalia Rodriguez
Subject: RE: Interview with Bob Nazarian

I can advise that I did not consent to any such thing. And I look forward to the material that sets this out.

Regards,

Derrick Fulton



Derrick M. Fulton, B.A., B.A. (hons), dip. J.S., LL.B., LL.M., C.S.*

*Certified Specialist (Civil Litigation)

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email: dfulton@smhilaw.com

Website: www.smhilaw.com

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From: Peter Doody [<mailto:PDoody@elliottlakeinquiry.ca>]
Sent: June-12-13 11:59 AM
To: mtitle
Cc: Natalia Rodriguez; Derrick M. Fulton
Subject: Re: Interview with Bob Nazarian

Your partner Mr. Fulton consented to the release of these documents or chose to not claim privilege over them. I will have Ms. Rodriguez send you the material that sets that out.

Please advise whether my proposal for interviewing Mr Nazarian will work.

Peter Doody

Sent from my BlackBerry 10 smartphone on the Bell network.

From: mtitle@smhilaw.com
Sent: Wednesday, June 12, 2013 10:57 AM
To: Peter Doody
Reply To: mtitle

Cc: Nadia Effendi; Dfulton@smhilaw.com; Georgina Cairns

Subject: Re: Interview with Bob Nazarian

As you know I have been in Elliot Lake attending both the interviews with the Nazarians and the Inquiry itself. I have only now had the opportunity to review other Inquiry materials in any detail.

During Bob's interview I was handed a brief entitled "Potentially Privileged".

I can indicate that if these items were not objected to previously then I must now register my vigorous objection to all items contained in this brief.

Should you wish to discuss further please advise.

Michael Title JD CS

Sent from my BlackBerry device on the Rogers Wireless Network

-----Original Message-----

From: Peter Doody <PDooddy@elliottlakeinquiry.ca>

Date: Wed, 12 Jun 2013 13:58:00

To: mtitle<mtitle@smhilaw.com>

Cc: Nadia Effendi<NEffendi@elliottlakeinquiry.ca>

Subject: Interview with Bob Nazarian

Mr. Title:

I sent you an email last week proposing that we conclude our interview of Mr. Nazarian on June 24 and 25, in either Toronto or Ottawa. I will be out of town after tomorrow and all of next week, so I am trying to confirm this today. Please advise whether these dates will work, and where you wish to have the interview take place.

Yours,

Peter Doody

Sent from my BlackBerry 10 smartphone on the Bell network.