

***IN THE MATTER OF THE ELLIOT LAKE INQUIRY
THE HONOURABLE PAUL R. BÉLANGER, COMMISSIONER***

***AND IN THE MATTER OF an Application by Eastwood Mall Inc. for Standing and Funding
AND IN THE MATTER OF an Application by Robert Nazarian for Standing and Funding
AND IN THE MATTER OF an Application by Levon Nazarian for Standing and Funding***

BETWEEN:

THE ELLIOT LAKE INQUIRY

- and -

EASTWOOD MALL INC.

- and -

ROBERT NAZARIAN

- and -

LEVON NAZARIAN

APPLICATION FOR STANDING AND FUNDING

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NOTICE OF APPLICATION

TAKE NOTICE that the Applicants will bring an Application, including oral submissions, if permitted, to the Inquiry on Friday October 26th, 2012 at 9:30a.m. or so soon thereafter as the matter may be heard at the Maple Room, Hampton Inn, 279 Highway 108 North in the City of Elliot Lake, in the Province of Ontario, for an order allowing the Applicants standing to take part in the proceedings and for an order recommending that the Province of Ontario fund the Applicants' participation.

GROUND FOR THIS APPLICATION ARE:

A. Standing

1. The Applicants have a direct and substantial interest in the subject matter of this Inquiry;

2. Eastwood Mall Inc. owned the Algo Center Mall from 2005 to the present date, inclusive of the date of the collapse being June 23rd, 2012;
3. Robert Nazarian, is, and was at all relevant times, a director and President, and owner and operator of Eastwood Mall Inc. As such, he has extensive information, experience and firsthand knowledge of the company;
4. Levon Nazarian worked for Eastwood Mall Inc., as an independent contractor and an administrator. He oversaw the administration of Eastwood Mall Inc.'s business transactions, including assisting with the leases and retaining contractors. As such, he has extensive information, experience and firsthand knowledge of the company;
5. The Applicants have been subpoenaed by the Commission to testify at the Inquiry;
6. The Inquiry's mandate is to inquire into and report on events surrounding the collapse on June 23, 2012, of the Algo Centre Mall in Elliot Lake, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals as well as the emergency management and response. Furthermore, the Commission is to review relevant legislation, regulations and bylaws, policies processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity of the Algo Centre Mall and the emergency management and response. The Commission is to make recommendations to prevent such occurrences in the future. As such, the Applicants represent a distinct and ascertainable interest and perspective which is essential to the Commission's mandate.
7. The Applicants clearly have a substantial and direct interest in the subject matter of the inquiry;
8. The Applicants are persons for whom a finding of misconduct may be made by this Commission. As such, they are persons contemplated by section 17 of the *Public Inquiries Act*, and paragraph 11 of this Inquiry's *Rules of Standing and Funding*, as persons "likely to be notified of a possible finding of misconduct under section 17 of the *Public Inquiries Act*;"

9. The Applicants' participation would further the conduct of the public inquiry;
10. The Applicants' participation would contribute to the openness and fairness of the public inquiry; and
11. Such further and other grounds as counsel may advise and this Honourable Commission may permit.

B. Funding

1. The Applicants will not be able to participate in the Inquiry without funding;
2. The Applicants have been subpoenaed by the Commission to testify and their testimony is essential to the Commission's mandate
3. It is anticipated that funding will be required for the following:
 - a) three experienced counsel and one junior counsel;
 - b) accommodations while in Elliot Lake; and
 - c) disbursements, such as photocopies, faxes, retention of experts etc..
4. Such further and other grounds as Counsel may advise and this Honourable Commission may permit.

STATUTORY PROVISIONS OR RULES RELIED UPON WHICH THE APPLICANTS PLACE RELIANCE ARE:

1. *Public Inquiries Act*, R.S.O. 1990, Chapter P. 41;
2. The Elliot Lake Inquiry *Revised Rules of Standing and Funding*;
3. The Elliot Lake Inquiry *Rules of Procedure*;
4. The Elliot Lake Inquiry *Terms of Reference*; and

3. Such further and other provisions as counsel may advise and the Honourable Commissioner may permit.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

1. This application;
2. Oral submissions of counsel; and
3. Such further and other material as counsel may advise and this Honourable Commission may permit.

