THE ELLIOT LAKE COMMISSION OF INQUIRY

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H E A R I N G O N C O N F I D E N T I A L I T Y

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HEARD BEFORE THE HONOURABLE JUSTICE P.R. BÉLANGER
On Monday, December 17, 2012, at OTTAWA, Ontario

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ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

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Monday, December 17, 2012

MR. COMMISSIONER: Good morning. Be seated, please. As you were probably informed, we're having a problem this morning. We received a call from Mr. Fabris, representing both Bob and Levon Nazarian of Eastwood. He's returning back from Sudbury, I gather, having been unable to book a flight. What we're trying to do is see whether we can reach him at an appropriate stage this morning and perhaps have him make submissions by telephone.

In any event, what we propose doing this morning is hearing from PEO after I've made some brief opening remarks and after Mr. Doody has made some brief opening remarks and that we break thereafter to see what progress Mr. Fabris has made in terms of attempting to participate this morning.

Does anybody have a problem with that before we go any further? All right. Would counsel tell me who they are

because I don't think I've met any of you before? I know these four.

MR. DOODY: We have a counsel slip, Your Honour, as well.

MR. COMMISSIONER: Do we? Thank you. Ma'am?

MS. RITACCA: Good morning, Mr. Commissioner, I'm Luisa Ritacca here for the PEO. So, I get the front row here.

MR. COMMISSIONER: Thank you. Welcome.

MR. MACRAE: Good morning, Mr. Commissioner, my name is Rob MacRae. I'm here on behalf of Mr. Wood.

MR. COMMISSIONER: Thank you.

MR. BISCEGLIA: My name is Joe Bisceglia. I'm here for Greg Saunders.

MR. COMMISSIONER: Thank you.

MR. CASSAN: Good morning, Commissioner, Paul Cassan for the City of Elliot Lake. We met last time.

MR. COMMISSIONER: Yes, we've met before.

MS. CARR: Good morning, Mr. Commissioner, Alexandra Carr for ELMAC and SAGE.

MR. JACOBSEN: Good morning. I'm Peter Jacobsen. I'm here for the Media Group.

MR. COMMISSIONER: It's not that I recognized you. You're the only one left.

Thank you very much for being here this morning on such a miserable day. Bonjour mesdames et messieurs. Welcome to Ottawa. Bienvenue à Ottawa.

As you are aware, we're here to deal with two applications for confidentiality, one filed by the Association of Professional Engineers of Ontario relating to the documents that were filed in response to a Commission summons, and the other by Robert and Levon Nazarian and Eastwood Mall Incorporated in relation to documents filed along with their request for a funding recommendation from the Commission. Of course, we've had those standing and funding hearings some months ago.

This hearing underscores two important values in modern Canadian society and the conflict that often arises when both of these values intersect in proceedings similar to the ones we're engaged in. On the one hand, we prize and we defend individual privacy. And on the other, democratic processes must be transparent and public and seen to be transparent and public.

One of these processes of course is a public commission of inquiry and the jurisprudence is now unquestionably and conclusively established that as between these two values the onus of demonstrating primacy in any particular circumstance is on those who would restrict full and unalloyed – Mr. Bindman – publicity and transparency.

Il est de jurisprudence tout à fait constante qu'entre ces valeurs conflictuelles, primauté doit être accordée à la publicité et à la transparence.

That is the "toile de fond", the canvas against which arguments will proceed today. I've reviewed all of your written submissions and I thank you for them and I look forward to hearing from each of you. You will have seen before you - I think they've been distributed - a publication ban that I make this morning and which will remain in force until I render my decision on the matters that occupy us today.

Une ordonnance de non-publication est en vigueur et a été placée ici et là dans la pièce.

Now, you've also been provided with an order of proceedings for the day. That need and of necessity will not be rigidly adhered to by reason of the circumstance I mentioned previously. Do any of the participants have any comment about that proposed agenda?

Est-ce que vous avez des commentaires se rapportant au déroulement des procédures aujourd'hui?

MR. JACOBSEN: Mr. Commissioner, I had put my submissions together on the basis of making one global submission with respect to freedom of expression etcetera. If we're going to do it two separate, I'll have to do it twice, which I think I need to give both parties access to it. It might be a bit cumbersome. So, I just warn you that you can turn off your hearing aid if you have one for the second part of the submission.

MR. COMMISSIONER: Thank you. Anyone else have any comments before we start? Thank you. We'll begin by hearing from Mr. Doody, Commission Counsel.

MR. DOODY: Thank you, Mr. Commissioner.

OPENING REMARKS BY MR. DOODY

I propose not to make submissions, Mr. Commissioner, because that's not our role, but rather what I do propose is to outline the particular issues in which Commission Counsel is interested that we would like Counsel for the Applicants to address.

I will go through what we're interested in hearing from both applicants, although Mr. Fabris is not here and we'll have to repeat that, but I think it may be of some utility for other counsel to hear what we would expect to hear from Mr. Fabris.

So firstly, from Mr. Fabris on behalf of Eastwood, Robert and Levon Nazarian, we are interested in hearing particulars as to how the particular information in question for which he seeks a confidentiality order would, if made public, harm the commercial interests of his clients. That is, how explicitly would there be harm to the commercial interest and what is the evidentiary basis for that. That's what we're interested in, in the first part from Mr. Fabris.

Similarly, on an initial basis from the Professional Engineers of Ontario, we're interested in, firstly, why notice to anyone to whom the information in the documents relates is

required when no such practice appears to have been followed by courts considering a sealing order or a confidentiality order of the type sought here.

And I should pause there and say while the Commission Counsel have not concluded - and of course you have not concluded, Commissioner - that there is an obligation to serve and provide notice to the persons who the PEO has asked us to provide notice to, I can indicate that we have provided notice to the people set out in paragraph seven of the submissions of the PEO, on page four of their submissions.

And with the knowledge that these names are subject to the publication ban that you just announced, Commissioner, I can indicate that the following individuals were provided by courier with notice of these applications, Messrs. Kadlec. That's in subparagraph 7(a)(ii). And then, in subparagraph 7(a)(iii), the following complainants, Nasir Ahmad, Vilen Zlotnikov, Christopher Hart, L.

Grant Boundy, Robert Wilson, and Kevin Brown.

So, those individuals have all been provided with notice of this application by courier, along with a letter that indicated that if they wished to make application to be heard at this hearing, they were to contact us. We have heard from two of those individuals, neither of whom asked for the right to be heard. We've not heard from the others. Of course, Messrs. Wood and Saunders, whose names are also in 7(a)(ii), know of this because they are participants and have counsel here representing them.

We have not provided notice to anyone in the class outlined in 7(a)(iv), that is, anyone else to whom information contained in any of the confidential documents relate.

So, as I've indicated, Mr. Commissioner, the first thing we're interested in from the PEO is their submissions on why notice to anyone

else to whom information contained in any of the confidential documents relates is required when that appears not to have been the practice followed by courts considering such applications.

Secondly, we're interested in hearing from the PEO how the information in the documents which they seek to have covered by this order will harm an important public interest if, firstly, they are released to the participants to the inquiry pursuant to an obligation to use those documents only for the purpose of the inquiry, an undertaking which is deemed to have been given pursuant to Section 12 of the *Public Inquiries Act*, and then secondly, subsequently filed in the public hearing if you determine them to be relevant at the time of tendering.

So, on a preliminary basis, that's what we're interested in from the PEO.

And then, from both counsel for both applicants, we're interested in how the

order sought will prevent a serious harm, serious risk rather, to an important public interest, and secondly, how the salutary effects of the restriction on release of the information outweigh the deleterious effects on the rights and the interests of the parties and the public.

From our perspective, Mr. Commissioner, that's what we're interested in hearing from today and that's all I have to say.

MR. COMMISSIONER: Thank you, Mr. Doody. All right. We'll start with the PEO's submissions, Ms. Ritacca.

MS. RITACCA: Thank you, Mr. Commissioner.

SUBMISSIONS BY MS. RITACCA

I'd like to in my arguments this morning address three issues broadly. I hope to address the questions raised by your counsel in my submissions, but I will deal with them specifically at the end if I haven't.

Our position, the PEO's position is set out largely in the submissions filed in November, as well as the reply submissions provided late last week. The three issues that I'd like to deal with are as follows.

One, I would like to start with clearing up what appears to be some confusion surrounding the PEO's request and the reasons for the request.

Two, address what steps the Commission with the PEO's assistance has already taken. And Mr. Doody has done that in large measure, but I'd like to take you through what has already taken place to fulfill the PEO's that notice be provided to at least some of the Affected Persons.

And three, I would like to address what the PEO submits still needs to be done before the Commission makes any further decisions regarding the public release or use of the confidential documents.

So, starting with the first issue, Mr. Commissioner, the PEO has complied with its obligation to produce. This is set out in both our submissions and our reply submissions in response to the Commission's Summons to Produce.

Back in September of this year, the PEO produced on an unrestricted basis all non-privileged documents which were not covered, we say, by Section 38 of the Home Statute. And those are the documents that I think in some places in our submissions we call the public documents. By way of example, those would be copies of the exhibits filed in the public record during discipline hearings, which were public, public discipline decisions and the like.

Also in response to the summons from the Commission, the PEO provided the Commission with full and un-redacted access to those non-privileged documents which we say are normally protected by the confidentiality provisions of Section 38 of the *Professional Engineers Act*. Those are

the documents that are referred to throughout as the confidential documents. Those sort of broadly are documents that contain information not otherwise publicly available.

And as you may know, Mr. Commissioner, the list of confidential documents has been now reduced by approximately 22 productions and your counsel were able to determine that those 22-odd productions were already publicly available either in the PEO's public documents or in another participant's productions.

So, on my count, we have about 100 documents or productions that remain in issue. But given that notice has now been given to two of the categories of people that we say require notice that number may in fact even be smaller or could get smaller still.

And contrary to the submissions of many of the responding parties, the issue before you, with respect, is not the same issue that was facing Commissioner

Goudge with regard to the CPSO's resistance of complying with a summons from that commission. And the CPSO, as you know and are no doubt familiar with that decision, took the position that the confidentiality provisions in its Home Statute, the *Regulated Health Professions Act*, required that it not even comply with the Summons to Produce.

And so, the CPSO moved for directions in front of Commissioner Goudge, arguing that Section 36(3) of their Home Statute prevented them from producing documents or information. Ultimately, the Commissioner in that case determined that the provisions of the RHPA did not prevent the registrar and the CPSO from complying with the summons.

I think it's important to distinguish the case, the two cases, the two circumstances. Commissioner Goudge's conclusions, I submit, sir, relate to a threshold issue. That is, whether production can be made in light of the

confidentiality provisions of the enabling statute, in that case the RHPA, and not, with respect, to the issue of disclosure or further public dissemination or use of the documents in questions.

The PEO has never taken the position that it was not required to comply with the Commission's summons. The PEO recognizes the authority of this Commission to require documents be produced and information be provided as set out in the *Public Inquiries Act* 2009.

I would like to take you to that Act, if I can. I think it's in a number of spots. It will be at tab one of my document brief – sorry – tab two. You may have it in a handier place. Have I led you astray?

MR. COMMISSIONER: No. Go ahead.

MS. RITACCA: All right. So, the PEO accepts that under Section 10(3) in particular of the legislation that the Commission has this extraordinary summons power and that these powers

supplants the confidentiality provisions of the *Professional Engineers Act* vis-à-vis the requirement to produce to the Commission.

However, I submit to you, sir, that you must read Section 10(3) in context and look to Section 10(4), which I say is the section that the legislature has included in this statute to temper the impact of the summons power, which explicitly recognizes that issues of confidentiality remain an important issue and may require orders or directions from you, Mr. Commissioner.

