

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

AND IN THE MATTER OF the Elliot Lake Commission of Inquiry, established by
Order in Council 1097/2012 dated July 19, 2012

AND IN THE MATTER OF James W. Keywan

**FACTUM OF THE ELLIOT LAKE MALL ACTION COMMITTEE
(RESPONDING PARTY)**

**(Mr. Keywan's motion to introduce rebuttal evidence at the Commission of Inquiry
pursuant to Rule 31 of the Commission's Rules of Procedure)**

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PART I – OVERVIEW

1. The Elliot Lake Mall Action Committee (“ELMAC”) opposes Mr. Keywan’s motion to admit the report of Mr. Larden. ELMAC also opposes permitting Mr. Larden to testify in accordance with his opinion. The opinion is not focused on the issue raised by the section 17 notice—the alleged misconduct of Mr. Keywan. Rather it is directed at rebutting any allegations of civil liability. The Commissioner can completely address Mr. Keywan’s concerns by confirming that he will neither be informed nor rely upon NORR’s opinion that “a duty of care required in the design and construction of the Algo Centre Mall’s roof was not exercised”.

PART II - FACTS

2. In 1976, Algocen Realty Holding Limited retained James W. Keywan to prepare drawings for the Algo Central Mall (the “Mall”).

SECTION 17 NOTICE

3. By letter dated February 14, 2013, Bruce Carr-Harris, Commission Counsel, notified Mr. Keywan of the potential for a finding of misconduct against him under section 17 of the *Public Inquiries Act*. Mr. Carr-Harris defined “misconduct” by reference to Justice Cory’s reasons in *Canada (Attorney General) vs. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] S.C.R. 440 (“*Krever*”) as “improper or unprofessional behavior” or “bad management”.

Letter from Carr-Harris to Keywan dated February 14, 2013, Exhibit A to the Affidavit of Mario Delgado (“Delgado Affidavit”), sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 16.

4. Mr. Carr-Harris advised that the Commission is prohibited by its Order in Council and governing jurisprudence “from expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization”.

Letter from Carr-Harris to Keywan dated February 14, 2013, Exhibit A to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 16.

5. Finally, he advised that evidence obtained by the Commission could be the basis for finding that Mr. Keywan failed to
 - a. ensure that the building envelope of the Algo Centre Mall, and in particular the roof top parking, was properly designed so as to ensure a watertight condition so as to prevent leakage of water in the building; and
 - b. prepare a proper design for the waterproof membrane system to be installed over the hollow core pre-cast concrete slabs which formed part of the roof top parking for the Algo Centre Mall.

Letter from Carr-Harris to Keywan dated February 14, 2013, Exhibit A to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 17.

THE COMMISSION HEARS MR. KEYWAN'S EVIDENCE

6. On March 11, Mr. Keywan gave evidence before the Commission. He was represented by counsel, Mario Delgado.
7. The following day, a report issued by NORR Limited on March 8, 2013 (the "**NORR Report**"), was entered as Exhibits 3007-3021 and 3141. One of the authors of the report is Mr. Chris Hughes, an architect.

Affidavit of Alexandra Carr ("Carr Affidavit"), sworn June 21, 2013, p. 1, para. 2; ELMAC Responding Record, Tab 1, p. 1.

8. The OPP commissioned NORR "to provide...the basis or foundation for potential findings of negligence or other liability".

Transcript of the evidence of the NORR Panel provided March 30, 2012, Elliot Lake Commission of Inquiry, P. 12553, Exhibit A to the Carr Affidavit; ELMAC Responding Record, Tab 1A.

9. The NORR Report states the following at page 67:

It is Norr's opinion that a duty of care required in the design and construction of this roof was not exercised.

NORR Report dated March 8, 2013, Exhibit 3007, Elliot Lake Commission of Inquiry.

KEYWAN INTENDS TO RETAIN AN EXPERT

10. By email dated March 27, counsel for Mr. Keywan, John Brunner, advised Commission Counsel that he intended to retain an expert on behalf of Mr. Keywan and expressed his preference to submit the expert's report to the Commission.

Email from Brunner dated March 27, 2013, Exhibit B to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 20.

11. After considering Mr. Brunner's proposal, on May 15 Commission Counsel, Nadia Authier, advised that they required delivery of the report by May 21 to decide if it would be entered as an exhibit or if its author would be called as a witness.

Email from Authier dated May 15, 2013, Exhibit C to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 20.

