THE HONOURABLE MR. JUSTICE PAUL R. BÉLANGER

IN THE MATTER OF an Application under the *Rules of Procedure* of the Elliot Lake Commission of Inquiry and the *Public Inquiries Act, 2009*, SO 2009, c 33, Sched 6

FACTUM OF CANADIAN BROADCASTING CORPORATION, THE GLOBE AND MAIL INC. and CANADIAN PRESS ENTERPRISES INC.

June 13, 2014

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OVERVIEW

1. These submissions are filed on behalf of the Canadian Broadcasting Corporation, The Globe and Mail Inc. and Canadian Press Enterprises Inc. (collectively, the "Media Organizations") pursuant to Procedural Order Nos. 7, 10 and 12 issued by the Commissioner of the Elliot Lake Commission of Inquiry on April 29, May 13 and 22, 2014, respectively, and in response to the Application Record and Factum filed by Robert Wood on May 20, 2014, and the Amended Application Record and Amended Factum filed by Robert Wood on May 30, 2014.

2. The Media Organizations are challenging Robert Wood's request for an order from the Commission that it partially redact its Final Report prior to releasing it on three grounds.

3. First, since the Commissioner pointed out in Procedural Order No. 12 that it is the Attorney General and not the Commission who decides whether to release the Final Report to the public, Mr. Wood has amended his application to request that the Commission release a redacted version of the Final Report to the Attorney General without providing the Commission with any authority to show that it has the legal capacity to grant such extraordinary and unprecedented relief.

4. Second, it is respectfully submitted that the Commission does not have the jurisdiction or authority to grant the order requested by Mr. Wood. The Order in Council establishing the Commission (OIC 1097/2012 as amended by OIC 1873/2013 (the "Order in Council")) requires the Commission to deliver its full Final Report to the Attorney General and gives the Attorney General the sole authority and responsibility for making that report available to the public. An order granting Mr. Wood's requested relief would directly violate one of the Commission's central obligations as set out both in the *Public Inquiries Act, 2009*, SO 2009, c 33, Sched 6 (the "Act") (subsection 20(1)) and in the Order in Council (paragraph 12): to "deliver a final report containing its findings, conclusions and recommendations to the Attorney General…"

5. Third, even if the Commission does have the jurisdiction to redact the Final Report in the manner requested, the Media Organizations submit that Mr. Wood has not met the evidentiary or legal burden required to displace the presumption of openness that attaches

to all aspects of public inquiries, including to the report containing its findings, conclusions and recommendations, as he is required to do by the *Dagenais/Mentuck* test.

PART I - FACTS

6. On April 25, 2014, Robert Wood, a Participant in the Inquiry, advised Commission Counsel that he would be bringing an application before the Commissioner for an order redacting the Commission's Final Report to delete any reference to Mr. Wood and that the redacted portions not be released until following the completion of the criminal proceedings brought against him.

7. On April 29, 2014, the Commissioner issued Procedural Order No. 7 outlining the process to be followed for Mr. Wood's application.

8. On May 13, 2014, Mr. Wood sought an extension for the serving of his application, which extension was granted by Procedural Order No. 10, issued the same day.

9. On May 20, 2014, Mr. Wood served an Application Record with the Commission, which included a Notice of Application, an Affidavit and Exhibits, and a Factum.

10. On May 22, 2014, the Commissioner issued Procedural Order No. 12, in which it was noted that Mr. Wood's application materials filed on May 20 sought a remedy different from the one he had advised Commission Counsel he would be seeking on April 25. Specifically, instead of requesting the redaction of those portions of the Final Report that related to Mr. Wood, in the application materials filed Mr. Wood was now seeking an order that passages relating to him contained in the final draft of the Final Report be provided to him and his counsel prior to the Final Report being made public so as to allow him to determine whether he wanted to request that redactions be made to those passages.

11. In Procedural Order No. 12 the Commissioner raised several concerns with Mr. Wood's application and set out a new timeline, including setting a deadline for Mr. Wood to serve additional materials and submissions.