RELIEF SOUGHT:

1. An order granting the Applicant full standing in the Elliot Lake Inquiry;
2. An order allowing funding of the Applicant's participation.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION:

1. By service through counsel at 151 Yonge Street, Toronto Ontario M5C 2W7, fax: 416-362-8410.

Dated at Toronto this 17 day of October, 2012

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Mr. Robert Nazarian and Mr. Levon Nazarian

TO: THE ELLIOT LAKE INQUIRY

The Honourable Paul R. Bélanger, Commissioner

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- and –

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APPLICATION FOR STANDING AND FUNDING

OVERVIEW

1. This application for standing and funding is being submitted in addition to, and jointly with, the application for standing and funding brought by counsel Rene Fabris on behalf of Eastwood Mall Inc., and Robert Nazarian.
2. Mr. Robert Nazarian is a director and the President of Eastwood Mall Inc. and is seeking standing and funding, jointly with Eastwood Mall Inc. for the Elliot Lake Public Inquiry (hereinafter “the Inquiry”).
3. Mr. Levon Nazarian is, and was at all relevant times, working for Eastwood Mall Inc. as an independent contractor, in the capacity of administrator. In this role, he was responsible for

the administrative overview of business operations, including finding and hiring engineers and contractors for the the Algo Centre Mall. He is seeking standing and funding jointly with Eastwood Mall Inc. and Mr. Robert Nazarian for the Inquiry.

4. This application is submitted to allow the Applicants to fully participate in the Inquiry and to represent the interests and views of the company and individuals owning and operating the Algo Centre Mall. Robert Nazarian and Eastwood Mall Inc. have a direct and substantial interest in the subject matter of this Inquiry as a result of their ownership of the Algo Centre Mall. Levon Nazarian has a direct and substantial interest in the subject matter of this Inquiry as a result of his role as administrator of the Algo Centre Mall during all relevant times to the Inquiry.
5. The Commission's Mandate is to inquire into and report on events surrounding the collapse on June 23, 2012, of the Algo Centre Mall in Elliot Lake, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals as well as the emergency management and response. Furthermore, the Commission is to review relevant legislation, regulations and bylaws, policies processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity of the Algo Centre Mall and the emergency management and response. The Commission is to make recommendations to prevent such occurrences in the future. As a result, the unique knowledge and perspective of the Applicants is indispensable in these proceedings.
6. This application is also to request funding to allow the Applicants to play a crucial part in the Inquiry. Without funding the Applicants would be precluded from meaningfully participating in the Inquiry, notwithstanding their rights to fair representation and access to legal counsel.
7. The Applicants respectfully submit that they satisfy the Commission's requirements both for standing and funding.

REQUEST FOR STANDING

CRITERIA FOR STANDING

8. Pursuant to the Inquiry's *Revised Rules of Standing and Funding* ("the Rules"), and the *Public Inquiries Act* ("the Act"), standing will be granted in the discretion of the Commissioner, in accordance with section 15 of the Act, the *Terms of Reference* and the desirability of a fair and expeditious proceeding. As such, in determining whether a person will participate in the inquiry, a Commissioner must consider, among other things, if they have a substantial and direct interest in the subject matter of the inquiry and whether a person is likely to be notified of a possible finding of misconduct.

9. Section 15(2) of the Act provides as follows:

Before making a decision under subsection (1), the commission shall consider,

- (a) whether a person has a substantial and direct interest in the subject matter of the public inquiry;*
- (b) whether a person is likely to be notified of a possible finding of misconduct under section 17;*
- (c) whether a person's participation would further the conduct of the public inquiry; and*
- (d) whether a person's participation would contribute to the openness and fairness of the public inquiry. 2009, c. 33, Sched. 6, s. 15 (2).*

10. In *Re Royal Commission on Conduct of Waste Management* (1977), 80 D.L.R. (3d) 76 (Ont. H.C.), in addressing the substantial and direct interest test, Lerner J. interpreted s. 5(1) of the *Provincial Inquiries Act* (as it then was) as follows:

Subsection (1) requires the Commission to accord to any person who satisfies it that he has a substantial and direct interest in the subject-matter of the Inquiry, an opportunity to give evidence and to call and examine witnesses or cross-examine other witnesses who testify. A person having a substantial and direct interest in the subject matter of the Inquiry, therefore, is by the mandatory provision of s-s. (1), to be accorded "standing" before the Commission and, in effect, to participate as an independent party. This is a right which has important implications for such a person in that he is not dependent upon the decisions of Commission counsel in the placing of relevant evidence before the Commission.