12. On May 16, Mr. Keywan delivered the report of Mr. Allan Larden dated May 14, 2013, to Commission Counsel.

Delgado Affidavit, p. 2, para. 4, Keywan Motion Record, Tab 2, p. 12.

13. By letter dated May 24, Mr. Carr-Harris confirmed that the Commission would enter Mr. Larden's report in Relativity and notify the participants that it had been added to the database. Commission Counsel would ask the participants if they intended to cross-examine Mr. Larden on his report.

Letter from Carr-Harris to Keywan dated May 24, 2013, Exhibit E to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 30.

14. In a separate letter of the same date, Mr. Carr-Harris set out the specific evidence that could support a potential finding of misconduct against Mr. Keywan.

Letter from Carr-Harris to Keywan dated May 24, 2013, Exhibit D to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 30.

15. On May 27, 2013, Commission Counsel advised the participants that the Commission intended to enter Mr. Larden's report as evidence, and asked the participants to advise Commission Counsel by June 4 if they wished to cross-examine Mr. Larden on his report.

Email from Authier dated May 27, 2013, Exhibit F to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 33.

ELMAC OBJECTS TO MR. LARDEN'S REPORT

16. On behalf of ELMAC, Douglas Elliott advised Commission Counsel that ELMAC has serious objections to entering Mr. Larden's report as evidence. Highlighting that the Commissioner may not make findings of civil or criminal liability, Mr. Elliott cited Cory J.'s reasons in *Krever* for the definition of "misconduct".

Email from Elliott dated May 28, 2013, Exhibit G to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 35.

17. Describing the gravamen of Mr. Larden's report, the email states:

Mr. Larden is not a fact witness. He has no personal knowledge of the facts described in his report, all of which were or could have been elicited from Mr. Keywan.

...

Mr. Larden expresses an opinion on Mr. Keywan's possible tortious conduct. References to "duty of care" and "foreseeable risk of harm" demonstrate that Mr. Larden was concerned primarily with negligence, not "misconduct", when drafting his opinion.

Email from Elliott dated May 28, 2013, Exhibit G to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 35.

MR. KEYWAN'S COUNSEL CROSS-EXAMINES THE NORR PANEL

18. On May 29 and 30, Mr. Hughes provided oral evidence at the Commission about the contents of the NORR Report. Mr. Delgado cross-examined him at length about his findings of fact and opinions, including the excerpt in issue.

Transcript of the evidence of the NORR Panel provided March 30, 2012, Elliot Lake Commission of Inquiry, P. 12635-12638, Exhibit B to the Carr Affidavit; ELMAC Responding Record, Tab 1B.

PART III – ISSUES AND LAW

19. The issue before the commission is whether procedural fairness requires the Commission to admit Mr. Larden's report or permit him to testify.

20. Procedural fairness requires the Commission to provide Mr. Keywan reasonable notice of the possible finding of misconduct, a summary of the evidence supporting the possible finding and a reasonable opportunity to respond.

Public Inquiries Act, 2009, c. 33, Sched. 6, s. 17 (1).

Canada (Attorney General) vs. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission), [1997] S.C.R. 440 at 69.

MR. LARDEN'S REPORT AND TESTIMONY ARE UNNECESSARY AND INAPPROPRIATE

21. Mr. Larden's report and his testimony are unnecessary. As noted in Mr. Elliott's email of May 28, 2013, Mr. Larden does not have any direct knowledge of the events that took place prior to the collapse and accordingly cannot provide the Commission with any information that could not otherwise be ascertained.

Email from Elliott dated May 28, 2013, Exhibit G to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 35.

22. The Commission is prohibited by its Order in Council and *Krever* from expressing any conclusion or recommendation about the potential civil or criminal liability of Mr. Keywan. As the OPP, not the Commission, retained and instructed NORR about the scope of its investigation, the admission of NORR's report does not demonstrate that the Commissioner intends to make a finding of legal liability against Mr. Keywan.

Order in Council 1097/2012 dated July 19, 2012.

Canada (Attorney General) vs. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission), [1997] S.C.R. 440 at 62-63.

See p. 2, para. 3-4 above.

23. ELMAC respectfully submits that the Commission can completely address Mr. Keywan's expressed concern by confirming that in determining whether to make a finding of misconduct against Mr. Keywan, the Commissioner will not be informed or rely upon the following sentence on page 67 of NORR's report: "a duty of care required in the design and construction of this roof was not exercised". In these circumstances, permitting Mr. Larden to testify would be a waste of time and resources.

