THE ELLIOT LAKE INQUIRY
Order-in-Council 1097/2012

SUBMISSIONS OF CTV, a division of BELL MEDIA INC., CANADIAN BROADCASTING CORPORATION, THE GLOBE AND MAIL and SHAW TELEVISION LIMITED PARTNERSHIP

Responding Submissions to the Request Pursuant to Section 10(4) of the *Public Inquiries Act, 2009* of the Association of Professional Engineers of Ontario and the Request Pursuant to Section 10(4) of the *Public Inquiries Act, 2009* of Eastwood Mall Inc., Robert Nazarian and Levon Nazarian

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OVERVIEW

1. These submissions are filed on behalf of CTV, a division of Bell Media Inc., Canadian Broadcasting Corporation, The Globe and Mail and Shaw Television Limited Partnership (collectively, the "Media Organizations") in response to the Notice to Participants and Media dated November 26, 2012 issued by The Elliot Lake Commission of Inquiry ("the Commission").

2. The Media Organizations are challenging both applications for a confidentiality order filed by (1) Eastwood Mall Inc., Robert Nazarian and Levon Nazarian (collectively, the "Eastwood Mall applicants") and (2) the Association of Professional Engineers of Ontario ("the PEO").

3. With respect to the Eastwood Mall applicants' application, the Media Organizations take the position that the public interest in disclosure of the financial statements of the owners of the Algo Centre Mall ("the Mall") outweighs any potential privacy interests of the Mall's owners.

4. With respect to the PEO's application, the Media Organizations assert that it amounts to a request for a blanket confidentiality order, sealing all of the documents it produced under a summons. The process proposed by the PEO is lengthy and convoluted, and runs contrary to the *Public Inquiries Act, 2009,* S.O. 2009, c. 33, Sched 6 (the "*Act*"), the Inquiry's Rules of Procedure (revised November 8, 2012 – the "Rules of Procedure") and the open court principle.

PART I - FACTS

5. On November 26, 2012, the Commission released a Notice to Media and Participants advising that the Commission had received two requests ("the two requests") from

persons objecting to the disclosure of documents to the public on the grounds of confidentiality.

6. On December 3, 2012, counsel for the Media Organizations ("media counsel") advised the Commission of the Media Organizations' intent to make submissions in response to the two requests. Counsel for the Media Organizations also delivered a confidentiality undertaking to permit counsel to receive copies of the information sought to be kept confidential for the purpose of making submissions. The unredacted documents at the centre of these applications for confidentiality were received by media counsel later that day, with further unredacted documents received on December 5, 2012.

PART II – ISSUES AND LAW

7. The Media Organizations will address the following issues in these submissions:

   a. What is the relevance of the open court principle to this Inquiry and how does the *Dagenais/Mentuck* test apply to the two requests?

   b. Have the Eastwood Mall applicants established that their privacy interests outweigh the public's interest in disclosure of the financial information they have filed, being information that was filed voluntarily and pursuant to the *prima facie* condition that such information is public?

   c. Does s. 38(1) of the *Professional Engineers Act,* R.S.O. 1990, Chapter P. 28 (the "*PEA*") operate to "mandate" confidentiality in the manner proposed by the PEO?

Issue A: Relevance of the Open Court Principle and *Dagenais/Mentuck* Test

8. The Media Organizations submit that the orders sought by the two sets of applicants are contrary to the open court principle, which is of particular importance in the context of a public inquiry and governs the conduct of a public inquiry.

9. Both sets of applicants seek, in effect, a blanket confidentiality order, or at the very least an order based on the premise that a presumption of confidentiality should be applied to certain documents – in doing so, they are asking the Commission to favour the preservation of "secrecy" over the principle of openness, which has been described as a "hallmark of a democratic society".[1]

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1 *Re Vancouver Sun*, 2004 SCC 43 at para 23.

10. One of the central goals of a *public* inquiry is to shed light on the circumstances surrounding a community problem or tragedy. Thus, such proceedings are presumed in law to be open to the public. The overarching function of public inquiries is one of public interest, which includes both public scrutiny and public education.

> The "open court" principle takes on a particular importance in relation to this type of public inquiry, the purpose of which is to educate the public about events leading up to a tragedy…
>
> > "One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth".[2]

11. The Supreme Court of Canada has affirmed the importance of the open court principle on several occasions. For example, in *Re Vancouver Sun*, the Court stressed this point in the following terms:

> The open court principle has long been recognized as a cornerstone of the common law. The right of public access to the courts is "one of principle…turning, not on convenience, but on necessity". "Justice is not a cloistered value". "[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity".
>
> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law". Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.[3]

12. Furthermore, the open court principle has been held to be an integral part of the guarantee of freedom of expression set out in section 2(b) of the *Canadian Charter of Rights and Freedoms*. Any violation of the principle of open courts must be based on clear, and not speculative, evidence that an exception is warranted. The open court principle is "not to be lightly interfered with".[4]

13. More recently, Deschamps J, for the Supreme Court, began her decision in *Canadian Broadcasting Corporation v Canada (Attorney General)* by stating:

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2 *Episcopal Corp of the Diocese of Alexandria-Cornwall v Cornwall (Public Inquiry)*, 2007 ONCA 20 at para 48 (citations omitted).