12. On May 30, 2014, Mr. Wood served an "Amended Application Record" and an "Amended Factum" on the Commission. In response to the concerns raised by the

Commissioner in Procedural Order No. 12, Mr. Wood is now requesting an order that "passages that deal with the matter of the Applicant's Section 17 notice as provided to the Applicant pursuant to the *Public Inquiries Act, 2009*" contained in the Final Report be redacted until such time as he elects a mode of trial that does not involve a jury, he is not committed to stand trial at a preliminary hearing or, if he elects to be tried by judge and jury, at the conclusion of his trial.

13. On June 6, 2014, counsel for the Media Organizations advised the Commission of the Media Organizations' intent to make submissions in response to Mr. Wood's application.

PART II – ISSUES AND LAW

The Commission Lacks Jurisdiction to Redact Its Final Report

14. It is trite law that public inquiries, while often given broad investigative powers, do not have inherent jurisdiction; any given commission of inquiry's particular powers must be derived from a statutory grant of authority. This Commission's statutory grant of authority is found in the terms of reference set out in the Order in Council establishing it and in the Act.

15. Paragraphs 12 and 15 of the Order in Council are clear in requiring the Commission to deliver its Final Report to the Attorney General and in giving the Attorney General the sole authority and responsibility for making that report available to the public. There is no power conferred on the Commission in the Order in Council or in the Act allowing it to redact the Final Report before delivering it to the Attorney General.

16. In bringing his application, Mr. Wood invokes the power conferred on the Commission by paragraph 14(3)(a) of the Act. The Media Organizations submit that paragraph 14(3)(a) does not allow the Commission to redact its Final Report prior to its delivery to the Attorney General.

17. Mr. Wood specifically notes that in Procedural Order No. 12 the Commissioner invited submissions with respect to the jurisdiction of the Commission to grant the relief

requested in his first Notice of Application, that is, to provide Mr. Wood with the opportunity to review the Final Report prior to its delivery to the Attorney General.[1]

18. Having decided not to seek the relief indicated in his first Notice of Application, but instead to return to a request that the Commission make redactions in the Final Report, Mr. Wood has not made any submission with respect to the jurisdiction to grant the relief he is now seeking, apparently deeming it unnecessary.[2]

19. The Media Organizations submit that the question of the Commission's jurisdiction remains live, even in the context of Mr. Wood's revised application.

20. The government of Ontario, by order of the Lieutenant Governor in Council, has established this Commission with a mandate to, in part,

    a. Inquire into and report on events surrounding the collapse of the Algo Centre Mall in Elliot Lake, Ontario, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals in attendance at the mall and the emergency management and response by responsible bodies and individuals subsequent to the collapse;[3]

21. On a proper reading of both the Order in Council and the Act, the powers conferred on the Commission for the purpose of allowing it to carry out its investigative mandate have no application to its responsibility and duty to report its findings, conclusions and recommendations to the government. These two functions – to inquire into and report – are entirely separate in this regard.

22. Mr. Wood relies on the "powers granted to the Commissioner pursuant to the [Act]"[4] by the Lieutenant Governor in Council and paragraph 14(3)(a) of the Act as the source(s) of the Commission's authority to redact the Final Report in the manner he has requested.[5]

23. Mr. Wood does not point to any specific "power granted to the Commissioner" in his submissions. Rather, he relies entirely on paragraph 14(3)(a) of the Act.

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1 Factum of the Applicant Robert Wood dated May 30, 2014 at para 39 (the "Amended Factum").
2 *Ibid* at paras 40-43.
3 OIC 1097/2012 at para 2.
4 Amended Factum at para 44.
5 *Ibid* at paras 45-46.

24. It is clear from a plain reading of section 14 of the Act, even on its own, that it has no relevance to the Commission's Final Report; it relates only to "hearings" and the Commission's power to control the process at any hearings it holds.

25. Subsection 14(1) provides that a commission may only hold a hearing if authorized to do so by the order in council establishing it. Paragraph 6 of the Order in Council provides that the Commission shall hold public hearings, pursuant to section 14 of the Act.

