Inquiry Process

I close by thanking the citizens of Elliot Lake. Their personal and collective sacrifices are recognized throughout this Report. This community, at the official and individual levels, has made me and all other members of the Commission feel welcome, appreciated, and at home here in their beautiful and unique city. We will not forget them.

Inquiry Process

The purpose of this chapter

The creation of the Elliot Lake Commission of Inquiry and my appointment as Commissioner occurred on July 9, 2012, less than one month after the tragic events of June 23, 2012. Indeed, only six days after the collapse of the Mall, the then-premier of Ontario announced that an independent public inquiry would be held into the disaster, stating: "We have an obligation to do whatever we can to prevent similar tragedies and respond in the best way possible when they do happen."[1]

The speed with which the Government of Ontario acted spoke, at least in part, to the importance it gave to those events for the people of Elliot Lake and for the citizens of this province, as well as to the need for change to ensure the safety of people who work in or frequent large buildings used for mercantile occupancy.

I have been a judge presiding over criminal trials for more than 36 years. Before my appointment as Commissioner, I had no experience with the conduct of such an undertaking. Nevertheless, it appeared to me that, while a criminal trial and a commission have different objectives and processes, their conduct shares many characteristics: they include the need for fairness, compassion, independence, careful and well-articulated reasoning, transparency and openness, expedition, efficiency, and effectiveness.

This part of my Report outlines the measures taken by the Commission to achieve the objectives set out in its mandate[2] with those characteristics in mind.

Mr. Justice Sidney Linden, in his *Report of the Ipperwash Inquiry*, usefully contrasts the differences between public inquiries and other proceedings:

> **1.3 Differences between Public Inquiries and Other Proceedings**
>
> Public inquiries are established by government, and their objective is to fulfill the mandate set out in an order-in-council, yet they are independent of government. Their role is also distinct from that of the legislative, executive, or judicial branches. Mr. Justice Cory of the Supreme Court of Canada pointed out that public inquiries, as temporary bodies, "are free of many of the institutional impediments, which at times constrain the operation of various branches of government." He further wrote that
>
> > [i]nquiries 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 of partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented.
>
> Despite these institutional distinctions, those observing a public inquiry and indeed even those directly participating in one, often assume that it is like a trial. This is understandable. Although the specific features of inquiries vary, often the commissioner is a judge, the hearings are usually held in a court-like environment, and evidence is obtained from witnesses who may be examined and cross-examined by lawyers. In the case of the Ipperwash Inquiry, for example, I had powers to summons witnesses to attend, and if necessary to produce documents, and to make findings of misconduct in my report. However, a public inquiry is not a trial, and, generally, a commission is not established to revisit judgments already passed. While a commission may establish wrongdoing or misconduct, it does not find anyone guilty of a crime, nor does it establish civil liability for monetary damages. To underscore this point, I described these limits in my public statements during the Inquiry.
>
> Unlike a civil or criminal trial, a public inquiry is more inquisitorial than adversarial, in that the objective of those involved in the process is to uncover the truth rather than to establish liability. Nevertheless, the proceedings can become heated at times. Invariably, a public inquiry involves groups, individuals, or institutions with legitimate and often competing interests that must be explored. And, although an inquiry is not intended to determine guilt or innocence, or fault or no fault, the actions of individuals or institutions may be questioned and misconduct may be found. This, and the fact that the investigation is conducted in public, carries with it the possibility that individual or organizational reputations will be at

> risk. Counsel have a duty to protect and/or advance their clients' interests, and therefore an adversarial element invariably makes its way into the inquisitorial process. Given this reality, it is imperative that the inquiry process include safeguards that uphold the principles of natural justice and procedural fairness. Inquiries with both fact-finding and policy mandates also face the challenge of accommodating the sometimes competing interests of lawyers and policy-makers. Lawyers retained by an organization or individual directly involved with or affected by the subject of the investigation are likely to focus only on the interests of their clients. They will therefore support procedural arrangements that afford maximum protection of their clients' legal rights. On the other hand, policy-makers, and lawyers representing parties with a broader policy focus, are likely to seek the broadest possible body of information relevant to the policy debate. They will tend to resist procedural mechanisms that may narrow the scope of the inquiry. The challenge is to put in place procedural and organizational structures that satisfy both fairness in fact-finding and thoroughness in eliciting information to contribute to the policy debate.
>
> Another feature that distinguishes public inquiries from trials is that public inquiries are not strictly bound by the rules of evidence that govern civil or criminal proceedings. Our Rules of Procedure and Practice (the "Rules") stated that "[t]he strict rules of evidence will not apply to determine the admissibility of evidence." The commissioner of a public inquiry may receive any relevant evidence including evidence that might be inadmissible in a court of law, such as hearsay evidence. However, although hearsay evidence may be admitted at a public inquiry, the commissioner may accord little weight to it.[3]

The purposes of this Commission of Inquiry

The Order in Council creating this Commission asked me to:

- Inquire into the events surrounding the collapse of the Algo Centre Mall in Elliot Lake on June 23, 2012.
- Inquire into the emergency management and response subsequent to the collapse.
- Review the existing legislation, regulations, by-laws, policies, processes and procedures relating to the first two subjects of the inquiry.
- Report my findings, conclusions and recommendations to the Attorney General.*

Therefore, this Inquiry has both retrospective and prospective functions as I outlined in more detail in the first chapter of Part I of the Report. It is to look back to discover the causes of the collapse and to examine the conduct of the rescue / recovery effort. But it is also to look forward and to make recommendations, both to prevent a recurrence and to improve the emergency management process.

Clearly, the principal objectives of the Inquiry are not blame, retribution, or attribution of liability or culpability; this Commission exists to discover what went wrong and to suggest measures that will make Ontario a safer place.

The public nature of a commission of inquiry

As Mr. Justice Linden pointed out:

> In my view, what distinguishes the public inquiry from other types of investigations is that it is truly *public*. It investigates a matter of public interest, in public view, and with the participation of the public. This attribute was at the heart of all my decisions affecting the inquiry process.[4] [Emphasis in original.]

* Order in Council OC 1097/2012 and Order in Council OC 1873/2013 (amended), reproduced as Appendix F and Appendix G.

I agree entirely. Confidence in the work of a commission such as mine depends, in large part, on the public's understanding of, and substantial agreement with, its means, methods and objectives.

At the hearing I held dealing with claims for confidentiality, I said:

> [W]henever a conflict arises between the expectation of privacy or confidentiality and the open court principle, "jurisprudence has now unquestionably and conclusively established that, as between these two values, the onus of demonstrating primacy in any particular circumstance rests on those who would restrict full and unalloyed publicity and transparency."*

That was invariably my guiding principle.

There will be exceptions, of course. For example, notices under s.17 of the *Public Inquiries Act*[5] requiring that persons be provided with reasonable notice of a potential finding of misconduct are kept strictly confidential because, after hearing the evidence, such a finding may eventually not be made and publicity might negatively affect reputations.

In addition, I issued a non-publication order of certain graphic and potentially disturbing photographs.

Access to all of the material obtained in response to the Commission's summonses was only permitted to Participants upon the execution of confidentiality undertakings, because only a small portion of that massive database would be relevant and made exhibits. The remainder would not be relied on by the Commission and could contain private information.

Finally, I ordered redaction or non-publication of some non-relevant private information found in some exhibits – personal social insurance numbers, for example – for obvious reasons.

My first contact with the community of Elliot Lake

At the time of my appointment, I had a very limited knowledge of the geography, demographics, and history of this part of our very large province. By virtue of the relative isolation of the City of Elliot Lake and its comparatively small size, recruitment of Commission counsel and administrative / support staff had, of necessity, to come from a larger centre. Ottawa was the city I was most familiar with and my choices were, for the most part, confined to that city.

Consequently, I was conscious of, and determined to dispel as much as possible, the perception that we "the big city folks" would descend on Elliot Lake and impress the local citizenry with our wisdom and talent. To that end, one my first decisions† was to come to Elliot Lake with senior counsel and staff to formally introduce ourselves and to answer questions from the public and media. Most significantly, we came to hear from the residents about the impact of the tragedy on their lives and on the community as a whole. I wrote an open letter and sent a televised message to them to that effect.‡

On August 15, 2012, I travelled with my senior staff to Elliot Lake to meet with residents, both publicly (at a meeting of the community held at the Lester B. Pearson Community Centre) and privately.§ We also toured the site of the collapse and counsel met with members of the Chamber of Commerce, the Fire Department, the

* Ruling on Confidentiality, January 8, 2013, p. 2, Appendix M.2.

† Upon the wise advice of previous commissioners, such as Associate Chief Justice (as he then was) Dennis O'Connor and Justice Stephen Goudge of the Ontario Court of Appeal.

‡ See Commissioner Bélanger's statement to residents of Elliot Lake, August 1, 2012, Appendix J.1.

§ See Address of Commissioner Bélanger to the residents of Elliot Lake, Appendix J.2.

Ontario Provincial Police, and elected officials. We also met with the families of the two victims. In total, we heard from approximately 40 individuals, many of whom preferred to speak to us in a private setting about their grief, losses, and trauma. As I reported later:

> [W]e all left with a clear understanding of how emotional the issues we are investigating are to this community, and the absolutely devastating impact the collapse of the Algo Centre Mall has had on the people of Elliot Lake and surrounding community. As we continue our work, we will most certainly keep these sentiments in mind and remember the two citizens who perished in this tragedy.[6]

Our entire three-day stay was well publicized and well attended and we returned to Ottawa somewhat confident that we had successfully broken the ice.

Particular challenges

Geography

Every inquiry faces unique challenges – for example, national security or scientific complexity.

For this Inquiry, one of the key challenges was clearly geographic. I determined early on that it was critical that the public hearings be held in Elliot Lake. Many of the witnesses would be local, of course, but in addition to the functional and practical reasons for local hearings, I felt that there were other compelling reasons. Because virtually all the citizens of Elliot Lake had, in one way or another, undergone the consequences of the collapse, the Commission's physical presence in the community might be both cathartic and restorative. It went beyond mere symbolism. The Commission was, in a real sense, *their* commission. Without a doubt, thanks to modern technology all the proceedings could have occurred at a distance, but nothing compares to experiencing the reality of a witness being questioned in a live setting. In any event, since most of the Participants' lawyers lived outside Elliot Lake, travel (and its attendant costs) would be necessary, regardless of location.

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Elliot Lake is about 650 kilometres by road to Ottawa, a trip of approximately eight hours by automobile. It was clear from the outset that we would have to secure long-term accommodation for me, counsel, and staff. One of the city's two hotels was under the rubble of the Algo Mall and the other, of necessity, was not only almost fully booked but would also be more expensive compared with the cost of leasing private residences or apartments. Fortunately, these accommodations were in relatively plentiful supply and a sufficient number were rented for the duration of the hearings.

A substantial number of the many witness interviews Commission counsel conducted to prepare for the formal hearings had to be held outside Ottawa. To the extent possible, many interviews were conducted by telephone.

Although the City of Elliot Lake operates its municipal airport year-round, it is not served by the large commercial carriers. The closest airports served by commercial airlines are in Sudbury or Sault Ste. Marie, a two hour-drive in ideal conditions. The rigours of winter and near-winter conditions in Northern Ontario often made driving or flying on commercial airlines difficult, if not occasionally impossible; this situation created budgetary difficulties because of problems such as missed or rescheduled witness interviews or counsel marooned in airports when flying conditions worsened.