3 *Re Vancouver Sun*, 2004 SCC 43 at paras 24-25.

4 *Re Vancouver Sun*, 2004 SCC 43 at para 26.

> The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of the judicial process inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.
>
> The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfillment. Freedom of the press has always been an embodiment of freedom of expression. It is also the main vehicle for informing the public about court proceedings. In this sense, freedom of the press is essential to the open court principle…[5]

14. Furthermore, the open court principle is fundamental to the conduct of commissions of public inquiry. In fact, as pointed out by E. Ratushny, "the very nature and purpose 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 principle of freedom of expression under the *Charter*".[6]

15. Justice Cory's oft-cited reasons in *Phillips v Nova Scotia (Commissioner, Public Inquiries Act)* describe the nature and purpose of inquiries, and highlight their public importance:

> 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.
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> This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:

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5 *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2 at paras 1-2.

6 Ruling on Publication Ban, July 12, 2012, Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair at para 86, citing Ed Ratushny, *The Conduct of Public Inquiries*, (Toronto: Irwin Law Inc, 2009) at 331.

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are *public* inquiries…I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.[7]

16. Cory J. then noted that public inquiries serve a "social function" within our democratic culture.[8] Later in his reasons, he continued:

> Open hearings function as a means of restoring the public confidence in the affected industry and in the regulations pertaining to it and their enforcement. As well, it can serve as a type of healing therapy for a community shocked and angered by a tragedy. It can channel the natural desire to assign blame and exact retribution into a constructive exercise providing recommendations for reform and improvement.[9]

17. The open court principle is mandated in the *Act*, in the Order in Council establishing the Commission (the "Terms of Reference")[10] and in the Inquiry's rules. In sections 10 and 14 of the *Act*, and Rule 17 of the Rules of Procedure,[11] it is presumed that materials and hearings will be open to the public.

18. It is undisputed that the Commissioner has the authority to control the proceedings of the Inquiry, including the power to order *in camera* hearings, to delay or ban publication of certain evidence or to delay the release of the commission's conclusions.[12] Subsections 10(4) and 14(3) of the *Act* and Rule 17 of the Rules of Procedure are explicit in this regard.

19. However, the Supreme Court of Canada has also held that the *Dagenais/Mentuck* analysis applies to *any* discretionary order that limits freedom of expression and freedom of the press in relation to legal proceedings.[13]

20. The *Dagenais/Mentuck* analysis requires the party seeking an order that places restrictions on the open court principle to establish through convincing evidence that:

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7 *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 62-63. [Emphasis in original]

8 *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 64.

9 *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 117.

10 Order in Council 1097/2012.

11 Revised Rules of Procedure, November 8, 2012.

12 *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras 175-176.

13 *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 7 [*Toronto Star*].

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the restriction outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[14]

21. The Supreme Court has held that the risk to the proper administration of justice must be serious and well-grounded in the evidence. The purpose of the application to restrict access must be to prevent serious danger and not simply to obtain an advantage for the administration of justice.[15]

22. It was further held in *R v Mentuck* that in instances where interests other than the administration of justice are raised, a similar approach would be used; the applicants would be required to establish through convincing evidence that a "serious risk" favoured displacing the general rule of openness under the *Dagenais/Mentuck* analysis.[16]

Issue B: The Eastwood Mall Applicants Have Not Met the Test for a Confidentiality Order

23. The Eastwood Mall applicants seek a confidentiality order pursuant to subsections 10(4) and 14(3) of the *Act*. The order sought would prevent the dissemination of the evidence filed in support of their application for funding to any participants and "particularly to the public". It would also prevent the use of this information by the Commission for any purpose other than making a determination with respect to the application for funding.[17]

24. The Media Organizations submit that the information filed by the Eastwood Mall applicants in support of their funding application should not be protected by a confidentiality order. The filed information forms the basis for the Commissioner's November 8, 2012 Ruling on Standing and Funding. Upon its filing before the Commission, the information became a matter of public interest and should be made public.

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14 *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 26.

15 *R v Mentuck*, 2001 SCC 76 at paras 26, 34.

16 See, eg, *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

17 Eastwood Mall Applicants' Submissions Requesting a Confidentiality Order, October 22, 2012 at para. 6.

Materials in Support of Funding are Automatically Public Upon Filing

25. The Eastwood Mall applicants applied for standing and funding pursuant to the Commission's Revised Rules of Standing and Funding. The Rules of Standing and Funding clearly state that the materials filed in support of a request for standing and funding will be made public:

> Rule 14. All materials filed in support of a person's motion in writing for standing will be available to the public on the Commission's website at www.elliotlakeinquiry.ca.
>
> Rule 25. <u>All materials filed in support of a party's motion in writing for funding will be available to the public on the Commission's website at www.elliotlakeinquiry.ca.</u>[18]

26. The Media Organizations submit that in determining the Eastwood Mall applicants' request for a confidentiality order, the Commission should consider the following points:

> (a) the applicants' decision to submit a request for funding was entirely voluntary;[19]
>
> (b) the choice of materials filed in support of a request for funding was entirely at the discretion of the party filing them;
>
> (c) the Inquiry's Rules of Standing and Funding governing requests for funding clearly state that all materials filed in support of such a request will be made public; and
>
> (d) the ruling by the Commissioner should be open to public scrutiny which can only be achieved if the public has access to the documents upon which the Commissioner based his decision.