26. Subsection 14(2) provides that, subject to subsection (3), hearings will be open to the public.

27. Paragraph 14(3)(a) allows a commission to "exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information" in circumstances in which it determines that "the public's interest in…the information to be disclosed…is outweighed by the need to prevent the disclosure of information that could reasonably be expected to be injurious…to the administration of justice." Paragraphs (b) through (d) provide additional bases on which a commission may ground an exclusion or other non-disclosure measure in the context of presumptively open hearings.

28. Finally, subsection 14(4) allows a commission to limit examination and cross-examination of witnesses at its hearings.

29. The powers granted the Commission pursuant to subsection 14(3) only apply in the context of the Commission's public hearings; section 14 is clear in this respect. Despite this lack of ambiguity, Mr. Wood assumes, without providing any argument or authority supporting his assumption, that the Commission's power to "take other measures to prevent the disclosure of information" in holding its hearings grants it power to redact its Final Report.

30. Reference to other parts of the Act only bolster the argument that the powers provided under section 14 only apply to hearings.

31. Section 20 of the Act governs a commission's – and this Commission's – report.

32. In particular, subsection 20(1) requires a commission to "deliver its report in writing to the Minister on or before the date fixed in the order establishing the commission for the delivery of its report."

33. There is no provision in section 20 granting a commission any power to "take measures to prevent the disclosure of information" or to redact its report.

34. The Act has two separate, unrelated provisions governing (i) a commission's holding of hearings during its investigative stage and (ii) its duty to report its findings and recommendations to the government of Ontario.

35. This is also true of the terms of reference governing this Commission, as set out in the Order in Council.

36. As noted above, paragraph 6 of the Order in Council provides that the Commission shall hold public hearings, pursuant to section 14 of the Act.

37. As noted in Procedural Order No. 12, paragraph 12 of the Order in Council, as amended, provides:

> The Commission shall deliver a final report containing its findings, conclusions and recommendations to the Attorney General no later than October 31, 2014.[6]

38. Paragraph 6 of the Order in Council comes under the general heading, "Mandate", while paragraph 12 comes under the general heading, "Report and Recommendations".

39. It is worth noting that the Act also makes use of headings. The heading above section 14 is "Hearings", while the heading above section 20 is "Report of Commission".[7]

40. It is clear from the text and structure of the Act and from the text and structure of the Order in Council that the powers the Commission has over the information that is

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6 OIC 1079/2012 as amended by OIC 1875/2013.

7 It is acknowledged by the Media Organizations that section 70 of the *Legislation Act, 2006*, SO 2006, c 21, Sched F provides that headings in legislation "do not form part of" the legislation and are inserted "for convenience of reference only." However, as noted in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis Canada Inc., 2008) at 392-397, courts do use headings in interpreting the meaning and context of statutory provisions. In any event, the headings here in question only further bolster the meanings and applications of the plain text of sections 14 and 20 of the Act. See eg. *Holyday v Toronto (City)*, 2010 ONSC 3355 at paras 41-42.

disclosed in its presumptively open hearings do not grant it authority to redact its Final Report.

41. There was no intention by the legislature or by the Lieutenant Governor in Council to confer a power on the Commission to redact its Final Report before delivering it to the Attorney General.

42. The Act and Order in Council, in requiring the Commission "to deliver a final report containing its findings, conclusions and recommendations to the Attorney General", must be understood to mean that the Commission is required to deliver a final report containing **all of** its findings, conclusions and recommendations, not just some of them. There is simply no flexibility as to which of the findings, conclusions and recommendations made by the Commission it must deliver to the Attorney General, once they are made and are finalized.

43. And yet, were it to grant the order requested by Mr. Wood and redact all passages relating to the confidential Section 17 Notice Mr. Wood received, the Commission would be delivering only some of its findings and/or conclusions and/or recommendations, in direct contravention of both its governing Order in Council and the Act.