If I can just read subsection 10(4):

> "A commission may impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information."

That is consistent with what happened in earlier commissions of inquiry before this legislation was enacted and it is consistent, we say, with striking a balance, the very balance that you

indicated in your opening statement this morning, between the Commission's obligation to fulfill its mandate in a public and transparent manner and the obligation to ensure fairness to the inquiry participants and to those persons to whom the confidential documents relate.

The Process for Notice that the PEO is requesting respectfully, Mr. Commissioner, is, we submit, consistent with the confidentiality requirements set out in the PEO's Home Statute and at the same time will not, does not thwart this Commission's ability to proceed fairly and transparently.

The second issue I wanted to clear up so that there is no confusion. The PEO has no independent claim of confidentiality over the documents or information contained in the documents at issue.

And again, we saw this time and time again in the written materials of some of the respondents, this application

before you, sir, is not an effort by the PEO to maintain secrecy over its processes to protect its members or to protect the confidentiality of its work.

The confidential documents as we've set out in our submissions are those documents collected by the PEO and its staff and employees in the course of fulfilling its mandate.

Section 38(1) of the *Professional Engineers Act* makes clear that those engaged in such work must maintain as confidential all information received in the course of their duties except where the disclosure is required in connection with the administration of the Act or the *Architectures Act* or in connection with a proceeding under either of those Acts.

And if there's any doubt as to the intent of Section 38(1), I can take you to the comments of Justice Boland in the *Watson and Boundry* decision.

Again, I have it at tab four. I hope you do too.

MR. COMMISSIONER: Yes. Thank you.

MS. RITACCA: And at paragraph 5 of that decision – sorry, I should just back up for a moment – this is in the context of a civil proceeding where the plaintiffs sought to have the defendants answer certain questions that were refused on discovery and produce certain documents in relation to a complaint filed with the association about the plaintiff, who is an engineer.. So, at paragraph 5:

> "Having considered all of the material and the submissions of counsel, I am satisfied that the wording of section 38 is clear and unambiguous. It simply prohibits an order compelling the defendants to give testimony or to produce any book, record, document or thing in any action or proceeding with regard to information obtained in the course of the defendants' duties, employment, examination, review or investigation under the Act. Section 38 expresses a clear intent on the part of the legislature to protect the investigation and deliberation process of professional regulatory bodies. It promotes full and

> impartial investigation and sensibly ensures the confidentiality of the complaints and the independence of investigators and decision makers. It protects the operation independence and goals of the APEO. An order to answer questions on discovery related to their investigations and work for the APEO, would undermine the purpose of the section."

Now, in the submissions filed by the families of the victims, Mr. Commissioner, there was an argument raised that Section 38(1) is only intended to address voluntary disclosure and not where disclosure is ordered by the Court.

With respect, I don't think that that position is borne out by Justice Boland's comments in the *Watson* case, but also - and I can just tell you the cites for this if you don't want to turn it up – but the decision of *Niagara South Condominium Corp*, Justice Quinn, which is found in the submissions of the Media Organizations, on this....

MR. JACOBSEN: It's in our tab 3, Your Honour.

MS. RITACCA: Thank you, Mr. Jacobsen.

MR. COMMISSIONER: I see it.

MS. RITACCA: You see it. Thank you. And particularly at paragraph 20, 22, starting really at paragraph 19, the prohibition in the legislature is clear and Justice Quinn takes a very similar position as the Court does in the *Watson* case.

So, it's not as my friends suggest only a prohibition on voluntary disclosure.

MR. COMMISSIONER: Justice Boland in *Watson and Boundry* speaks repeatedly of privilege. I take it he's referring to that in a very broad sense and not in the sense in which we normally understand that term.

For example, in the second paragraph of his decision, he says the APEO claim privilege for a number of documents. He repeats the expression "privilege" in paragraph seven, that the APEO shall not be required to disclose any

documents for which privilege is claimed.

Now, was he talking about privileged documents or was he simply using that expression to reflect Section 38?

MS. RITACCA: As I read it - and it may be that's the word that the parties before him used – but as I read it he's using that word as it relates to the requirement for confidentiality under Section 38 and not as a solicitor-client privilege.

MR. COMMISSIONER: We're not dealing here with privileged documents at this point.

MS. RITACCA: No.

MR. COMMISSIONER: And I take it he was not either. Perhaps it's a misnomer or he uses the wrong expression.

MS. RITACCA: Right. And he's speaking about two employees of the APEO and we know one of them named here we know was an investigator not a lawyer. I don't know the identity of the other one, but presumably he's talking about keeping confidential information that would be protected under Section 38(1) and not

protected by virtue of some other privilege.

MR. COMMISSIONER: Yes.

MS. RITACCA: Certainly, that's my position on that case in any event.

Now, Mr. Doody in one of his questions posed to my client he asked how the information in the documents will have – I'm sorry – the release of the documents will harm an important public interest.

I think if we look at Justice Boland's remarks with respect to the importance of promoting investigative secrecy and promoting impartial investigation, where parties who provide information to the PEO or recipients of information under the umbrella of confidentiality need to have confidence in that process, I submit to you, sir, that the PEO relies on the voluntary cooperation of complainants and others and its professional members in fulfilling its investigative functions.

I think we've included in our submission as well the point that unlike some other professional associations or professional regulated bodies, engineers are not obligated to comply with an investigation. So, the voluntariness and the confidentiality of the process is a very important interest for the PEO.

MR. COMMISSIONER: That may be so. Are you in a position to identify the specific documents that you allege challenge that particular value? Quite a number of documents have been filed. Do they all relate to investigative secrecy, voluntariness, and informant protection?

MS. RITACCA: I can't say with any certainty that they all relate to informant secrecy. They are all from investigation and complaint files. That's where they're housed. That's how the PEO takes custody of them.

MR. COMMISSIONER: All right. Well, putting it in another way, which documents specifically deal with informant protection? They may not all, you can't say, but you must be

able to identify specific documents that you seek to exclude in order to protect the value you speak of.

MS. RITACCA: So, let me just back up. We're not seeking to exclude any of the documents. We are asking this Commission to provide notice to people who may have other people who may have an interest in the documents.

MR. COMMISSIONER: Are you restricting yourself to that?

MS. RITACCA: Yes, absolutely.

MR. COMMISSIONER: All right.

MS. RITACCA: We are not seeking to exclude. It is not the PEO's position, not the PEO's role to take an issue on particular documents.

In answer to your specific question, I can tell you that the list that we were able to come up with, at paragraph 7 of our submissions, the list of I think we've called them the complainants, we were able to get those peoples' names from the complaint files, which include documents described by their phone calls or letters received from specific complainants.

So, that would be sort of one category of documents that would exist in the confidential documents that may contain information about parties who are not before you here and who haven't had any notice.

MR. COMMISSIONER: Whose responsibility is it to determine who these unnamed individuals are? We, I think voluntarily, Commission Counsel have contacted those individuals that you've mentioned and received no objections, but who is in a better position to identify the individuals, the "anyone else's" that you refer to you in your submissions and why is that not your responsibility?

MS. RITACCA: Well, I would say in the first part of your question is who is in the best position to identify, and I think as we've laid out in our reply submissions we are happy to do best efforts, make best efforts to identify the remained Affected Persons.

MR. COMMISSIONER: Why has that not already been done?

MS. RITACCA: Well, why has this not already been done? Well, the process has been ongoing. The confidential documents list has shrunk already by 22 productions. It may in fact shrink more depending on the position taken by some of the Affected Persons that are present.

But it really down to a timing issue, Mr. Commissioner. The PEO has moved as swiftly as possible in responding to the summons in September, moving before you on this issue, and in the meantime gathering as many names to deal with paragraph 7(a) (1) and (2).

MR. COMMISSIONER: Having done that you couldn't come up with anymore at that point?

MS. RITACCA: Well, we haven't tried. We haven't sort of completed that process.

MR. COMMISSIONER: I mean the summons went out in September. Here we are in December.

MS. RITACCA: Well, in terms of who's...the original response to the summons was that these are protected

by; you know we believed that the documents were protected by Section 38(1). We have concern that people have to have notice of that. And then, there's been sort of a continuous exchange with counsel. I'm not sure that the delay can lie at the feet of the PEO.

MR. COMMISSIONER: I'm not trying to impute delay. I'm just asking whose responsibility is it to identify these individuals and why is it that we don't have a list of other individuals? I take it you've made some significant efforts to identify the people you've named.

MS. RITACCA: Well, we certainly have tried to identify categories of documents that may have the names of individuals who would be Affected Persons, as we've defined them.

As we said in our submissions we're prepared to undertake to do that. We've given a timeline and obviously will take whatever direction or order that you, Mr. Commissioner, make today or shortly after today on the timing.

But once the people are identified, in terms of giving notice, it is the PEO's view that notice should probably be given by the Commission since it's the Commission's intention to disseminate or otherwise use the documents.

MR. COMMISSIONER: All right. You can move on.

MS. RITACCA: Thank you. The notice process, sir, that the PEO is advancing here we say ensures a very minimal and cautious approach to any encroachment on the presumptive confidentiality of Section 38 that we say attaches to the documents.

And ultimately, and I think I've said this now but I'll say it again, ultimately, whether there is any opposition or argument advanced by an Affected Person with respect to a document or categories of documents is really of no moment to the PEO. We have no independent interest in the confidentiality of the documents or in the information they contain.

The third point I want to make on clearing up some issues. The process urged by – I'm sorry, I'll speed up my time here – the process urged by the PEO does not offend the open court principles developed in the case law.

And the notice that we're seeking for the Affected Persons does not amount, contrary to what my friends have said in their submissions, to a blanket order of confidentiality and does not offend the presumption of open courts that have developed in the cases both in the courts and in cases of public inquiries.

In most of the cases cited by my friends opposite, there is a party or parties seeking to conceal or otherwise keep secret documents or information that is about to be or has already been made use of in a court proceeding. And that's not what the PEO is urging upon this Commission. That's not what we're asking for here.

Also, in virtually all of those cases the interested parties are before the Court, including the media. And it's those parties, we say, who are in the best position to address whether or not any sort of confidentiality has to attach to the information or documents at all.

The Supreme Court in many of these cases, including Justice Iacobucci in *Mentuck* and Justice Fish in *Toronto Star*, emphasize that any approach to these kinds of applications or requests for confidentiality or public bans must be a context-specific approach. That, as I understand it, means one that needs to be applied flexibly and not in a mechanic-listicaly sort of way.

The approach that the PEO is urging upon you with respect, sir, in this context we submit will in fact enhance openness and transparency of the inquiry process.

And if I could just address a couple of the cases cited by some of my friends,

in the interests of time, I won't necessarily take you to them. Justice Hughes decision on a publication ban in the Sinclair Inquiry again was cited by Mr. Jacobsen. I don't have a tab number because I didn't get a brief of authorities.

MR. JACOBSEN: Actually, we did send you it electronically.

MS. RITACCA: That's okay. In any event....

MR. COMMISSIONER: That's Mr. Justice Hughes in the Phoenix Sinclair case? Is that the one you're referring to?

MS. RITACCA: Yes, that's the one.

MR. COMMISSIONER: That's the one. I think that's a tab nine, right? All right. Go ahead.

MR. JACOBSEN: Tab eight.

MR. COMMISSIONER: Oh, tab eight, yes.

MS. RITACCA: So, Justice Hughes in that inquiry is being asked to make quite a broad sweeping publication ban with regard to the names of certain witnesses at the hearing. Ultimately – I don't know that this is much issue here today – but ultimately, he grants some of the requests, but not others.