The Test for Granting the Applicants' Request for Confidentiality

27. As discussed above, the *Dagenais/Mentuck* analysis requires the applicants to establish through convincing evidence that such a "serious risk" exists that on balance, secrecy in a *public* inquiry is justified and the presumption of openness should be displaced.

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18 Revised Rules of Standing and Funding, October 26, 2012 [emphasis added].

19 Note that several other parties applied for standing and many of these parties applied for standing *and* funding. No other party has requested a confidentiality order for any of their filed materials in support of standing or standing/funding. These materials are posted on the Inquiry website.

28. The statutory power under the *Act* to grant a confidentiality order requires the Commissioner to weigh the public interest in disclosure against the individuals' interest in confidentiality.

29. Though the open court principle creates a presumption of openness, Rule 17 of the Rules of Procedure provides that where a participant or summons recipient objects to the disclosure of a document or information to other participants and/or the public on the grounds of confidentiality, and seeks an order pursuant to subsection 10(4) or 14(3) of the *Act*, the participant or summons recipient shall provide written submissions setting out the order requested and the reasons for it. "In determining whether to make the order, the Commissioner will consider, among other things, the duty of procedural fairness to the other participants and his obligation pursuant to section 17 of the *Act*."[20]

30. Subsection 10(4) of the *Act* grants the Commission the power to impose conditions on the disclosure of information at a public inquiry to protect its confidentiality.

31. Subsection 14(3) of the *Act* provides that the Commission may exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information if it decides that the public interest in the public inquiry or the information to be disclosed in the public inquiry is outweighed by the need to prevent the disclosure of information that could reasonably be expected to be injurious to, *inter alia,* "a person's privacy, security or financial interest."

32. The Eastwood Mall applicants submit that consideration of their privacy interests, the duty of procedural fairness to the other participants and the Commissioner's obligations pursuant to section 17 of the *Act* supports their request for a confidentiality order.

33. The Media Organizations submit that the Eastwood Mall applicants have not met the high burden set out in the *Dagenais/Mentuck* analysis and have therefore not displaced the presumption of openness underlying subsection 14(3) of the *Act*.

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20 Revised Rules of Procedure, November 8, 2012, r. 17 [emphasis added]

No Evidence of Serious Risk Justifying Confidentiality

34. The Media Organizations submit that no serious risk has been established on the evidence such that the presumption of openness should be displaced in the circumstances of the Eastwood Mall applicants' request for confidentiality.

35. The request for confidentiality submitted by the Eastwood Mall applicants is not supported by any evidence. Their bald, unsupported arguments are as follows: (a) the basic concept that financial records are generally expected to be private; (b) a "serious prejudice" to these applicants if the materials are misused or used for any other purpose.

36. The Media Organizations submit that in the circumstances, Eastwood Mall applicants can have no reasonable expectation of privacy in the filed records at issue.

37. As discussed above, the Eastwood Mall applicants' expectations of privacy must be seen in light of the fact that they voluntarily chose to submit a request for discretionary funding and to file certain information in support of that request. The information was not compelled (i.e. by way of a summons). Unlike the situation in the authorities cited by these applicants, the information was not obtained pursuant to the search and seizure powers of the state. Rather, the filing of the material was done with full knowledge of the Commission's intention to make all such materials public pursuant to the Commission's Rules of Standing and Funding and it was indeed received into evidence and considered by the Commission for the purposes of its Ruling on Standing and Funding.

38. Moreover, the Eastwood Mall applicants have failed to provide any evidence of the "serious prejudice" that would arise if the materials are disclosed. Their reliance on the deemed undertaking rule in the *Act* as support for their allegation of "serious prejudice" is not applicable to this request for a confidentiality order. As well, their passing reference to a speculative negative impact on their reputations as a result of this information becoming public falls well short of displacing the presumption of openness.

39. Even in the Gomery Inquiry, where some evidence of alleged risk of harm was introduced by the applicants, the public interest in openness prevailed: "The public interest requires complete disclosure of the financial statements in question. Moreover, within the context of this Commission of Inquiry, freedom of expression, a fundamental

right, must be respected and protected, even at the expense of private interests, particularly strictly commercial interests."[21]

Public Interest in the Information Being Disclosed

40. The Media Organizations submit that there no public interest allowing the Eastwood Mall applicants' request to displace the *prima facie* public nature of their materials filed in support of the funding request.

41. The legal authority of the Commissioner to recommend funding, pursuant to the Terms of Reference and the Rules of Procedure, supports the conclusion that all of the Commission's decisions on requests for funding, and the evidentiary basis for these discretionary decisions, are of significant importance to the Inquiry and therefore in the public interest.