The Elliot Lake airport has a good landing strip that can accommodate private or charter aircraft. A cost-benefit analysis made clear that hiring a charter aircraft would be ideal to give my staff a trip to Ottawa every second week to attend to personal affairs and family, ensuring very rapid cost-effective transportation with no time-consuming large airport procedures and attendant delays. The flight time between the two cities is only one hour and 20 minutes on average, allowing for arrivals in Ottawa in the early evening on Thursdays and return to Elliot Lake in the early evening on Mondays. I preferred to remain in Elliot Lake most weekends.

Hearing facilities

The Commission also required suitable premises in which to conduct the hearings. Fortuitously, one building was centrally located in the city and available for retrofit. The White Mountain Academy of the Arts, in disuse since 2006 as an academic institution, was already occupied to temporarily accommodate municipal, provincial, and local services that had been located in the Algo Mall. The building was beautiful, airy, and solidly constructed, having been designed to house the CANMET Laboratory when the uranium mines were in operation. With the assistance of the municipality and the Province of Ontario, a hearing room was designed and constructed on the second floor, along with attendant facilities such as press room, Commission offices and conference room, witness interview rooms, and public viewing room. It served admirably well for the duration of the hearings.

The hearing room itself would be the envy of any commission or, indeed, any tribunal. Counsel tables for 25 were equipped with microphones, electrical and computer connections, and document viewer / repeaters. Four large-screen monitors were strategically located throughout the room so that the public in attendance could view documents on screen. Remotely operated cameras captured the scene and the players as witnesses were examined, as counsel addressed me, and as I did my work. A large electronic interactive whiteboard was available for all to view paper documents and to allow witnesses to mark graphic / photographic evidence and make their markings part of the exhibit record. The Commissioner's elevated dais allowed for a panoramic view of the entire room and was equipped with three monitors, showing documentary evidence, the simultaneously produced transcript, and the examiner / witness. Sound amplification was provided. Proceedings were remotely telecast within the building to a café room on the ground level so that the public could follow proceedings in a more relaxed atmosphere. The proceedings were also fed to monitors in the press room so that journalists could work outside the hearing room.

Figure 2.12.1 The hearing room

Benches for public seating accommodated approximately 50 persons and were always sufficient for our purposes. An elevated control booth in one strategically located corner allowed the on-site technician to survey the proceedings and to constantly adjust the cameras, microphones, and other equipment to provide continuous uninterrupted coverage.

Inquiry Services, a subsidiary of Avolution Multimedia, was responsible for the design, installation, and operation of the audio visual coverage system, press pool, and broadcast feeds and the evidence display system. This firm had provided similar systems to the Ipperwash, Pediatric Forensic Pathology, and Cornwall inquiries. Its level of service and expertise was exceptional.

Ottawa Commission offices

Until I, some staff, and counsel could move to Elliot Lake for the hearings, suitable office space had to be found in Ottawa. The Government of Ontario justifiably expressed a preference that the Commission use existing government assets for that purpose. Unfortunately, none existed in July and August 2012 that could accommodate my full staff for the entirety of the Commission. Leased premises were found on Blair Road pending refurbishment of facilities in the industrial park section of St. Laurent Boulevard. The Commission was on Blair Road from August 2012 until March 2013, and Ottawa-based staff moved to the St. Laurent property owned by the Province of Ontario in March 2013. Staff, counsel, and I returned there from Elliot Lake in October 2013 and remained there until the completion of our work.

Translation and interpretation

Elliot Lake has a significant French-language-speaking population, as does all of Northern Ontario. It was apparent to me from the outset that all my public proceedings would have to be simultaneously translated into one or the other official language and that all the Commission's official documents would have to be produced in both. To that end, a soundproof translation booth was installed in the hearing room, and certified interpreters were hired to provide simultaneous translation of all the proceedings throughout the eight months of the hearings.

Other proceedings

The Order in Council creating the Commission stipulated that 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." In that respect, care had to be exercised not to interfere with an ongoing criminal investigation by the Ontario Provincial Police, civil proceedings, a Ministry of Labour investigation, and a potential coroner's inquest. Fortunately, no insurmountable issues arose during the conduct of the Inquiry by virtue of the existence of parallel proceedings. Indeed, Robert Wood, who had standing at this Inquiry, was charged on April 22, 2013, under the *Occupational Health and Safety Act*, and on January 31, 2014, under the *Criminal Code*, but continued to be a full participant in the Commission's proceedings.

As I describe further below, the criminal charges led to Mr. Wood's application before me in May 2014 for an order that my report be redacted before being publicly released to remove "only passages that deal with the matter of the Applicant's Section 17 notice."

Technology

One of the challenges that the Commission faced from its inception was the set-up of its information technology network as well as its ability to access the Internet in Elliot Lake. Although the information technology section of the Ministry of the Attorney General offered to set up the necessary informatics system, the Commission felt that the Government of Ontario's protocols and policies would limit the remote and flexible access it required for counsel and staff and opted to set up its own independent, efficient, and reliable system. The main challenge for the Commission was obtaining sufficient bandwidth to ensure the live broadcasting of the hearings from Elliot Lake as well as remote access to the large volume of data located on its server in Ottawa. These difficulties were eventually resolved, but not without substantial delays and painful hurdles for the Commission staff.

The *Public Inquiries Act, 2009*

This Commission was the first public inquiry conducted in Ontario since the enactment of the *Public Inquiries Act, 2009*.[7] Before then, the authorizing statute was the *Public Inquiries Act*.[8] This legislation made important and significant changes to the framework governing the administration of public inquiries, including:

- the authority granted to government to fix the date for the delivery of the commission's report (section 20(1));
- the authority granted to government to set a budget for the conduct of the inquiry (section 25 (1)) and the obligation of the commission to be financially responsible and to operate within budget; and
- the obligation to share with the government administrative information relating to budget, actual and projected expenditures, timing and progress of the inquiry, and production and delivery of the report (section 27(1)).

The financial obligations set out under the new legislation required the hiring of a financial analyst who would be an employee of the Government of Ontario and who would have access to the government's financial system. While the selection process was in progress, the setting up of the financial system for the Commission and the preparation of the initial budget forecast was done through the Ministry of the Attorney General in Toronto. This process was time-consuming and resulted in many delays in processing invoices during the first few months. Nevertheless, these comments should not be construed as being critical. The Commission recognized and agreed with its obligation to be effective, expeditious, and financially responsible. Throughout the duration of the Inquiry, the Commission had complete access to and assistance from various departmental personnel while respecting the delicate balance between the principle of independence and the government's obligation to be a prudent steward of public funds. This co-operation was particularly evident during the administrative process required when requesting any extension to the Commission's mandate. At no time was I given cause to fear interference of any sort with the Commission's independence.

The initial stages

Staffing

Finding and recruiting staff and counsel was my initial preoccupation after my appointment. As other commissioners have pointed out, the limited term of a commission makes recruitment of experienced and qualified staff and lawyers problematic. For administrative staff, secondment is an option that is not career limiting and, to the extent possible, I resorted to that method.

Identifying an experienced executive director could have been another matter, but I was most fortuitously blessed by discovering that Suzanne Labbé (see acknowledgments, below) was just then ending her term as executive director of the 2011–12 federal Judicial Compensation and Benefits Commission.

I was also successful in quite quickly recruiting my first choice of counsel. The role of Commission counsel is to assist the Commissioner in carrying out the Commission's mandate. This role was aptly described by one of my Commission counsel at the opening of the hearings:

> [T]he role of your counsel is to assist you with your obligation to find the facts that led to the tragedy that occurred on the 23rd of June of last year and the response to that tragedy.
>
> Unlike the normal situation for us, your counsel, when we are in court, our duty is not to advance or defend the interest of any particular party. Our brief is to determine the truth, whatever that may be.[9]

As described by Associate Chief Justice (as he then was) Dennis O'Connor, commission counsel becomes the alter ego of the commissioner.[10] Aside from being advocates in the hearing room, Commission counsel were the liaison between me and the Participants and witnesses, ensuring that the hearing ran smoothly and expeditiously but without compromising thoroughness and diligence.

Process stages

It was immediately apparent that there would be three distinct parts to the mandate of the Commission. First, it was necessary to conduct an analysis of the causes of the collapse. Second, I would have to review the emergency response following the collapse. And, finally, I would need to formulate my recommendations. Different mixes of players would necessarily be involved in each area. The first two portions would be essentially fact-finding: evidentiary and analytical. The third segment would be policy oriented and would depend on my conclusions drawn from the evidentiary experience, aided by suggestions from Participants and experts. Consequently, Part One of the hearings in Elliot Lake concentrated on the history of the Algo Mall from its conception until its eventual destruction after the collapse. Part Two of the Elliot Lake hearings dealt with the facts surrounding the emergency response. The third area consisted of roundtables of experts in Ottawa dealing with discrete subjects emanating from my examination of the factual material, with a view to crafting realistic recommendations. The three areas proceeded sequentially.

Preliminary investigation and summonses

Even before the Commission had formal offices, my staff conducted some preliminary investigations to assess who possessed documents relevant to the Commission's mandate and to identify potential witnesses.

A review of media coverage of the collapse allowed the Commission to prepare a tentative chronology of events, as well as prepare a list of potentially relevant individuals and corporations. But more importantly, this review led the Commission to issue, at the end of August 2012, less than two months after its creation, its first series of summonses for production of documents. This first series of summonses was directed to municipal and provincial

government departments and agencies (Ministry of Labour, Ministry of Community Safety and Correctional Services, Ontario Provincial Police (OPP), City of Elliot Lake, City of Elliot Lake Fire Department, Toronto Police Services, City of Toronto).

In September 2012, following a title search of the Mall ownership records, the Commission issued a second series of summonses to a variety of individuals and corporations, including the current owner of the Mall, Eastwood Mall Inc.; as well as the two previous owners, Algoma Central Properties Inc., and 1425164 Ontario Limited (known as NorDev); and builders, architects, engineers, consultants, tenants, insurers, and bankers.

The Commission continued to issue summonses for production of documents throughout its proceedings to a variety of individuals and organizations as the review and analysis of documents continued and led the Commission to new investigation leads. Post-collapse investigations conducted by bodies such as the OPP and the engineering specialists it retained were a major source of materials for the Commission. In total, more than 120 summonses for production were issued by the Commission, resulting in more than 550,000 documents, amounting to more than a million pages.*

Request for information

In some cases, the summonses issued by the Commission required production of information in addition to documents. Indeed, paragraph 10(1) of the *Public Inquiries Act, 2009*, provides that a commission may serve a summons requiring a person to "produce for the public inquiry any information, document or thing under the person's power or control." That was the case, for example, for the Ministries of Labour and Community Safety and Correctional Services, the OPP, and the City of Elliot Lake. Generally, these summonses required them to provide an outline of the policies, processes, and procedures of the various ministries or agencies with respect to emergency management. What was contemplated was the preparation of an analysis by those possessing the most intimate knowledge of these topics, and not merely the production of promulgated policies and manuals. The analysis would explain the overall process, pulling together and elaborating on the documents produced. The Commission recognized that those who deal with the subject matter on a daily basis possessed the expertise and depth of knowledge necessary to provide this form of commentary and thus contribute to the successful completion of the Commission's mandate.

By making this type of request, it was the intention of the Commission to use this information produced in accordance with subparagraph 9(1)(f) of the *Public Inquiries Act, 2009*.† This was a new feature of the newly enacted legislation designed to ensure efficiency and cost effectiveness in public inquiries.

Interviews by investigators

To assist the Commission in its duties during its initial stages, I retained on secondment two experienced Ottawa police investigators who aided Commission counsel and me in locating witnesses and conducting preliminary interviews. Their assistance was particularly valuable in locating individuals who were involved in the events surrounding the construction of the Mall in the late 1970s and during its first years of operations.

* An example of the Commission's Summons to Produce Documents appears as Appendix N.

