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 ALLEGATIONS OF COMMISSION COUNSEL

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WISHART LAW FIRM LLP

390 Bay Street, 5th Floor
Sault Ste. Marie, ON P6A 1X2

Telephone: 705-949-6700
Fax: 705-949-2465

Emails:
pcassan@wishartlaw.com
alittle@wishartlaw.com
sshoemaker@wishartlaw.com
mshoemaker@wishartlaw.com

Lawyers for the Corporation of the City of Elliot Lake

It is alleged by Commission Counsel that the City of Elliot Lake mismanaged matters relating to the structural integrity of the Algo Centre Mall on the following grounds:

ALLEGATION #1:

"The confidentiality obligations that the City of Elliot Lake allowed to be imposed on its appointees on the Retirement Living/NorDev Board of Directors materially hindered them from fulfilling the very purpose for which they were on the Board: to represent the City of Elliot Lake."

ALLEGED EVIDENCE IN SUPPORT OF ALLEGATION #1:

- On January 30, 1997, the corporate secretary of Retirement Living issued a report that was intended to provide all directors of Retirement Living, including new directors, with an understanding of their roles and responsibilities. The report stated that the Retirement Living By-Laws that the individual Directors had the responsibility "To respect the confidentiality of matters considered by the Board or coming to their attention as directors which are of a confidential or private nature." A signed undertaking was required of the Board Members (Exhibit 2146, pg. 4).

KENNEALY EVIDENCE

- Mr. Kennealy testified that, in reality, Board members would talk about Retirement Living business on a regular basis. However, he acknowledged that a Board member would interpret the Report from Mr. Kearns and the Undertaking as meaning that Directors have the responsibility to respect the confidentiality of matters considered by the Board. Mr. Kennealy further stated if a matter came before the Board and had not yet been voted on, there was an expectation that the matter would not be discussed outside of the confines of the Board.

FARKOUH EVIDENCE

- Mr. Farkouh testified that there was always a flow of information between the community, City Council and Retirement Living. Mr. Farkouh said he would advocate for the City's interests and assert Council's position on matters that came before the Retirement Living Board. However, the Undertaking prevented Retirement Living Board members from even commenting on matters that were before the Board and that had not yet been voted on. Under examination from Commission Counsel, Mr. Farkouh acknowledged this tension.

HAMILTON EVIDENCE

- Rick Hamilton, who was an appointee of City Council on the Retirement Living Board from 2003 until 2009, testified that he did not report to City Council on matters before the Board of Retirement Living. Similar to Mr. Farkouh, Mr. Hamilton acknowledged that Councilors could not provide their opinion on matters before Retirement Living if the City's appointee did not report to them.

- Mr. Hamilton testified that he would not disclose information that he obtained as a Director of Retirement Living if the information could cause harm to the business of Retirement Living.

- Mr. Hamilton further testified that there were occasions when Mr. Kennealy and Ms. Guertin met privately with members of City Council for the purpose of sharing information with Councilors that they did not want to become public. Mr. Hamilton testified that, in order to attend such a meeting, he signed a nondisclosure agreement which required him to keep information presented at the meeting confidential.

- Evidently, Councilors that did not agree to sign the non-disclosure agreement could not attend the private meetings with Retirement Living. The Commission heard evidence from a City Councilor, Don Denley, that he did not attend any meetings of the Retirement Living Board of Directors because as a precondition to attending a meeting he was asked to sign a non-disclosure agreement", which, as he understood it, would have prohibited him from disclosing any information obtained at a Board meeting.

- The Commission heard other evidence that the City appointee on the Retirement Living Board did not discuss matters before the Board at Council meetings. Mr. Bauthus testified that during his tenure of over ten years as CAO, the City Councilors who sat on the Retirement Living Board never reported back to Council, the CAO or City staff about issues discussed at the Board of Retirement Living, nor the decisions the City appointees were being asked to make as Board members.