44. Just as there is no jurisdiction for the Commission to provide a copy of its Final Report to someone other than the Attorney General, there is no jurisdiction to provide only a portion of its Final Report to the Attorney General by redacting parts of it at the request of a Participant.

45. As noted by the Commissioner in Procedural Order No. 12, by virtue of paragraphs 12 and 15 of the Order in Council, its Final Report will be "entirely confidential" until the Attorney General tables it in the Legislature and makes it available to the public. The Commission is required – and only has the authority – to deliver the Final Report, in its entirety, to the Attorney General.

46. Absent any grant of authority giving the Commission the power to redact its Final Report, it may not do so. The Commission therefore has no choice but to deny Mr. Wood's application.

The Applicant has Not Met the Evidentiary or Legal Burden of the *Dagenais/Mentuck* Test

47. Even if the Commission did have the authority to grant the order requested by Mr. Wood, the Media Organizations submit that he has not established that delivery of the Commission's full Final Report to the Attorney General, or the publication of that report, would pose a serious risk to the administration of justice that could only be prevented by redacting passages relating to the matters discussed in the confidential Section 17 Notice delivered to him.

48. Further, Mr. Wood has not established that the salutary effects of redacting the Commission's Final Report outweigh the deleterious effects on the rights and interests of the public or of others, including the other Participants to this Inquiry and the government of Ontario, which established this public Commission of Inquiry.

49. Unless the evidentiary and legal burden of the *Dagenais/Mentuck* test can be met, the serious restrictions on the open court principle and interference with one of the central purposes of this Commission that would result from the redactions Mr. Wood is requesting cannot be ordered.

50. As acknowledged in Mr. Wood's Amended Factum,[8] one of the central goals of a public inquiry is to shed light on the circumstances surrounding a community problem or tragedy. 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".[9]

51. This Commission has already served an invaluable function in holding its hearings in a manner that was accessible and open to the public, including by webcasting its hearings on its website, so that the facts and circumstances of the lead-up to and aftermath of the

8 Amended Factum at para 47.
9 *Episcopal Corp of the Diocese of Alexandria-Cornwall v Cornwall (Public Inquiry)*, 2007 ONCA 20 at para 48 (citations omitted).

tragic events of June 23, 2012 could be weighed and considered by anyone who was interested.

52. However, the Commission's work – and its vital service to the public – is not yet complete. As noted by Simon Ruel, "[t]he ultimate raison d'être of commissions of inquiry is to produce a report to the Executive containing an analysis of the facts and recommendations with respect to the situation under review."[10]

53. The Final Report of the Commission was to be delivered to the Attorney General within 12 to 18 months of the commencement of the Inquiry under the original Order in Council dated July 19, 2012. On December 4, 2013, this deadline was extended, by virtue of Order in Council 1873/2013, to October 31, 2014.

54. In that context, any Participant who requests that the Final Report be delivered in a redacted form, contrary to the open court principle and the very reason for the establishment of this Commission of Inquiry, as Mr. Wood has done, must base his request on more than mere speculation.

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

> (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.[11]

56. 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 to the administration of justice.[12]

57. The evidence that Mr. Wood appears to rely on does not meet these tests.

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10 Simon Ruel, *The Laws of Public Inquiries in Canada* (Toronto: Carswell, 2010) at 54.
11 *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 26.
12 *R v Mentuck*, 2001 SCC 76 at para 34.

Basic Facts

58. As set out in his application materials, in the spring of 2013, Mr. Wood was charged under the *Provincial Offences Act*, RSO 1990, c P.33 with having committed offences contrary to the *Occupational Health and Safety Act*, RSO 1990, c O.1 ("OHSA"). These charges emanate from the same set of facts that have been examined by this Commission and that led to the *Criminal Code* charges being laid against Mr. Wood by the OPP.

59. On June 6 and 7, 2013, Mr. Wood gave evidence under oath to the Commission as a Participant in a public hearing during the investigative stage of the Inquiry. Following this, he was served with a confidential Section 17 Notice, providing him with notice that the Commission may make a finding of misconduct by him.[13]

60. On January 31, 2014, following an 18 month investigation, the Ontario Provincial Police ("OPP") charged Mr. Wood with two counts of causing death by criminal negligence and one count of causing bodily harm by criminal negligence under sections 220 and 221 of the *Criminal Code*.