† Subparagraph 9(1)(f) provides that a commission shall, as much as practicable and appropriate, refer to and rely on any other document or information, if referral to and reliance on the document or information would promote the efficient and expeditious conduct of the public inquiry.

Documents

When Commission counsel first met with the OPP in August 2012, they were advised that the volume of documents that the OPP had collected – which would undoubtedly be relevant to the mandate of the Commission and eventually produced to it pursuant to a summons – was in excess of one terabyte of electronic material: a daunting quantity, to say the least.

Nevertheless, it came as no surprise that the volume of documents that the Commission needed to gather would be very large. The Algo Mall had existed for 33 years, and we anticipated that the records generated during that time would come from a multitude of sources. Furthermore, it was fully expected that the Internet and email traffic would increase the number of documentary records exponentially, if not qualitatively. Although the aftermath of the collapse occupied a much more limited period, the amount of data generated was similarly voluminous. As a result, I felt it was impossible to conduct the initial investigation in a timely way without the assistance of a document management firm as well as a document review firm.

Inquiring into events surrounding the construction of the Mall concerned the Commission because of the structure's age and the passage of time. Indeed, we discovered early on that several key figures from that time period had passed away. However, the Commission was fortunate that its first owner, and the one that initiated its construction, Algoma Central Properties, still possessed a file on its construction and operation. This file was provided to the Commission pursuant to a summons.

Electronic document management and review services

The Commission retained the services of esi Specialists, a Toronto firm with expertise in collection, identification, capture, review, and production of all forms of digital evidence as well as the creation of a data and web-hosting platform for online discovery and review.

The Commission's documents were hosted in a database called Relativity. Relativity served not only as the repository for all the documents received by the Commission, but also as the tool used by Commission, Participants', and witnesses' counsel to review and analyze documents throughout the proceedings. Relativity is a web-based platform that lets its users conduct advanced searches. Because it is intuitive, it allowed the Commission to search, review, and digest documents quickly and efficiently.

Early on, we decided to aim to keep paper documents to a minimum and, therefore, have as paperless a hearing as possible.

The Commission retained the services of the law firm of Wortzman Nickle to assist in the culling and triage of the many gigabytes of materials in order to identify and exclude non-relevant documents. Commission counsel met with the Wortzman Nickle team to provide it with an overview of the issues and themes that were likely to become relevant to the Commission's mandate. This collaborative and coordinated effort resulted in a significantly reduced and manageable number of documents for Commission counsel to review.

After the documents were sorted and entered into Relativity by esi Specialists, they went through a first-level review by the Wortzman Nickle team. Wortzman Nickle was able to assemble a team of more than 20 lawyers in short order to assist us with the preliminary review of the documents.

In addition to identifying relevant documents, Wortzman Nickle assisted the Commission by, among other things, coding relevant documents to a series of issues identified by Commission counsel and identifying technical documents.

The Commission's document management clerk, Kassandra Kuka, ably oversaw the liaison between the Commission and esi Specialists as well as the various custodians. As the hearings began in Elliot Lake, her role was transformed into that of court operator managing the production of documents on large and small screens and electronic whiteboards in a seamless fashion.

Review of documents by Commission counsel

Documents identified by the Wortzman Nickle team as potentially relevant then proceeded to a second review by Commission counsel. During this second review, Commission counsel confirmed the relevance of documents, where appropriate, but also identified key documents which eventually were entered as the first series of exhibits for both phases of the hearings or led to the creation of documents that were entered as exhibits. Because they identified important documents at the outset, these exhibits proved to be helpful tools for the Participants, who did not have to search among the many thousands of documents available to them. As it turned out, these were the exhibits most often referred to during the proceedings. For Part One, these first exhibits included a list of relevant individuals, consultants' reports, and engineering and architectural plans. For Part Two, these first exhibits included a list of key players, various policies and procedures, and photographs.

Although all these documents were admitted as evidence on a provisional basis, they were subject to being expunged from the record if a Participant's objection, filed within 21 days of admission, was upheld. The same procedure was applied to the documents appended to the Overview Reports, further discussed below.[11]

I note in passing that the Commission did make use of electronic keyword searches when possible in an attempt to reduce the volume of documents that would then proceed to first level review and the subsequent review by Commission counsel. These searches were particularly helpful with respect to the computers seized by the OPP, described below, as well as the data provided by the City of Elliot Lake.

Delay in production of documents by the Ontario government

As I described above, the first summonses issued by the Commission, in August 2012, were directed at the various departments and agencies of the Ontario government. Commission counsel met with counsel for the Ontario government in September 2012 to discuss the issue of the production of documents. The Ontario government advised the Commission that it did not believe that it could produce the documents requested for approximately two months, until sometime in November 2012. Commission counsel advised that this was unacceptable, and that the production of documents in a timely manner was essential if the Commission was to meet its deadlines.

This was the beginning of what turned out to be a dilatory and fragmented response by the Ontario government to Commission summonses. By November 29, 2012, three months after the issuance of the summonses, the Commission had received only 636 documents from the Ministry of Labour and 3,426 documents from the Ministry of Community Safety and Correctional Services and its agencies. These numbers increased exponentially over the course of the subsequent months. A total of 9,097 documents were eventually received from the Ministry of Labour and 16,335 from the Ministry of Community Safety and Correctional Services and its agencies.

A total of 2,553 documents were eventually received from the Cabinet Office. It was later discovered, during the interview of one witness who worked in the Office of the Premier, that he had in his possession more emails which were not captured by the search conducted by the Ontario representative. These emails were added to the Commission's database in August 2013.

A dispute arose early on between the Commission and the OPP over production of documents in the possession of the OPP. The OPP initially took the position that, before providing documents to the Commission, it would be required to review every document to determine whether public disclosure would interfere with its ongoing investigation. The OPP advised that this process would take months. This situation created important difficulties for the Commission because it was apparent that, in a number of cases, documents were provided to the OPP as a result of a search warrant without copies being kept by their custodian. When summonses were issued by the Commission to those persons, they were unable to provide the documents sought. As a result, the OPP was in sole possession of vital information needed by the Commission to carry out its mandate.

Following discussions with the OPP, on October 3, 2012, it was agreed that the OPP would deliver to the Commission, as soon as possible, all documents described in the summons without a prior review.

By November 29, 2012, the Commission had received from the OPP 21,647 documents along with five hard drives containing forensic-quality copies of computer-related exhibits obtained by the OPP pursuant to the execution of search warrants (at, among other places, the residence and business of Bob Nazarian and the offices of M.R. Wright & Associates). The Commission would see this amount triple over the next few months. Indeed, on February 4, 2013, alone, the Commission received more than 29,000 documents from the OPP. A total of 73,245 documents were produced by the OPP (excluding the content of the hard drives, which exceeded 180,000 documents).

Late production of documents

Production of summonsed material, which was initially voluminous, continued throughout the hearing phase. Indeed, in late September 2013, when the evidentiary hearings were nearly complete, the Commission received more than 19,000 emails from the OPP, which it had obtained, under the Mutual Legal Assistance Treaty, from GoDaddy, the US Internet-hosting provider for the Nazarians' email accounts. The Commission used a focused approach in conducting specific keyword searches of these documents, which produced only about 450 potentially relevant documents. Following a review, 29 were found to be marginally relevant to the Commission's mandate. In the end, it was determined that they did not constitute new evidence, required no further investigation, and did not warrant being made exhibits. Although they were not considered by the Commissioner in the preparation of this Report, these documents were brought to the attention of the Participants to preserve the transparency and openness of the public inquiry.

Production of documents by the Nazarians

During the course of the proceedings, a dispute developed between the Commission and the current owner of the Mall over the provision of records.

In September 2012, I issued summonses to Bob Nazarian, Irene Nazarian, and Levon Nazarian to produce documents to the Commission.

By November 2012, the Commission had received only one banker's box of documents and one CD containing electronic documents in response to the summonses issued to the Nazarians. As a result, and given the conflicting information from the Nazarians' lawyers regarding the amount of documents in possession of their client, I issued summonses to their lawyers personally. These summonses resulted in few documents being produced.

In October and November 2012, the Commission reviewed the computers that the OPP had seized at the residence and business of Bob Nazarian and found very few emails among them. As a result, the Commission hired a forensic investigation firm (TCS Forensics Ltd.) to conduct a forensic investigation of the various hard drives and identify (1) whether there had been any deletions after June 23, 2012; (2) if any software had been used that would inhibit the forensic analysis (e.g., wiping software); and (3) any access to remote email / webmail and associated accounts. The forensic firm did not find any suspicious file deletion. It did, however, identify more than 4,500 emails relating to certain email accounts (including webmail accounts) used by Bob, Irene, and Levon Nazarian. Following further forensic analysis, the TCS concluded that there was no evidence of improper methods being used to securely remove data. The firm was able to recover and reconstruct images showing the webmail accounts. A preliminary review of the 4,500-plus emails as well as the recovered webmail pages disclosed evidence that the Nazarians were using these accounts as part of their management of the Mall. The forensic investigation also identified several smartphones that the Nazarians used.

As a result of the forensic analysis, in December 2012, I issued three additional summonses to the Nazarians for email accounts and smartphone devices discovered by the forensic investigation firm.

By February 4, 2013, a month before the beginning of the hearings, I had yet to receive any additional documents from the current owners. I therefore issued an order pursuant to section 29 of the *Public Inquiries Act, 2009*, requiring the Nazarians to comply with the summons. As I stated in my reasons for making that order:

> Having applied for and obtained standing at this inquiry, it is incumbent upon Bob and Levon to comply with the summonses issued to them. In the Additional Summonses and subsequent correspondence, the Commission identified a series of email accounts that are in the possession, power or control of Bob and Levon. Despite numerous requests, Bob and Levon have not produced the emails relating to the Algo Centre Mall from those email accounts. Nor have they produced any evidence to the Commission to confirm that the requests for emails from third party service providers have even been made. Instead, throughout the documentary production process, they have shown disregard for the timelines set out in the summonses that I have issued, the reasonable requests of Commission Counsel, and now, my order of February 4, 2013. They appear to be of the view that they can produce what they want, when they want.*

In March 2013, I retained counsel to state a case to the Divisional Court under section 30 of the *Public Inquiries Act, 2009*, the contempt provisions. On March 7, 2013, the Notice of Application for a stated case was issued by the Divisional Court, which assigned a hearing date of March 20, 2013.†

On March 8, 2013, the Nazarians turned over approximately 85,000 emails to the Commission. They also provided financial information sought in the summons. Each of the Nazarians also provided a sworn affidavit that set out in detail the steps taken by them to comply with the summonses and a signed direction to the Canada Revenue Agency directing it to provide income tax information to the Commission.

On March 19, 2013, I indicated that, in light of the provision of this information, I had instructed my counsel to discontinue the Divisional Court case.‡

* See Reasons for Decision and Stated Case, March 6, 2013, Appendix M.3.

† Statement by Commissioner, March 19, 2013, pp. 1734–5, Appendix J.6.

‡ Statement by Commissioner, March 19, 2013, p. 1737, Appendix J.6.

The emails provided by the Nazarians were not all relevant to the Commission's mandate. They were reviewed electronically, with keyword searches, in order to identify potentially relevant emails. The identified emails then proceeded to a first-level review by Wortzman Nickle's team and a subsequent review by Commission counsel. The first-level review also screened out any document that was potentially privileged. These potentially privileged documents were provided to the Nazarians' counsel for review to determine whether a claim of privilege would be asserted. Counsel for the Nazarians was then provided with an opportunity to assert a privilege claim within seven days of receipt of the emails in accordance with the provisions of Rule 11 of the Commission's Rules of Procedure.