- Mr. Denley testified that, during his time on Council, from 2003 to 2006, the then City Council appointee on the Board did not raise issues involving Retirement Living at meetings of the City Council.

- This trend continued after Retirement Living sold the Mall. Mr. Al Collett, who became a member of City Council in 2008, testified that the City Council appointee on the Retirement Living Board did not report to Council on the activities of Retirement Living. He further testified that Council did not give instructions to those appointees on decisions to be made in connection with Retirement Living-related matters.

- In 2011, City Councilor Tom Farquhar resigned as a City appointee to the Retirement Living Board because he did not think the confidentiality restrictions placed on Board members were appropriate for an appointee of City Council. The City accepted Mr. Farquhar's resignation and chose an alternative appointee .

RESPONSE TO ALLEGATION #1

Commission Counsel's statement that the City of Elliot Lake "allowed" confidentiality obligations to be imposed on the City appointees to the Elliot Lake Retirement Living Board of Directors ("ELRL Board") lacks a recognition that pursuant to both the Federal and Ontario law, directors and officers have a fiduciary duty to act in good faith and in the best interest of the corporation, including upholding the duty of confidentiality. The

corporation in this case is Elliot Lake Retirement Living ("ELRL"). [1] [2] In fact, the City had no input, involvement or control over these obligations.

Board members of a non-profit corporation are in a fiduciary relationship with the non-profit corporation.[3] The fact that a ELRL Board member is a City appointee to does not obviate, eliminate, or otherwise constrain that legal duty. Each of the ELRL Board members, including the City appointees, was obliged to act honestly and in good faith in respect of the affairs of the ELRL Board and to maintain the confidentiality of information that they acquired by virtue of their position. [4]

The City appointed members of the ELRL Board are akin to nominee directors in a private corporation setting. It would be a breach of their fiduciary duties for a member of the ELRL Board to disclose confidential information to the City, just as it would be a breach of a director's legal obligations to disclose confidential information to a shareholder that appointed them as a nominee director.

The duty of confidentiality, which is a statutorily obligation, trumps any loyalty that a Board member may have to the body or person who appointed them. When a director's duties conflict with their nominating entity, the duty to the corporation **must take precedence**.[5]

There are a number of general references to the "exchange" of information between the City and ELRL. Unfortunately, Commission counsel's characterization of the nature of those 'exchanges' of information is not supported by the evidence. There was no evidence before the Commission to support Commission Counsel's allegation that there was a free flow "exchange" of information between the ELRL Board and the City that fell within the definitions in the Undertaking or the fiduciary duty owed by ELRL Board members to ELRL.

At no time did the evidence of Mr. Kenneally, Mr. Farkouh or Mayor Hamilton establish that those individuals breached their legal obligations to ELRL. This lack of evidence precludes a finding of negligence against them of the City.

The only evidence of information flowing between the City, ELRL and at times, the community, was the generic and benign testimony as summarized above.

In each instance, the testimony made clear that none of the information provided to the City was inconsistent with the Undertaking or NDA. Accordingly, none of the information as to the condition of the roof structure could have been provided to the City, outside of a public safety concern. As noted below, a number of engineers specifically testified that

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[1] Canada Business Corporations Act, RSC 1985, c. C-44, subsection 122(1)(a);

[2] Ontario Business Corporations Act, RSO 1990, Chapter B.16, subsection 47(1);

[3] London Humane Society (Re), 2010 ONSC 5775 at para. 19;

[4] 101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp., 2011 SKCA 82 at para. 18;

[5] AM v. Misir, [2004] OJ NO 5088 at para. 57;

there was no public safety concern.

Corporations, like ELRL, often protect their confidential information by adopting confidentiality policies that restrict the flow of certain information to outsiders. ELRL did so with the Undertaking at Exhibit 2146 and the Non-Disclosure Agreement ("NDA") at Exhibit 4213.