42. The authority of the Commissioner to recommend funding is specifically set out in the Terms of Reference governing the Inquiry.[22] Pursuant to section 11 of the Terms of Reference, the Commission may make recommendations to the Attorney General regarding funding to participants, to the extent of that participant's interest where, in the Commissioner's view, the participants would not otherwise be able to participate in the inquiry without such funding.[23]

43. Furthermore, the Revised Rules of Standing and Funding outline the various considerations for the Commissioner when exercising his power to recommend funding, in addition to the question of whether the participant would not otherwise be able to participate without funding: the nature of the applicant's interest and/or proposed involvement in the Inquiry; whether the applicant has an established record of concerns for and a demonstrated commitment to the interest it seeks to represent; whether the applicant has special experience or expertise with respect to the Commission's mandate; whether the applicant has attempted to form a group with others of similar interests.

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21 Ruling on Confidentiality Order, April 13, 2005, Commission of Inquiry into the Sponsorship Program and Advertising Activities: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/rulingonconfidentialityorder/default.htm

22 Terms of Reference, s. 11, "Funding".

23 Emphasis added.

44. As noted by the Commissioner in his Ruling on Standing and Funding, the materials filed by the Eastwood Mall applicants in support of their funding request (in addition to their publicly available filed materials[24]) include the following documents over which confidentiality is sought[25]:

1) CRA Notice of Assessment for Tax Years 2007, 2008 and 2011 for Robert Nazarian;

2) CRA Income Tax and Benefit Return for Tax Year 2011 for Robert Nazarian;

3) Bank account statements for Robert Nazarian for various periods between July 1 and October 18, 2012;

4) Profit and Loss/Balance Sheets for Eastwood Mall Inc. for January 1 to June 23, 2012;

5) Financial records and correspondence from Eastwood Mall Inc.'s accountants for the periods January 1, 2010 to December 31, 2010 and January 1, 2011 to December 31, 2011;

6) CRA Income Tax Return for Eastwood Mall Inc. for Tax Year 2011;

7) CRA Income Tax and Benefit Return for Tax year 2011 for Levon Nazarian;

8) Supplementary Submissions on Funding;

9) Affidavit of Fabio Brussolo;

10) Affidavit of Sam Hurmizi;

11) Affidavit of Robert Nazarian;

12) Letters from Michael Title, dated October 26, 2012;

13) Order to Prohibit Use and Occupancy, dated October 24, 2011;

14) Contract for the Demolition of the Algo Centre Mall;

15) Supplementary Submissions on behalf of the Diocese of Alexandria-Cornwall at the Cornwall Inquiry;[26]

16) CRA Income Tax and Benefit Return for Tax Years 2008, 2009 and 2010 for Robert Nazarian;

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24 The publicly available documents include the two initial Applications for Standing and Funding of the Eastwood Mall applicants and the supporting Affidavit of Oliver Fonseca, as posted on the Commission website.

25 Ruling on Standing and Funding, November 8, 2012, para. 13-15.

26 This document is presumably not included in the request for a Confidentiality Order.

17) Profit and Loss/Balance Sheets for Yorkdale Group Inc. as of 30 September 2012;

18) Profit and Loss/Balance Sheets for Yorkdale Centres Inc. as of 30 September 2012.

45. The Commissioner was highly critical of the evidentiary record filed by the Eastwood Mall applicants in support of their request for funding. He made the following findings in support of his Ruling to reject their request for funding:

- applicants seeking funding must be forthright and provide the Comission with a clear picture of their net worth, including their revenues, expenses, assets and liabilities;

- the Eastwood Mall applicants "have not provided sufficient evidence to justify why they would not otherwise be able to participate in the Inquiry without such funding";

- the evidence of the Eastwood Mall applicants is "wholly deficient";

- the documents indicate a relationship between Eastwood Mall Inc. and various other entities (Yorkdale Group Inc., Yorkdale Centre Inc. and Robert Nazarian) and large transfers of funds between them, yet they are "completely silent about their corporate structure and share ownership"

- "the unaudited statements provided raise more questions than they answer";

- the picture is unclear regarding insurance coverage issues and the nature and extent of coverage;

- in view of the "nebulous quality of the information" provided, it is unclear as to the distinctions between Robert Nazarian and the corporate entitites he is clearly connected to.[27]

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27 Ruling on Standing and Funding, November 8, 2012, pp. 15-17.

46. The Media Organizations submit that there is a clear public interest in understanding the basis for the Commissioner's Ruling on Standing and Funding and in particular, his ruling on the Eastwood Mall applicants' request. It is a fundamental aspect of the open court principle that the public to have access to everything that is filed with the Commission. In general, understanding an important decision as to whether a participant may receive public funds for their participation in an inquiry is a matter of public interest. Furthermore, understanding the evidentiary basis for the Commissioner's ruling is tied to the general principle of ensuring public oversight, and in particular, the fundamental goals of transparency and openness of public inquiries.

47. The Media Organizations submit that there is additional public interest in the Mall's financial records as they contain background information about the key figures in the Inquiry.

48. The records are relevant to understanding the financial situation of the Mall and its owners including *inter alia,* its ownership structure, expenditures and revenues.