61. Pursuant to subsection 536(2) of the *Criminal Code*, Mr. Wood has the option of electing to be tried by a judge of the Ontario Court of Justice, by a judge of the Superior Court of Justice without a jury, or by a judge of the Superior Court of Justice with a jury. Mr. Wood has not yet made his election.

The Application is Based on Speculation

62. Following the Supreme Court of Canada's decision in Phillips, it is well-established that restrictions on the open court principle will not succeed where a person seeking such restriction claims his fair trial rights will be prejudiced, unless that person is to be tried by judge and jury.[14]

63. Mr. Wood argues that the release of the Commission's Final Report without the redactions he has requested could infringe his s. 11(d) Charter right to a fair trial of the charges he is facing, but this is only even a possibility if the report contains negative findings or conclusions regarding any conduct on his part and/or relating to the credibility

13 It should be noted that a Section 17 Notice is entirely confidential by design. Until Mr. Wood referenced the fact that he had received such a notice in bringing this application, this fact was not known publicly.

14 *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 ["*Phillips*"].

of the evidence he gave before the Commission during the investigative stage of the Inquiry, and if he ultimately elects to be tried by a judge with a jury.

64. By its very nature, Mr. Wood's request is speculative and therefore fails to meet the requirements of the *Dagenais/Mentuck* test. None of the major factors to be considered in a request of the variety that Mr. Wood has made is actually known at this time:

a. It is not known what will be contained in the Commission's Final Report and, therefore, whether what it will say could even arguably affect Mr. Wood's right to a fair trial;

b. Because he has not made his election, it is not known whether Mr. Wood will be tried in regard to the criminal charges brought against him or, if he is tried, whether he will be tried before a jury;

c. It is not known when Mr. Wood's criminal trial can be expected to proceed;

d. While the Commission must deliver its Final Report to the Attorney General before the end of October 2014, it is not known when the Final Report will be made available to the public, as that is a decision to be made by the government.

65. In these circumstances, Mr. Wood's request that the Commission's yet-to-be drafted Final Report be redacted cannot be granted. At the very least, in view of the lack of actual evidence of any risk to Mr. Wood's fair trial rights, his application before this Commission has been brought too soon.

The Risk to Mr. Wood's Fair Trial Rights is Not Serious

66. Though based on speculation and contingencies, Mr. Wood's application is founded on the purported risk that the release of the Commission's Final Report would taint the pool of potential jurors in his criminal trial.

67. The Media Organizations submit that this purported risk is overstated, in addition to being speculative.

68. By their very nature, commissions of inquiry will often inquire into and report on matters that will also be before civil and criminal courts. In these circumstances, the Supreme

Court of Canada has commented on the scope of a commission of inquiry's power to make findings of misconduct and the use to which such findings can be put:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.[15]

69. In quoting the above passage in Cory J.'s judgment in the *Blood Inquiry* case as support for the proposition that the report of a commissioner "will only represent his views, and will not determine civil or criminal liability, if any", Binnie J. added the following in a decision relating to a municipality's authority to establish a public inquiry:

> While the public benefits sought to be achieved by the judicial inquiry cannot be purchased at the expense of violating the rights of the appellants and others involved in the land transactions, those rights will be protected in the course of the proceedings by the principles of natural justice and the fairness of the Commissioner, and thereafter by the inadmissibility of compelled testimony in subsequent proceedings federally under s. 5(2) of the *Canada Evidence Act*, RSC 1985, c C-5 and s. 13 of the *Canadian Charter of Rights and Freedoms* (*Di Iorio v Warden of the Montreal Jail*, [1978] 1 SCR 152; Dubois v The Queen, [1985] 2 SCR 350), and provincially under s. 9(1) of the Ontario *Public Inquiries Act*, which is incorporated by reference into s. 100(1) of the *Municipal Act*.[16]