Namely, corporations have inward looking duties that protect the confidentiality of information whereas municipalities have public policy objectives of transparency that differ substantially from the private nature of "private corporations" such as ELRL.

In the case of the ELRL, the Undertaking and NDA are clear, concise and contain a broad definition of the type of information that is restricted from being disclosed.

Courts have considered the existence of confidentiality policies, such as the policies contained in the Undertaking and NDA in the present case, to better assess an alleged breach of these contractual obligations. It is common practice for these protocols and policies to exist at the Board level and the evidence strongly supports that each of Mr. Kenneally, Mr. Farkouh and Mayor Hamilton complied with their obligations under both federal and provincial law. [6]

Commission Counsel suggests that that the City appointees to the ELRL Board were hindered or restricted in their ability to represent the City. However, this position by Commission Counsel is inconsistent with the current law in Canada and Ontario as it relates to corporate entities and the obligations of its board members.

There is nothing laudable in Mr. Farquhar's refusal to sign the Undertaking or in the self-serving testimony of Mr. Denley in refusing to sign the NDA, or in the testimony of Mr. Collett, who was not apprised by Commission Counsel that the law in Canada and Ontario legally restricted the City appointees from reporting to City Council.

Moreover, the testimony of Messrs. Denley and Collet should be given little to no weight as these witnesses were self-serving and uninformed. As noted by former CAO, Troy Speck, Councillor Denley was often seeking to stir the pot and is now attempting to lay blame upon the individuals who were appointed by the City to the ELRL Board.

> Q. Did you take any steps to determine whether that complaint was a valid one?
>
> A. No, I did not. And I did not because, quite frankly, Councillor Denley liked to stir the pot often.
>
> Q. So you discounted any complaint he made?

[6] In Disney v. The Walt Disney Co., 2005 Del. Ch. LEXIS 94, at para. 10-14, the Court of Chancery gave significant weight to the fact that the company's confidentiality policy prohibited the disclosure of certain information;

A. When I hear a report from a fellow Councillor expressing dismay over his actions and presentation at a board meeting, and knowing some of the political motivations that were behind a lot of what Councillor Denley did, I would have discounted that, yes.

Troy Speck, April 24, 2013, Page 6754, Line 11

What was clear was Mr. Denley's lack of appreciation for basic corporate matters, including understanding the confidentiality obligations upon City appointees to the ELRL Board. Notably, he testified that he believed a not-for-profit corporation was governed by the government. [7] In general, Mr. Denley's testimony left him appearing misdirected, as exemplified when he indicated that he did not bother to warn the City building department of the leaks at the mall because he was coaching soccer and baseball. [8] As previously noted in our Phase I closing submissions, Mr. Denley was an abrasive witness whose sole motive appeared to be to criticize the City.

Furthermore, the testimony of Mr. Collett should be discounted as Mr. Collett's testimony in a number of instances was self-serving and his position regarding notices of meetings (in his case for relocation of the library) was absurd, as he testified that he essentially ignored emails regarding meetings because they were not sent to his personal email. [9]

The testimonies of Messrs. Denley and Collett are inherently unreliable and should be appropriately disregarded given their questionable motivations and arguable lack of insight.

What is clear, however, is that the City appointees to the ELRL Board upheld their fiduciary duties, including the duty of confidentiality.

ALLEGATION #2

- The City should have insisted that it be provided with a copy of the 1998 Nicholls Yallowega Belanger Report (the "NYB Report").

ALLEGED EVIDENCE IN SUPPORT OF ALLEGATION #2:

- Exhibit 3233, which contains an agreement pursuant to which Retirement Living agreed to pay for an assessment of the physical condition of the Mall and Hotel.

- Nicholls Yallowega Belanger provided two preliminary cost estimates to remediate the roof deck. They were dependent on the outcome of the further studies that had been recommended.

