

**IN THE MATTER** of the *Public Inquiries Act*, 2009, S.O. 2009, c.33 Sched. 6

**AND IN THE MATTER** of the Elliot Lake Commission of Inquiry, Order in Council 1097/2012

**AND IN THE MATTER** of a request brought by the Association of Professional Engineers Ontario (PEO) for an Order under s.10 (4) Public Inquiries Act, 2009

**AND IN THE MATTER** of a request by Greg Saunders, P.Eng, for clarification and direction with respect to the disclosed and produced documents and information

**AND IN THE MATTER** of an Application on behalf of **Greg Saunders, P.Eng.**

**SUBMISSIONS OF GREG SAUNDERS P. Eng.  
IN RESPONSE TO THE REQUEST OF PEO AND IN SUPPORT OF MR.  
SAUNDERS' REQUEST FOR DIRECTIONS AND CLARIFICATION RELATIVE  
TO PRODUCED DOCUMENTS AND INFORMATION**

**Overview**

1. The request by PEO, before the Commission, involving production and disclosure raises the following issues:
  - (a) Whether or not production/disclosure is mandatory and required to be made by PEO;
  - (b) If production/disclosure is required, pursuant to the summons, and the information and documents are received by the Commission, how is that information and documents handled or secured. What happens to that information?
  - (c) In the event that production/disclosure of the information and documents is made by the Commission to the Participants or Legal

Counsel or some other individual (witness) what are the terms and conditions thereof and the responsibilities of the Participants and Legal Counsel or individual who may be in receipt of the production/disclosure?

We propose to address those issues.

### **The request of PEO**

2. Mr. Saunders leaves it to the PEO to argue the issue of paramountcy or interplay between the *Public Inquiries Act*, 1990 and the *Professional Engineers Act*.

3. Mr. Saunders supports the PEO's position that he be permitted to review the documents not produced by PEO in response to the summons from the Commission.

4. Mr. Saunders wishes the opportunity to review those documents in the possession or control of PEO that have not been produced or disclosed and are not otherwise itemized or listed by the PEO in its list of documents before taking a position with respect to whether or not those documents should be produced by PEO to the Commission in response to the summons.

5. If, after a review of the documents, a position is taken by Mr. Saunders that the documents can or should be produced by PEO to the

Commission then Mr. Saunders requests that as a condition of any such production there be an order or directives issued by the Commissioner protecting the confidentiality thereof and prohibiting the publication, broadcast or distribution thereof.

6. It is submitted that any and all documents and information presently in possession of the Commission or may come into the possession of the Commission, whether or not it includes the documents and information sought to be kept confidential by PEO, that any and all such documents and information continue to be kept by the Commission on a confidential basis and if relevant, it should be released to the Participants and Legal Counsel on behalf of the Participants on strict terms and conditions.

### **Factual Background**

7. As a result of the collapse of the Algo Mall, Greg Saunders met with investigators from the OPP, Ministry of Labour and PEO. He, in the spirit of co-operation and without legal counsel, provided to the investigators what documentation he had and, in addition, gave statements with respect to his knowledge, information and background concerning the Algo Mall and the connection or relationship between the Algo Mall and M. R. Wright & Associates Co. Ltd. The latter being a company with which he was involved.

8. In the course of the investigation by the authorities, the OPP seized Mr. Saunders' personal computer. That computer had significant personal information unrelated to anything involving the Algo Mall. It contained income tax information, banking information and personal e-mails. While the computer has been returned to Mr. Saunders by the OPP we are not certain whether or not some or all information was downloaded therefrom or came in possession of the authorities. We assume that they accessed the information on that computer.

9. Mr. Saunders is of the understanding that the information and documents obtained by the OPP, Ministry of Labour and PEO have been the subject of a summons by the Commission. It is therefore our premise, with respect to this submission, that apart from production and disclosure made by Mr. Saunders with respect to matters he had in his possession and control, the Commission has received other information from other sources concerning Mr. Saunders and M. R. Wright & Associates Co. Ltd.

10. Mr. Saunders, in response to the summons from the Commission, provided to the Commission material, information and documents with respect to work and activities of M. R. Wright & Associates vis-à-vis the Algo Mall.

11. At the same time and forming part of the disclosure and production Mr. Saunders produced the information relating to disciplinary proceedings involving M. R. Wright & Associates, himself and Mr. Wood with PEO. He had

disclosed this earlier to the authorities investigating the matter. The disciplinary proceedings had nothing to do with the Algo Mall or the Algo Mall collapse or any work associated with the Algo Mall lands or premises.