11. As explained in J.A. O'Connor's ruling on standing dated May 4, 2004, in relation to the Maher Arar Inquiry, when determining eligibility for standing, *a Commissioner must consider a variety of factors including his or her mandate, the nature of that aspect of the public inquiry for which standing is sought, the type of interest asserted by the applicant, and the connection of the particular applicant to the Inquiry's.*
12. J. A. O'Connor also ruled that *[c]learly individuals or groups whose interests may be adversely affected by the report of an Inquiry as set out in section 13 [now section 17] of the Inquiries Act, R.S.C. 1985, c. I-11, have a substantial and direct interest. However, a "substantial and direct interest" embodies more than a section 13 interest (see for example, Re Royal Commission on Conduct of Waste Management Inc. et al. (1977), 80 D.L.R. (3d) 76 (Div. Ct.)).*
13. Section 17 of the current Act reads as follows:
- 17. (1) A commission shall not find misconduct by a person unless,*
(a) reasonable notice of the possible finding and a summary of the evidence supporting the possible finding have been given to that person; and
(b) the person has been given a reasonable opportunity to respond. 2009, c. 33, Sched. 6, s. 17 (1).
14. In *Re Ontario (Royal Commission on the Northern Environment) Re*, [1983] 1 O. J. No. 994 (Ont. Div. Ct.) (QL) at paras. 7, 8, the Divisional Court elaborated on the "substantial and direct interest" test pursuant to section 5(1) of the *Public Inquiries Act*. In essence, the Court held that a party will have a substantial and direct interest in the subject matter of a public inquiry where it is "greatly affected" by potential recommendations and findings flowing from the inquiry, or where the party has "vital information to give" concerning the inquiry.
15. Although substantial and direct interest test of the former section 5(1) has been removed, and placed within what is now section 15(2) (laid out above), the substantial and direct interest test still applies as a major consideration with respect to standing, and as such, the interpretations noted in the preceding paragraphs are still relevant in addressing how this consideration is to be applied.
16. The Applicants satisfy all four considerations as listed in section 15(2) of the Act. In particular, as the owners of the Algo Centre Mall, it is clear that the Applicants have a

substantial and direct interest in the Inquiry and are likely to be notified of a possible finding of misconduct. Moreover, there can be no doubt that the participation of the Applicants would further the conduct of the Inquiry.

THE INQUIRY

17. The Inquiry, according to its *Terms of Reference* will “inquire into and report on events surrounding the collapse on June 23, 2012, of the Algo Centre Mall in Elliot Lake, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals as well as the emergency management and response.” Furthermore, the Commission will focus on “reviewing relevant legislation, regulations and bylaws, policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity of the Algo Centre Mall and the emergency management and response. The Commission is to make recommendations to prevent such occurrences in the future.”

STANDING FOR THE INQUIRY

18. Pursuant to paragraph 11 of the *Rules*, an individual may be granted standing by the Commissioner, if the Commissioner is satisfied that they:

- a. have a substantial and direct interest in the subject matter of the Inquiry;
- b. are likely to be notified of a possible finding of misconduct under section 17 of the *Act*;
- c. their participation would further the conduct of the Inquiry;
- d. their participation would contribute to the openness and fairness of the Inquiry.

19. As noted in paragraph 15 above, the goal of the Commission is to make recommendations to prevent occurrences like the Elliot Lake tragedy in the future.

20. The Algo Centre Mall, and information surrounding its policies and procedures is clearly central to the Inquiry. Accordingly, the Commission’s mandate undoubtedly requires the knowledge and perspectives of the owners of the Algo Centre Mall. As a result it is essential for the Applicants to be granted standing as a full party in this Inquiry.

21. The Applicants possess exclusive knowledge, of and insight into issues relating to this Inquiry, which is vital to its success and mandatory for the satisfaction of its mandate.
22. Furthermore, this Inquiry will have a significant impact on the Applicants, specifically with respect to their reputation. As a result of various media reports relating to this Inquiry, the reputations of the Applicants have already been affected negatively. There can be no doubt that as the Inquiry progresses, their reputations will continue to be significantly impacted. Participating fully in this Inquiry is crucial to safeguarding the reputational interests of the Applicants.
23. As owners, operators and administrators of Eastwood Mall Inc., and consequently the Algo Centre Mall, the Applicants each have a real and substantial interest in the Inquiry and its findings, and are likely to be notified of possible findings of misconduct pursuant to section 17 of the *Act*. As noted, they have an exclusive viewpoint on the events in question before the Inquiry and can provide exceptional assistance to the Inquiry in its totality. The Applicants submit that they fulfill the requirements for standing for the Inquiry.