49. The Eastwood Mall applicants are clearly important participants to the Inquiry. As the Commissioner held in his ruling, "the corporation and the individuals are directly connected to the ownership and management of the Mall at the time of the collapse. They are the object of a number of investigations. They clearly have a significant, substantial and direct interest."[28]

50. The Eastwood Mall applicants have also stated on the record that they are "central figures in this Inquiry"[29] and that they "possess exclusive knowledge of and insight into issues relating to this Inquiry, which is vital to its success and mandatory for the satisfaction of its mandate."[30]

51. The Commission's mandate is to inquire and report on events surrounding the collapse of the Algo Centre Mall on June 23, 2012, the death of certain individuals and the injuries to other individuals, as well as the emergency management and response. The

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28 Ruling on Standing and Funding, November 8, 2012.

29 Eastwood Mall Applicants' Submissions Requesting a Confidentiality Order, October 24, 2012, para. 21.

30 *Ibid,* para. 24.

Commission's mandate also includes reviewing relevant legislation, regulations and bylaws, policies, processes and procedures of provincial and municipal governments *and other parties* with respect to the structural integrity and safety of the Mall, and with respect to the emergency management and response.[31]

52. The financial records over which confidentiality is sought are clearly relevant in that any information regarding revenues, losses, expenditures, debts and liabilities and ownership structure of the corporation that owns the Mall (and its linked corporations), and the records of the corporation's owner and operator and the owner/operator's son who oversaw the administration of the Mall's business transactions, are relevant to the inquiry into the collapse of the Mall and the policies, processes and procedures relating to the structural integrity and structure of the Mall. For example, it is widely reported that Robert Nazarian has publicly stated that he has spent over a million dollars in repairs on the Mall.[32]

Issue C: Does s. 38(1) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P. 28 (the "*PEA*") operate to "mandate" confidentiality in the manner proposed by the PEO?

Overview

53. The Media Organizations submit that the order requested by the PEO should be dismissed on the following basis: (1) the applicant has not provided any evidence that the open court principle should be overridden; (2) to grant the PEO's request would thwart the Commissioner's statutory mandate and significantly and unnecessarily delay the Inquiry's proceedings.

54. The PEO has provided numerous documents under its power or control to the Commission in response to a Summons to Produce, dated September 21, 2012. Specifically, it says it has produced all non-privileged documents relating to complaints received and/or disciplinary action taken by the PEO in relation to the work and/or practices of certain unnamed members of the PEO.

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31 Terms of Reference.

32 For example, see the news article at: http://www.theglobeandmail.com/news/national/labour-ministry-says-it-was-citys-responsibility-to-monitor-elliot-lake-malls-structure/article4379606/

55. The PEO alleges that more than one hundred of the documents produced to the Commission are covered by subsection 38(1) of the *PEA* and are therefore confidential ("the PEO Documents").

56. On that basis, the PEO objects to the disclosure of the PEO Documents to the other participants with standing at the Inquiry, as well as to the public.

57. The Media Organizations submit that in the context of a public inquiry, unless specific and compelling reasons exist for protecting a particular document's confidentiality such that the fundamental principles of openness and procedural fairness should be overridden, it must be disclosed to the public.

58. As described above, the open court principle is well-established in our society and in law and is of particular importance in commissions of public inquiry. The PEO's position, through its emphasis on the preservation of "secrecy", runs directly contrary to the important public purpose and function of the Inquiry and to the open court principle.

59. Contrary to the PEO's submissions, section 38 of the *PEA* does not change the fact that documents and information that are relevant to the proceedings of a public inquiry, including this one, are presumptively accessible to the public.

60. Moreover, the Media Organizations submit that section 38 has no applicability to the Commission or in the Inquiry.

Section 38 of the PEA *Only Applies to the PEO and its Employees/Agents*

61. Subsection 38(1) of the *PEA* obliges "[e]very person engaged in the administration of the Act" to refrain from communicating any matters he or she learns "in the course of his or her duties" to any other person, subject to certain exceptions listed in the provision. Subsection 38(3) provides that anyone who contravenes subsection (1) is guilty of an offence and subject to a fine of up to $10,000.

62. Subsection 38(2) prevents any person to whom subsection (1) applies from giving testimony or producing documents in a civil action or proceeding if it relates to information obtained in the course of his or her duties.

63. Section 38 is therefore clear in its scope and 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 proceeding.

64. The PEO's submission that the Commission is subject to the "obligation" contained in subsection 38(1) is not supported by the ordinary meaning of the words used in the provision itself.

65. The Commissioner, employees of the Commission and all others involved in this Inquiry are not "engaged in the administration" of the *PEA* through their involvement in the Inquiry.

66. According to its submissions, section 38 is particularly important for the protection of information gathered by the PEO in the course of an investigation of a complaint brought against one of its members. However, the scope of that protection is narrow; it only prevents persons employed or engaged by the PEO, or otherwise engaged in the administration of the *PEA*, from sharing information obtained in the course of their duties.

67. Put 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 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 the person against whom a complaint is made.

68. In its submissions, the PEO references a ruling Justice Goudge made while Commissioner of the Inquiry into Pediatric Forensic Pathology in Ontario (the "Goudge Inquiry") in which he ordered that certain measures be taken to protect the identities of young persons involved in the cases under review.[33]

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33 Submissions of the Association of Professional Engineers of Ontario, Request for Order under Section 10(4) *Public Inquiries Act, 2009* at para 17.