12. It is Mr. Saunders' position that any matters involving himself, M. R. Wright & Associates or Mr. Wood, before PEO, by way of disciplinary proceedings, are not relevant to the issues being investigated by the Commission. Whether or not that information may or may not become relevant will be a matter of argument potentially at any Inquiry. The fact that disciplinary proceedings occurred involving Mr. Saunders, Mr. Wood or M. R. Wright & Associates in an unrelated matter does not, in our submission, advance the investigation as to the causation of the Algo Mall collapse. To disclose and release information concerning disciplinary proceedings that may be found to be irrelevant and involve information or documentation that may be ruled to be inadmissible serves no useful purpose at this stage and if distributed and/or published or made public would do nothing but prejudice Mr. Saunders, Mr. Wood and M. R. Wright & Associates and undermine the procedural fairness and integrity of the Commission Inquiry.

13. To be clear, therefore, Mr. Saunders' position with respect to production and disclosure already made of information relating to disciplinary proceedings before PEO is information that ought not to be disclosed, published or distributed and should be kept confidential. Furthermore, in the event that the

Commissioner should rule that the documentation and information in possession of PEO, which PEO is attempting to have ruled as being confidential and not required to be released is, in fact, ordered to be produced that there be safe guards and directives given to continue to make and keep that information and documentation confidential.

**Procedural fairness/balancing of interest**

14. The *Public Inquiries Act* and the Rules of Procedure of the Elliot Lake Commission of Inquiry reflect that there be, at all times, procedural fairness and a proper balancing of interests.

15. Mr. Saunders adopts the submission made by PEO that s. 10 of the *Public Inquiries Act*, while operating to require production to the Commission, does not necessarily abrogate the principle of confidentiality.

16. At this stage of the proceeding the Commission must strike a balancing of interest. That balancing of interest involves the interest of the Commission to make the appropriate inquiry and, at the same time, protect the confidential nature of the information that may be received. There should be no broadcast or publication by those who have control or access to that information.

17. The integrity of the process requires that the information gathered or received and potentially disclosed to the Participants and Legal Counsel be done in a manner or fashion as to safeguard the interest of all parties. Ultimately, any and all relevant admissible evidence will potentially be heard and/or seen by the public as a result of the anticipated Inquiry. To permit the dissemination, broadcast or publication of any and all information gathered at the investigative stage without any consideration for the interests of all potential parties and/or perspective witnesses would be inappropriate. We adopt, to the extent applicable, in support of our submissions on behalf of Mr. Saunders, the submissions made by PEO; however, more specifically paragraphs 22, 23, 24, 25, 26, 27, 29 and 30.

**Rules of the Commission/Public Inquiries Act  
Relevant to the Issue of Confidentiality/Release of Information**

18. It is important, at this stage, for the Commissioner to address for the Participants and Legal Counsel and clarify the import of the provisions of the Rules of Procedure of the Commission as well as provisions of the *Public Inquiries Act*. The directives sought by Mr. Saunders may also alleviate, to some degree, the concerns raised by PEO. The Rules of Procedure of the Commission establish a process whereby production of documents made to the Commission and then distributed to the Participants and Legal Counsel are kept or held on a confidential basis by both the Commission as well as the Participants and Legal Counsel.

19. Rule 10 specifically provides that production to the Commission by a Participant or summons recipient does not constitute a waiver of any claim to privilege including solicitor-client privilege which a Participant or summons recipient may wish to assert.

20. Rule 13 provides that Legal Counsel to the Participants and witnesses will be provided with documents and information including statements of anticipated evidence only upon executing a written undertaking that all documents and information will be used solely for the purposes of the Inquiry. That Rule makes it fairly clear that one cannot use information or production for any other purpose other than the Inquiry and that, in our view, would prohibit release of that information to the media or to the public.

21. Rule 14 requires that Legal Counsel, on behalf of the Participant, requires that his or her client enter into a written undertaking to the same effect as what Legal Counsel as entered into.

22. Rule 16 requires that documents and information provided and all copies made, be returned to the Commission if not tendered in evidence. This emphasizes, in our view, the principle and expectation of confidentiality.



3. By virtue of Rule 17A the provisions of Rules 10, 11 and 17 apply with necessary modifications to persons who have had documents seized by the OPP, Ministry of Labour or other investigators.