PARTICULARS OF STANDING

24. With respect to a grant of full standing in the Inquiry the Applicants submit that such standing include the following:
 - a. access to documents collected by the Commission, subject to the *Rules of Procedure*;
 - b. advance notice of documents which are proposed to be introduced into evidence;
 - c. advance provision of statements of anticipated evidence;
 - d. a seat at the counsel table;
 - e. the opportunity to suggest witnesses to be called by the Commission Counsel, failing which an opportunity to apply to the Commissioner to lead the evidence of a particular witness;
 - f. the opportunity to cross-examine witnesses on matters relevant to the basis upon which standing was granted;
 - g. an opportunity to review transcripts (a certified copy of the transcripts may be purchased from the court reporter);
 - h. the opportunity to make closing submissions; and

- i. such further and other particulars of standing as counsel may advise and this Honourable Commission may permit.
25. The above Particulars of Standing are consistent with those granted to parties with Standing in at least Part I of the *Ipperwash Inquiry* as well as those granted to those with Standing at the Walkerton Inquiry.

*Reference: Ipperwash Inquiry, Ruling on Standing and Funding, May 7, 2004, p. 2-3
Victims' Group Application for Standing and Funding of Brief of Authorities*

*Reference: Walkerton Inquiry, Ruling on Standing and Funding, October 3, 2000, p. 64-65.
Victims' Group Application for Standing and Funding of Brief of Authorities.*

CONSOLIDATION

26. The Applicants understand that the Commission desires a fair and expeditious hearing, and therefore would wish to avoid duplication and would encourage joint submissions for standing.
27. The Applicants, Eastwood Mall Inc., Mr. Robert Nazarian and Mr. Levon Nazarian have joined their applications in order to consolidate, and contribute in making these proceedings more expeditious.
28. Further, for the purposes of consolidation and in the interests of expediency and efficiency, the Applicants have attempted, but were unable, to locate any other parties who are or were employed or connected to Eastwood Mall Inc., whose interests are aligned with those of the Applicants, in order to include those parties in this Application.

REQUEST FOR FUNDING

CRITERIA FOR FUNDING

29. The *Rules* and the Inquiry's *Terms of Reference* provide that the Commission may make recommendations to the Attorney General regarding funding to parties who have been granted standing, to the extent of the party's interest, where in the Commission's view the party would not be otherwise able to participate in the Inquiry without funding.
30. At paragraph 21, the *Rules* outline that applications for funding should provide:
- a. the person's name, address, telephone number, and fax number and e-mail address, if available;
 - b. the name(s) of the lawyer(s), if any, representing the person, together with the lawyer(s)'s address, telephone number, fax number and email address;
 - c. evidence that demonstrates that a person does not have adequate financial resources that enables it to represent its interest;
 - d. how it intends to make use of the funds and how it will account for the funds; and
 - e. whether the person wishes to make oral submissions in support of the motion for funding.
31. The *Rules* further stipulate, at paragraph 23, that in making his funding recommendations, the Commissioner will consider, among other things, the following factors:
- a. the nature of the applicant's interest and/or proposed involvement in the Inquiry;
 - b. whether the applicant has an established record of concerns for and a demonstrated commitment to the interest it seeks to represent;
 - c. whether the applicant has special experience or expertise with respect to the Commission's mandate; and
 - d. whether the applicant has attempted to form a group with others of similar interests.

32. The nature of the Applicants' interests, their importance with respect to the Commission's mandate, and their consolidation attempts have already been thoroughly canvassed in the accompanying section of this application on standing.
33. Recall that, as the owners and administrators of the Algo Centre Mall, which is central to the Inquiry and the Commission's mandate, the Applicants have unique knowledge and insight into issues crucial to the Commission's mandate.
34. The Applicants' knowledge, accounts and recollection of the events relating to this Inquiry are vital to its success and mandatory for the satisfaction of its mandate.
35. The importance of the evidence which could be provided by the Applicants is evidenced by the fact that they have been subpoenaed to testify at the Inquiry. Further, that for the purposes of the Inquiry, search warrants were executed with respect to Levon Nazarian's business, Robert Nazarian's home, and the Nazarians' and Eastwood Mall Inc.'s solicitor's offices. Many documents seized as a result of these searches which were in the possession of the Applicants.
36. Eastwood Mall Inc.'s sole source of income ceased on the date of the collapse of the Algo Centre Mall, June 23rd, 2012.
37. Eastwood Mall Inc. was a significant source of Levon Nazarian's income.
38. The Applicants have no sufficient source of income to support the funding for the Inquiry.
39. Eastwood Mall Inc. along with Robert Nazarian personally are the subject of civil lawsuits, two of which are claiming approximately \$11.5 million each, and a class action lawsuit is in the approximate amount \$40 million. These legal proceedings have exposed the Applicants to substantial financial consequences.
40. Insurance proceeds are being held in trust pending the result of any liability claims.
41. As a result of this combination of factors, notwithstanding the central role the Applicants' evidence would play in the Inquiry, they would be precluded from participating in the

Inquiry without funding as they do not have adequate financial resources to participate effectively.