69. Unlike section 38 of the *PEA*, the provisions in the child welfare and youth criminal justice legislation at issue before the Goudge Inquiry are expansive in their application. As opposed to being restricted to a small group of people, these provisions broadly state that "no person" shall publish identifying information about the young person (or others) covered by the provisions.[34]

70. The restriction on publication under the legislation considered by Justice Goudge applied to everyone, including the Commission itself. In contrast, Section 38 of the *PEA* does not apply to the Commission or anyone associated with its work.

Section 38 of the PEA *Does Not Attach to Documents or Information* Per Se

71. The narrow scope of section 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 (or information) they have acquired in the course of their duties.

72. In contrast, subsection 36(3) of the *Regulated Health Professions Act, 1991* ("*RHPA*") states that "[n]o record of a proceeding under this Act, ... no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding."[35] Unlike section 38, subsection 36(3) of the *RHPA* attaches directly to the document, no matter who may possess it.

The Case Law on Section 38 of the PEA

73. The case law supports the above analysis.

74. In *Watson v Boundry*, 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. The plaintiff sought the information and documents from the PEO and two of its employees, the defendants in the action.[36]

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34 *Youth Criminal Justice Act*, SC 2002, c.1, *Young Offenders Act*, RSC, 1985, c. Y-1; *Child and Family Services Act*, RSO 1990, c. C.11; *Child Welfare Act*, RSO 1980, c.66.

35 *Regulated Health Professions Act, 1991*, SO 1991, c.18.

36 *Watson v Boundry*, 1997 CarswellOnt 2325.

75. Similarly, in *Niagara South Condominium Corp v J David Pounder Ltd*, the plaintiff sought access to a report commissioned by the PEO during its investigation of a complaint made by the plaintiff against the defendant. The plaintiff sought non-party production of the report from the PEO.[37]

76. 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 is the Commission that has possession of the documents and since it is not "engaged in the administration of the [PEA]" section 38 does not apply to the Commission.

77. As a counterpoint, in *Williams v Webster*, Somers J. 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. This complaint was admitted as evidence.[38]

78. In that case, section 38 would have prevented production of the same formal complaint had it been sought from the PEO or one of its employees. But there was no concern about the use of the formal complaint at the motion because the defendants, who had received the formal complaint during the PEO's complaints process, were not engaged in the administration of the *PEA*.

The Public Inquiries Act, 2009 Requires Production of Section 38 Documents

79. As acknowledged by the PEO in its submissions, subsection 10(3) of the *Act* is explicit in requiring any person so ordered, and despite any other Act, to provide the commission with information that is confidential or inadmissible under another Act or regulation. The information provided in these circumstances is disclosed "for the purposes of the public inquiry".

80. The PEO purported to produce documents that it otherwise may have an obligation to keep confidential pursuant to subsection 10(3) of the *Act*.

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37 *Niagara South Condominium Corp v J David Pounder Ltd*, 1998 CarswellOnt 3719.

38 *Williams v Webster*, 1998 CarswellOnt 3298.

81. Subsection 10(3) of the *Act,* like many of the provisions in the *Act*, was not part of the predecessor public inquiries legislation. That is, there was no provision that explicitly empowered a commission to require production of documents despite any confidentiality provisions in any other Act.

82. That said, even under the previous version of the legislation, Justice Goudge ruled that subsection 36(1) of the *RHPA*, which is similar to subsection 38(1) of the *PEA*, did not put documents held by the College of Physicians and Surgeons of Ontario "beyond the reach" of the commission's summons for production:

> ...it is clear that the provision of a statutory promise of confidentiality does not bar the compelled production of documents by summons unless the documents meet the test for privilege, or the legislature has used language specifically prohibiting their introduction into evidence.[39]

83. Through provisions like subsection 10(3), the legislature clearly intended to provide commissions with sufficient tools to enable them to fulfill their mandates of investigating, uncovering truth, educating and informing the public, and making recommendations for change in the wake of a community problem or tragedy. The new *Public Inquiries Act, 2009* expressly recognizes that materials under the power or control of persons who are statutorily precluded from disclosing them in most circumstances should be made available to public inquiries.

84. Section 38 of the *PEA* should not, and is not intended to, interfere with the important function public inquiries play in our society. In enacting the *Act*, the legislature has decided that in the special circumstances under which a commission of inquiry is established by the government, section 38 and provisions like section 38 have no application.

The Inquiry is Not a Civil Proceeding

85. If any doubt remains that section 38 of the *PEA* has no applicability to the Commission or to the proceedings of the Inquiry, the fact that public inquiries have been held not to be

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39 Ruling on the CPSO Motion for Directions, October 10, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 8.

"civil proceedings" for the purposes of confidentiality provisions like section 38 provides further support for this position.