70. The particular issue of whether or not pre-trial publicity will prejudice an accused's fair trial rights by placing "irreversible ideas" regarding the actions of the accused in the minds of potential jurors was thoroughly canvassed by Nordheimer J. of the Ontario Superior Court in his recent and highly publicized decision authorizing the release of informations to obtain in the investigation that led to extortion charges being brought against Alexander Lisi.[17]

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15 *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 40 at para 34 [the "*Blood Inquiry* case"].
16 *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3 at para 37. See s. 16 of the Act and s. 5(2) of the *Canada Evidence Act*, RSC 1985, c C-5.
17 *Canadian Broadcasting Corporation v HMQ*, 2013 CanLII 75897 (ONSC) ["*CBC v HMQ*"].

71. Having accepted that there was some risk to the accused's fair trial rights, one of the first "salient facts" raised by Nordheimer J. in that case was that "there has already been a fair amount of publicity in this matter that does not reflect well on Mr. Lisi."[18]

72. It must be remembered that Mr. Wood gave testimony over two days before the Commission in a hearing that was open to the public, broadcast publicly and reported on by the press. Other Participants and witnesses have also testified and given evidence in respect of Mr. Wood's actions under the same circumstances.

73. As acknowledged by Mr. Wood, many stories, including radio and television news items, newspaper and magazine articles, and books, discussing Mr. Wood's role in the events that led to the collapse of the Algo Centre Mall have been published in the media.

74. Mr. Wood asserts that any findings or conclusions that appear in the Commission's Final Report will be of a different species from all of these forms of publicity and, as a consequence, that the will be more damaging to his right to a fair trial.

75. With respect, this assertion is not supported by any evidence and does not properly take account of the realities surrounding or the safeguards built into the jury selection and jury instruction processes.

76. First, as pointed out by Nordheimer J., "experience shows that members of the public do not remember, in any great detail, events that they read or heard about months earlier."[19] While Mr. Wood may or may not be correct in anticipating that the release of the Final Report to the public will result in "substantial publicity", it is very safe to assume, given the complexities and wide ambit of this particular Inquiry, that there will be numerous findings, conclusions and recommendations completely unrelated to Mr. Wood's actions discussed and reported on should that occur.

77. This is far from being a case where Mr. Wood is likely to be the sole focus of attention upon the release of the Final Report. The actions of several individuals, governments, agencies, corporations and others will all be scrutinized when the Final Report is

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18 *Ibid* at para 40.
19 *Ibid* at para 41.

released. This would appear to significantly attenuate any potential risk to Mr. Wood's fair trial rights that might be caused by the release of the Final Report to the public.

78. In any event, at a challenge for cause, potential jurors who have paid particularly close attention to any findings made by the Commission specifically regarding Mr. Wood can be challenged and excluded from his jury, should he elect to be tried by one.

79. Second, the ability of jurors, once selected, to carry out their duty in accordance with the law and the instructions they receive from the presiding judge should not be underestimated. This was recognized by Lamer CJ in *Dagenais*:

> What matters is that this Court has strongly endorsed the ability of a jury to follow the explicit instructions of a judge. This endorsement surely applies as much to the instruction to ignore all information not presented in the course of the criminal proceedings as it applies to the instruction to use evidence of prior convictions for one purpose and not another.[20]

80. One more observation made by Nordheimer J. would appear to be pertinent in the circumstances of this application, given all that we do not know about timing of events yet to come:

> The problem, of course, is that it is impossible at this stage to determine whether there will be a period of sustained pre-trial publicity….I would observe that, if the current publicity is sustained, it is open to Mr. Lisi to bring an application, some time prior to the trial, for a publication ban at that time.[21]

Mr. Wood's Position Regarding the Provincial Offences Trial

81. At this stage, Mr. Wood has not established through convincing evidence that the delivery of the Commission's Final Report to the Attorney General would pose a serious risk to his s. 11(d) right to a fair trial. Nor has he established through such evidence that the wider publication of the Commissioner's Final Report would pose such a risk.