I'd like to take you to paragraph 85, if I can, of that decision, which is at page 24 of 57. He says, and I think there's no argument here that hearings such as these are presumptively public. He's citing Ruel in his text *The Law of Public Inquiries in Canada*:

> "that as a starting point, unless the publicity of the proceedings is mandated under legislation, a government may create an inquiry that will not be public or will only be partially public. However, once an inquiry is created with no specified limitation on publicity, as is the case here, the inquiry should presumptively proceed in public. That said, the general power of the Commissioner to control his proceedings will include the discretionary authority to make appropriate orders where necessary to protect the rights of those affected by the inquiry, including ordering an *in camera* hearing, a publication ban, or other confidentiality orders. Such confidentiality measures will need to be carefully tailored and restricted as much as possible in order to preserve the freedom of the press."

In Ontario, this discretion I submit to you is codified in Section 10(4), which I've already taken you to, also in Section 14 of the Act, which allows you to order some parts of the inquiry closed to the public, and also in your Rule 17.

I submit that Justice Hughes' cautious balancing approach in his ruling is consistent with the approach recommended by Justice Cory in the Westray Mine decision. I think everyone has cited it. In our brief, it's at tab 13. I'll take you to paragraphs 175 and 176.

MR. COMMISSIONER: What paragraph in your brief?

MS. RITACCA: Staring at 175.

MR. COMMISSIONER: I'm sorry, I'm missing you.

MS. RITACCA: You're missing tab 13?

MR. COMMISSIONER: Tab 13? This is 13 in your materials?

MS. RITACCA: Yes, so it should be in there.

MR. COMMISSIONER: It's probably there somewhere. Go ahead.

MS. RITACCA: Okay. I've given you the cite and I'll just read it out here.

MR. DOODY: Mr. Commissioner, why don't I give you mine so you can follow along.

MR. COMMISSIONER: I probably have it. I've just got too much paper up here. Thank you, Mr. Doody.

MS. RITACCA: So, we're at paragraph 175, the last sentence in 175:

> "It is the commissioner who must be responsible for ensuring that the hearings are as public as possible yet still maintain the essential rights of the individual witnesses.
>
> On the other hand, when relief is sought upon the basis that to continue with current inquiry proceedings without any restraint will prejudice a subsequent criminal trial, it is arguable...."

And he goes on to sort of deal with the specific issue there. And then, just turning over the page, starting at "it must be remembered", the second sentence on the top of the page:

> "It must be remembered that publicity bans, *in camera* hearings

> and other protective measures are exceptional remedies which will rarely be ordered on the basis of a prospective breach of s.11(*d*).
>
> [So, obviously not an issue here]
>
> In an inquiry, it is the commissioner who should first determine whether such exceptional orders should be issued. The authority to make those orders derives from and relates to the conduct of the inquiry hearings. This authority should be given a reasonable and purposeful interpretation in order to provide commissions of inquiry with the ability to achieve their goals.

And consistent with that caution I submit that public and transparent process of this inquiry is paramount, but not at the expense of essential rights of the individuals.

MR. COMMISSIONER: Whose identity we don't know.

MS. RITACCA: But whose identity will very easily be known once the documents are publicly disseminated.

And without taking you there, Mr. Wood's counsel's brief cites Justice Binnie in *Consortium Development*, who

offers the same warning. Actually, I will take you to that. I'm sorry. I misspoke. This is in Mr. Wood's brief, paragraph 41.

MR. COMMISSIONER: Which tab?

MS. EFFENDI: If I may, Mr. Commissioner, it's at tab four of your binder.

MR. COMMISSIONER: Okay. Paragraph?

MS. RITACCA: Paragraph 41. MR. COMMISSIONER: Yes.

MS. RITACCA: So, staring with the second sentence:

> "Unlike an ordinary law suit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of commission counsel what the documents will show, what the key witnesses will

> say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information, involvement, and exposure. It is a tall order to ask any Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants."

If I can take you down five lines from the bottom of that paragraph:

> "Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no *lis* between the participants."

The process order that is still being sought by the PEO, Mr. Commissioner, we say will help ensure this Commission can freely further the public interest of getting to the truth in these matters in a public and transparent way without risking unnecessary damage to the essential rights of the Affected Persons. We say that the process

strikes the appropriate balance between the interests of the public and the interests of the Affected Persons.

The Media Organizations have argued that the process that the PEO is seeking will essentially bring the inquiry to a screeching halt. It's unwieldy. It's onerous.

With respect, we submit that suggestion is just not reasonable. There's been no suggestion that this will be particularly time consuming or that any such process will interfere with an already established schedule. We're not at the eve of public hearings. As I understand, we don't have a start date for the public hearings.

In any event, it's the media that are often the beneficiary of court orders requiring notice prior to decisions being made about publication or confidentiality orders. So, with respect, I find it odd that they are now arguing against providing notice.

Now, I'm going leave my second issue as to what we've done because I think Mr. Doody's fairly set out the fact that notice has already been made to two categories of parties.

The only thing I would say is I would submit that the process that the Commission undertook with regard to those two categories wasn't, in my view, particularly onerous nor did it take up extraordinary amounts of time.

Also what's been done that Mr. Doody didn't deal with directly is that the Counsel for the Participants and Counsel for the Media now have had a chance to look at the confidential documents and here to make submissions, if they choose.

The PEO certainly leaves it to the other participants that are here, and in particular counsel for Mr. Wood and Mr. Saunders, to make submissions with regard to whether or not additional safeguards are required or disclosure shouldn't be made or what have you.

I'll address finally my third issue that I wanted to deal with today. We've really been dealing with this throughout, which is what we say is left to do, Mr. Commissioner.

So, going back to our original submissions and that third category of participants, to date notice has not been provided to that third category of individuals. And the PEO submits that prior to any public dissemination of the confidential document the requested notice ought to also be provided to this last group of Affected Persons.

Again, we don't think that this process would be overly complicated. I know you pressed me a little bit on this, Mr. Commissioner, and I'm not trying to evade your question. While we're not in a position to estimate how many more people this would be or how many more parties would fall under this category, given that there are only 100 documents we're talking about and given the steps that we've already taken, we believe

that the number is certainly not large or unwieldy.

And just by way of example, I won't take you to this. I did provide my friends with a number of document ID numbers yesterday. These are examples of some of the confidential documents that we say contain information, identifying information, about Affected Persons who would not otherwise be involved in this process and would not otherwise be notified that their documents might be used by this Commission.

And these are letters that went out to a number of individuals whose projects were relied upon and discussed by a discipline panel in an *in camera* proceeding with respect to Mr. Kadlec.

As a result of the reports filed with this panel in an *in camera* hearing, Mr. Kadlec's certificate to practice was revoked at the time. As part of the terms of the penalty, the discipline panel ordered the registrar to notify

these individuals that Mr. Kadlec's licence was revoked and that a report was filed in an *in camera* hearing about a project that related to them and a project on which Mr. Kadlec provided engineering services.

MR. COMMISSIONER: Why didn't you include those names in your "anyone else" in the submissions?

MS. RITACCA: This is something that's come up that we've discovered between the filing or our submissions, certainly between the filing of the November submissions and today.

So just finally, by way of summary, it's the PEO's submission that it has the statutory obligation to raise the issue that it has here and to preserve the confidentiality of the information protected under Section 38. In requesting that notice be provided to the Affected Persons, the PEO is simply discharging its obligations under the PEA.

And, sir, in your opening address in August you acknowledged that for

Commissions of Inquiry to be effective and receive cooperation, they must be perceived as being completely fair to all and that that would be one of this Commission's overriding objectives. With respect, the process that the PEO urges upon you now we say is consistent with that stated objective.

And again, I repeat the PEO does not take a position as to how the Commission should deal with the individual documents or the information contained therein or whether any of the documents are relevant to the inquiry process. We leave that to others.

We have acted always in furtherance of our statutory mandate. The PEO will continue and remains committed to cooperating with you, Mr. Commissioner, and to giving whatever assistance and cooperation to your counsel.

Subject to any further questions for me, sir, those are my submissions.

MR. COMMISSIONER: Thank you very much, Ms. Ritacca.

Is it at this point that you were suggesting we take the break, Mr. Doody?

MR. DOODY: If that would be appropriate in your eyes, Mr. Commissioner.

MR. COMMISSIONER: We'll see if we can find out where Mr. Fabris is at. Let's take five minutes at this point.

R E C E S S . . .

H E A R I N G R E C O N V E N E S

MR. COMMISSIONER: Sit down, folks. Is Mr. Jacobsen still out there? In any event, you can tell him what I'm going to tell you now. There's no big problem.

Mr. Fabris will be available in half an hour, by telephone, which will give us an opportunity to see if we can set something up. He's willing to participate by telephone. So, I think it's worth waiting the half hour rather than complicate matters. We'll just

give you more time at the backend if necessary.

I see, is it Mr. Subramaniam? I'm sorry, sir. You walked in and I was told of your presence by Ms. Effendi. You're here representing Mr. Oatley are you, sir?

MR. SUBRAMANIAM: Yes. That's correct, co-counsel.

MR. COMMISSIONER: And for ELMAC?

MR. DOODY: No, for the victims' families, for the families of the victims.

MR. COMMISSIONER: For the victims' families, yes.

MR. SUBRAMANIAM: That's correct.

MR. COMMISSIONER: All right. Do you wish to make comments before we go any further?

MR. SUBRAMANIAM: My submissions are just....

MR. COMMISSIONER: I don't want to hear your submissions now, but just if you have any preliminary comments.

MR. SUBRAMANIAM: No, I just wanted the voice of the victims' families to be...Thank you.

MR. COMMISSIONER: All right. Thank you. We know you're here.

MR. SUBRAMANIAM: Thank you.

MR. COMMISSIONER: So, we'll see Madam Clerk if we can get one of those phones organized. We'll be dialing out to Elliot Lake.

THE COURT CLERK: Okay. I'll see if I can get the equipment.

MR. COMMISSIONER: So, let's take a half hour and see.

R E C E S S . . .

H E A R I N G R E C O N V E N E S

MR. COMMISSIONER: Mr. Fabris, you're online?

MR. FABRIS: I am.

MR. COMMISSIONER: You can hear me?

MR. FABRIS: I can hear you.

MR. COMMISSIONER: This is Commissioner Bélanger.

MR. FABRIS: Oh, good morning, sir.

MR. COMMISSIONER: Good morning. We can hear you nice and loud and clear. We're sorry to hear about your predicament. That's one of the joys of

living where you do and practicing where you do, I suppose.

MR. FABRIS: Well, it was lonely at the airport yesterday.

MR. COMMISSIONER: I'm sure it was.

MR. FABRIS: I apologize. I apologize to you, sir, and the Commission and my fellow counsel for not being there, but I did try.

MR. COMMISSIONER: All right. We've already heard, I think as Mr. Doody mentioned to you, we've already heard from PEO and we've heard their submissions. You were first on the list, but we thought that you wouldn't mind if we let Ms. Ritacca for PEO go ahead before you. Are you prepared to make your submissions now, sir?

MR. FABRIS: I am, Your Honour.

MR. COMMISSIONER: All right.

MR. FABRIS: First of all....

MR. COMMISSIONER: Just hold on for a second, please.

MR. DOODY: Mr. Commissioner, perhaps before Mr. Fabris begins I should go through what I indicated this morning that Commission Counsel was interested

in hearing from him about just before he begins.

MR. COMMISSIONER: Can you hear Mr. Doody, sir?

MR. FABRIS: I can very well.

MR. COMMISSIONER: All right. Thank you.

MR. DOODY: Thank you. So, Commission Counsel, Mr. Commissioner, are interested in hearing from Mr. Fabris with particulars as to how the particular information in question that he's seeking to have covered by the confidentiality order would harm the commercial interests of Eastwood and Robert and Levon Nazarian.