24. Mr. Larden's report is inappropriate and directed at the wrong issue. To be sure, the NORR Report makes a general comment that "a duty of care required in the design and construction of this roof was not exercised;" however, this is the only reference to civil liability identified by Mr. Keywan as a basis for seeking the admission of Mr. Larden's report. It is not directed specifically at Mr. Keywan, and NORR's reference to civil liability is understandable given its mandate.

See p. 2, para. 8-9 above.

25. Although Mr. Keywan was advised by Commission Counsel that the Commission was prohibited from expressing any conclusion or recommendation about potential civil liability, and that the Commission's focus would be on misconduct, Mr. Larden's report is primarily concerned with civil liability. His report is directed to refuting allegations that Mr. Keywan was negligent. It expresses opinions about his "duty of care" and the "foreseeable risk of harm" from his actions and inactions.

See p. 2,4, para. 4,16-17 above.

Email from Elliott dated May 28, 2013, Exhibit G to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 35.

26. It does not directly address the actual issue before the Commission: whether Mr. Keywan's conduct in relation to his work designing the Mall displayed improper or unprofessional behaviour or bad management. Mr. Larden's report is ultimately unhelpful for the very reason it was to be obtained. To date, Mr. Keywan has failed to disagree with ELMAC's characterization of Mr. Larden's report as being primarily focused with civil liability. Nor has he provided a subsequent report that directly addresses the allegations of misconduct or the evidence of misconduct identified in Mr. Carr-Harris's letter of May 24. The Commission should not admit Mr. Larden's report.

Email from Elliott dated May 28, 2013, Exhibit G to the Delgado Affidavit, sworn June 19, 2013, Keywan Motion Record, Tab 2, p. 35.

MR. KEYWAN HAS HAD AN OPPORTUNITY TO RESPOND

27. Before Mr. Keywan testified, he was aware that the Commission was considering a finding of misconduct against him. He was also aware that the Commission believed it had some evidence to possibly find that he had failed ensure that the roof top parking was properly designed to ensure a watertight condition to prevent leaks in the building; and failed to prepare a proper design for the waterproof membrane system to be installed over the hollow core pre-cast concrete slabs that formed part of the roof top parking for the Mall. In addition, counsel for Mr. Keywan thoroughly cross-examined Mr. Hughes on NORR's reference to the duty of care and had an opportunity to explore NORR's findings of fact and opinions relating to misconduct, but failed to exploit that opportunity.

See p. 1,2 &5, para. 3,5 &18 above.

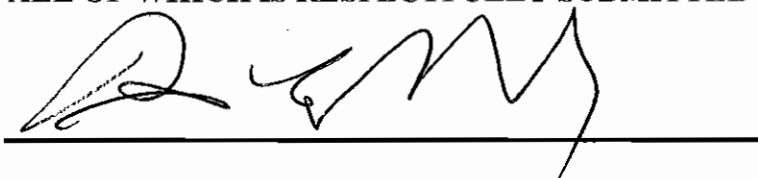
28. Mr. Larden is not a fact witness. He has no personal knowledge of the facts described in his report, all of which were or could have been elicited from Mr. Keywan. To date, Mr. Keywan has also failed to address this criticism. Mr. Keywan has had sufficient opportunities to respond to any allegations of misconduct.

See p. 4, para. 17, above.

**MR. LARDEN SHOULD NOT BE PERMITTED TO TESTIFY ABOUT MR.
KEYWAN'S ALLEGED NEGLIGENCE**

29. We respectfully submit that if Mr. Larden is permitted to testify at the Commission, then he should only be permitted to give evidence to rebut allegations of Mr. Keywan's misconduct. He should not be permitted to wade into opinions of legal liability. Furthermore, he should be prohibited from referring to his report, which should not be admitted as evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a series of connected loops and a final vertical stroke, positioned above a solid horizontal line.

**OF COUNSEL FOR THE PARTICIPANT AND
RESPONDING PARTY ELMAC**

SCHEDULE A – LIST OF AUTHORITIES

1. *Canada (Attorney General) vs. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] S.C.R. 440.

THE ELLIOT LAKE COMMISSION OF INQUIRY

ONTARIO

COMMISSION OF INQUIRY

**FACTUM OF THE ELLIOT LAKE MALL
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