86. In his ruling dated October 10, 2007, Justice Goudge determined that a public inquiry is not a civil proceeding for the purposes of section 36 of the *RHPA*, referred to above. In coming to this conclusion, Justice Goudge applied Justice Linden's analysis as commissioner of the Ipperwash Public Inquiry on a similar question:

> ...Commissioner Linden was required to consider the meaning of "civil proceeding" in s. 69(9) of the *Police Services Act*, RSO 1990, c P.15. That subsection precluded certain documents prepared pursuant to that Act from admission in a civil proceeding. Using the same approach as Cory J. [in *Winters v Legal Services Society*, [1999] 3 SCR 160], he concluded that this prohibition does not apply to a public inquiry because an inquiry is an investigative not an adjudicative process, and he could make no finding of civil or criminal liability. As he put it at paragraph 44 of his ruling: "...there is no *lis* in a public inquiry."[40]

87. Justice Goudge held that one of the goals of section 36 (and provisions like it) is to protect the integrity of the complaints process "by preventing it from being used as a vehicle to assist in vindicating one's rights in another proceeding."[41] Prohibitions against admissibility or production in a civil proceeding do not extend to a public inquiry, according to Justice Goudge, because:

> ...to be true to that objective, [a collateral proceeding] must be one...that involves the enforcement, redress, or protection of private rights.[42]

88. As noted by Justice Goudge, public inquiries do not adjudicate private rights. [43] As was the case for the Goudge Inquiry, the Order in Council establishing this Commission prohibits it from expressing any conclusion regarding the potential civil or criminal liability of any person or organization.[44]

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40 Ruling on the CPSO Motion for Directions, October 10, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 11.

41 Ruling on the CPSO Motion for Directions, October 10, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 12. Justice Goudge noted that this was consistent with Laskin JA's analysis in *MF v Sutherland*, 2000 CanLII 5761, which also pertained to section 36 of the *RHPA*.

42 Ruling on the CPSO Motion for Directions, October 10, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 12.

43 Ruling on the CPSO Motion for Directions, October 10, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 12-13.

44 Terms of Reference, s. 3.

The PEO *Has Not Met the Burden for Displacing the Presumption of Openness*

89. As is noted in the PEO's submission, Boland J. in *Watson v Boundry*, stated that, in preserving secrecy, section 38 of the *PEA* "promotes full and impartial investigation and sensibly ensures the confidentiality of complaints and the independence of investigators and decision makers."[45]

90. The importance of conducting a full, impartial investigation and uncovering truth lies at the very heart of the Inquiry's raison d'être.

91. In fulfilling its mandate, the Commission will be conducting most of its activities in full public view, including its hearing in public. To quote Justice Goudge in his November 1, 2007 ruling:

> Public hearings, by their very nature, must be conducted in public, so far as possible. That is their raison d'être.[46]

92. In this same ruling, Justice Goudge excerpted from several decisions of the Supreme Court that comment on the importance of public inquiries and the open court principle. In so doing, he emphasized the open and public nature of commissions of inquiry.[47]

93. Contrary to the submission of the PEO,[48] there should be no "presumption of secrecy and confidentiality" in the Inquiry's proceedings. Rather, as is made explicit in provisions like subsections 10(3) and 14(2) of the *Act* and Rule 17 of the Commission's Rules of Procedure, the presumption is openness and disclosure at a public inquiry. Pursuant to the *Act*, the Rules of Procedure and the *Dagenais/Mentuck* analysis, those asserting confidentiality must establish through convincing evidence that documents and information relevant to the purpose of the Inquiry should be kept secret and from the public's view.

94. Apart from reliance on section 38 of the *PEA*, the PEO has provided no evidence that any of the PEO Documents are of such a nature that the open court principle should not be

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45 *Watson v Boundry* (1997), 34 CLR (2d) 248, 1997 CarswellOnt 2325 at para 6.

46 Ruling on the Requests for Non-Publication Orders, November 1, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 1.

47 Ruling on the Requests for Non-Publication Orders, November 1, 2007, Inquiry into Pediatric Forensic Pathology in Ontario at 4 [emphasis in original].

48 Submissions of the Association of Professional Engineers of Ontario, Request for Order under Section 10(4) *Public Inquiries Act, 2009* at para 21.

complied with. Such evidence is required both under Rule 17 and under the *Dagenais/Mentuck* test.

95. In fact, according to a letter from PEO counsel to Commission Counsel dated December 3, 2012, the PEO does "not accept any suggestion…that somehow there is any onus on the PEO to justify the confidentiality" it asserts, and submits that reliance on section 38 "mandates" confidentiality on its own.[49]

96. With respect, the above submission is incorrect in law.

97. In the ongoing Manitoba Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair ("Hughes Inquiry"), several parties with standing argued that because the inquiry was to examine the child welfare system, in which the 'status quo' is confidentiality, the normal onus should be reversed; the media and others should be required to show why disclosure is necessary. Commissioner Hughes rejected this argument, stating that "[t]he onus and standard in this case has been clearly stated by the Supreme Court in *R v Mentuck*".[50]

98. In addition, the Media Organizations repeat and rely on the arguments, set out above, that section 38 of the *PEA* is not applicable to the Commission or in the context of the Inquiry's proceedings. The PEO has therefore not met the high burden it must meet to restrict access to documents or information relevant to a public inquiry.