And in addition to that, we are interested in hearing from him on the second point, which really consists of two parts. The first is that how the order which he's seeking will prevent a serious risk to that important public interest that he will have identified relating to the commercial interests of his clients.

And second, how the beneficial effects of the restriction on public access outweigh the deleterious effects on the rights and the interests of the parties and public to access to what evidence is led and used by this Commission of Inquiry.

So, those are the issues that we're interested in hearing from Mr. Fabris about.

MR. COMMISSIONER: And just before we hear from you, Mr. Fabris, I just want to caution again everyone here of my order for non-publication. I haven't actually said it, but it's laid out pretty well everywhere in the courtroom. So, Mr. Fabris, I've made an order that none of this evidence can be published, broadcast, or otherwise disseminated until such time as I make a further order.

That being said, sir, go ahead. I have before me your brief and the floor is yours.

MR. FABRIS: Thank you, Mr. Commissioner.

SUBMISSIONS BY MR. FABRIS

Certainly to limit my submissions, I can tell counsel and the Commission that we are conceding. After review of some of the materials with my client and fellow counsel, we will be conceding that some of the documentation that's listed in the tabs, specifically the corporate financial records of Eastwood Mall, Eastwood Mall Inc., they are relevant to the inquiry.

My understanding is that these documents were part of the production order for the Ontario Provincial Police as well as the summons for the Commission. We do concede that these documents would be relevant to getting to the truth of the matter.

Having said that, there are associated affidavits with those financial records, specifically the affidavit of Fabio Brussolo, Sam Hurmizi, and Robert Nazarian, which were attachments to

those financial records which certainly we have...contain nothing of value, so to speak, apart from conceding that the records that were submitted were accurate and were the actual records that were given to CRA.

So, that takes care of a number of documents that the initial claim of confidentiality was put up for.

The second part of my argument deals specifically with the demolition contract. Now, this is a contract that was signed after, a very recent contract that was signed after the collapse of the mall. It deals with a third-party contractor.

Now, certainly the prejudicial effects against this third party may be great in that the demolition hasn't commenced. It's due to commence shortly. The publication of this otherwise private document will certainly hinder this individual in a commercial aspect and probably that of the Eastwood Mall as well in obtaining

subcontract or sub-trades to aid in the demolition.

I know that one of the parties that we're currently in negotiation with is the City of Elliot Lake in respect of tipping fees. I think that that might, it certainly might give an unfair advantage to anyone that we're negotiating with at the end of the day if they know the terms of the contract.

Certainly I don't believe that it's relevant to the cause of the collapse or any of the getting to the truth of matter after the fact. This is after the fact.

So, that's pretty well the argument with respect to the contract, which brings us to the final block of documents. And those are the personal financial records of Robert Nazarian, which includes his CRA Notice of Assessment and tax returns from 2007 onwards to 2011, as well as Royal Bank account statements and the financial records of Levon Nazarian.

Both parties have been summoned as witnesses to the Commission. Both parties will testify. There are a number of questions that have been put forward by the respondents as to the corporate structure, the position of either party in terms of directorship or executive-ship of the corporations. That will be answered in due course certainly by both witnesses.

Nothing in the personal tax returns is relevant and could be seen as relevant to the collapse of the mall. If there are allegations that transfers were made or large sums were transferred, that will be shown through the financial records of Eastwood Mall.

And as for the written submissions, there is an underlying assumption that personal tax returns have a certain high degree of privacy with them. I certainly follow that line of thought.

All of the tests that my learned friends have put in their briefs

certainly look at the question of relevance. Is it relevant? My respectful submission is that it's not.

What can we gain from those personal financial records to the mall? Personally, I don't see what can be obtained. If the allegations are that there were large money transfers that will be seen through the corporate. If there are questions with respect to structure that will be answered by the witness through the corporation.

We're dealing with a corporation. The owner of the Algo Mall was Eastwood Mall. That's the corporation, the corporate entity that is the centre of this Commission. The two individuals, Levon Nazarian is not a shareholder or an executive of Eastwood Mall, Bob Nazarian is, very little can be added to the Commission by the addition of these personal financial records.

I'm not sure how counsel can tie in the personal tax returns of either Levon or Bob to the Commission to make them

relevant. I'm somewhat at a loss for that. Given that both parties will be testifying, I think that if there are any questions with respect to personal finances they certainly can be addressed at that time.

I don't have much more in terms of submissions, Mr. Commissioner, fellow counsel. Basically, it's three-part submissions. I do concede on the corporate financial records. And as to the other two parts, I leave it to Mr. Commissioner to make his decision.

MR. COMMISSIONER: Thank you, Mr. Fabris. In respect of certain documents, you're seeking a blanket exclusion; in particular, let's say the income tax returns. Now, assuming but without deciding – I want to make that quite clear – but assuming that eventually I'm predisposed to deny your request, there may nevertheless be parts of documents that would justify redaction.

For example, I note that in Mr. Robert Nazarian's income tax returns mention

is made of his spouse's particulars and contains information like social insurance numbers. They may contain information like telephone numbers and addresses.

As a fallback position - and again I underscore that I'm not deciding the issue, but I'm simply anticipating one of the possibilities – as a fallback position have you considered what parts of the individual documents that are before me would justify redaction in some way?

MR. FABRIS: Well, certainly social insurance numbers, addresses, telephone numbers, the type of personal information that would not be generally available to the public.

MR. COMMISSIONER: I take it that's as specific as you can make it at this point.

MR. FABRIS: At this point, yes.

MR. COMMISSIONER: All right. Thank you. I take it then that is the sum of your submissions, Mr. Fabris, at this point?

MR. FABRIS: It is, Your Honour.

MR. COMMISSIONER: Thank you. Do you wish to remain on line?

MR. FABRIS: I'd like to listen to what my friends have to say.

MR. COMMISSIONER: I tried to make it cheaper for you by having us call, but the way these phones are set up in this particular courtroom, indeed in all of the courtrooms, we can't call out, we can only get in.

MR. FABRIS: That's fine. That's fine.

MR. COMMISSIONER: All right. So, we're sorry about that. Thank you very much then.

We'll move on now and hear submissions by Mr. Bisceglia in relation to Greg Saunders.

MR. BISCEGLIA: Thank you, sir.

MR. COMMISSIONER: Yes. Go ahead.

SUBMISSIONS BY MR. BISCEGLIA

The submissions that we made in writing to you, sir, were made prior to having received disclosure and production of the documents submitted and provided by PEO to the Commission. Having reviewed

those documents on behalf of my client, I can advise you that we take no objection to those documents having been provided and being in possession of the Commission and Commission Counsel.

As I indicated in our written submission, in large measure my client had already provided that to the investigators, including Ontario Provincial Police, and to the Ministry of Labour and to others who questioned him with respect to this incident.

Having said that however, my concern with respect to the matter is the issue that now arises from the application being brought before you today because as part of the process and arising from PEO's application is those documents have been produced and provided to counsel who are participating in this application or motion.

It's my respectful submission that while they have been provided and disclosed to the participants or

participants' counsel, they do not form part of the record and they do not form part of these proceedings for you, sir, as Commissioner, to make a decision.

The issue before you from PEO is in essence to seek a directive or direction as to what use, if you will, or whether or not the Commission can provide disclosure of these third-party records or these records in the possession of the PEO without notice to those individuals that may have either given information or given statements.

That is a question that can be answered without reference to or without looking at, if you will, the actual documentation.

Put another way, the question as I see it that's being directed to you by PEO is whether or not under Section 38 of the *Engineers Act* the Commissioner should be required when exercising the authority under the *Public Inquiries Act* to provide notice to these other individuals.

And to put it in even simpler terms, I indicated in my submission to you there is a paramountcy argument here. I don't think there is a paramountcy argument. I believe that having issued the summons you're entitled to receive the documents and the information and then it is up to Commission Counsel with the Commission to determine the relevancy and what happens with those documents.

The point that I'm trying to make is that the open court principle or the Dagenais/Mentuck test with respect to the matter before you really does not come into play.

A Commission of Inquiry involves a series of steps or phases. After it has been established by the Orders in Council, as you can well appreciate, you have what I refer to as the investigative aspect to the matter. In the course of that investigating process summonses are issued. That, in my respectful submission, is an

administrative function, not judicial or a matter of record.

In this particular case, in the course of that administrative function, PEO was served with the summons. In response thereto, the PEO has provided to you the documents and information that it considered confidential and not privileged.

And now, it's basically requesting that people potentially affected by that disclosure in response to the summons be notified to see if they have any objection to the use of that information or material by the Commission.

Whether you choose to do that or not, ultimately, it's your decision, but in terms of impacting my client, as I indicated at the outset, we have no objection to you receiving it and if you believe it to be relevant, utilizing it in the course of the objects of this Commission.

I do accept the proposition advanced by PEO however that having made production of a document that there continues to be a confidential aspect to the matter. We say that notwithstanding that you have received it and notwithstanding that we have a process here today which is in essence an interlocutory application of sorts or a pre-hearing hearing, those documents should not be published, should not be broadcast or disseminated to the media.

My client, Mr. Saunders, should be treated no differently than those other individuals who have been served with a summons and who have responded to that summons and whose information and documents you are now in possession of.

To leave Mr. Saunders to be the only one or perhaps even with Mr. Wood, in a position where what they produce to the Commission to be published or broadcast or distributed without the protections that the rules would be, in my submission, inappropriate.

MR. COMMISSIONER: Well, are we not talking at this point only about releasing these documents to the participants? We're not talking about making them public at this point.

Once they are introduced as exhibits by Commission Counsel in the hearing process, then the question may arise at that point. But at this point, there is no issue, I don't think, of all of the documents being collected by the Commission being made available to the press.

MR. BISCEGLIA: Sir, in my written submission at paragraphs 30 a), b) and c)...

MR. COMMISSIONER: Yes.

MR. BISCEGLIA: ...without deciding it, but assuming from your remarks that I'm understanding you, sir. If the Commissioner's position is having received the information from PEO and with the consent of Mr. Saunders that that information received would be subject to the confidentiality terms that are provided by your rules and as I tried to indicate in my submission,

an Order of Confidentiality, and there would be an undertaking and so forth signed by the participants or participants counsel or those people whom are hired, I have no further submissions to make to you.

MR. COMMISSIONER: That was, Mr. Doody, the position, was it not? We're not proposing releasing.

MR. DOODY: No, quite, Your Honour. And in fact, looking at paragraph 30 of my friend's application, 30 a) and 30 b) are consistent with our intention and consistent with the statute, which requires that documents be subject to that undertaking.

Sub c) in which he asks for an order that and I quote:

> "In the event that a Participant, Legal Counsel, or anyone, subject to the undertaking and directive, wishing to be released therefrom, in whole or in part, that an application may be made to the Commissioner to obtain any exemption therefrom."

Mr. Commissioner, the statute itself in Section 12 provides that upon the document being...I think it provides four categories, one of which is consent, but the other of which is filing and being made public by filing as an exhibit on the record in the inquiry, that the undertaking no longer applies.

It doesn't contemplate that the only way in which somebody could be released from the undertaking is an application, but of course I would have thought that would be...in fact, it does envisage an application as well, but not as the only way.

MR. BISCEGLIA: My concern was that issue, Mr. Commissioner, and related to that is the fact that I did not believe it necessary or appropriate that that information, as it relates with Mr. Saunders, be part of the record in these proceedings.

In other words, there's no need for it to be included as part of the discussion or the submission because

it's not necessary to make the determination with respect to the issue PEO has raised.

MR. COMMISSIONER: You may be reiterating that position later on when we start talking about matters involving relevance and things of that nature.

