

THE HONOURABLE MR. JUSTICE PAUL R. BELANGER

IN THE MATTER of an Application under the *Rules of Procedure* of the Elliot Lake
Commission of Inquiry and the *Public Inquiries Act, 2009*

BETWEEN:

ROBERT WOOD

Applicant

-and-

THE ELLIOT LAKE COMMISSION OF INQUIRY

Respondent

FACTUM

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PART I - OVERVIEW

1. In Procedural Order No. 12, the Commissioner indicated that he would welcome submissions regarding his jurisdiction to consider Mr. Wood's application for redaction of portions of the final Report of the Elliot Lake Commission of Inquiry (Commission or Inquiry). Ontario makes the following submissions regarding jurisdiction and the process by which such redactions could be made, if the Commissioner determines they are necessary. Ontario takes no position on whether such redactions should be made to the final Report of this Inquiry.
2. It is Ontario's position that the Commissioner has the jurisdiction to redact his findings regarding the Applicant Robert Wood prior to the release of his final report to the Attorney General, pursuant to sections 10(4) and 14(3) of the *Public Inquiries Act, 2009*, and that this jurisdiction is not abrogated or limited by the Order in Council (OIC) establishing the Inquiry.
3. If the Commissioner determines that his findings regarding Mr. Wood should be redacted to protect Mr. Wood's fair trial rights, both a redacted and unredacted version of the Report will have to be produced and delivered to the Attorney General for Ontario. The precise method for accomplishing this will have to be determined between Ministry officials and the Commission.
4. Finally, it is Ontario's position that the amendments to the OIC sought by the Ontario Building Officials Association should not be granted because they are contrary to section 20 of the *Public Inquiries Act, 2009*; there is no legal authority to order the Lieutenant Governor in Council to amend an OIC; and in any event, the amendments are unnecessary because

the Attorney General anticipates the Commission will organize the public release of the Report after it is delivered to the Attorney General, pursuant to the OIC.

PART II - FACTS

1. BACKGROUND

5. Mr. Wood was a structural engineer who authored a report regarding the structural soundness of the Algo Centre Mall in May 2012, shortly before its collapse. He testified before the Inquiry on June 6 and 7, 2013.¹

6. While the Inquiry hearings were ongoing, Mr. Wood was charged with endangering a worker as a result of providing negligent advice, and working in a manner that may endanger a worker, pursuant to sections 31(2) and 28(2)(b) of the *Occupational Health and Safety Act* (OHSA).² Those charges are pending. The Ministry of Labour is seeking an adjournment of the prosecution of the OHSA charges, pending the outcome of the more serious *Criminal Code* charges that have been laid against Mr. Wood. Mr. Wood is contesting that adjournment. The adjournment will be argued in Elliot Lake on June 16, 2014.³

7. On January 31, 2014, Mr. Wood was charged with two counts of criminal negligence causing death and one count of criminal negligence causing bodily harm pursuant to sections 220(b) and 221 of the *Criminal Code*, by failing to conduct competent and thorough structural integrity engineering inspections of the Algo Centre Mall. Mr. Wood has not yet

¹ Transcript, Elliot Lake Inquiry Hearings, June 6 and 7, 2013, Applicant's Application Record, Tab

² R.S.O. 1990 c. O.1

³ Information 13-161 and Transcript, March 25, 2014, Ontario's Application Record, Tabs 3 and 4

made an election to be tried in the Ontario Court of Justice or by judge alone or judge and jury in Superior Court of Justice.⁴

2. APPLICATION TO THE COMMISSION

8. In his amended Notice of Application, Mr. Wood seeks an Order that the final Report of the Elliot Lake inquiry be redacted to protect Mr. Wood's fair trial rights pursuant to the *Charter*, that the redactions include only passages that deal with matters set out in the Section 17 Notice received by Mr. Wood and that redaction be removed from the final Report immediately following: Mr. Wood's election to be tried before the Ontario Court of Justice; Mr. Wood's election to be tried by judge alone in the Superior Court of Justice; Mr. Wood is discharged after a preliminary inquiry, if one is held; or Mr. Wood is acquitted or convicted after a trial by judge and jury in the Superior Court of Justice.

PART III – APPLICABLE LAW

1. JURISDICTION OF THE COMMISSIONER

9. It is Ontario's position that the Commissioner has the jurisdiction to make the redactions to his final report requested by the Applicant pursuant to both sections 10(4) and 14(3) of the *Public Inquiries Act, 2009*, and that such an order would not conflict with the OIC establishing the Inquiry.