99. It is clear from provisions such as subsections 10(4) and 14(3) of the *Act* and Rule 17 of the Rules of Procedure, that the Commission has the power to impose conditions on the disclosure of information to protect confidentiality in appropriate circumstances. But "appropriate circumstances" are rare and must be supported by clear and convincing evidence.

100. In the absence of any evidence – much less "clear and convincing evidence" – supporting its claim, there is no basis for the PEO's assertion that the PEO Documents, or some number or portion of them, should remain confidential.

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49 Letter from Phil Tunley to Peter Doody, Commission Counsel (3 December 2012) at http://www.elliotlakeinquiry.ca/confidentiality/pdf/Professional_Engineers_of_Ontario/12.03.12-Stockwoods.pdf

50 Ruling on Publication Ban, July 12, 2012, Commission of Inquiry into the Circumstances Surrounding the Death of Phoenix Sinclair at para 101.

101. All materials the PEO has produced to the Commission that are used in the Inquiry or included in the Inquiry's Record, should be immediately disclosed to the participants and accessible to the public and to the media until and unless the PEO presents convincing evidence that there is a serious risk of such a nature that the open court principle should not be complied with.

The PEO's Proposed Order is Contrary to the Principles of Transparency and Efficiency

102. The PEO seeks an order establishing a cumbersome multi-step procedure for determining whether the materials it has produced in compliance with the September 21, 2012 Summons are to be made public. Prior to disclosure of the PEO Documents to other participants in the Inquiry or to the public, this proposed procedure would require giving the PEO, certain named individuals, including six complainants, and "anyone else to whom information contained in any of the [PEO] Documents relates", an opportunity to review the PEO Documents and to make submissions to the Commissioner "as to the appropriateness of any further disclosure and/or use of such documents by the Commission."

103. The Media Organizations submit that the PEO's requested order is contrary to the public purpose of the Inquiry, unnecessary, and overly burdensome and time-consuming. In short, it will delay and complicate the important work of the Commission.

104. The Media Organizations note that the Terms of Reference require the Commission to deliver a final report within 12 months, but no later than 18 months, from the commencement of the Inquiry.[51]

105. Efficiency and expeditiousness, like transparency and openness, form part of the core of the Commission's procedural mandate.[52]

106. The PEO relies only on section 38 of the *PEA* to justify the order it seeks. Pursuant to the analysis presented above, it is apparent that the secrecy imposed by section 38 either applies or it does not. That is, if it applies, there should be no production or disclosure of the information, but, conversely, if the section does not apply, no restrictions should be

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51 Terms of Reference, s. 12.

52 See, eg., subsections 5(b) and 9(f) of the *Act* and section 12 of the Terms of Reference.

placed on their disclosure. It is noted that the documents have already been provided to the Commission.

107. For example, in *Williams v Webster*, Somers J allowed the defendants in a civil action to rely on the formal complaint filed with the PEO. Likewise, at the Goudge Inquiry, the documents purported to be covered by section 36 of the *RHPA* were ordered to be produced. Once it was determined that section 38 (or section 36 in the case of the *RHPA*) did not apply, no conditions or restrictions were imposed on the disclosure of these documents merely because the confidentiality provision exists in other legislation.

108. It is equally clear that section 38 has no application at this Inquiry. There is therefore no basis for the Commission to order the imposition of the multi-step procedure requested by the PEO.

109. In addition, the proposal that several individuals, including anyone to whom one of the PEO Documents may relate, be given an opportunity to review and make submissions with regard to the disclosure of the documents is unreasonable. Standing has been granted to 14 parties at the Inquiry. To displace the onus that lies on the PEO to justify confidentiality and to involve parties beyond those with a direct interest in the subject matter of the Inquiry will only serve to further complicate and unnecessarily delay the proceedings.

110. The Media Organizations respectfully submit that the PEO Documents should be produced to all parties with standing before the Commission in a timely manner. It is important to the public and the credibility of the Commission that its proceedings are not unnecessarily delayed. The participants must have access to all relevant documents and information, including the PEO Documents, at the earliest opportunity. This in turn will expedite the entry of the PEO Documents into the public realm, thus satisfying the need for transparency and efficiency.

111. While Rule 17 allows a party to object to disclosure of documents to other participants, the PEO has provided no grounds supporting the non-disclosure of any document or class of documents. Unfettered access to the PEO Documents should therefore be provided to

the other participants in the Inquiry, in accordance with their rights as parties with standing.

112. Since section 38 of the *PEA* has no applicability in these proceedings, the PEO Documents should have the same status and be treated in the same manner as any other information that is used in the course of the Inquiry's proceedings.

113. Any restriction on the public disclosure of any materials used in the course of the Inquiry's proceedings must meet the high burden imposed by the *Dagenais/Mentuck* analysis.

114. In conclusion, the Media Organizations respectfully submit that the two applications for a confidentiality order be dismissed. The Eastwood Mall applicants have failed to establish that their alleged privacy interests in the voluntarily filed documents outweigh the clear public interest in their immediate disclosure. Similarly, the PEO has failed to establish that the PEA has any applicability to the Commission or Inquiry. Furthermore, there is no rational need for the PEO's proposed multi-step process. To accept this process will only lead to delay and complication, and to the displacement of the open court principle.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2012.

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