Access to database by Participants

I decided early on that all Participants with standing would be given access to all relevant material collected during the Commission's investigation, not simply those documents which were to be filed as exhibits. As a result, in December 2012, counsel for the Participants were advised that they would be given access in January to the Commission's database, Relativity, which contained all the relevant documents that the Commission had collected. They were required to sign an undertaking to keep the material confidential until it was made public at the Inquiry.*

On January 16, 17, and 24, 2013, three training sessions on the use of Relativity were offered to Participants' counsel and representatives who, following the sessions, were provided access to the database via a password. Participants were required to pay a licence fee for their use of Relativity. Access to the database was not limited to Participants; it was also provided to counsel for witnesses who sought access. Participants were given access to the database in Relativity until the end of October 2013.

Throughout the proceedings, the Participants benefited from the assistance of Yvette and Steve Bula – initially of esi Specialists and later with SVR Litigation Case Management – for any technical difficulties, as well as guidance from Ms. Kuka, who mastered the use of Relativity.

Witnesses

Interview of witnesses by Commission counsel

Based on their review of the documents, and the investigators' preliminary interviews, Commission counsel identified the potential witnesses who would be called to appear before the Commission. Commission counsel conducted interviews of these witnesses in the presence of counsel, where they were represented.

Before each interview, the witnesses were provided with a brief of documents anticipated to be relevant to their evidence. Following each interview, a summary of the anticipated evidence of the witness (will-say statement) was prepared and provided to the witness for her or his review. These will-say statements were then distributed to the Participants before the witness's testimony (see Rules of Procedure section, below, with respect to the use of these will-say statements), along with a list of the documents related to the evidence of the witness to be entered as exhibits.

Witnesses were not compelled to attend these interviews, but nearly all readily obliged and co-operated with the Commission. There were only three instances where requests for a further interview or the continuation of an interview were declined.

* Undertaking, Appendix O.

Schedule of hearings

Starting in February 2013, and throughout the proceedings, Participants and witnesses were advised of the anticipated schedule. Of necessity, this schedule was an evolving document that required constant adjustment to accommodate the availability of the witnesses and their counsel and to reflect the uncertainties inherent in the estimates of the time required for examination and cross-examination.

Summonses to attend

All witnesses who testified before the Commission were compelled to attend by virtue of a summons to appear, which was served on them pursuant to subparagraph 10(1)(a) of the *Public Inquiries Act, 2009*.

Of course my powers to compel the attendance of a witness did not extend beyond the Ontario border. Although some witnesses residing outside Ontario voluntarily agreed to testify before the Commission (for example, Henrieth Laroue (McLeery) came from Alberta and Dave Munroe from Pittsburgh), I was faced with one recalcitrant witness from the United States who refused to offer up a representative to attend.

During Part Two, the Commission sought the assistance of Geophysical Survey Systems, Inc. (GSSI), a company based in Salem, New Hampshire. GSSI is the manufacturer of the LifeLocator III+, a device that the OPP used during the emergency response. Before the start of the hearings, GSSI provided valuable information through correspondence with Commission counsel.[12] However, when Commission counsel requested that a representative of GSSI, of its choosing, be present at the hearing to explain certain key issues,[13] the company declined the invitation.[14]

Subsequently, on October 2, 2013, counsel for GSSI advised that the company had not entirely ruled out testifying at the hearings. On October 4, 2013, counsel for GSSI was reminded that, should a representative wish to testify at the hearings, that person must be available to complete his or her testimony before the end of the day on October 8, 2013. The Commission received no response.

On March 5, 2014, five months after the conclusion of the hearings, counsel for GSSI sent a letter to Commission counsel providing additional submissions with respect to the proper functioning of the LifeLocator as well as the proper training of its operator. This letter was provided to the Participants, who were given an opportunity to respond to it if they wished to do so. Brief submissions were received from the OPP, Seniors' Action Group of Elliot Lake (SAGE), and the Ontario Fire Chief's Association. I did not find these submissions helpful in resolving the issues with respect to the reliability of the device.

Website and information

The Commission was directed by its mandate to "promote accessibility and transparency to the public through the use of technology, including by establishing and maintaining a website." The Commission's bilingual website was created by Autcon, a company owned by Djordje Sredojevic. It contains virtually all the material on which this Report is based – all exhibits and all transcripts of evidence of the 125 witnesses heard over 118 hearing days. The hearings were webcast live and could be followed daily by the simple expedient of typing **www.elliotlakeinquiry.ca/** in a search engine. The Commission's rules and my rulings, statements, schedules, biographies, and so forth, were instantly accessible to anyone interested in the process.

Individuals seeking to obtain information from the Commission or provide information they deemed relevant could also reach the Commission via email (info@elliotlakeinquiry.ca). Emails, which were received by the Commission on a regular basis, were vetted by Commission counsel, who took the necessary steps to pursue any relevant information.

The Commission's Rules – general

The *Public Inquiries Act, 2009*,[15] provides that:

> **7. (1)** Subject to this Act and the order establishing it, a commission has the power to control its own processes and may make rules governing its practice and procedure.
>
> **(2)** As examples of matters that may be dealt with in rules made under subsection (1), a commission may make rules with respect to the following:
>
> 1. The scheduling of activities for the conduct of the public inquiry, including dividing the public inquiry into phases or parts.
> 2. Processes for determining who may participate in the public inquiry and the scope of any participation in the public inquiry.
> 3. Time limits applicable to any of its proceedings and the extension or abridgement of time limits applicable to any of its proceedings.
> 4. The service of notices and other documents.
> 5. Adjournments.
> 6. The transcription and recording of meetings and hearings.
> 7. The collection, submission and receipt of information.
> 8. Processes for determining any privilege claimed in respect of information.
> 9. Fees and expenses payable to witnesses and participants.
>
> **(3)** A commission may, for different persons or different classes of persons,
>
> (a) make different rules; and
>
> (b) waive or modify the application of one or more of its rules.
>
> **(4)** A commission shall ensure that its rules are made available to the public

One of Commission counsel's first duties was to draft Rules of Procedure* and Rules of Standing and Funding† in accordance with the legislation and to post them on the Commission's website.

Following my Ruling on Standing and Funding issued November 8, 2012, Participants were invited to make submissions on desired changes or amendments to the Rules of Procedure. Revised rules were posted as changes were made.

Rules are essential to allow the Commission to control its process effectively and fairly. They cover areas such as granting of standing, limitations on participation, funding recommendations, document production, rules of examinations, Overview Reports, and privilege claims. Some aspects of the Rules of Procedure deserve specific mention, and I cover them below.

* Rules of Procedure (revised December 20, 2012), Appendix K.2.

† Rules of Standing and Funding (revised September 26, 2012), Appendix K.1.

Standing and funding

Standing

Section 16 of the Rules of Standing and Funding provide that Participants granted standing may have:

a. Access to documents collected by the Commission subject to the Rules of Procedure;

b. Advance notice of documents which are proposed to be introduced into evidence;

c. Advance provision of will say statements of anticipated witnesses;

d. A seat at counsel table;

e. The opportunity to suggest witnesses to be called by Commission Counsel, failing which an opportunity to apply to the Commissioner to lead the evidence of a particular witness;

f. The right to cross-examine witnesses on matters relevant to the basis upon which standing was granted;

g. The right to make closing submissions.

h. The opportunity to apply for funding pursuant to the Rules on Standing and Funding.

Section 11 of the Rules of Standing and Funding required me to consider the following factors in my determination to grant or refuse standing:

a. whether a person has a substantial and direct interest in the subject matter of the Inquiry;

b. whether a person is likely to be notified of a possible finding of misconduct under section 17 of the Act;

c. whether a person's participation would further the conduct of the Inquiry;

d. whether a person's participation would contribute to the openness and fairness of the Inquiry.

In September 2012, advertisements were placed in several national and legal publications seeking applications for standing and funding. Eighteen groups or individuals sought standing and/or funding and a hearing was held on October 26, 2012, in Elliot Lake to hear motions for standing and funding. (However, a number of persons and organizations / associations were advised beforehand that they did not need to attend the hearing.) Ultimately, I heard oral submissions from six applicants.

Individual applicants who had a commonality of interest without conflict were encouraged to form groups with a single grant of standing. In this regard, two of the original applicants, Peter Unfried and the Seniors' Action Group of Elliot Lake (SAGE), agreed to join with the Elliot Lake Mall Action Committee (ELMAC) and be represented by its counsel. I noted at the time that "should a conflict arise between SAGE and ELMAC, SAGE will be free to make a new application for standing."

In April, a dispute developed between SAGE and its counsel. I therefore granted separate standing to SAGE, although its members chose not to be represented by counsel.

A total of 34 individuals or groups of individuals were granted standing for participation in either Part One or Part Two of the proceedings, or both. Two applicants were refused standing, and one (Peter Unfried) withdrew his application.

In my Ruling on Standing and Funding dated November 8, 2012,* I granted standing to the following individuals / groups:

Parties – Full Standing

- Réjean Aylwin, Rachelle Aylwin, Stéphane Aylwin, Teresa Perizzolo and Cindy Lee Allan
- Government of Ontario
- Corporation of the City of Elliot Lake
- Elliot Lake Mall Action Committee

Parties – Part I Standing

- Eastwood Mall Inc., Robert Nazarian and Levon Nazarian
- Non-Profit Retirement Residences of Elliot Lake Inc. and NorDev 1425164 Ontario Ltd.
- Robert Wood
- Greg Saunders
- Shoppers Drug Mart Associate #667, Martinette Venter
- Association of Professional Engineers of Ontario
- Ontario Building Officials Association
- Ontario Society of Professional Engineers

Parties – Part II Standing

- Ontario Association of Fire Chiefs
- Elliot Lake Professional Fire Fighters Association, IAFF Local 1351, Toronto Professional Fire Fighters Association, IAFF Local 3888, Ontario Professional Fire Fighters Association (OPFFA) and the International Association of Fire Fighters (IAFF)

Subsequently, as the investigation and hearings continued, I received applications for standing from several other individuals and entities, which I granted, namely:

- Algoma Central Properties Inc. (January 25, 2013)
- exp Global Inc. (formerly Trow Global Holdings Inc.) (March 1, 2013)
- Rod Caughill, development supervisor, Algoma Central Properties Inc. (March 4, 2013)
- Robert Leistner, Vice-President, Algoma Central Properties Inc. (March 21, 2013)
- City of Toronto (April 2, 2013)
- Tom Derreck (April 21, 2013)
- Coreslab Structures (May 8, 2013)
- Alexandre Sennett (July 10, 2013)
- Brian MacDonald (July 18, 2013)

* Ruling on Standing and Funding, September 26, 2012, Appendix M.1.

Funding

The Commission's Order in Council provides:

> 11. The Commission may make recommendations to the Attorney General regarding funding to participants in the inquiry, to the extent of that participant's interest where, in the Commissioner's view, the participants would not otherwise be able to participate in the inquiry without such funding. Such funding shall be in accordance with applicable Management Board of Cabinet directives and guidelines.

It is important to note that, unlike the issue of standing, where my decisions were final, I only had the power to recommend funding for Participants to the Attorney General. The final decision on whether to grant it belonged to that ministry.

Section 23 of the Rules of Standing and Funding required me to consider the following factors in my determination to recommend funding:

a. the nature of the applicant's interest and/or proposed involvement in the Inquiry;

b. whether the applicant has an established record of concerns for and a demonstrated commitment to the interest it seeks to represent;

c. whether the applicant has special experience or expertise with respect to the Commission's mandate; and

d. whether the applicant has attempted to form a group with others of similar interests.