10. *The Public Inquiries Act, 2009*, states:

Protection of confidential information

⁴ Informations 14-027 and 14-031, Ontario's Application Record, Tabs 1 and 2

10(4) A commission may impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information.

...

Exclusion of public

14 (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.

11. Although these provisions have not yet been judicially considered, they appear to be broader than a Commissioner's powers in the former *Public Inquiries Act*.⁵

12. The OIC establishing the Inquiry states:

- 3. The Commission shall perform its duties without expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commission shall further ensure that the conduct of the inquiry does not in any way interfere or conflict with any ongoing investigation or proceeding related to these matters.

...

⁵ *Public Inquiries Act* R.S.O. 1990, c. P. 41:

Hearings to be open, exceptions

4. All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,

- (a) matters involving public security may be disclosed at the hearing; or
- (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the commission may hold the hearing concerning any such matters in the absence of the public.

12. The Commission shall deliver a final report containing its findings, conclusions, and recommendations to the Attorney General no later than October 31, 2014.
- ...
15. The Attorney General shall table the report with the Legislature and make the report available to the public.

13. It is Ontario's position that there is nothing in the OIC which abrogates or limits the Commissioner's jurisdiction pursuant to sections 10(4) and 14(3) of the Act to make any orders regarding his final Report which he determines are necessary to protect the integrity of the administration of justice or law enforcement (such as protecting the integrity of a criminal prosecution). In fact, paragraph 3 of the OIC specifically states that the Commissioner shall ensure that the conduct of the Inquiry does not interfere or conflict with any ongoing proceeding related to these matters.

14. In addition to his statutory authority, it is also Ontario's position that the Commissioner has the common law jurisdiction to control the processes of the Inquiry.

Phillips v. Nova Scotia

15. In *Phillips v. Nova Scotia*⁶, the Supreme Court of Canada considered the intersection of a public inquiry and criminal charges arising from the same facts.

16. Shortly after the Westray Mine disaster in 1992, the government of Nova Scotia called a public inquiry. Around the same time, criminal charges and occupational health and safety charges were laid against mine managers who were also expected to testify at the Inquiry.⁷ The criminal prosecution and Inquiry were expected to run concurrently.⁸

⁶ [1995] 2 S.C.R. 97

⁷ The occupational health and safety charges were eventually stayed.

⁸ Ruel, Simon, *The Law of Public Inquiries in Canada*, Carswell: Toronto, 2010, at p. 121

17. The accused brought an application alleging that the OIC establishing the Inquiry was *ultra vires* the province and that it infringed their *Charter* rights. They sought an injunction to prevent the Inquiry from proceeding. The trial court found that the OIC was *ultra vires*. On appeal to the Nova Scotia Court of Appeal, the Court found that the Inquiry hearings would imperil the *Charter* rights of those charged and ordered that the public hearings of the Inquiry be stayed until the completion of the criminal trials.
18. When the appeal of that decision was heard by the Supreme Court of Canada, the accused had elected to be tried before a judge and jury. However, before the Court's decision was released, the accused re-elected to be tried by a judge alone. The questions before the Supreme Court were therefore whether the accused were compellable witnesses at the Inquiry (which is not at issue in our case because the Inquiry hearings have concluded and Mr. Wood has already testified⁹), whether the Inquiry infringed the presumption of innocence and right to a fair trial pursuant to section 11(d) of the *Charter* and whether the Inquiry should be stayed as a result.
19. The Supreme Court allowed the appeal. The majority decision set aside the stay of proceedings on the basis that the accused had, since the hearing of the appeal, re-elected to be tried before a judge alone. The Court also found that there was no evidence supporting the view that the publicity arising from the Inquiry would have an effect on a trial judge, and that the issue of the compellability of the accused was premature. The majority

⁹ It is clear, pursuant to the *Canada Evidence Act*, the *Ontario Evidence Act*, the *Public Inquiries Act, 2009* and the case law regarding the right against self-incrimination that Mr. Wood's inquiry evidence would not be admissible in the criminal prosecution. See *R v. S. (R.J.)* [1995] 1 S.C.R. 451, *British Columbia (Securities Commission v. Branch* [1995] 2 S.C.R. 3 and *Phillips* at para. 81.