[7] Don Denley, June 4, 2013, Page 12849, Line 1

[8] Don Denley, June 4, 2013, Page 12868, Line 3

[9] Al Collett. May 23, 2013, Page 11110, Line 20

1. Option A - involved the installation of a new waterproofing membrane over the existing concrete topping. It would be covered with a protection Board and an asphaltic wear layer. The cost was $606,500.00.

2. Option B - involved removing the existing concrete topping and insulation, applying a new waterproofing membrane which would be covered with protection Board and reinforced concrete topping. It would cost 1,806,500.00.

• Mr. Nicholls testified that leaking water with chlorides can be a problem for a building. Left uncorrected, he said, it can lead to the loss of structural integrity for a building.

• The City was not provided with the NYB Report. See the testimony of Richard Kennealy and, in particular, his testimony from April 17, 2013, pp. 5342-3.

• The City accepted, through non-action, that Retirement Living would receive the Report (see the testimony of Mr. Bauthus and in particular his testimony from March 26. 2013, pp. 3050-1).

• Exhibit 2143

• The testimony of numerous engineers who looked at the roof and reported on the condition of the roof support's the City's position that there was no need for the City to take action on repairs to the roof.

RESPONSE TO ALLEGATION #2

The City and ELRL entered into an agreement in March 1998 whereby the City would pay $45,000 to ELRL to perform a number of deliverables (the "Agreement"), being:

(a) Retail space database;

(b) Retail survey; and

(c) Physical condition of the mall.

Nowhere in the Agreement does it say that the documents required to produce those deliverables would be disclosed to the City.

MAYOR RICK HAMILTON

Q. (…) So this is the Nicholls Yallowega Bélanger report of November 12th, 1998, and it had attached to it a report from the Halsall Engineering firm. Did you see this report -- either of those reports, sir?

A. No, sir.

Rick Hamilton , July 8, 2013, Page 14970, Line 18

As noted in the testimony of the CAO of the City at the time, Mr. Bauthus, upholding confidentiality and benefitting from the requirements of the internal ELRL fiduciary duty was of ***paramount importance*** to all parties involved.

The City needed the privacy of ELRL to help alleviate the concerns of private business providing information to the City which could then be obtained through freedom of information requests. Again, this speaks to the vast differences between a corporation, which by definition and operation of law is a "private" entity and a municipality, by operation of law, conducts itself in a very "public" manner.

> Q. And the purpose for th[e] [agreement between City and ELRL] was that it was felt that, particularly on the -- the retail study part, that Retirement Living would achieve a higher degree of success in being able to get information from the local businesses in terms of their – their sales, employment, et cetera, et cetera, and their direction than the City would, because of the level of confidentiality.· The perception, of course, the City, anything that comes into the City becomes public domain. And the businesses did not -- I can understand. They would not want to see details of their business in -- in the community, in the public domain.
>
> So the undertaking of the study, pursuant to the terms of reference, was turned over to Retirement Living under the terms of that contract.
>
> Q. And what you've just told me about is the -- as I understand it, is the reticence of businesses to disclose financial information which might become public; is that fair?
>
> A. That is correct. That -- that was my understanding at the time in the discussions that we had, because the nature of the study was in understanding the – the retail business in the community. And that was going to require quite a bit of detail – detailed information.

Fred Bauthus, March 26, 2013, Page 3002, Line 17

Once again, the primary concern of the City and the ELRL was confidentiality. Specifically, the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990 CHAPTER M56 ("MFIPPA"), which came into force on January 1, 1991.

The MFIPPA provisions, particularly Section 10(1) of the MFIPPA, could have quite easily required the disclosure of the private information sent by local business to the City for the deliverables of the Agreement.

Since 1991, there have been well over 400 decisions by the Information and Privacy Commissioner relating to third party disclosure held by the City. Many of the decisions have supported the disclosure of the type of information that the City would have received had it

performed the deliverables on its own.[10] [11]

To alleviate this concern, the City contracted with ELRL to protect the confidentiality of the information in support of the deliverables of the Agreement. There was nothing inappropriate or extraordinary about this arrangement. The City was simply acknowledging to private enterprise that it would not risk their private information and, further, that the applicable privacy restrictions did not support the City in obtaining this information.