On October 15, 2012, I also issued Procedural Order No. 1, in which I drew the attention of the persons applying for funding to Rule 21 of the Rules of Standing and Funding and, more specifically, to Rule 21(c), which describes the evidence that must be filed in support of such a request.

I made recommendations for various levels of funding in relation to six applicants. All my recommendations were accepted by the Attorney General.

In my Ruling on Standing and Funding dated November 8, 2012,* I recommended funding to the following Participants:

- Elliot Lake Mall Action Committee
- Corporation of the City of Elliot Lake
- Ontario Building Officials Association

I was not, however, prepared to recommend funding for Eastwood Mall Inc., Bob Nazarian and Levon Nazarian, the last owners of the Mall, given the "incomplete nature of the materials provided."

I further indicated in my ruling that "at all times I expect parties with similar interests to co-operate with one another and with Commission counsel to avoid repetition and delay. I will not hesitate to intervene to ensure these limits are respected and this Inquiry is conducted in a fair but expeditious manner."†

* Ruling on Standing and Funding, September 26, 2012, Appendix M.1.

† Ruling on Standing and Funding, September 26, 2012, Appendix M.1.

Subsequently, as the investigation and hearings continued, I received applications for funding from other individuals and entities, which I recommended receive funding, namely:

- Ontario Association of Fire Chiefs (January 10, 2013)
- Thomas Derreck (April 21, 2013)
- Alexandre Sennett (July 10, 2013)*

On April 9, 2013, I received a request to recommend additional funding to the City of Elliot Lake. In a supplementary ruling issued April 21, 2013, I concluded that the request was justified and recommended to the Attorney General that the additional funding be provided, stating:

> 5. The applicant's central role and that of its elected officials and employees are a constant and uninterrupted thread running through the entirety of the Commission's mandated examination of events commencing with historical events preceding the Algo Mall's construction until the post-collapse dismantling of the structure. It is now clear to me that no other participant has so central, important and ubiquitous an engagement with matters of concern to the Commission.

An independent assessment officer, Freya Kristjanson, was appointed by the Attorney General to ensure that all submitted expenses were in conformity with my recommendations and with Management Board of Cabinet directives and guidelines.

I was relatively liberal in my recommendation to the Attorney General that he fund Participants' counsel (and sometimes more than one counsel) to spend adequate time preparing for and attending hearings, given the importance of the hearings to Participants' interests. However, I applied a different standard for requests for Participants to attend the policy roundtables. These sessions were designed to be non-adversarial and non-confrontational, with little opportunity for Participant interaction, save for a relatively short question period at the end of each roundtable. I was satisfied that this involvement could be achieved at a distance via electronic means (the roundtables were webcast in the same way as were the evidentiary hearings) and did not require either personal attendance or extensive preparation by counsel for the Participants.

On February 26, 2013, clarification was sought from counsel for the Ontario Building Officials Association (OBOA) with respect to the limits I had recommended regarding the attendance and participation of Participants at the roundtables. I clarified that, exceptionally, I was prepared to recommend the full payment of the fees and expenses of OBOA's counsel, given the specific invitation that had been extended to him to participate in the roundtables.

On June 9, 2014, the OBOA sought my recommendation with respect to the funding of its participation in the application by Mr. Wood, which I discuss below. Although I valued the advice and expertise of counsel for the OBOA, I was not prepared to recommend full funding for OBOA counsel to prepare a response and attend in Ottawa at the hearing, given that I was nearing the budgetary limits of my mandate and I was committed to doing everything I could to respect that limit. I welcomed, however, a succinct written submission on the matter and recommended modest funding for that narrower purpose. The OBOA did file such a response.

* On July 23, 2013, I issued a further Supplementary Ruling on Funding with respect to Mr. Sennett clarifying two issues in my ruling of July 10, 2013.

Payment by the Ontario government and withdrawal by counsel

Early in the hearings, an issue arose about the speed – or lack thereof – with which the Ontario government was paying the accounts for fees and disbursements submitted by counsel who had received funding. On April 19, 2013, Douglas Elliott, counsel for ELMAC and SAGE, informed me that, with the consent of his clients, he was withdrawing from further participating in the hearings because he had not yet been paid by the Ontario government. He stated:

> I think this is extremely disrespectful of the Commission. I think it is disrespectful of the people of Elliot Lake. The people of Elliot Lake have learned through this Inquiry that there have been people who have put money ahead of the interests of the people of Elliot Lake, and regrettably, it appears that the Government of Ontario is doing that now.[16]

Although Mr. Elliott was paid within a few days and returned to the proceedings, I am nonetheless concerned with what transpired on two issues: (1) payment by the Ontario government; and (2) the unilateral decision to withdraw by counsel without permission from the Commission. I address each of these in turn.

During the initial stages of the Commission's existence, timely salary payments and reimbursements were a recurring and annoying reality and a significant hardship for members of my staff with earnings at the lower end of the salary scale.

The same can be said of the Participants' lawyers whose fees and disbursements were not paid in a timely manner at the beginning of the Inquiry. I therefore *recommend* that, once the government agrees to provide funding to Participants at an inquiry following a recommendation to that effect by the commissioner, it appoints its independent assessment officer and pays their lawyers' accounts for fees and disbursements as expeditiously as possible to prevent any unnecessary delays and controversy during the proceedings. These fees are usually heavily discounted in comparison with the fees normally charged by law firms to commercial clients (or in comparison to fees normally regarded as reasonable by the courts when assessing costs in civil proceedings). In addition, when a commission holds hearings in as remote a location as Elliot Lake, the disbursements borne and carried by the Participants' lawyers can be substantial.

With respect to the removal from record by counsel for ELMAC and SAGE, as I expressed during the hearings, I was quite concerned that permission was not sought from the Commission before such action was taken and that I received no forewarning.[17] I was even more surprised when I was then advised that SAGE had not been informed by its counsel of their decision to withdraw and was advised only after the fact.[18]

Counsel for ELMAC argued before me that the obligation of counsel to seek leave of the tribunal to withdraw is different in the context of a Commission and is not analogous to a civil or criminal proceeding. He argued that the client's interest in the context of a commission does not parallel those of a client in a civil or criminal proceeding.[19] I disagree. Rule 2.09(1) of the Rules of Professional Conduct[20] provides that a lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances. This rule implies that notice to the tribunal be given and that permission be sought. In this regard, I agree with the submissions made to me by Commission counsel:

> I would not treat any of those tribunals or courts any differently in respect of the fundamental matter of respect for the tribunal, respect for the process, and the necessity to ensure decorum and respect amongst all participants at all times. In my respectful submission, it is fundamental to the nature of that respect that is required both from the participants to the tribunal, and the concomitant respect from the tribunal to the participants, that communication is made before a lawyer ceases to appear for a client.[21]

Privilege claims

Paragraph 8(3) of the *Public Inquiries Act, 2009*, provides that no information may be received and accepted by a commission that would be inadmissible in a court by reason of any privilege under the law of evidence. Consequently, Rule 11 of the Commission's Rules of Procedure outlines the procedure to be followed if a participant or a recipient of a summons objects to the production of documents on the grounds of privilege. The rule states that the Commissioner may determine the privilege issue or, at his or her option, refer the matter for determination by a third party. The latter course of action is often preferred and, for this Commission, Mr. Justice Stephen Goudge of the Ontario Court of Appeal graciously accepted to act as *persona designata* for this purpose and is referred to in Rule 11(c). Two claims for privilege were dealt with by Mr. Justice Goudge and were determined on June 28, 2013.*

Overview Reports

During the Commission's collection of information and evidence, I was mindful of these provisions of the *Public Inquiries Act, 2009*:

- paragraph 8(1), which provides that a commission may collect and receive information that it considers relevant and appropriate, whether or not the information would be admissible in a court and in whatever form the information takes, and may accept the information as evidence at the public inquiry; and
- subparagraph 9(1)(f), which provides that a commission shall, as much as practicable and appropriate, refer to and rely on any other document or information, if referral to and reliance on the document or information would promote the efficient and expeditious conduct of the public inquiry.

Rule 19 of the Commission's Rules of Procedure provides that the Commission may prepare Overview Reports, which may contain core or background facts. The rules also provide that the Overview Reports could be used to assist in identifying systemic issues relevant to the Inquiry (Rule 21). Rule 22 provides that the Commission would rely, whenever possible, on the Overview Reports instead of calling witnesses.

A number of these reports were filed as exhibits at the outset of the hearings for Parts I and II, including a report on the history of the City of Elliot Lake and an overview of the incident management system.†

Participants were offered the opportunity to comment on the reports before they were entered as exhibits. The comments were received and considered. These reports allowed for the admission in evidence of relevant and generally uncontroverted but pertinent information without the necessity of calling witnesses. These reports were practical timesavers. It would have been impossible to have a witness speak to every one of these documents and still meet the time constraints imposed on us by the Order in Council.

Many of the Overview Reports also included numerous documents collected by the Commission during its investigation.

* Reasons of Goudge JA dated June 28, 2013, Appendix M.5.

† List of Overview Reports, Appendix L.

I was satisfied with the *prima facie* relevance and importance of the information contained in these documents. However, I did not consider them conclusive. Participants were invited to present evidence or to cross-examine to challenge the content of the reports. Only after that stage did I feel free to reach definitive conclusions relating to them and to make what I considered to be appropriate findings of fact.

Confidentiality

Paragraph 10(3) of the *Public Inquiries Act, 2009*, states that a commission may require the provision or production of information that is considered confidential or inadmissible under another act. Nonetheless, paragraph 14(3) provides that a commission may exclude the public from all or part of a hearing or take other measures to prevent the disclosure of information.

Rule 17 of the Commission's Rules of Procedure deals with the procedure to be followed when a participant or summons recipient objects to the disclosure of documents or information on the grounds of confidentiality.

Bob and Levon Nazarian and Eastwood Mall Inc. sought an order preventing disclosure of all documents filed in support of their application for funding made to the Commission. The Association of Professional Engineers of Ontario requested an order under the *Professional Engineers Act* that, before the disclosure of any documents produced in response to a Commission summons, certain named and unnamed individuals be given the opportunity to review the documents and make submissions as to the appropriateness of further disclosure. The applications were contested. After a full hearing in Ottawa on December 17, 2012, both applications were dismissed.*

Section 17 notices

Section 17 of the *Public Inquiries Act, 2009*, provides that

> [a] commission shall not find misconduct by a person unless,
>
> (a) reasonable notice of the possible finding and a summary of the evidence supporting the possible finding have been given to that person; and
>
> (b) the person has been given a reasonable opportunity to respond.

This Commission is prohibited by its Order in Council, and by the governing jurisprudence, from expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commission is, however, required to find the facts in respect of the matters it is directed to inquire into.

This Commission is prohibited by its Order in Council, and by the governing jurisprudence, from expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization.

One of the principles guiding this Commission throughout has been the need to ensure procedural fairness to those persons who may be affected by its activities. I am well aware that, as Justice Peter Cory noted in *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*,[22] findings of misconduct (which he defined

* My ruling appears at Appendix M.2.

as including "improper or unprofessional behavior" or "bad management") should not be the principal focus of this public inquiry. They should be made only in those circumstances where they are required to carry out the inquiry's mandate. Nevertheless, it may well be necessary to make findings of misconduct. As Justice Cory wrote:

> The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. Yet they must be made in order to define the nature of and responsibility for the tragedy under investigation and to make the helpful suggestions needed to rectify the problem … procedural fairness is essential[,] for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.[23]

Neither the statute nor the jurisprudence defines the standard to be applied when determining whether a notice ought to be issued about a possible finding of misconduct. In my view, the appropriate standard, keeping in mind the Commission's fairness obligation, has been a determination that there is evidence which, if accepted, and in the absence of an explanation, could be the basis for a finding that the person had mismanaged matters relating to the structural integrity of the Mall or relating to the emergency management and response.