specifically declined to deal with the other issues raised by the appeal, essentially finding the matter was moot because of the re-election to trial by judge alone.¹⁰

20. The minority decision authored by Cory J. concurred in the result, but found that the other issues raised should be dealt with to provide guidance for future inquiries.¹¹

21. With respect to jurisdiction, the minority opined that the Commissioner is best placed to assess the potentially harmful effects of evidence introduced at an Inquiry and the judicial use by a Commissioner of flexible measures to overcome individual threats to fair trial rights represents the most efficient means of protecting constitutional rights during the Inquiry process and criminal proceedings.¹²

22. The minority also found that powers of an Inquiry to control its own processes pursuant to its constituent statute should be read generously. In addition to its statutory powers, the minority noted that a commission of inquiry also has a broad common law jurisdiction to control its own processes. Finally, the Court noted that the appropriate forum to make orders regarding restraints to inquiry proceedings designed to protect the integrity of criminal trials may sometimes be the criminal court, but generally it is appropriate that the Commission should be the first body to determine whether any of the exceptional orders concerning publicity bans or other measures should be made.¹³

¹⁰ *Phillips*, at para. 14

¹¹ In his book, the *Conduct of Public Inquiries*, Ed Ratushny states that although Justice Cory's reasons are obiter because they were part of a minority decision "they are likely to be treated as authoritative unless and until they are modified by future rulings of the Supreme Court". *Conduct of Public Inquiries* Irwin: Toronto, 2009, at p. 296.

¹² *Phillips*, *supra*, at paras. 36, 38 and 170. See also *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall (Public Inquiry)* [2007] O.J. No. 100 (C.A.), at para. 24.

¹³ *Phillips*, *supra*, at para. 174-176

23. It is submitted, for all of these reasons, that the Commissioner has both the statutory and common law jurisdiction to determine the Applicant's application.

2. PROCESS

24. In *Dagenais v. Canadian Broadcasting Corp.*, the Supreme Court stated that the efficacy of publication bans has been reduced by technological advances which permit the sharing of information. Therefore, if the Commissioner determines that he will make redactions to his final report, the process by which those redactions are made should be carefully considered.¹⁴ Further, both a redacted and unredacted version of the Report will have to be produced and delivered to the Attorney General for Ontario pursuant to the OIC. The precise method for accomplishing this will have to be determined between Ministry officials and the Commission.

25. In keeping with long-standing tradition, the Attorney General anticipates that the Commission will organize the public release of the Report and the media lock-up with respect to the public release of the Report after the Attorney General is presented with the Report pursuant to the OIC. The Attorney General also anticipates, subject to the views of the Commissioner, that the Report will be released to the public in Elliot Lake, the community most affected by the Report. The exact process for the public release of the Report will be a matter of discussion between officials from the Ministry of the Attorney General and the Commission.¹⁵

¹⁴ *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, at paras. 89-90

¹⁵ This is consistent with paragraph 3 of the OIC which requires that the Attorney General will make the report available to the public and section 27 of the Act which contemplates sharing of administrative information between the Commission and the Ministry.

3. RESPONSE TO THE ORDER SOUGHT BY THE OBOA

26. The amendments to the OIC sought by the Ontario Building Officials Association (OBOA) are contrary to section 20 of the *Public Inquiries Act, 2009*, which requires the delivery of a Commission's report to the Attorney General for Ontario or other designated Minister:

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.¹⁶

It is submitted that an OIC establishing an Inquiry must be consistent with the *Public Inquiries Act, 2009*.¹⁷ The OIC in this case requires that the final Report be delivered to the Attorney General for Ontario prior to being released to the public.

27. Furthermore, an OIC is a form of executive legislation and therefore may only be amended by the executive. A Commissioner has no legal authority to compel Cabinet to amend an OIC.¹⁸ The authority to make the OIC establishing this Inquiry is set out in section 3 of the *Public Inquiries Act*:

3. (1) The Lieutenant Governor in Council may by order establish a commission to conduct a public inquiry into a matter that the Lieutenant Governor in Council considers to be in the public interest.

While a Commissioner may request or recommend that the OIC be amended, it is up to the Lieutenant Governor in Council to determine whether or not it is prepared to accept those

¹⁶ "Minister" is defined as "the Attorney General or such other Minister as may be made responsible for a public inquiry in the order under section 3". No such other Minister has been made responsible in this Inquiry.