24. S. 12(1) of the *Public Inquiries Act* provides as follows:

**12. (1) Subject to this section, all participants and their lawyers or agents are deemed to undertake not to use information obtained from another participant or collected or received by the commission for any purpose other than that of the public inquiry in which it was obtained."**

25. Sub-section 2 of Section 12 provides that sub-section (1) of Section 12 does not prohibit the following:

- "1. A use to which the person who disclosed the information consents.**
- 2. The use, for any purpose, of information that is disclosed to the public.**
- 3. The use, for any purpose, of information that is provided or referred to during a hearing.**
- 4. The use, for any purpose, of information obtained from information referred to in paragraph 2 or 3.**
- 5. The use of information to impeach the testimony of a person in another proceeding or for a prosecution for perjury in respect of that testimony."**

26. The aforementioned provisions make it very clear that the Participants and their Legal Counsel are under a legal obligation to keep information received by them confidential and for the limited purposes of the Inquiry. There is to be no broadcast, dissemination or disclosure of that

information to the media or parties not otherwise involved or retained for the purposes of the Inquiry by the Participants or their Legal Counsel.

27. The provisions in the Rules of Procedure and legislation in our submission codify what has and continues to be a standard practice in criminal law. We attach with this Submission at Schedule "A" the Condition for Disclosure Form issued by the Ministry of the Attorney General/Crown Attorney's Office when providing to legal counsel or an accused disclosure in a criminal matter.

28. The implied undertaking of confidentiality, both in civil and criminal cases and the conditions of disclosure make emanate good sense. Not all information collected or gathered at the investigative stage is either relevant or admissible. Relevancy and admissibility are determined at a later stage. Furthermore, even in situations where evidence may be admissible or relevant, if the prejudicial effect outweighs any probative value, the Commissioner may determine and has authority to exclude that evidence. Section 14(3) confers on the Commissioner considerable latitude on the conduct of hearings. That provision states:

**"A 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's 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,**

**(a) the administration of justice;**

- (b) **law enforcement;**
- (c) **national security; or**
- (d) **a person's privacy, security or financial interest."**

29. If there is no limitation as to what Participant and Legal Counsel does with information disclosed or produced prior to the hearing stage and publication, broadcast or dissemination of documents and information should occur, that undermines the integrity of the process. The inappropriate release of information/documents removes from the Commission its ability to control the process. Ultimately, therefore, its integrity would be undermined.

### **Summary**

30. Mr. Saunders requests that the Commissioner issue a directive or Order similar to Procedural Order No. 4. It is respectfully submitted that the Commissioner, in the present circumstances, whether or not it involves existing information and/or documents in possession of the Commission or that which may come into possession of the Commission, be subject to a directive that includes the following:

- a) That all documents and information produced to the Commission/Commission Counsel be secure and kept confidential and not disclosed or distributed to anyone without the recipient of that information or disclosure undertaking, in writing, that all documents and information be kept confidential, be used solely for purposes of the Inquiry

and that there be no disclosure or release of the information or documents or the contents thereof to the media or to the public;

- b) That the aforementioned undertaking also include a provision that others who may be required to access the information to assist the Commission, the Participants and Legal Counsel be required to execute the same undertaking of confidentiality;
- c) 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 be made to the Commissioner to obtain any exemption therefrom.

**All of which is respectfully submitted.**

DATED: December 7, 2012

  

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## **SCHEDULE 'A'**



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## CONDITIONS OF DISCLOSURE

**By accepting disclosure you agree to the following conditions:**

- 1. You may use these materials solely for the purpose of making full answer and defence to the charges identified in these materials.**
- 2. You must keep these materials secure and not publish or otherwise distribute them or their contents without the written permission of Crown counsel.**
- 3. Counsel may, however, permit access to these materials for the use of persons acting under the supervision of Counsel (for example, articling students and retained experts).**
- 4. If counsel is retained by the accused, the accused will deliver all disclosed material to the counsel with these same trust conditions attached to them.**
- 5. If counsel ceases to act for the accused before the conclusion of this matter, it is your obligation to return all disclosure materials to the Crown Attorney's Office forthwith.**
- 6. All future disclosure on this file is subject to these same conditions.**
- 7. You may seek the consent of the Crown or an order of the Court to deviate from any of the conditions above, giving notice to the Crown of any such application See R. v. Wagg (2004) O.J. No. 2053 (Ont. C.A.)**

**If you do not accept these conditions you should immediately return these materials to the Crown and come to an agreement with respect to disclosure, or seek a court order with respect to disclosure.**