Commission counsel and I agreed that we would give section 17 of the *Public Inquiries Act, 2009*, an expansive interpretation, both in the interest of fairness and to avoid being constrained by the section when time came to write this Report. Consequently, I directed counsel to err on the side of issuing more of these notices rather than fewer, knowing that I was not likely to find misconduct in the terms set out in every notice. That direction was explained as clearly as possible in the correspondence accompanying the notices, but in many cases caused some degree of concern. I also directed counsel to issue the notices as far in advance as possible before the witness's attendance to give evidence. Counsel adhered to that procedure with few exceptions. Unanticipated evidence, for example, led of necessity to the issuance of supplementary notices.* Commission counsel drafted all section 17 notices.

For obvious reasons, the fact of the issuance of a section 17 notice was kept rigorously confidential by the Commission.

Pursuant to paragraph 17(2) of the *Public Inquiries Act, 2009*, recipients of section 17 notices were afforded the same rights as persons who had been granted standing as Participants. They had the right both to participate in the Inquiry and to be represented by counsel. They could also apply for a funding recommendation.

Conduct of the hearings

Hearings were held at the White Mountain Building in Elliot Lake beginning on March 4, 2013, and ending on October 9, 2013 (in addition to one day for oral submissions relating to Part Two), for a total of 118 days. During that time, the Commission heard 118 witnesses. One week preceding the hearings was spent testing the equipment and facilities and doing a dry run and demonstration with the Participants.

A typical hearing day began at 9 a.m. and ended at 5 p.m., with short breaks for health and lunch. The only interruption was between June 17 and July 5, 2013. Sitting weeks were four days – Tuesday through Friday, and Monday through Thursday – with a four-day weekend every other week to permit staff and counsel to return to Ottawa to look after personal and professional business.

* A generic example of such a notice, containing no confidential information, is found at Appendix Q.

Witnesses who testified provided their evidence under oath or affirmation. Each witness was entitled to have his or her counsel present while testifying. The Rules of Procedure governed the procedural pace of the examination of witnesses. Examination-in-chief was always conducted by Commission counsel. If the witness had counsel present, they were entitled to examine-in-chief and/or re-examine.

The Rules of Procedure permitted Commission counsel to ask leading questions. On occasion, Commission counsel cross-examined with respect to credibility. This was necessary in order to establish the facts in accordance with my mandate. I agree with the Honourable Dennis O'Connor, who wrote in his *Report of the Arar Inquiry*:

> It is often said that Commission counsel's role in a public inquiry is to lead the evidence in an independent and fair manner, and that Commission counsel should neither advocate a particular position nor set out to "prove a case." I agree with this description. The fact that Commission counsel may, in some circumstances, be required to cross-examine witnesses need not compromise the independence or fairness of their position. Cross-examinations, even challenging ones, can be carried out fairly and even-handedly, and need not result in Commission counsel adopting an adversarial or prosecutorial role.[24]

The Rules of Procedure also provided that neither Participants nor Commission counsel were entitled to cross-examine a witness on any will-say statement that may be provided, except with my leave (Rule 45). Leave was never sought from me. Participants' counsel invariably agreed on the order of cross-examination without the necessity of my intervention. As a general rule, cross-examinations were relatively short. I was not required to impose any time limitation. Counsel intending to present a document to a witness were required to give all counsel advance notice.

The examinations of two witnesses, James Keywan and Roger Pigeau, were conducted by video-conference to accommodate their age and state of health. Sophisticated electronic equipment allowed these examinations to unfold smoothly, but the process was far from cost-free. Setting up facilities and equipment permitting two-way visual and audio real-time communications is an expensive endeavour.

Neeson & Associates provided real-time / expedited reporting and transcript services, meaning that the transcript could be viewed from a screen in the hearing room and a rough draft of the transcript would be available for consultation only a few hours after the conclusion of each day's evidence. The transcript was posted on the Commission's website. The quality of this company's services and the professionalism of its staff were superlative. Search features at the end of each day's transcript were particularly useful. In addition, it was possible to access the exhibits directly from the transcript via a hyperlink feature.

I was aware that some aspects of the evidence, particularly in Part Two, might be upsetting for family members and other residents of Elliot Lake. For example, there was graphic evidence about the injuries suffered by the victims of the collapse and videos of the collapse. I asked counsel to provide advance notice when such evidence was about to be presented so that I could issue the appropriate warnings. I also issued a publication ban on August 29, 2013, and restricted the dissemination of certain exhibits outside the hearing room and press room, ordering that they not be shown on the webcast version of the proceedings.

Oral submissions by Participants

Oral submissions at the end of each part were succinct and were generally completed in less than the time allotted to each Participant. At my direction, Commission counsel made no concluding oral submissions.

Motion to adduce evidence by James Keywan

On June 21, 2013, John Brunner, counsel for James Keywan, who was the original architect of the Algo Mall, filed a motion and supporting materials seeking an order granting him the right to introduce rebuttal evidence from an expert witness at the Inquiry pursuant to Rule 31 of the Commission's Rules of Procedure and section 17.1(b) of the *Public Inquiries Act, 2009.* Mr. Keywan was seeking to introduce the report of architect Allan Larden dated May 14, 2013 (the Larden Report).

On June 24, 2013, counsel for the Elliot Lake Mall Action Committee submitted responding materials opposing the filing of the Larden Report or permitting Mr. Larden to testify at the Inquiry. On July 15, 2013, I ruled that Mr. Larden's report would be filed and all Participants would be given the right to cross-examine Mr. Larden. I stated:

> At this stage of the proceedings of the Commission, I am not prepared to be constrained or restricted in arriving at the findings and conclusions encompassed by my mandate … I am sensitive to counter any perception of unfairness to any Participant or section 17 recipient constrained to appear to give evidence before the Commission or to those who have the right to cross examine.*

Mr. Larden testified before the Commission on July 30, 2013.

Application by Robert Wood

On April 25, 2014, counsel for engineer Robert Wood wrote Commission counsel, advising that he intended to bring an application seeking an order that my Report be redacted before being publicly released to delete any reference to Mr. Wood, and that the redacted portions not be released publicly until the completion of the charges brought against Mr. Wood under the *Criminal Code*.

On April 29, 2014, I issued Procedural Order No. 7 setting out the process to be followed by Mr. Wood, the items his application should contain, and a schedule for the application.†

Mr. Wood did not then, as he had indicated that he would, make an application for an order that portions of the my final Report be redacted before its public release. Instead, on May 20, 2014, counsel for Mr. Wood served and filed a Notice of Application seeking, among other things, an order that he and his counsel be permitted to review the final draft of the Report in advance of its being made public to determine whether, in their opinion, there were passages that would affect Mr. Wood's right to a fair trial. Mr. Wood also sought orders setting out the procedure to be followed for the determination of a subsequent application for redaction of specific passages and references "if necessary."

On May 22, 2014, I issued Procedural Order No. 12, setting out concerns I had about the application, including a possible jurisdictional issue, as well as the procedure to be followed for determination of Mr. Wood's application (including the filing of responding submissions).‡

* Ruling on Keywan motion, Appendix M.4.

† Procedural Order No. 7, Appendix K.4.

‡ Procedural Order No. 12, Appendix K.7.

On May 30, 2014, Mr. Wood served an Application Record containing a Notice of Amended Application, in which he abandoned his initial application for an order allowing him a preliminary review of the Report of the Commission before its delivery. Mr. Wood sought instead an order that the Report be redacted of "only passages that deal with the matter of the Applicant's Section 17 notice." He also sought an order that the redactions be removed from the Report of the Commission immediately following the event of:

> a) The Applicant electing a trial of the Criminal Code matters before an Ontario Court of Justice or
>
> b) The Applicant electing a trial of the Criminal Code matters before a judge sitting without a jury or
>
> c) The Applicant or the prosecutor [requesting] a preliminary hearing following the Applicant electing to be tried before a court comprised of a judge sitting with a jury and the Applicant ... not [being] committed to stand trial following the completion of the preliminary hearing or:
>
> d) The applicant [being] acquitted or convicted following the trial of the Applicant before a judge sitting with a jury.

The Ontario Building Officials Association, the Province of Ontario, and a group of media organizations (made up of the Canadian Broadcasting Corporation, the *Globe and Mail*, and Canadian Press Enterprises Inc.) filed responding submissions. A hearing was held in Ottawa on June 20, 2014.

On July 28, 2014, I dismissed Mr. Wood's application:*

> Mr. Wood had to show that the publication of the Commission's report would pose a serious threat (grounded in evidence) to the proper administration of justice through a risk to his fair trial rights. In light of the alternative methods available to address any concerns regarding the impact the publication of the Report may have on potential jurors, I am not convinced that the Report will impair Mr. Wood's rights under s. 11(d) of the *Charter* and I therefore conclude that he has failed to discharge this heavy onus.

1988 *Deterioration of parking structures* report

On May 8, 2014, the Commission received an anonymous letter enclosing a report entitled *Deterioration of parking structures*. The report, dated July 1988, had not been produced to the Inquiry during its investigation and appeared to have been prepared by an Advisory Committee struck by the Ontario Ministry of Housing. Members of the Advisory Committee included individuals from the Ministry of Housing, Trow Group, Halsall Robt & Associates Ltd., and Construction Control Ltd.

On May 12, 2014, I issued Procedural Order No. 9 in which I sought submissions from the Province of Ontario and the Participants to Part One of the Inquiry.†

Submissions were filed by the Province of Ontario, exp. Global Inc. (formerly Trow), Robert Wood, the Ontario Building Officials Association, and the City of Elliot Lake, which I considered and led me to the preparation of an addendum to the first part of my report.

* Ruling on Wood application, Appendix M.6.

† Procedural Order No. 9, Appendix K.6.

Opportunity to make further submissions

On May 1, 2014, I issued Procedural Order No. 8, describing the process to be followed in the event that individual Participants were given an opportunity to make further submissions on particular issues. I directed that any such submissions be posted on the Commission's website and that notice of the submissions be provided to all Participants in the part of the Inquiry to which the submissions related. I ordered that all such Participants be entitled to provide a written response to the submissions and that the responding submissions also be posted on the Commission's website.

News reporting, media relations, and communications

Technology made it possible for the public to follow the hearings through a variety of sources without having to be in the Elliot Lake hearing room. Foremost among these sources were the Inquiry's live webcast and the transcripts posted on the web page at the end of each day. For people not able to watch in real time, the webcast was archived on Ustream, a web-streaming service similar to YouTube, where each day's video could be watched at any time. The webcast remained online for a period after the end of the Inquiry. The live proceedings were translated simultaneously into French.

Area residents also had the opportunity to watch the hearings on Eastlink, the cable company that services the area, with a day's delay. The Eastlink station in Sudbury picked up a physical copy of the day's proceedings each evening and broadcast it at 1 p.m. the following day.

Several media outlets reported on the hearing, among them the *Elliot Lake Standard*, Sudbury CBC, Radio-Canada, CTV, Global Television, and the Canadian Press.

I decided early on that I would not grant any media interviews or make any statements concerning the work of the Commission except officially on the record from the dais or in print on the Commission's website. Media relations were handled by Peter Rehak, the Commission's highly experienced media consultant, and interviews or questions about the work of the Commission were answered on my behalf by Commission counsel – Peter Doody, Bruce Carr-Harris, and Mark Wallace in English and Nadia Effendi in French. All correspondence was similarly handled by counsel, except for official communications between me and the Attorney General relating to such matters as funding recommendations or budgetary issues. At various stages, I made public official statements regarding the work of the Commission.*

Inevitably, I received a number of letters and messages from individuals wishing to provide me with confidential or "inside" information about the subject matter of the Inquiry. In the interest of fairness and impartiality and the appearance thereof, I studiously avoided reading or responding to this material and had it screened by clerical or legal staff, who would respond as necessary.