MR. BISCEGLIA: That's right.

MR. COMMISSIONER: But at this point, I think we're on the same wavelength.

MR. BISCEGLIA: Thank you very much. I have nothing further to add and take up your time.

MR. COMMISSIONER: Thank you very much, sir.

And then, Mr. O'Neill.

MR. DOODY: Mr. MacRae is here in Mr. O'Neill's firm, I believe.

MR. COMMISSIONER: Mr. MacRae, I'm sorry, yes.

MR. MACRAE: Thank you very much, Mr. Commissioner.

SUBMISSIONS BY MR. MACRAE

I can be very brief. I was intending to make submissions with respect to confidentiality, but given your comments so far, my submissions are identical to Mr. Bisceglia's.

If that's the position, there may very well be an opportunity in the future to have discussions with respect to the relevancy of the documents.

MR. COMMISSIONER: We're not there yet. Obviously, we're collecting a huge number of documents, a lot of material, much of which may very well be totally irrelevant to our purposes. Of course, the process requires us to get it in to make that evaluation. There will be further opportunities, obviously, as we progress.

MR. MACRAE: Well, those are my submissions then.

MR. COMMISSIONER: Thank you very much, sir.

Mr. Jacobsen.

MR. JACOBSEN: Thank you, sir.

SUBMISSIONS BY MR. JACOBSEN

Your Honour, the issues that I raise do deal with the open court principle. Of course, they deal with documents that have already been...I'm talking about documents that have been filed, on the one hand, to deal with the issue of funding.

MR. COMMISSIONER: Two different things entirely.

MR. JACOBSEN: In short form, I say those documents have been filed. You have made a decision based on those documents.

With respect, the public and the process requires that observers be able to evaluate the nature of that decision, which is, in my submission, true of every decision that you will make throughout this public inquiry process.

I have no concerns about the process that's been put forward whereby parties have been required by subpoena or

summons to provide information to the Commission and the Commission has not yet...you've not yet used that information to make a decision. Indeed, other counsel here who are perhaps adverse in interest in some respect have not had an opportunity to evaluate that material.

My hope would be and the hope that I express on behalf of my clients is that all of those documents will be made available to all counsel who are parties, and certainly not us at this point, but all counsel who are parties, so that they can decide what if any of that material they want to put before you by way of evidence, either for the purpose of evidence-in-chief by your own counsel or cross-examination. In my submission, that's how the process is to work.

So, let me start and I assume that we still have at play the issue of whether or not the documents that you received for the funding application should be made public. If that's the case, I'll

address that issue and then I will address the submissions that were made on behalf of the engineers.

But my initial position and this is what I was trying to warn you of this morning and I'm so glad that my friend is on the line now because I think that it's important, without going into a lot of repetition, that we understand what the open court principle is about.

I know that you do, sir, but for the purposes of putting this on the record, I think that our factum sets it out. I won't take you to each of these because I know that you know the law in this area and I don't want to make this longer than it should be.

What we have to remember is that there is a presumption of openness. Now, what does that mean? In real on-the-ground terms what that means is that if someone wants to displace that presumption of openness, which the courts describe as a hallmark of democratic society and one of the

central goals of a public inquiry is to be as open as possible, the parties that want to displace that presumption have to come forward with clear and specific evidence with respect to what they want to keep secret.

In my submission, we've heard none of that today from any of the parties. Now, part of that may be as a result, with my last two friends, because we're not there yet, but I would certainly say that with respect to both the PEO and with respect to those who want to keep confidential the documents that relate to the funding decision that they are obliged to come forward and put specific evidence, which puts meat on the questions that you were asking.

You were saying, well, what evidence are you talking about? That's the obligation at this stage to address. Not only do they have to address it with specificity, in my submission, but they also have to come forward with evidence that there will be harm that is done, which is why Mr. Doody has

been asking will the deleterious effects outweigh the benefits, taking that straight out of the Dagenais/Mentuck test.

That's exactly what the Commission should be doing and it's exactly the onus that my friends should be displacing, but they haven't even addressed it.

Now, I think it goes without saying that in addition to the principle that any violation of the principle of open courts must be based on clear and not speculative evidence that an exception is warranted. The courts also have said the open court principle is not to be lightly interfered with. That all comes out of the *Vancouver Sun* and you have our factum.

My friend representing the PEO read to you a portion of a case where Mr. Ratushny was quoted with respect to the conduct of public inquiries, but she didn't read you the next paragraph in which he said:

> "the very nature...of an inquiry lends even greater weight to the presumption of openness in relation to the administration of justice which has been reinforced by the freedom of expression under the *Charter*."

MR. COMMISSIONER: Just as a side comment here, if anybody has not read Mr. Ratushny's book as well as Mr. Ruel's for that matter, I strongly recommend it to you. It's certainly required reading by Commission Counsel. Go ahead, sir.

MR. JACOBSEN: Thank you. My friend also referred to the *Phillips v. Nova Scotia*, the public inquiry that came out of the Westray Mine Disaster. I've set this out in our factum, but I think it's useful to just go over Justice Cory's oft cited reason. He says:

> "Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to

> take a long-term view of the problem presented. Cynics decry inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and the high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence in not only the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public."

So, when my friends talk about how this piece of information may not be specifically relevant to your mandate, I encourage them - and I probably don't need to encourage the Commission - but to see the mandate as being a very broad mandate, so that the financial situation of individuals may well be very relevant.

I don't know the details that my friends were just dealing with in terms of the personal finances of the owners, but surely that information could be very relevant. If we found, for example, that these owners were extremely wealthy or extremely impecunious, all of those issues need to be known so that the public can say, well, that's why it happened or that may inform part of the decisions that they made to make certain repairs or to not make certain repairs.

I say this coming from a purely theoretical perspective, sir. I'm not advocating that there's any fault anywhere right now. I'm just saying that all of that should be in play and must be in play if the public is going to be reassured that the Commission had every tool and had it at its disposal in order to fulfil its mandate.

So, we know from my friends have gone over their terms of reference and the Orders in Council and the *Public*

Inquiries Act. We know that prima facie the presumption is openness. We know what the Dagenais/Mentuck test says.

So, let me now deal with the issues that I raise in the factum under issue B specifically dealing with the Eastwood Mall applicants. As I said, they have chosen voluntarily to put evidence in front of you about their financial situation in an effort to obtain funding. So, they have put in evidence and I stress that.

Having put in evidence, evidence upon which you have relied in making a decision, every document must be made public, in my submission, and the full document must be made public, subject to them coming along with some specific application to say this should not be made public and having cogent evidence before you.

MR. COMMISSIONER: Is there an obligation on me to redact what is evidently irrelevant and yet confidential material? Now, Mr. Fabris

has not been specific. Nevertheless, as a matter of fairness, if I do decide to make those documents public, do I have an obligation to redact?

MR. JACOBSEN: I say you have no obligation, no legal obligation. There may be, for example, information like social security numbers, those, in my submission, are not necessary. They are the type of information that we can see people making mischief of them.

MR. COMMISSIONER: Yes.

MR. JACOBSEN: But beyond that, I say it's up to my friends to come forward and say this is what we don't want you to release and for you to make that decision. And I would submit that that request that they make, at least in its generic sense, needs to be made publicly so that others can come forward and say, yes, we need that.

Now, I can't imagine why someone might need a social security number, but maybe I'm wrong. Maybe there is some investigation that would be able to be furthered with that. I doubt it, but I think that parties have got the right

to come forward and say, no, you should not redact that, as does the media or the public in general.

I think that that train has now left the station. I think this is where it should have been done. We run into a very elongated circuitous route if every time you want to do something people can then come along and say, oh, by the way, what I submitted I don't want to be made public. The presumption is openness. If they don't the idea that something's going to become public, they should make that submission to you immediately.

MR. COMMISSIONER: My concern in relation to the Nazarians and the corporation but to the Nazarians in particular, Mr. Jacobsen, is this. My decision to refuse funding to the Nazarians was based on an absence of evidence, i.e. more specifically, there was no statement of net worth, nothing at all that indicated to me what these gentlemen were worth.

Of course, I can't show you; I can't show anybody a negative except you have to take my word for it I suppose in a sense, although you've seen the documents or the parties have seen the documents, and you have as well.

MR. JACOBSEN: Yes, sir.

MR. COMMISSIONER: The fact remains that my statement is that that information was simply not there. In that sense, the materials provided are simply irrelevant. They might as well be Mr. Nazarian's mother-in-law's laundry bill. It's irrelevant. It really doesn't form part of the underlying reasons for my order.

And considering in particular that there was a refusal, what need is there, what interest is there in seeing material that in the ordinary course I think all of us would consider confidential, apart from curiosity?

If financial records do become relevant to the inquiry itself and are produced pursuant to summonses, the situation might very well be different as they

would relate to one of the objectives of the inquiry, but here the voluntary production of these documents related only to one issue and that was whether or not funding would be granted, and funding was refused. So, that's my concern at this point.

MR. JACOBSEN: Well, my answer to that, sir, would be that there's a presumption of openness. These documents were filed before you. And based on those documents, you made a decision. Rightly or wrongly, you made a decision, and I say that with respect. You made a decision and you said that they didn't produce the documentation that would be required to satisfy you.

Now, I say members of the public have got a right to look at that and decide whether you did the right thing or not.

Secondly, they have the right to look at those documents and see what it was that these owners put forward. That may well go to their evaluation of the character of these people. It may well

go to their view of how unfair the system is towards them or how it bent over backwards in favour of them.

The point is very simply that, in my submission, without solid evidence of there being particular harm which should have already been put before you by now, you have made a decision and the public has a right to see the basis upon which you made that decision.

So, if it's Aunt Mabel's laundry list and that's what they put forward, the public's got a right to say, well, look at these owners. They put forward Aunt Mabel's laundry list. That tells us something about them. Were they trying to pull the wool over the Commission's eyes or maybe there's something in that laundry list that you should have considered and that they want to comment on?

So, I say because this is a public inquiry and this is evidence that was put before and you've made a public ruling, the public has a right to know

the basis upon which you made that ruling. I say that with the greatest of respect, sir. It's part of the process.

And we get into, in my submission, an impossible philosophical problem if each time you make a decision you are then going to sit back and say, well, now, I made my decision looking at all these documents, but now I, as the Commissioner, will decide which ones were relevant to my decision.

In fact, they were all relevant, in my submission, to your decision. You may have rejected the evidence, but it was all relevant. And the persons that made it relevant were the applicants. They put forward all of this material. So, it's not, in my submission, up to you and it's not even, in my submission, part of your role to start vetting those documents. They put them there.

And it's a very different situation than the one that my two friends just

described where you're still at the investigatory stage and nothing has been put into evidence yet. So, that's the distinction that I draw there.

MR. COMMISSIONER: Well, there's a clear distinction, I agree with you, between the Nazarians....

MR. JACOBSEN: So, the short answer to my longwinded answer is public scrutiny. That's what it comes down to.

MR. COMMISSIONER: Thank you.

MR. JACOBSEN: As you'll note from the cases that we've put forward, the cases consistently reject bald unsupported arguments. In this case, they put forward the bald unsupported argument that financial records are generally expected to be private.

Secondly, a serious prejudice to these applicants will ensue if the materials are misused or used for any other purpose. Well, you can say that about almost anything, but the fact of the matter is that they put the material before you and they put forward no specific evidence.

The courts, remember back in the days of *Dagenais* what the Supreme Court of Canada was doing is it was looking mainly at the criminal law back then and saying, well, should the right of openness, open court principle, should that continue to be trumped by the fair trial process?

And the court said these two important principles should not be on a collision course, that they are equally important. So, as important as it is to have a fair trial, it is to have an open process.