82. In fact, where the trial of the provincial offences charges brought against him under the OHSA is concerned, Mr. Wood appears to be of the view that a public trial and public judicial finding in respect of his conduct prior to the collapse of the Algo Centre Mall will not affect his fair trial rights if and when he is tried under sections 220 and 221 of the *Criminal Code*.

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20 *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 1994 CarswellOnt 112 at para 91.
21 *CBC v HMQ*, *supra* note 17 at para 47.

83. As stated in his Amended Factum, on June 16, 2014, Mr. Wood will be explicitly opposing the Crown's motion to adjourn the trial of the OHSA charges brought against him.[22] The Crown's motion would allow the trial of the more serious criminal charges to proceed before any evidence is presented or judgment rendered in the provincial offences proceeding.

84. Mr. Wood's position with respect to the timing of his provincial offences trial appears to be completely at odds with and undermines the one he is taking before this Commission on this application.

85. As stated above, Mr. Wood gave testimony over two days before the Commission. The Commission's mandate is very broad in that it has been asked to inquire into and report on facts and issues that go far beyond Mr. Wood's role and actions prior to the events of June 23, 2012. Further, the Commission is specifically prohibited from "expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization"[23] and must abide by that prohibition in drafting its Final Report.

86. Mr. Wood's provincial offences trial, on the other hand, could take several days or even weeks to complete and will be focussed only on his actions. In addition, the entire aim of that proceeding will be to assess and determine whether or not Mr. Wood contravened provisions of OHSA, including whether he is guilty of the offence set out at subsection 31(2) of that legislation, which provides:

> …a professional engineer as defined in the *Professional Engineers Act*, contravenes this Act if, as a result of his or her advice that is given...negligently or incompetently, a worker is endangered.

87. On the face of it, it would appear that allowing Mr. Wood's provincial offences trial to proceed prior to his *Criminal Code* trial is likely to be more prejudicial to his fair trial rights than would the release of the Commission's Final Report. And yet Mr. Wood is taking active steps to ensure that the provincial offences trial does proceed prior to his criminal trial, while at the same time taking active steps to prevent the release of the Commission's full Final Report prior to his criminal trial.

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22 Amended Factum at para 30.
23 OIC 1097/2012, para 3.

88. Quite apart from the lack of evidence put forth by Mr. Wood in support of this application, Mr. Wood's apparently contradictory positions regarding the purported precariousness of his fair trial rights should be taken as an indication that the eventual release of the Commission's full Final Report does not pose a risk to those rights.

The Balance Clearly Favours Freedom of Expression

89. Finally, the Media Organizations submit that Mr. Wood has not established that the salutary effects of the proposed order would outweigh the deleterious effects the prophylactic redaction order would have on the open court principle In the context of a public inquiry the public has a Charter protected right to freedom of expression and to learn the highly anticipated results of the important work of this Commission so as to be able to fully consider, discuss and debate its findings and recommendations at the earliest possible opportunity.

90. It is useful in this analysis to recall the purpose and significance of commissions of inquiry:

> 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". 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 public 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 of high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in 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.[24]

91. The presentation to the public of a partially redacted final report following more than two years of wide-ranging, open and inclusive inquiry and investigation into the tragedy that occurred in Elliot Lake on June 23, 2012 by this public Commission of Inquiry could

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24 *Phillips*, *supra* note 14 at para 62.

significantly diminish and detract from the good and important work that it has done. The broader role of public inquiries in this province, and the confidence that Ontarians have in them, should also weigh heavily in the balance.

92. The principle of openness and the freedom of expression, guaranteed by s. 2(b) of the Charter, are especially crucial where significant time, money, talent and effort are poured into the work of a public commission of inquiry, whose entire mandate is to help a community to grapple with a tragedy and find solutions to the problems that led to that tragedy.

93. In conclusion, the Media Organizations respectfully submit that Mr. Wood's application for an order redacting the Commission's Final Report in the manner requested be denied. The Commission lacks the authority to grant Mr. Wood's application. Even if that were not the case, the Media Organizations submit that Mr. Wood has failed to overcome the significant evidentiary and legal requirements of the *Dagenais/Mentuck* test.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of June, 2014.