* All such statements appear in Appendix J.

The roundtables of experts

To assist in formulating my recommendations, I convened a series of policy roundtables after the completion of the evidence and closing submissions. Each roundtable, chaired by a Commission counsel, consisted of a number of experts who considered a series of questions prepared by Commission staff. These questions were also designed to reflect the recommendations made by Participants in their closing submissions.

For Part One of the Inquiry, the first roundtable discussed issues related to the inspection of buildings, to property standards, and to the training and qualifications of building officials. The second roundtable examined whether there should be greater sharing of reports and information relating to the conditions of buildings. The third roundtable focused on the role of architects, engineers, and building inspection companies. The Part Two roundtable examined issues relating to the conduct and management of an emergency response and the entities that may respond to an emergency.

Unlike for the factual hearings, I decided to convene these roundtables in Ottawa, for reasons of economy. However, the sessions were webcast on the Inquiry's website and screened in Elliot Lake. Observers in Elliot Lake had the opportunity to pose questions at the end of each roundtable, either by telephone or through email.

I attempted to include in the roundtables representatives from all the sectors that could be affected by my possible recommendations. The Commission also received written submissions in advance from each of the organizations represented by these individuals, from the Ontario Association of Architects, and from Ontario's Large Municipalities Chief Building Officials.

The purpose of the roundtables was to allow stakeholders and persons with experience and expertise in these areas to discuss policy recommendations under consideration by the Commission. All the Participants took an active role in the discussions. The representatives of the Ontario public service understandably took the position that, since the Commission had been established to provide advice to the Government of Ontario, their role was to offer relevant information from Ontario's experience with the issues under consideration rather than advocating specific positions on the topics discussed.

I am grateful to all the experts who took time out of their busy schedules to assist the Commission in its work.*

Drafting the Report

After almost seven months of hearings, I had to review and consider evidence from 118 witnesses consisting of more than 29,000 pages of transcript, as well as more than 11,000 exhibits.

The evidence was summarized and distilled in Excel spreadsheets by Commission counsel as soon as the hearings were completed. To ensure that the summaries of the evidence could subsequently be used effectively for the purposes of fact-finding and analysis, we determined that each noteworthy and relevant piece of evidence would form one entry in the spreadsheet, accompanied by a date (and time, for Part Two) and the precise reference to the transcript and exhibits. The Part One summaries included 3,700 entries, while Part Two included 1,400 entries. All the summaries were then merged into one spreadsheet and sorted in chronological order, permitting a systematic and coordinated review of the evidence. This was a laborious and time-consuming exercise. I am grateful to counsel for the hundreds and hundreds of hours spent on this onerous task.

* The questions discussed at the roundtables for Part Two and the names of the Participants appear in Appendix D.

I decided that it would make sense to divide my Report into two volumes, reflecting the two Parts of my mandate and the two parts of the hearings that had taken place. The first volume, Part One, dealt with all events from the construction of the Mall to its eventual collapse. The second volume, Part Two, would deal with the emergency response to the collapse. It would also include this chapter on the Inquiry process.

For Part One, following the summarizing of the evidence, narratives of each of the three ownership periods of the Mall (Algocen years, Retirement Living years, and Eastwood Mall years) were prepared by counsel for my review and final redaction, assisted by my editor, along with a chapter on the causes of the collapse. The narrative for Part Two was apportioned among counsel in a chronological order (starting from the time of the collapse to the recovery of the victims and debriefing conducted by the responders). An additional chapter was drafted on the cause and time of deaths of the victims, before being submitted to me. I then drafted a chapter, for each of Parts One and Two, analyzing the specific issues emerging from the evidence and the conclusions that I drew from that exercise.

Further, for each of Parts One and Two, an appendix describing the roundtables was drafted. Finally, and perhaps most importantly, a chapter containing the Commission's recommendations was composed.

Shipton, McDougall Maude Associates were hired to edit and prepare the Report for printing. H3Creative Inc. was retained to plan the design and layout as well as to coordinate and to supervise the translation and printing of the Report.

Amendment to the Order in Council

Several unanticipated circumstances required that the Commission seek an amendment to its Order in Council, extending the time for the delivery of its Report, and seek the minister's permission to revise its budget.

At the time of my appointment as Commissioner, a principled determination of the time required for the Commission to carry out its mandate would have been impossible. It was only after the initial investigative stage, which lasted until February 2013, that Commission counsel and I developed a meaningful grasp and understanding of the magnitude of the problem the Commission was tasked to analyze. Indeed, it was only then that the Commission was able to fix a tentative schedule for the hearings.

As I explained above, the investigative stage could begin only after Commission counsel and staff were recruited and after temporary premises in Ottawa were found and equipped. The Commission's offices and infrastructure were up and running only in late September 2012, in part because of the difficulty in locating suitable space. The investigation was a cumulative and progressive process involving the issuance and service of well over 100 summonses and the collection, coding, and analysis of many thousands of responding documents, the interviewing of witnesses, and the preparation of briefs, will-say statements, and other documents for each witness. The breadth of that endeavour, particularly in relation to the events preceding the Algo Mall collapse, was due to the age of the Mall itself. The Commission's research covered a period of more than 30 years.

As I have explained in greater detail above, hearings had to be conducted with respect to standing and funding as well as confidentiality.

Furthermore, as I advised the Participants during the confidentiality hearing on December 17, 2012, two reasons contributed to the hearings not commencing before the beginning of March 2013. First, the response to Commission document production summonses was not always timely. Late production of documents was a recurring reality throughout the hearing phase, particularly from the Ontario government and the last owner of the Mall. Second, the completion date for the refurbishment of the hearing facility at the White Mountain

Academy was delayed until February 2013, when the Commission had been assured that construction would be complete by December 1, 2012.

In November 2013, I wrote the Attorney General seeking an extension of the original January 2014 deadline.* In December 2013, Order in Council OC 1873/2013 extended the deadline for delivery of a final Report to October 31, 2014.†

Although I fully recognize the right and responsibility of the government to impose a deadline on the work of an Inquiry, such a deadline must be realistic, given the mandate and scope of work. It must also take into account all the "setting up" required before the actual work can begin. As discussed, staff must be retained, offices located, computers rented. Competent and experienced counsel cannot simply drop everything to begin work instantly on the Inquiry. Offices do not magically appear. I would *recommend*, therefore, that any deadline imposed by the government include a reasonable period of set up time and that the government ensure that its resources are in place to assist the Inquiry in the basic organizational phase of its work. In the case of this Commission, I found the government was very slow or ill equipped to assist with essential prerequisites such as locating suitable office space, providing accounting services, and obtaining specialized resources.

Acknowledgements

Being appointed to head a commission of inquiry is a privileged and unique experience, and one for which I was singularly unprepared.

I have been a provincial court judge for more than 36 years, presiding over thousands of criminal trials. I had administrative duties as a regional senior judge for 12 of those years. Those experiences, however, did not adequately prepare me for the whirlwind that was to follow my appointment to lead this Inquiry. Judges are coddled and pampered persons – from the moment of their appointment, everything is provided to them. When I accepted the premier's invitation to head up the Elliot Lake Commission of Inquiry, I possessed only one asset: me!

A commission does not come equipped with anything. In a very short time, a commissioner must create a sophisticated organization, similar to a small government agency. Furniture and equipment – ranging from pencils to computer systems, desks to telephones – must be purchased, leased, rented, or borrowed. Offices must be found and equipped. Contracts must be entered into for accommodation, document retrieval and analysis, translation and interpretation, stenography, transportation, webcasting, audio-visual equipment, and report design and printing – to name a few tasks.

And, most important of all, a cohesive staff must be assembled.

This Inquiry was presented with unique problems owing to the relative remoteness of the location of its subject. Recruiting legal counsel locally in Elliot Lake was virtually impossible. The Elliot Lake bar is very small, and most of the local lawyers had already been retained to represent persons and interests involved in this tragedy. Because I reside and work in Ottawa, it was consequently logical to recruit Ottawa-based counsel who had construction law, criminal law, and inquiry experience. In addition, it was important that at least some members of my legal team be bilingual, owing to the bilingual character of the City of Elliot Lake. Although hearings would of necessity take place in that city, much of the organizational and preparatory work could be done in Ottawa.

* Letter to Attorney General, see Appendix R.

† Order in Council OC 1873/2013, see Appendix G.

That meant leasing office premises both in Ottawa and in Elliot Lake, as well as facilities for hearings in the city where the Algo Mall had been located. Facilities for roundtable sessions were also found in Ottawa.

After the shock of my appointment wore off and reality crept in, my first priority was to recruit an executive director whose knowledge of organizational processes would be an absolute essential. I was extremely fortunate to find Suzanne Labbé early on. I knew Suzanne from her days at the office of the Commissioner for Federal Judicial Affairs in the late 1990s. We also worked together on various international judicial reform projects, and I was impressed by her diplomatic skills and administrative ability. She joined the Courts Administration Service as deputy chief administrator responsible for judicial affairs in March 2005 and retired from the public service in July 2011. At the time that she agreed to assist me as executive director of the Commission, she had just completed her term as executive director of the 2011–12 Judicial Compensation and Benefits Commission. Suzanne is fluently bilingual. Her constant and caring support, quiet and sound advice, and depth of experience were invaluable.

My next priority was to seek advice. Invariably, those I sought assistance from were immediately responsive and very generous. Their collective experience and expert guidance provided me with a solid base on which to build. They were all very kind and patient with a rookie commissioner. I list their names in no particular order:

- Regional Senior Justice Lise Maisonneuve, Ontario Court of Justice, Ottawa;
- Regional Senior Justice Charles Hackland, Ontario Superior Court, Ottawa;
- Chief Justice Annemarie Bonkalo;
- George Thomson (former head of the National Judicial Institute and former federal and provincial deputy minister of justice);
- Ed Ratushny (author of a leading textbook on commissions of inquiry);
- David Scott (dean of the Ottawa bar);
- P. Donald Rasmussen (expert in construction law);
- Associate Chief Justice Dennis O'Connor (retired) (headed two commissions of inquiry);
- Mr. Justice Stephen Goudge (headed the Inquiry into Pediatric Forensic Pathology in Ontario);
- Madam Justice Denise Bellamy (headed the Toronto Leasing Inquiry);
- Mr. Justice Sidney Linden (headed the Ipperwash Inquiry);
- Paul Cavalluzzo (commission counsel on two inquiries); and
- Linda Rothstein (commission counsel at the Goudge Inquiry) and Tina Lie, both of whom acted for the Commission in the Application for Stated Case against the Nazarians.

Legal staff

Instead of one senior commission counsel, I chose three. They were the people whose assistance I sought, and their respective ability and experience did not permit distinction:

- Bruce Carr-Harris
- Peter Doody
- Mark Wallace

Collectively, these three senior members of the Ottawa bar had the experience of working on eight previous commissions of inquiry. Their expertise in construction litigation, general litigation, and criminal law is widely recognized and deeply respected, and I was amply rewarded by choosing them. They worked seamlessly and

energetically as the core of the Commission's legal team. Their wise advice and consummate skills as advocates were of inestimable assistance to me.