That puts it, I think, in stark relief when you look at persons coming forward without any evidence, making bald assertions. Imagine if they were trying to do that in a circumstance where they were saying I don't want...the Crown was saying I don't want so and so to have a fair trial. And why is it? Well, just because it would be bad for everybody. It wouldn't be good to have a fair trial.

It’s such a ludicrous proposition that I put forward only to say that the openness concept is of the same magnitude and importance. That’s why there has to be clear convincing evidence put before you if we are going to abrogate that principle at all.

So, having failed to provide any evidence of the serious prejudice that would arise if the material were disclosed, in my respectful submission, it would come nowhere close to fulfilling the Dagenais/Mentuck test. In my submission, there’s no public interest or benefit to the public in allowing the Eastwood Mall applicants’ request to displace the public nature of the materials filed.

Now, my friends have also spoken about CRA Notices of Assessment, etcetera. To the extent that those were put before you, I say they are fair play.

To the extent that they are still part of the...and this was answered by my

last two friends who were up where they were talking about documents that have not been put before you, we'll see what other parties do with that material and what Commission Counsel wants to do with that material.

Obviously, the media has no role in choosing what goes before you publicly, but it has a distinct role in respectfully requesting that everything that is put before you by way of evidence is made public subject to the Dagenais/Mentuck test.

Now, in our factum, we then go on and argue even beyond that that there are the financial records over which confidentiality is sought are clearly relevant, but we don't even need to do that, in my submission. We've already said it's up to my friends to prove that it shouldn't be put in into the public realm. It's not up to us to come forward and say that it must be. That's the presumption.

But if it's of assistance, in my submission, any information regarding revenues, losses, expenditures, debts and liabilities, and ownership structure of the corporation that owns the mall, clearly must be relevant.

The records of the corporation's owner and the operator and the owner/operator's son who oversaw the administration of the malls business transactions are relevant to the inquiry into the collapse.

The policies and procedures are clearly relevant. For example, it's widely reported that Robert Nazarian has publicly stated that he spent over a million dollars in repairs to the mall. It's inconceivable that that couldn't be relevant. It may be to his benefit. It may be to his detriment. I don't know. I don't know what he should have put in or what the Commission may think of the repair situation, but surely that's got to be relevant.

In short, the records are relevant to understanding the financial situation of the mall and its owners.

Now, I recognize that I need to move on now. So, I though what I might do, sir, is ask you at this point if you have any questions with respect to that part of my submissions, with respect to the mall owners, and then I'll move onto the PEO.

MR. COMMISSIONER: No, you've answered my question, sir, and that was the one that I meant to ask.

MR. JACOBSEN: Thank you. Now, with respect to the PEO, it appears now that their only argument is that there ought to be some special deference given to the PEO documents because of subsection 38(1) of the PEA. It's quite clear that they also have not provided any evidence that the open court principle should be overridden.

They say that the process that they are putting forward will not delay matters, but yet my friend was good enough to be extremely frank when you asked what

effort have you made to give notice to people, and she said, with respect to those people listed in 7 a) of their factum, we haven't tried.

Now this is, in my submission, a very troubling statement because what it means is that things are not moving as fast as they should. We're not talking about a stampede here. We're talking about information that they have had for some time and that they've done nothing about.

Now, they say that the Commission should be giving notice. In my respectful submission, there is no statutory obligation or common-law obligation on the Commission to go through the PEO's documents and try and figure out who it is that should get notice.

Let's not forget that most of the information that my friend is talking about arises out of disciplinary hearings. To the extent that that's true, surely the PEO is going to have a

much better idea of who needs to get notice than this Commission.

And if we're going to go through a process whereby the PEO sits down behind closed doors and talks to Commission Counsel and says, well, let's give this person notice but not that person, I think it puts Commission Counsel in an impossible position.

Now again, and I don't want to repeat this too often, but there has to be clear and convincing evidence for doing anything outside of the normal here and we've got nothing except my friend saying that Section 38 somehow puts those documents into a special category whereby there should be this vetting process that goes on and that these documents should be treated very differently from any other documents that this Commission receives. In my respectful submission, that cannot be right.

Section 38 is clear in its scope and its application. It prevents specific

persons from sharing specific information obtained in particular circumstances with others, subject to certain exceptions.

Related to this, it also prevents those same specific persons from being compelled to provide that same specific information, whether through testimony or production, in any civil action or proceedings.

But the PEO's submission that the Commission is subject to the obligation contained in Section 38 is not supported by the ordinary meaning of the words used in that provision.

So, what it comes down to is they're saying, well, if you're dealing with a PEO matter, this is what would apply. Now that we've got the *Public Inquiries Act* coming along and saying all of these documents must be produced, there's some kind of special regime that comes out of that. In my respectful submission, that's not supported.

Put in another way, Section 38 does not apply to persons who are not engaged in the administration of the PEA but may otherwise be privy to materials related to a complaint against or an investigation of a member of the PEO. For example, Section 38 does not apply to someone who brings a complaint against a member of the PEO or to a person against whom a complaint is made.

Now, it's very important to think of the relevance, possible relevance, because if there are engineers that have come to the attention of the PEO and the PEO has not taken appropriate action – and again, I speak without...it's purely conjecture – but let's suppose that one of these engineers should have lost his licence forever and didn't and then came along and did some negligent engineering work that contributed to the collapse. That surely is going to be extremely relevant and it is within the mandate of this Commission to be highly

critical of the PEO if that's what happened.

In the same way, it would be part of the mandate of the Commission to be highly critical of the College of Physicians and Surgeons if they allowed a surgeon to continue to practice when they should have yanked his licence because he's killing people in the operating room. It's the same principle.

You have got to be able to go beyond the obvious here and perhaps look at the regulatory bodies that may have let the public down or may have done a terrific job, in which case encouraging them to get maybe more funding might be part of your recommendation.

I'm not trying to blacken one side of this. I'm just trying to say that it's clearly relevant what the engineers did and what disciplinary action there was or wasn't taken against them in the past. It may be that there should have been some continuing education that

they should have received. You might want to make recommendation with respect to that and you might want to ask members of the PEO why they didn't recommend certain things.

But I'll leave all that, that's Commission Counsel and the decisions that will arise from the parties. But to say that it's somehow not relevant or not likely to be relevant, which is not what I understand my friend to be saying, but I just make the point that it clearly is something that would be of concern to the public.

Now, my friend made reference to Justice Goudge's decision in the inquiry into pediatric-forensic pathology in Ontario, the Goudge Inquiry. What Justice Goudge said quite clearly - and I won't take you to it in our factum - but what he quite clearly said is that these matters are open to the public unless we are dealing with something like the clearly irrelevant name of a child.

MR. COMMISSIONER: And a statutory injunction against publication.

MR. JACOBSEN: And a statutory injunction, but we don't have that here. In fact, we have the opposite here. We have a statutory mandatory conjunction for this to be public, unless my friends can show you on clearly convincing evidence why it should not be.

And as you said, the restriction on publication that Justice Goudge was dealing with applied to everyone, including the Commission. Well, that's not the circumstance with respect to Section 38 of the PEA.

Lastly, on the strict interpretation of Section 38, the narrow scope of 38 is also evidenced by the fact that it does not make a document or information confidential in and of itself. It only prevents certain people from sharing and, in the context of a civil action or proceeding, from being compelled to share documents they've acquired in the course of their duties.

Well, we're already past that. The Commission's got the documents. Clearly, the PEO thought that they could not restrict giving those documents to you. I think it was the right decision. And so, now they get to stage two. How does the Commission treat those documents?

In my respectful submission, you treat them the same way as you would any other document. Obviously, if my friend has got specific documents and specific issues that need to be raised, they ought to be raised, but they should have been raised here, now, not waiting in the weeds hoping that you will set up some kind of elaborate scheme for vetting through these documents that up until now they've not been bothered to give notice with respect to...[CELLPHONE GOES OFF]

So, in my submission, the case law supports this analysis in *Watson and Boundry*, which is at tab 13 of our material, and cited by the PEO in its

submissions. The plaintiff, a member of the PEO, sought information and documents related to a complaint lodged against him at the discovery stage of a civil action. Well, that's very different than what we have here.

And in the Niagara case that my friend referred to, which is at our tab 3, again, the plaintiff sought non-party production of a report from the PEO.

In both cases, Section 38 clearly applied because the PEO and employees of the PEO are "engaged in the administration of the PEA". Here it's the Commission that is in possession of the documents and it is not "engaged in the administration of the PEA". Section 38, in my submission, does not apply to the Commission.

And, as a counterpoint, you can look at our tab 14, which is the decision of Justice Somers in *Williams and Webster* where he ruled that Section 38 did not apply to a formal complaint submitted to the PEO. In that case, the

defendants who were the subject of the formal complaint sought to rely on its contents in the context of a motion before the court and the complaint was admitted into evidence.

In my submission, I won't go through all of the cases unless you have specific questions.

MR. COMMISSIONER: I've looked at them all.

MR. JACOBSEN: Because they all support the proposition that Section 38 does not and was not intended to interfere with the important function of public inquiries.

And part of that again is to say that obviously the inquiry is not a civil proceeding, so that takes the civil proceedings cases right out of the analysis.

And again, what I would submit is that the PEO has not met the burden for displacing the presumption of openness. Now, they will say, no, they're not trying to do that. There's just 100-

odd documents they would like to go and have...they would like to get special consideration for because of Section 38.

Now, they may have another reason for some of the information in those documents not being made public. I don't know. But simply to rely on Section 38, in my submission, means that this Commission, with respect, should dismiss their application because it is not a ground for doing anything different with those documents than any other documents that have been provided to you.

And when we look at the other commissions of inquiries, the death of Phoenix Sinclair, I know you've read this material, so I'm not going to go over it. But you will see again and again that the commissions of inquiries have a different role and are able to get this documentation.

My friends must, must convince you on the basis of clear evidence that

certain portions or maybe all of some of those documents should not be put into the public sphere.

In my submission, they're not entitled to keep coming back. They have their shot like we do in court and we don't get a chance to go back and say, oh, I wish I had said that or I wish we had submitted this additional evidence. My friends are learned in the law. They know what the obligation is and they've not put any evidence before you.

You asked why these names weren't dealt with in between the filing of submissions and today. Those are the names that they say other people should get notice. In my submission, the answer to that was not satisfied. They did not provide any reason.

And clearly, the best that my friend can do is to say it's strange that the media request notice all the time, but here they're saying there ought to be no notice. Let me be really clear. In Dagenais and Mentuck, the Supreme Court

of Canada said the media must get notice, but we don't get to go back again and again. We get one shot.

We get notice, well, often we don't. We find out about it and have to go and ask to get some kind of notice. But once we get the notice, if we don't put our best foot forward, we're done. We don't get to come back two months later on the same case and say, oh, by the way, we thought of something else.

And that's what my friends are trying to do here. They're trying to say, well, we're not going to tell you. We're playing a bit of peek-a-boo here. We're not going to tell you what's in those 100-odd documents that we want to keep.

In fact, I don't think my friend...I think my friend admitted that she couldn't tell you at this point. They don't get to keep coming back, in my submission. She says we're not in a position to estimate how many documents there are, but she says it's not a

large or unwieldy number. There should be, she says, some kind of *in camera* hearing.

My submission is simply this. Where has the PEO been? In fact, my submission - and this is with the greatest of respect to my friend - it seems to me that the PEO is ducking all responsibility here. It's handed over the documents. They're not giving notice to the people that they have the most knowledge about, way more knowledge, in my submission, than the Commission could possibly have. And they're taking no position on the documents in detail. Yet, they come forward and they ask for this special review.

In my submission, with the greatest of respect to them, the Commission ought to deny that and treat these documents the same as any other documents that are received.