Peter M. Jacobsen
Bersenas Jacobsen Chouest Thomson Blackburn LLP

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Schedule "A" – List of Authorities

Case Law

1. *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 40.

2. *Canadian Broadcasting Corporation v HMQ*, 2013 CanLII 75897 (ONSC).

3. *Consortium Developments (Clearwater) Ltd v Sarnia (City)*, [1998] 3 SCR 3.

4. *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 1994 CarswellOnt 112.

5. *Episcopal Corp of the Diocese of Alexandria-Cornwall v Cornwall (Public Inquiry)*, 2007 ONCA 20.

6. *Holyday v Toronto (City)*, 2010 ONSC 3355.

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

8. *R v Mentuck*, 2001 SCC 76.

9. *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41.

Secondary Sources

10. Simon Ruel, *The Laws of Public Inquiries in Canada* (Toronto: Carswell, 2010) - Extract.

11. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis Canada Inc., 2008) - Extract.

Schedule "B" – Legislation

I – *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(…)

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(…)

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(…)

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(…)

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

II – *Criminal Code*, RSC 1985, c C-46

CRIMINAL NEGLIGENCE

Criminal negligence

219. (1) Every one is criminally negligent who

(*a*) in doing anything, or

(*b*) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Definition of "duty"

(2) For the purposes of this section, "duty" means a duty imposed by law.

Causing death by criminal negligence

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(*b*) in any other case, to imprisonment for life.

Causing bodily harm by criminal negligence

221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Remand by justice to provincial court judge in certain cases

536. (1)

(...)

Election before justice in certain cases

(2) If an accused is before a justice charged with an indictable offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

III – *Legislation Act, 2006*, SO 2006, c 21, Sched F

Reference aids

70. Tables of contents, marginal notes, information included to provide legislative history, headnotes and headings are inserted in an Act or regulation for convenience of reference only and do not form part of it. 2006, c. 21, Sched. F, s. 70.

IV – *Occupational Health and Safety Act*, RSO 1990, c O.1

Duties of suppliers

31. (1)

(…)

Architects and engineers

(2) An architect as defined in the *Architects Act*, and a professional engineer as defined in the *Professional Engineers Act*, contravenes this Act if, as a result of his or her advice that is given or his or her certification required under this Act that is made negligently or incompetently, a worker is endangered.

V – *Public Inquiries Act, 2009*, SO 2009, c 33, Sched 6

HEARINGS

Holding a hearing

14. (1) A commission shall hold a hearing during the public inquiry only if authorized in the order establishing the commission.

Hearings open to the public

(2) Subject to subsection (3), a commission that is conducting a hearing shall,

(a) give reasonable advance notice to the public of the schedule and location of the hearing;

(b) ensure that the hearing is open to the public, either in person or by electronic means; and

(c) give the public access to the information collected or received in the hearing.

Exclusion of public

(3) 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.

Limitations on examinations

(4) A commission may reasonably limit examination and cross-examination of a witness where the commission is satisfied that it has been sufficient to disclose fully and fairly the facts in relation to which the witness has given evidence.

REPORT OF COMMISSION

Commission's report

20. (1) A commission shall deliver its report in writing to the Minister on or before the date fixed in the order establishing the commission for the delivery of its report. 2009, c. 33, Sched. 6, s. 20 (1).

Interim report

(2) A commission may prepare and deliver an interim report if the commission considers it to be appropriate for the public inquiry. 2009, c. 33, Sched. 6, s. 20 (2).

Attachment of orders

(3) Each order made by the Lieutenant Governor in Council under this Act must be included in or appended to the commission's report. 2009, c. 33, Sched. 6, s. 20 (3).

THE ELLIOT LAKE
COMMISSION OF INQUIRY

FACTUM OF CANADIAN BROADCASTING CORPORATION, THE GLOBE AND MAIL INC. and CANADIAN PRESS ENTERPRISES INC.

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