They were soon joined by Nadia Authier, Nadia Effendi, and Nigel Marshman, all fluently bilingual. The intellectual brilliance and prodigious work ethic of these three lawyers challenged and amazed me every day. Two of them had clerked for the Supreme Court of Canada, and Mr. Marshman had worked on three previous inquiries. Two younger lawyers, Duncan Ault and Natalia Rodriguez, were felicitous additions as associate counsel, and their hard work enhanced that of the Commission. They were joined by our articling student Ivana Nenadic, who not only gained the practical experience needed to be called to the Ontario Bar in June 2013, but also had the rare opportunity to question a witness before the Inquiry. Kyle Lambert joined the team in June 2013 as special assistant to counsel, and Ms. Nenadic returned in September to replace him. Ms. Rodriguez left shortly before the completion of the Commission's work to become one of two new mothers on the team. In the summer of 2014, Stéfanie Lacroix, a summer student with Borden Ladner Gervais, assisted with editing.

I owe a deep debt of gratitude to my legal team. They all possess academic and professional distinctions and awards. They worked as an effective and co-operative unit from the outset. During the hearings, they were required to be away from their families and other loved ones from late February until October of 2013. All worked late into weekday evenings and on weekends in preparation for forthcoming hearings, preparing briefs, interviewing witnesses, or sorting through mountains of documents. That list is far from exhaustive. Their schedule was punishing: hearings began at 9 a.m. and continued until 5 p.m. every weekday, with short meal and health breaks. Their advice to me was invariably generous, wise, and freely given. Their enthusiasm and energy was inspiring. This Report is overwhelmingly their report.

Media relations

Media relations were entrusted to Peter Rehak, who has undertaken this role for virtually every commission of inquiry in Ontario in the past dozen years or so. The depth of his particular knowledge and experience, and his relationship with members of the media, are unique and invaluable, and I thank him sincerely.

Special advisors

Stephen Bindman is a lapsed journalist – his words – of many years' experience, an adjunct professor at the University of Ottawa, and former lay bencher of the Law Society of Upper Canada. He was seconded to the Commission from the Department of Justice Canada, where he works as special advisor on wrongful convictions. As a journalist, his primary focus has always been on matters of judicial interest and he had covered several commissions of inquiry. Stephen was of great assistance to the Commission in organizing the drafting, editing, and production of this report as well as the policy roundtables.

Dale Craig, P. Eng., served as a special consultant to the Commission on engineering and architectural issues. He is chairman of the firm J.L. Richards and Associates Ltd. and enjoys a national reputation as an engineer, engineering consultant, and project manager, as well as for his community and professional engagement. His valuable guidance, advice, and evidence during the first phase of the Commission were essential. He was ably assisted by Laura Grover, P. Eng.

Nicolas deBreyne was seconded to the Commission as a civilian member of the Ottawa Police Service, with 18 years' experience in search and rescue and emergency management. He is an active member of a professional as well as a volunteer ground search and rescue team. He has participated in several hundred search and rescue missions, acting in such diverse roles as search manager and team leader in missing persons' searches and technical rescues. He is an internationally certified instructor in ground search and rescue as well as an accredited

instructor for all levels of the incident command system. His advice and expertise during Part Two of the Commission were of great value.

Section 11 of the Commission's Rules of Procedure provides that the Honourable Stephen Goudge of the Ontario Court of Appeal would (at the Commissioner's option) determine issues related to claims of privilege arising during the proceedings. I am particularly grateful that Mr. Justice Goudge immediately accepted this responsibility and for his determination of just such an issue during the course of the hearings.

Office staff

All Commission personnel were ably assisted by the loyal and competent service of the Commission's office staff.

Line Lapointe and Jennifer Caissy ran the Elliot Lake office with great efficiency. In Ottawa, Jocelyne Geoffroy served as assistant to the executive director, and law clerk Sujethra Nadarajah handled numerous important tasks. Marie Burgher was a welcome addition to support staff during the report-writing stage. Jocelyne Shank from Borden Ladner Gervais, although not a formal member of the Commission staff, was an invaluable asset as we endeavoured to write the Report.

Durowaa Agalic, manager of operations and finance, diligently reviewed, processed, and followed up on the mountain of weekly invoices and kept the Commission updated on its budget forecasts and balances. Although she left the team early, it was for the best of reasons – she is now the proud mother of a baby girl.

Special mention is deserved for two individuals whose role before, during and, after the hearings was central. Kassandra Kuka, the Commission's document management clerk, managed the mountain of documents that formed part of the evidentiary foundation of the Commission and liaised with esi Specialists, the Commission's web-hosting and electronic data-processing specialists. Kassandra's good humour, expertise, and constant availability made this process seamless and relatively painless. Her name now appears countless times in the archived record of these proceedings followed by "Ms. Kuka, please call up document number …" Marc-André Bernard, my personal secretary and the Commission registrar, accomplished his role with great dignity and efficiency. In addition, he assumed the role of office manager of the Commission's Ottawa offices after the roundtables were completed.

I am indebted to the Ottawa Police Service for graciously permitting the secondment of two senior members of the force as investigators during the initial stages of the Commission. Det. Sabrina Corneanu and Sgt. Dan Simser ably conducted scores of interviews in preparation for the hearings and provided sound advice to Commission counsel.

The Commission was also assisted by the investigative services of retired Ottawa police officers Marc Pinault, Dan Desroches, and Douglas Handy.

The staff and administrators of the White Mountain Academy worked quickly and effectively to convert the spaces in the building into functional offices and a hearing room with appurtenant facilities for press, counsel, and the general public. Ongoing services and maintenance provided by Dennis Guimond in particular were of a high calibre.

All administrative and budgetary issues were coordinated through the Policy and Adjudicative Tribunals Division of the Ministry of the Attorney General, in particular Assistant Deputy Attorney General Irwin Glasberg and officials Earl Dumitru and Laureen Moran. Their support, quick responses to our questions, and respect for the independence of the Inquiry were commendable and greatly appreciated.

As I indicate above, the Commission hired esi Specialists to process its documents and host its documents in an online database. The service was so excellent that the main contact for the Commission, Yvette Bula (first of esi Specialists and then with SVR Litigation Case Management), quickly became an integral part of the team providing such case management services as tracking every detail of the documents being received and processed, searching for documents, and creating new fields to track all manner of items (e.g., briefs).

The Commission also relied heavily on the seasoned team of Wortzman Nickle for the initial screening of the documents.

During the hearings, the Commission hired Neeson & Associates Court Reporting and Captioning Inc. to provide real-time court-reporting services. The certified version of the day's transcripts was delivered and posted on our website at the end of each day.

Webmaster Djordje Sredojevic's (Autcon) previous experience with commissions of inquiry was telling. His work as the Commission's webmaster was most professional and responsive to our needs.

I was particularly impressed with the quality, professionalism and expertise of Avolution and its chief executive officer, Guy Bennett, in the technical planning and management of the audio-visual system, webcasting, and hearing room design at the White Mountain Academy. Justin Gray's constant expert assistance, helpful disposition, and advice ensured the smooth functioning of the system throughout the hearings. He has always gone beyond the duties that were normally assigned to him and was invaluable when the Commission experienced its electronic growing pains. From his perch at the back of the hearing room, he was always vigilant and anticipated most problems before they occurred. Excellent assistance was also provided by Paul Cotton, who replaced Justin for the last month of the hearings.

The physical production of a report such as this, especially one so complex and voluminous, is a massive undertaking. Luckily, we were guided at every step by Rob and Laura Herrera and the design gurus at H3Creative Inc. They are experts on all matters of font, spacing, and headings and have the ability to maintain their good cheer even when deadlines are missed. Our editors, Dan Liebman, Mary McDougall Maude, and Rosemary Shipton of Shipton McDougall Maude Associates, veterans of many similar inquiries, showed remarkable grace under extremely tight timelines. Our translators, Larrass Translations, met the challenge of converting in record time a very long and technical report in an accurate and easy-flowing French. I hope the result of all these efforts is a report that is both comprehensive and readable and easy on the eyes.

Participants' counsel

Throughout the hearings, all counsel participated in a co-operative, highly professional, and dignified manner. With very few exceptions, potential areas of discord and conflict were easily resolved through intelligent and responsible discussion, negotiation, and common sense compromise. In the end, practical solutions were found to problems of substance and to problems of procedure without recourse to costly and time-consuming formal procedures. This collective sense of responsibility to achieve the ends of the Commission enabled proceedings to move along as smoothly as possible, without acrimony, spectacle-seeking, or futile squabbling, despite the existence of many competing interests. I note with pride that unlike many inquiries, none of these disputes ever landed in court to be resolved. For that and for the quality of their advocacy, this Commission is very grateful.

The Seniors Action Group of Elliot Lake (SAGE) was not represented by counsel. Its representatives (Keith Moyer and Chuck Myles), however, were granted one seat at the counsel table. Their active and intelligent participation as well as their sound and constructive advice were much appreciated. Similar comments are deserved by Ernie Thorne, representing the Elliot Lake Professional Fire Fighters Association (IAFF Local 1351); the Toronto Professional Fire Fighters Association (IAFF Local 3888); the Ontario Professional Fire Fighters Association (OPFFA);

and the International Association of Fire Fighters (IAFF). Mr. Thorne is not a lawyer, but his participation was both eloquent and effective.

Community of Elliot Lake

I close by thanking the citizens of Elliot Lake. Their personal and collective sacrifices are recognized throughout this Report. This community, at the official and individual levels, has made me and all other members of the Commission feel welcome, appreciated, and at home here in their beautiful and unique city. We will not forget them.

I was honoured to have been asked to lead this Commission of Inquiry.

I hope that the recommendations I have made will serve as a blueprint to ensure a tragedy like the collapse of the Algo Mall never occurs again.

Notes

1 "McGuinty seeks inquiry into mall collapse; Bodies of two victims released to families," *Ottawa Citizen*, June 30, 2012, A6.

2 See Part One, chapter 1 (the section on Mandate).

3 Ontario, *Report of the Ipperwash Inquiry* (Toronto: Ontario Ministry of the Attorney General, 2007), vol. 3, 4–6 (Commissioner Sidney B. Linden).

4 Ontario, *Report of the Ipperwash Inquiry* (Toronto: Ontario Ministry of the Attorney General, 2007), vol. 3, 4 (Commissioner Sidney B. Linden).

5 Public Inquiries Act, S.O. 2009, C. 33, Schedule 6.

6 Transcript, October 26, 2012, p. 2.

7 SO 2009, c 33, Schedule 6.

8 RSO 1990, c P.41.

9 Commission counsel submissions, March 4, 2013, p. 17.

10 D. O'Connor, "The role of commission counsel in a public inquiry," Advocates' Soc. J. 22(1) (2003), 10.

11 Commission counsel submissions, March 4, 2013, p. 21; Commission counsel submissions, August 7, 2013, p. 19740.

12 Exhibits 92099–12.

13 Exhibits 9212, 9216.

14 Exhibit 9215.

15 SO 2009, c 33,Schedule 6.

16 Elliott submissions, April 19, 2013, p. 5814.

17 Commissioner Statement, April 22, 2013, pp. 6027–8; Commissioner Statement, April 24, 2013, pp. 6232–3.

18 Broadbent submissions, April 24, 2013, pp. 6516–8.

19 Broadbent submissions, April 24, 2013, pp. 6531–5.

20 Law Society of Upper Canada, effective November 1, 2000.

21 Commission counsel submissions, April 24, 2013, pp. 6538–9.

22 [1997] SCR 440.

23 *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission*, [1997] 3 SCR 440, para 55.

24 Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. *Report of the events relating to Maher Arar* [vol.III]: *Analysis and Recommendations* (Ottawa: Minister of Public Works, and Government Services), 292–3 (Commissioner Dennis R. O'Connor).