¹⁷ *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia)* [1997] F.C.J. No. 985 (F.C.A.), at paras. 12-13 and 17; leave to appeal to the Supreme Court of Canada denied [1997] S.C.C.A. No. 505

¹⁸ *Dixon, supra*, at paras. 12-13

recommendations or grant those requests.¹⁹ For example, in this case, the Commission requested an extension of time to deliver its final Report. That request was granted by the Lieutenant Governor in Council. The Lieutenant Governor in Council could not grant the relief sought by the OBOA in this case because it would be contrary to section 20 of the *Public Inquiries Act, 2009*.

28. In any event, the OIC does not need to be amended to allow for a public release of the final Report to the citizens of Elliot Lake or to allow a media lock-up for parties to the Inquiry prior to the public release. As stated above, it has been a long-standing tradition for the public release of a Commission's final Report and the associated media lock-up to be organized by the Commission. The Attorney General anticipates that is what will occur in this case. The exact process for the public release of the Report will be a matter of discussion between officials from the Ministry of the Attorney General and the Commission.

29. Finally, the Order sought by the OBOA is not a proper response to Mr. Wood's application as it is completely unrelated to that application. If the relief is to be pursued, it should be the subject of a separate application on notice to all participants in the Inquiry (Phase 1 and 2) and adequate time should be given to all participants to respond. Alternatively, the relief should not be granted due to delay. The OIC establishing this Inquiry is dated July 19, 2012. The OBOA now moves at the eleventh hour to amend the OIC without bringing a proper application. The relief should be denied.

¹⁹ *Dixon, supra*, at paras. 12-13

PART IV – ORDER REQUESTED

30. Ontario takes no position on the Order requested by the Applicant. The Order sought by the Ontario Building Officials Association should not be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 13, 2014



**Heather Mackay
Counsel for the Province of Ontario**

SCHEDULE “A”

Cases

Phillips v. Nova Scotia [1995] 2 S.C.R. 97

R v. S. (R.J.) [1995] 1 S.C.R. 451

British Columbia (Securities Commission v. Branch [1995] 2 S.C. Phillips, at para. 14

Episcopal Corp. of the Diocese of Alexandria- Cornwall v. Cornwall (Public Inquiry) [2007] O.J. No. 100 (C.A.)

Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835

Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia [1997] F.C.J. No. 985 (F.C.A.), leave to appeal to the Supreme Court of Canada denied [1997] S.C.C.A. No. 505

Secondary Sources

Ruel, Simon, *The Law of Public Inquiries in Canada*, Carswell: Toronto, 2010

Ratushny, Ed, *Conduct of Public Inquiries* Irwin: Toronto, 2009

SCHEDULE "B"

Public Inquiries Act, 2009 S.O. 2009, c. 33, Sched. 6

Commission

3. (1) The Lieutenant Governor in Council may by order establish a commission to conduct a public inquiry into a matter that the Lieutenant Governor in Council considers to be in the public interest.

...

Protection of confidential information

10(4) A commission may impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information.

...

Exclusion of public

14 (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.

...

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.²⁰

...

Administrative information

27. (1) A commission and the Minister may at any time, or shall on the request of either, share with each other administrative information relating to the commission and the public inquiry, including information respecting,

- (a) the budget for the commission;
- (b) the commission's actual and projected expenditures;
- (c) the timing and progress of the public inquiry; and
- (d) the production and delivery of the commission's report.

Public Inquiries Act R.S.O. 1990, c. P. 41

Hearings to be open, exceptions

4. All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,

- (a) matters involving public security may be disclosed at the hearing; or

²⁰ "Minister" is defined as "the Attorney General or such other Minister as may be made responsible for a public inquiry in the order under section 3". No such other Minister has been made responsible in this Inquiry.

- (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the commission may hold the hearing concerning any such matters in the absence of the public.

Order in Council 1097/2012

- 3. The Commission shall perform its duties without expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commission shall further ensure that the conduct of the inquiry does not in any way interfere or conflict with any ongoing investigation or proceeding related to these matters.
- ...
- 12. The Commission shall deliver a final report containing its findings, conclusions, and recommendations to the Attorney General no later than October 31, 2014.
- ...
- 15. The Attorney General shall table the report with the Legislature and make the report available to the public.

ROBERT WOOD
Applicant

v.

THE ELLIOT LAKE COMMISSION OF INQUIRY
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