By virtue of the Agreement, the responsibility to obtain information to satisfy the deliverables was with ELRL. This included the NYB Report that was left solely to the discretion of the ELRL as noted by Mr. Bauthus in the following exchange:

> Q. Did [ELRL] seek the prior written consent of the City to retain these firms?
>
> A. I don't recall that there was any specific request for approval that would have hit the Council table.
>
> Q. Did you know that those particular firms had been retained, or were going to be retained?
>
> A. At this point in time I don't recall the discussion surrounding that and if I was involved.
>
> **Fred Bauthus, March 26, 2013, Page 3037, Line 10**

Furthermore, it is clear from the testimony in Phase I [12] and, specifically, Exhibit 3276 that the ELRL Board, and any City appointees attending the Board Meeting were provided only with a summary of the NYB Report, being much different than the depth of information contained in the NYB Report and the options to repair the leaks.

The City appointees to the ELRL Board were in attendance at the ELRL Board meetings and committee meetings on Dec 23, 1998 and Dec 30, 1998, but all the ELRL Board members received was the high level summary indicating that the "initial inspection [of the mall] indicates that the building is <u>structurally sound</u>, including the parking deck, and has been well maintained."

As noted above, each of the ELRL Board members, <u>including the City appointees,</u> being Mayor Farkouh and Terry Croteau, were obliged to maintain the confidentiality of information that they acquired by virtue of their position, including, the summary of the NYB Report, let alone the full NYB Report which was not provided to the Board.[13]

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[10] Township of Tiny (Municipality) (Re), 2014 CanLII 22999 (ON IPC)

[11] Etobicoke Board of Education (Re), 1992 CanLII 4261 (ON IPC)

[12] See, Robert Leistner, March 27, 2013 Page 3505, Line 12, See Larry Burling, April 2, 2013, Page 3875, Line 16

[13] 101109718 Saskatchewan Ltd. v. Agrikalium Potash Corp., 2011 SKCA 82 at para. 18;

It is emphasized that, pursuant to the allegations contained in #1, if the NYB Report came before the City appointees on the ELRL Board at the time, it would have been a breach of both federal and provincial law for the NYB Report to be disclosed to the City councillors. It would have further been a breach of the law to inform the City or anyone outside of the ELRL Board that they only received a polished summary.

Commission Counsel is seeking to find that the City committed misconduct when:

a. There was an Agreement which turned over the deliverables to a private corporation, being ELRL;

b. The ELRL Board members are required to abide by the corporate laws of Canada with respect to fiduciary duties and confidentiality as outlined in the response to Allegation #1;

c. The City appointed ELRL Board members were never provided with the full NYB Report;

d. The City appointed ELRL Board members were assured of the structural soundness of the mall based upon the NYB Report;

Moreover, in cross-examination by the City's counsel, Mr. Paul Cassan, Mr. Albert Celli, an engineer with Halsall (the company that provided the building condition assessment as part of the NYB Report) stated:

> 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.
>
> **Albert Celli, April 5, 2013, Page 4345, Line 25**

Mr. Celli also testified that the building did not in any way at the time he was looking at it present a public safety hazard.[14]

The point of this testimony has already been stated in our submissions regarding Phase I. To now seek misconduct as against the City pursuant to the facts surrounding the NYB Report would be find misconduct against the City appointees when every engineer from Phase I

[14] **Albert Celli , Page 4345, Line 12**

who was involved in the NYB Report did not see a public safety risk.

This is especially true considering that Mr. Celli specifically testified that he was "not worried about the structural safety at the time" and so there was no need for Mr. Celli to look beyond the scope of the retainer between NYB and Halsall and send the building condition assessment to the City.