42. The Applicants recognize that the Inquiry will be a lengthy and expensive process and respectfully submit that their participation is mandatory and funding is essential.
43. Furthermore, the Applicants are potentially exposed to civil, administrative, regulatory and criminal consequences or remedies, and are concerned that these remedies may be impacted by their participation at the Inquiry. Therefore, fair participation at the Inquiry requires access to legal counsel.
44. One of the criteria considered by the Commission in determining whether to recommend funding is whether the applicant has attempted to form a group with others of similar interests
45. As noted earlier, the Applicants, Eastwood Mall Inc., Mr. Robert Nazarian, and Mr. Levon Nazarian, have joined their applications in order to consolidate, and contribute in making these proceedings more expeditious.
46. Further, for the purposes of consolidation and in the interests of expediency and efficiency, the Applicants have attempted, but were unable, to locate any other parties who are employed or connected to Eastwood Mall Inc., whose interests are aligned with those of the Applicants, in order to include those parties in this Application.

PURPOSES FOR FUNDS AND DISBURSEMENT OF FUNDS

i) Legal Fees and Disbursements

47. The Applicants will be represented by Brauti Thorning Zibarras LLP and Brown & Fabris Law Office.
48. Due to the length of and complexities expected from the Inquiry, there will be three experienced counsel, and one junior counsel working on this file. These are Rene Fabris of Brown & Fabris Law Office, and Pradeep Chand, Peter Thorning and one Junior Associate of Brauti Thorning Zibarras LLP. Counsel fees for these counsel are being requested. The

amount of hours required by counsel to represent the Applicants at the Inquiry is unknown at this time.

49. It is respectfully submitted that the Applicants be afforded, as a party to the Inquiry, the funding resources, including all reasonable expenses incurred and fees and expenses for its legal counsel and assistants, to ensure its full and effective participation for the duration of the Inquiry, including necessary research, preparation, documentary review, expert retention, attendance and participation in all hearing and other activities of the Inquiry, commencing the date the Inquiry was effectively commissioned on July 19, 2012.

ii) The Applicants' Disbursements

50. The Applicants will require reimbursements for routine administrative needs, such as photocopying, meeting costs, printing etc.... The Applicants may also require reimbursements for retaining expert witnesses.

51. With respect to expenses such as travel, accommodation, attendance and administration at the hearings, the Applicants submit that consideration be given to the fact that some of their counsel is located in Toronto, Ontario.

52. The Applicants seek funding for payment of the legal and related expenses associated with attempting to coordinate and consolidate parties with similar interests, and the preparation of these submissions, whether or not this application is granted in full or in part.

ADMINISTRATOR OF FUNDS AND DESCRIPTION OF FINANCIAL CONTROLS

53. All funding monies will be placed in the client trust account at Brauti Thorning Zibarras LLP which is equipped with all necessary financial controls and accountability mechanisms for client trust accounts pursuant to the Rules of the Law Society of Upper Canada. Brauti Thorning Zibarras LLP is responsible for the trust account and Ann Marie Houston administers the account. Her contact information is listed below. When the work is completed and the expenses are incurred, Brauti Thorning Zibarras LLP will administer and account for the funds in accordance with the requirements of the Law Society of Upper Canada relating to the rules and by-laws for accounting of trust funds and all other funds.

CONTACT INFORMATION FOR ADMINISTRATOR OF FUNDS

54. The contact information for the administrator of the funds is as follows:

Ann Marie Houston
Brauti Thorning Zibarras LLP
151 Yonge Street, Suite 1800
Toronto, ON M5C 2W7
Tel: (416) 362-4567
Fax: (416) 362-8410

CONCLUSION

55. The Applicants seek full standing for the Inquiry and asks that the Commissioner recommend funding as set out above.

All of which is respectfully submitted.

Dated at Toronto, this ____ day of October, 2012

Robert Nazarian
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Applicant for Standing and Funding

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By solicitors,



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