Subject to any questions, sir, those are my submissions.

MR. COMMISSIONER: Thank you very much, Mr. Jacobsen.

It's just past one o'clock. I think we ought to break for lunch. Is everybody in agreement?

Mr. Fabris, could you check back in at two o'clock this afternoon?

MR. FABRIS: Not a problem.

MR. COMMISSIONER: Thank you. Same process, same procedure, and we'll be starting at two o'clock sharp.

Mr. FABRIS: Thank you.

MR. COMMISSIONER: Thank you very much.

R E C E S S . . .

H E A R I N G R E C O N V E N E S

MR. COMMISSIONER: Good afternoon, ladies and gentlemen.

Mr. Fabris, I gather you're on line.

MR. FABRIS: I am, Your Honour.

MR. COMMISSIONER: Thank you. I hope you've had a good lunch.

MR. FABRIS: Pretty good, pretty good.

MR. COMMISSIONER: This is one of the few courtrooms I'm sure in the province where we have a Tim Hortons opposite the plea of guilty courtroom. We give them free vouchers if they plead guilty.

Actually, that's not far from the truth. If they successfully complete a week of sobriety in our drug treatment court, they do get Tim Hortons' vouchers. But I don't have a budget and I can't give you one of those or at least it's not included in the terms of my budget.

Now, this afternoon, we have scheduled Mr. Subramaniam. I gather he has left with his compliments.

MR. DOODY: He has, Mr. Commissioner.

MR. COMMISSIONER: He has left us with a brief. And so, we ought to proceed now with the ELMAC and SAGE representative, Ms. Carr. Go ahead.

MS. CARR: Good afternoon.

SUBMISSIONS BY MS. CARR

I'm not going to repeat the very capable submissions of my friend, Mr. Jacobsen. You have our written submissions and subject to any questions, I suspect I'll be no longer than 10 minutes.

The only material that I anticipate that you'll need in front of you are two of the revised confidential documents of the Association of Professional Engineers of Ontario. I sent a letter on December 14th that there would be two documents that I'd be referring to. They were at tabs 3 and 61 of the revised confidential documents.

MR. COMMISSIONER: Okay.

MS. CARR: I will advise the Commission that on behalf of the largest group of Elliot Lake citizens and victims of the mall collapse participating in this inquiry, we fully adopt the submissions of the Media Organizations and urge the Commission to deny the request for confidentiality made by the mall owners and the PEO.

I think it would be more helpful to the Commission at this point if I can take a few minutes to draw the Commission's attention to a couple of examples of the documents in question, so that I can demonstrate from a practical level why a confidentiality order would be inappropriate.

I'm not going to spend very long on the mall owners' allegedly confidential documents because the mall owners have admitted that they're relevant by putting them in their application for funding. That admission in and of its own should be sufficient to warrant public scrutiny of the financial records.

I'm in full agreement with Mr. Jacobsen that the public has a right to know the evidentiary basis for the Commissioner's ruling for standing and funding.

In addition, quite apart from the relevance of the documents in the funding application, we can anticipate

that the ability of the mall owners to finance repairs may be an issue that is relevant to Part 1 of the inquiry. A ruling at this preliminary stage that the mall owners' financial records or some of them are confidential might very well hamper the work of the Commission at a later date.

My friend, Mr. Fabris, suggested that the Commission may be able to get at some of the relevant issues through witness testimony, for example, the corporate structure. And with respect, in my submission, where relevant documents exist, it's no answer to say that the same evidence can come through witness testimony.

I'm going to take you to two of the documents now over which the PEO seeks a confidentiality order. If I could ask you to turn up tab 3 and I believe it's PEO number P0001235.

MR. COMMISSIONER: Just give me a moment, please.

MS. CARR: Sure.

MR. COMMISSIONER: I'm having trouble finding that. Ms. Effendi, I'm probably looking at the wrong place.

MS. EFFENDI: Mr. Commissioner, it would be in a big binder that's three-inch thick. If you don't have it, I can bring you forward mine here. Yes, that's the one.

MR. COMMISSIONER: Is that the one?

MS. EFFENDI: Yes, and it would be tab 3.

MR. COMMISSIONER: All right. Yes.

MS. CARR: This is a letter from the PEO addressed to Mr. Robert Wood of M.R. Wright and Associates, dated November 16th 2011, advising him that his licence to practice professional engineering in Ontario was rescinded.

This letter is sent six months prior to the report of M.R. Wright with respect the Algo Centre Mall, which was signed by Mr. Wood and another engineer, Mr. Greg Saunders.

And I'm aware that that evidence is not in the record at this point, but we can

anticipate that it may be and that this document may be relevant.

I'll now ask you to turn up tab 61.

MS. EFFENDI: Mr. Commissioner, I believe that that would be in the second binder you would have.

MS. CARR: For your reference, I think the document number is P00001009.0860.

VOICES: 6-1? 6-2? 6-0?

MS. CARR: It starts at 6-0.

MR. COMMISSIONER: Okay.

MS. CARR: This is a letter addressed to the PEO from the engineering firm M.G. Pascoe and Associates and it's dated November 16th 1998. If you look at the subject line at the top right-hand side of the page, the letter appears to deal with J. Kadlec and an addition to the Sault Ste. Marie Station Mall.

It's been reported that J. Kadlec may also be the engineer that designed the Algo Centre Mall. And again, I know that's not in evidence at this stage.

In the first paragraph, it's explained that M.G. Pascoe was asked to review the structural design of the addition to the Sault Ste. Marie mall after the partial collapse of the roof.

And in the second paragraph on the same page, it states: At the end of the report, we'll comment briefly on Mr. Kadlec's responsibility for general review. At bullet-point one it states that the structural drawings of the addition were prepared by Beta Engineering Consultants and signed and sealed by Mr. J.J. Kadlec.

If you could turn now to page 3 of the letter, I'm going to start reading from the third paragraph from the bottom. It says: Based on the above, it's our opinion that the design and drawings were not prepared in accordance with generally accepted practice and we have concerns with respect to the foundation design and the overall stability of the building.

And finally, in the documents received, there are only two letters with respect to the progress of the work signed by Mr. Kadlec. It appears that Mr. Kadlec may not have visited the site, but rather relied on reports provided by third parties to prepare his report.

The owner, as part of the application for a permit, named Mr. Kadlec as the engineer who would provide general structural review. However, most of the inspection work was carried out by Wright and Barker, which I believe is a predecessor firm of M.R. Wright. This arrangement seems to have been acceptable to the City of Sault Ste. Marie, as long as Mr. Kadlec approved...changes.

On the next page, I'm just going to read to you the second paragraph: We cannot say if Mr. Kadlec failed to perform the review at an acceptable level if we cannot determine if this was in his scope of work. We would comment, however, that Mr. Kadlec, in our opinion, did not act in a prudent

fashion when he issued his site review report. Answer, you'll see the letter from BECC (ph) dated October 31st and his certification of his structural work. We're concerned that there are no records of...or any indication that this stage of the work was reviewed by any independent qualified group.... Although the city requested this information, it was never provided.

And I draw these documents to the Commission's attention simply for the point that these are documents that may be relevant to Part 1 of the inquiry.

And to the extent that they are relevant, the ultimate determination of whether they should be disclosed or precluded from disclosure cannot be made in an *in camera* hearing without the perspective of all of the parties.

Relevant non-privileged documents must be disclosed to the other participants of the inquiry in order to ensure an open transparent and an effective procedure and process.

Subject to any questions, Mr. Commissioner, those are my submissions.

MR. COMMISSIONER: All right. Thank you very much, Ms. Carr.

Mr. Cassan.

MR. CASSAN: Good afternoon, Mr. Commissioner.

SUBMISSIONS BY MR. CASSAN

At the outset, I see the City's position as being one of course where the best interests of the corporation have to be protected, but in light of their public governmental role, also one where we're stewards of the public interest for the citizens of Elliot Lake who have sustained the tragedy.

We are therefore concerned about the integrity of the Commission and see an adverse impact that could result from a confidentiality decision being made in favour of Mr. Fabris' clients before the commencement of the hearings

dealing with the financial interests of the Nazarians or Eastwood.

It's our position, Mr. Commissioner, that the time was before today for Mr. Fabris to clearly delineate what significant harm would befall his clients in the event that you do not grant the confidentiality order that he is seeking.

That said, Commissioner, we see no evidence before you to indicate the harm that might befall his client. It's our submission that that's mandated by the case law on the issue.

My friends have clearly taken you through the Dagenais/Mentuck test and have pointed out four significant cases that they wished to comment on. The bulk of them, Your Honour, deal with issues of public confidence and the cathartic effect of the inquiry and the necessity of educating the public.

It's been brought to your attention already by previous speakers that in

the case of a public inquiry, the doctrine of an open court is even stronger than in a normal court.

Really, I think that I can make your job somewhat easier with dealing with the question of whether or not the Nazarians' financial documents should be kept confidential. Your counsel asked us to comment on a case called *M.E.H. v. Williams*. I don't think that a copy of that has been provided to you. I brought a copy for you.

This of course is the Russell Williams case, Your Honour. This is a Court of Appeal decision where Mr. Williams' wife was seeking to have various of her personal information kept out of the public light.

I think that if I can turn to paragraph 32, which I've highlighted for Your Honour, I think that answers the question about what you need to do in this case. The quote at the end of that paragraph says that:

> "A court faced with a case like this one where decency suggests some kind of protection for the respondent must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media?

Well, in our case and indeed in my initial submissions, I was suggesting that it may not be publicly useful to have the Nazarians' social insurance numbers. I'm still about that opinion, although I think that it was necessary for Mr. Fabris and his other counsel who are working with him to black that out at the outset.

Now that that's not been done, that is part of the record that you reviewed in making the determination not to grant funding. I think that the next part of the quote perfectly illustrates the question that you must ask and that says:

> "Rather, the court must ask: has the respondent shown that without the protective orders she seeks

there is a serious risk to the proper administration of justice?"

My friend, Mr. Doody, indicated that he was asking Mr. Fabris to tell you about the commercial harm that would come to the Nazarians or Eastwood Mall if the information is disclosed.

With respect, I think that the real issue and the first question that needs to be asked is will there be a serious risk to the administration of justice if the confidentiality order is not given and that information or evidence has not been put before you? I think, therefore, that you have to answer the question in the negative and say that there is no serious risk if the confidentiality order is granted.

In fact, to the contrary, I would suggest that the risk is that we damage the integrity of the Commission by giving a confidentiality order in the absence of evidence clearly showing a risk to the parties who are seeking the confidentiality order.

I was going to take you through the onus sections, all of the other sections out of the cases that have been provided, but my previous friends have done that already.

The point that I wished to make, Your Honour, simply was that the evidence is not before you to show that the administration of justice will be damaged if the confidentiality order is not given.

And so, for the city, the City of Elliot Lake, I'm taking a position that vis-à-vis the Nazarians' material, it should be made public.

MR. COMMISSIONER: Just a thought that came to me over the lunch hour and it involved Mr. Fabris' referral to the contract involving a third-party contractor. Of course, that third-party contractor, I think it's D.G. Construction?

MR. CASSAN: That's correct.

MR. COMMISSIONER: Does the Commission have an obligation to advise that

particular individual of the request being made for publication of a contract in circumstances where he's simply not been advised that this is going on? Do I have an obligation?

MR. CASSAN: I am not aware of an obligation that you have. I haven't read anything in preparation for today that I could point to you that says that you do have an obligation.

Of course, the control of the hearing is in your hands and I think if we look at the Dagenais and Mentuck test where we're balancing the interests and looking at the potential harm that you need to think about that.