Professional Engineers are bound by a Code of Conduct that requires that they report any situation that could present a danger to the safeguarding of life, health or property of a person. Of the numerous engineers that appeared before the Inquiry, none stated that the situation was a danger to the safeguarding of life or health.

It would be neither fair nor appropriate to hold the City appointees to the ELRL Board to a higher standard than professional engineers who did not see a public safety concern.

In cross-examination by Mr. Cassan, all of the engineers related to the NYB and/or Halsall reports indicated that there was not a public safety danger which would have necessitated that the engineer warn the City of a looming disaster according to the Code of Conduct binding Professional Engineers.

For example, see the following cross-examination conducted by Mr. Cassan:

Michael Buckley (P. Eng), testified that he did not see the mall's state of repair as a concern to public safety.

> Q. Did you have any discussions Mr. Celli or Truman regarding reporting the condition of this building to the City?
>
> A. Not that I recall, no.
>
> Q. Why would you not report the conditions of the building to the City?
>
> A. The circumstances didn't warrant it.
>
> Q. Can you explain what you mean by the circumstances didn't warrant it?
>
> A. Well, if there was a situation where public safety was of a concern, then that would warrant it.
>
> **Michael Buckley, Page 4472, Line 1**

Jeff Truman (P. Eng) was of the same view as the other engineers who testified before the Commission, namely:

> Q. And you're aware of the definition of professional misconduct which states that,

"Failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of public life constitutes professional misconduct"?

A. Absolutely.

Q. And I would take this to mean that if a client is not following your recommendations, or is taking your recommendations out of context and not performing them in a way that protects the public safety, you'd have an obligation to report that to the appropriate agency?

A. If there was a risk to the public, yes.

Q. And in the circumstance if there was a risk to the public the appropriate agencies to report it to would be whom?

A. The building officials.

Q. And in this case after your review of the Algo Centre Mall did you report the situation of the mall to the building officials?

A. No, it didn't require it.

Q. And you state that in -- because of what evidence

A. Because any deterioration that we saw was not significant. There were no situations that posed a danger to the public.

Jeff Truman, Page 4681, Line 7

Consistent with the evidence of Messrs. Truman, Buckley and Celli, Mr. Bruce Caughill testified that he never turned the NYB report over to the City. Further, Mr. Caughill testified that he did not see the state of repair of the mall as a public safety issue in 2008 when he investigated leaks at the Scotiabank.

THE COMMISSIONER: The question is, sir: Is your duty to your client trumped, if you observe a situation which potentially can be dangerous to the public? In other words, despite any confidentiality obligation you have to your client, if you see something that's dangerous, you have an ethical obligation to report it. That's the question?

THE WITNESS: So is the answer "yes" or "no"? Yes.

THE COMMISSIONER: And so the next question is did you see something, which, in your opinion, was a danger to the public and the answer is "no," perhaps.

THE WITNESS: The answer is "no."

To find misconduct against the City as it relates to the NYB report would result in a finding of misconduct with the following facts known to be true:

a) The City struck an agreement specifically so they could turn over the deliverables to the non-profit ELRL because of concern for the requirement for Municipalities to disclose their public records, even those belonging to private third party businesses.;

b) The ELRL board members failed to disclose to the City the contents of a report they never received, which would have been a breach of their fiduciary duties owed to the ELRL Board;

c) The engineering experts themselves were "not worried about the structural safety at the time" meaning NYB architects and Halsall engineers and other engineers over the years did not see a need to warn the City of the concern for public safety pursuant to their professionally mandated standards of conduct.

If the engineers themselves were not concerned enough to warn the City about any public safety worries, then why would the disclosure of the NYB Report to the City have been useful? The CBO was not an engineer and the CBO position is a generalist position, which relies upon the opinions of the engineers experts, such as those engineers quoted above.

Based upon the response outlined above, it would be inappropriate in the circumstances to find any misconduct by the City as it relates to anything contained in the NYB Report.