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DELIVERED VIA EMAIL

Mr. Peter Doody, Commission Counsel
The Elliot Lake Commission of Inquiry
1400 Blair Place
6th Floor
Ottawa, ON K1J 9B8

Dear Mr. Doody:

Re: Confidential Document Process – Association of Professional Engineers of Ontario ("PEO")

Thank you for your letter of November 27, and also for the letters and enclosures from your colleagues, Ms. Authier dated November 26, and Ms. Effendi dated November 29, 2012.

We are pleased to see in the letters from your colleagues that the number of Confidential Documents in issue is narrowing as you and your team review the PEO's initial list. Our client has been doing the same. We therefore enclose an additional list of documents, prepared by our clients, which correlate an additional [10] documents that still remain on the Commission's list to public productions you have received from the PEO. We confirm that these can also be removed from the list of those that remain in issue.

In addition, we note that the letter of November 26 characterizes the documents remaining in issue as "responsive", which we presume means simply that they were responsive to the Commission's very broad summons. We assume that the Commission's review is ongoing, and that before this matter is argued on December 17 we will only be dealing with documents that the Commission believes are actually relevant, as opposed to broadly "responsive" in this sense.

With respect to your letter of November 27, we appreciate your acknowledgment on page 3 that the PEO has complied with ss. 10(3) of the *Public Inquiries Act,2009* by producing its Confidential Documents without redaction to the Commission.

However, your letter goes on to suggest that the Commission is now "required to give the public access to that information, to the extent that it is relevant." Obviously, for the reasons set out in

our Submissions, which you have, we disagree with this position. You appear to rely primarily on subsections 14(2) and 14(3) of the *Public Inquiries Act, 2009* in support of your position. However, we note that those provisions deal specifically and solely with public access to information disclosed and received "***in the hearing***". From the PEO's perspective, it is premature to address any questions about what information is or is not relevant to the eventual "hearing" in this matter at this time. At this stage, the process order sought by the PEO deals with pre-hearing public disclosure of the Confidential Documents, and not with their use or admissibility at the hearing.

Also on page 3, you characterize our Submissions as an "application" by the PEO "for a confidentiality order". We point out, and we believe our Submissions make it clear, that the position of the PEO is very different. From our perspective the "order" mandating confidentiality has already been made by the Legislature in ss. 38(1) of the *Professional Engineers Act*. We therefore do not accept any suggestion, if there is one, that somehow there is any onus on the PEO to justify the confidentiality to which we refer. That confidentiality is already mandated by law, and any onus in our view rests on those seeking to make the Confidential Documents more broadly available to the parties and the public than is mandated by ss. 10(3) of the *Public Inquiries Act,2009*. We note as well this is an important point of distinction between the situation of the PEO and that of the Mall Owners, whom we understand have brought an application for confidentiality in the absence of any similar statutory provision. Nevertheless, subject to that important clarification, if it is procedurally convenient to the Commission to consider the PEO as an "applicant," we will not raise any technical objection to that manner of proceeding.

We are concerned, however, by the Commission's position that it is not required to give notice of these proceedings to the persons whose confidentiality interests in the documents are protected by ss. 38(1). You appear to expect the PEO to argue on their behalf. However, the PEO has no independent interest in the confidentiality of these documents. If, after giving proper notice, the Commissioner decides to make some or all of the Confidential Documents available to the public, the PEO would have no independent objection. While the PEO intends to do its best to notify persons apparently affected, particularly those who are its own members or complainants for whom it may have last known contact information, it cannot accept any responsibility in that regard. Fundamentally, it is the Commission that owes a duty of fairness to persons affected by proceedings at this Inquiry, and the PEO has only the responsibilities of a party with standing. The PEO's request to defer the issue of public access until proper notice has been provided to all those with an interest in the Confidential Documents does not offend the "openness" principle. In our view, it is consistent with and part of the public interest in ensuring a transparent inquiry process to ensure that that process is fair.

Your letter then invites the PEO to comment on the applicability of a number of cases. You ask whether we wish an opportunity to file further submissions to address them. We have considered anew the cases you cite. In that regard, we note the following:

(a) With respect to the Inquiry into Pediatric Forensic Pathology in Ontario ("Goudge Inquiry"), we refer you to paragraphs 17-18 of the PEO's submissions, wherein we deal specifically with Justice Goudge's November 1, 2007 Ruling.

- Commissioner Goudge Rulings at Appendix 16 and 22 of the Inquiry into Pediatric Forensic Pathology in Ontario Report

(b) As to the other Inquiry rulings you have cited, we are of the view that the PEO's position is consistent with those rulings. The process order sought by the PEO ensures an appropriate balance between fairness to those to whom the Confidential Documents relate and the public's right to a transparent and open inquiry process. This issue is specifically anticipated and addressed in paragraphs 27-30 of our Submissions.

- *Episcopal Corporation of the Diocese of Alexandria-Cornwall v Cornwall Public Inquiry*, 2007 ONCA 20; and
- Ruling of Justice O'Connor, A.C.J.O., November 20, 2007, Inquiry into Pediatric Forensic Pathology in Ontario

(c) The remaining cases you have cited are familiar, leading cases dealing with the "open court" principle. This principle is, again, expressly addressed in paragraph 32 of our Submissions, which makes the point that this principle does not apply in the face of a statutory confidentiality provision such as ss. 38(1) of the *Professional Engineers Act*. In addition, like ss. 14(2) and (3) of *Public Inquiries Act, 2009*, this principle is only applicable at the hearing stage.

- *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 S.C.R. 522;
- *M.E.H. v Williams*, [2012] O.J. No. 525 (C.A.); and
- *Vancouver Sun (Re)*, 2004 2 SCC 43

The PEO's position remains as set out in its Submissions filed on Friday, November 16, 2012. The process order sought by the PEO is consistent with both the mandate of the Commission pursuant to s. 10(4) of the *Public Inquiries Act, 2009* and with section 38 of the *Professional Engineers Act*. Unlike the situation in the cases cited by you, the Confidential Documents have not been tendered (or sought to be tendered) into evidence as relevant to the inquiry.

We understand that submissions by the Commission and other interested parties will be available no later than this Friday, December 7, 2012. If necessary, we will provide brief reply submissions thereafter. However, if in advance of December 7, 2012 you wish to make this letter and an appropriately redacted copy of your letter of November 27, 2012 available publicly or to the parties interested, we would have no objection to that.

Yours truly,

Phil Tunley
PT/LR:cm