Perhaps the remedy in that situation where you're concerned about a third party who's not been involved is to give them notice and an opportunity to make some submissions. But apart from that in the sense of fairness, I wouldn't say that there's anything I've read to indicate that Your Honour has an obligation to do that.

MR. COMMISSIONER: It may very well be that I don't have that obligation in relation to Eastwood Mall or the Nazarians. That obviously is a matter that I'll have to decide, but I do note for example that the contract that was provided is unsigned. It's signed only by Mr. Nazarian. It's not signed by D.G. Construction.

The fact remains that there is a reference to a third party who would not in the normal course have been provided with any notice that a document involving some of his potentially private contractual arrangements is likely to be made public.

Do Commission Counsel or anyone else, only in relation to that very narrow, have any...?

I don't want to interrupt you halfway through your submissions.

MR. CASSAN: I'm not halfway through my submissions, Your Honour, I'm done, unless you have any questions.

MR. COMMISSIONER: Just I'd be interested in hearing what anyone else has to say about that specific aspect of it. It hadn't occurred to me before.

MR. DOODY: Simply as a matter of first impression, Mr. Commissioner, and not having thought it through, I would have thought that the same circumstance would arise in the overwhelming majority of the documents that will be tendered in evidence.

That is, they will refer to somebody other than a participant in the inquiry and will involve business matters about which the other party may rather that they not be made public.

Indeed, the same thing happens in courts in this building every day of the week that documents are tendered into evidence which contain personal and private matters and the persons to whom they relate are not given an opportunity to make submissions as to whether there ought to be a sealing order.

And in this case, Eastwood chose to tender that document – not to tender – to file it in respect of a contract with a third party with whom they were contracting.

MR. COMMISSIONER: Mr. Fabris, can you tell me was notice given to D.G. Construction that the contract would be produced as part of the funding application?

MR. FABRIS: I couldn't tell you that. I was surprised when I did see that, that it was included. Unfortunately, as you can probably devise, the firm that did the application is no longer employed. So, I'm sort of working backwards here. To my knowledge, D. & G. was not advised.

MR. COMMISSIONER: Are you telling me that as far as you know D. & G. has not entered into a contractual relationship with your client?

MR. FABRIS: They have entered into a contractual relationship.

MR. COMMISSIONER: I see.

MR. FABRIS: But they haven't been advised that the contract was disclosed.

MR. COMMISSIONER: All right. Thank you. Anyone else? Mr. Jacobsen, do you have comments you'd like to make?

MR. JACOBSEN: Your Honour, I echo Mr. Doody's approach that it happens all the time in court.

I think that the problem here is the documents were released before they were vetted. I don't think we can put the genie back in the bottle. They should have been properly vetted. If need be that that name should have been blacked out or the parties should have been given advice beforehand, it's certainly not up to the Commission to do that. It might have been up to the persons with whom they were contracting to do that. But there's nothing in the law that I'm aware of - and I've done a few public inquiry cases - where the public inquiry has been responsible to do that kind of thing.

I think that the fact of the matter is that if you enter down that road, you're going to be doing it with a great number of documents and that doesn't seem to be possible or legally required.

MR. COMMISSIONER: My concern is not that this is a document that the Commission has found, but rather one that has been produced by Mr. Fabris' clients through other counsel, I gather.

I can understand that if the Commission through its own processes comes across materials that might be the subject of some concern that it's not the Commission's business to enter upon an inquiry in every case, but here Mr. Fabris tells us, mentions specifically a potential risk to a financial position that is vis-à-vis subcontractors.

It's an allegation. It's not an assertion. It's not buttressed by fact, I grant you that. But again, I suppose I speak out of perhaps an excessive

desire to be fair and not to expose unnecessarily third parties to some form of prejudice, particularly as there's been some intonation about potential prejudice here. I'll take your submissions under advisement. Thank you very much.

Yes, Ma'am.

MS. CARR: Mr. Commissioner, if I may. I've only gone through this and I should probably check a little bit more carefully, but there doesn't seem to be a confidentiality provision in the contract itself. That may be worth your consideration.

MR. COMMISSIONER: Thank you for pointing that out.

Mr. Cassan, anything further that you wish to add?

MR. CASSAN: Nothing other than just to speak to the engineering issue. I think that the proposal being put forward is fine. We've not made written submissions on that and we're not taking any further position with respect to that.

MR. COMMISSIONER: Thank you very much, sir.

MR. CASSAN: Thank you.

MR. COMMISSIONER: All right. We're at the stage now where we can entertain reply submissions. I'm certainly prepared to give you a break, Mr. Fabris. We can take a break now to allow you to prepare any reply submissions you may have or in the alternative, we're prepared to hear you right now.

MR. FABRIS: Actually, Mr. Commissioner, I have no reply.

MR. COMMISSIONER: All right. Thank you very much, Mr. Fabris.

Ms. Ritacca.

MS. RITACCA: Thank you, sir. I'll be very brief in my reply.

REPLY BY MS. RITACCA

I'd start by saying that I am surprised and pleased to hear - and this may have been a misunderstanding on my part – but really to hear for the first time today that what we are discussing at

this stage is making the confidential documents available to the participants only, subject to an undertaking. That certainly wasn't the PEO's understanding at the start of this process.

That said, we're pleased to hear that and submit that while I certainly remain of the view that the notice process for that I've been urging upon you this morning is still necessary, our original concern about mass public dissemination has been somewhat elevated.

Turning to submissions of Mr. Jacobsen, I apologize if I confuse some of his submissions that were meant only for Mr. Fabris' clients and not PEO.

In any event, he started with a discussion with respect to the open court principles generally. He said that when we're talking about the open court principles you really related to documents that had been filed. That's

when he was referring to the Eastwood and the mall owners' documents.

I agree with that position, but then as his submissions went on and were dealing more directly with the PEO, he seemed to conflate the test, the Dagenais and Mentuck test.

And so while on the one hand he said, well, the principles of the open court case law don't really apply at this stage for the PEO confidential documents because they haven't been produced in any sort of public procedure, he still went on to impose the onus of the Mentuck test on the PEO, to suggest that there isn't evidence before you of overriding reasons why there should be this notice process.

So, I agree that the open court principles don't strictly apply to the request that's being made by the PEO. If Mr. Jacobsen said something more than that, then I take issue with his submissions.

He suggested that the PEO is asking this Commission to grant special deference over its documents produced. That's just not accurate. A large volume of documents, many CDs, if memory serves, have been produced. They're public documents and we take no position that Section 38 protects those documents. So, it's wrong to say that the PEO is asking for this process to be applied to all those documents. It simply is not.

Mr. Jacobsen suggested that there's nothing in the case law or in the statute requiring the Commission to be the party or the entity to give notice to these Affected Persons. He said this in response to my submission that the Commission is the right party.

My response to that submission is while there's maybe not necessarily a statutory obligation or anything specifically in the case law dealing with this, there certainly is an obligation to be fair. You've said so

yourself in relation to the exchange that you just had with respect to the third party involved in the affidavit in the other application and you, sir, acknowledged the importance of being fair in your opening remarks.

And so, while it's fair to say that there's nothing that deals specifically with notice, it's my submission that the very heart of making sure a procedure is fair is making sure that the parties who have an interest in the proceedings or may be affected by the proceedings have notice.

MR. COMMISSIONER: Well, doesn't the PEO also have an obligation to be fair? It is a statutorily-sanctioned body with responsibilities not only towards its members, but towards the public in general.

MS. RITACCA: Absolutely, and that is why the PEO filed the documents, produced the documents it did under the umbrella of Section 38. That's why the PEO named in the first instance...provided several names to the Commission to assist it in

providing notice. That's why the PEO has said that it will continue to do that if it's directed to do so.

MR. COMMISSIONER: But I really think the PEO should. The Commission Counsel took the position that they had no obligation to provide notice to the named individual, but nevertheless out of a concern for fairness, they did so and didn't require PEO to serve the notices or to advise the parties that they've named specifically, but at least they were provided with names.

Again, I reiterate what I'd said before that it seems to me that the PEO has some obligation to go over its own materials to determine whether or not there exist other individuals which the Commission ought to know about. It may very well be that in those circumstances Commission Counsel will take on the responsibility, not mandated by law but out of fairness, to notify these individuals, but you haven't done so.

MS. RITACCA: I don't disagree with you that the PEO together is in the best

position and can identify those remaining individuals. I think that's different than who provides the notice.

MR. COMMISSIONER: Well, we can argue about who provides the notice because we haven't argued about that in the past. The Commission Counsel have said it's not our responsibility, but we'll take it on, we'll assume that responsibility.

In those circumstances, it just seems to me it's not asking much of PEO to identify other individuals who might benefit from notice. That doesn't mean to say that the Commission or Commission Counsel have an obligation to provide notice, but at the very least if these names are identified in timely fashion it can proceed to do that, but you haven't done so despite the opportunity, in time.

One of the realities of course of a public commission is that we're spending public funds. We are directed by our charter, by our mandate to produce recommendations in the form of

a report within a very limited timeline. We don't have the luxury of an indefinite time period as some commissions have had. And so, those two considerations both time and budget, figure prominently in any decision that I may have to make to extend and to prolong the process.

MS. RITACCA: Well, I don't want to repeat the submissions I made this morning, but I certainly, with respect, sir, don't believe that the process that we're suggesting here would prolong the process. The PEO answered the Summons to Produce in an extremely timely fashion, unlike several of the other participants in the process.

So again, I don't think that the delay in either starting the hearings or the delays in moving this forward rests at the feet of the PEO.

MR. COMMISSIONER: All right. Well, the proof may be in the pudding. If you can produce names within a short period of time, it will be worth thinking about and considering.

MS. RITACCA: Thank you.

MR. COMMISSIONER: All right.

MS. RITACCA: So, just back briefly to Mr. Jacobsen's point that the Commission isn't statutorily obliged under Section 38 to keep the documents confidential.

I think that that really misses the point of the interplay of the PEA statute and the *Public Inquiries Act*, which clearly contemplates - and I took you to this morning under Section 10(4) – that where there is in some other statute a requirement that these documents or this information would otherwise be confidential, then you, sir, have the power to impose conditions. And that's how those two statutes work. Nowhere have we suggested that somehow the Commission is obligated under the PEA to keep the information secret.

Finally, on Mr. Jacobsen's submissions, while he was very clear to say that he wasn't really speaking about relevance, he did go on at great length to talk about why he thinks many of these

documents, confidential documents, could very well be relevant.

Nowhere in our submissions, nowhere in my submissions this morning have we taken any position on the relevance of the documents nor would we do so. The Commission Counsel have....

MR. COMMISSIONER: You just don't know.

MS. RITACCA: We don't. And they've identified them as – I want to use the right word, they didn't use the word relevant – responsive and we accept that they're responsive and we'll leave it to others to talk about whether or not they're relevant.

With respect to Ms. Carr's submissions, again, we're not asking for a blanket order of confidentiality and I think perhaps she misspoke, but that's not what has been sought by the PEO here.

And again, the examples of the documents that she's raised for you; we are the custodians of those documents. We don't have any particular interest that they remain confidential or

they're released. We want to make sure the right people are involved in discussions as to whether they're released.

Thank you.

MR. COMMISSIONER: Thank you very much. I think that just about does it. I thank everybody for having travelled here in these rather unpleasant circumstances. The only thing I can say is wait until you get up to Elliot Lake, if you think this is bad.

I thank you very much for your patience. I'm sorry we couldn't afford a better courtroom. This is the rump of the 14 courts on this floor, but every other courtroom in the building was occupied. But still, I think it's fulfilled its function.

That being said, I thank you very much for your help and your assistance. I'll certainly take your submissions under very serious advisement and render a decision just as soon as possible. Thank you very much.

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