

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

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

AND IN THE MATTER OF James W. Keywan

**MOTION RECORD OF THE ELLIOT LAKE MALL ACTION COMMITTEE  
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<b>TAB NUMBER</b>	<b>DOCUMENT</b>
1.	AFFIDAVIT OF ALEXANDRA CARR, SWORN JUNE 24, 2013
A. EXHIBIT A	<i>EXCERPTS OF THE TRANSCRIPT OF THE EVIDENCE OF THE NORR PANEL PROVIDED MARCH 30, 2012, ELLIOT LAKE COMMISSION OF INQUIRY, P. 12635-12638.</i>
B. EXHIBIT B	<i>EXCERPTS OF THE TRANSCRIPT OF THE EVIDENCE OF THE NORR PANEL PROVIDED MARCH 30, 2012, ELLIOT LAKE COMMISSION OF INQUIRY, P. 12551-12553.</i>

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

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

**AND IN THE MATTER OF** James W. Keywan


**AFFIDAVIT OF ALEXANDRA CARR**

I, Alexandra Carr, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am counsel for the Elliot Lake Mall Action Committee (“**ELMAC**”) a volunteer not-for-profit association that was granted standing in the Elliot Lake Commission of Inquiry (the “**Inquiry**”). As such, I have direct knowledge of the matters to which I depose in this affidavit. Where the information in this affidavit is not based on my direct knowledge, but rather upon information and belief from other sources, I have stated the source of the information and I believe it to be true.
2. On March 12, 2013, a report issued by NORR Limited on March 8, 2013 (the “**NORR Report**”), was entered as Exhibits 3007-3021 and 3141 at the herein Commission Inquiry. The report was prepared by Dr. Hassan Saffarini, P. Eng., PhD, Mr. Michael de Raaf, M.A.Sc., Mr. Chris Hughes, B.E.S., MRAIC, OAA, and Mr. Chris Pal, P. Eng.

3. On May 29 and 30, 2013 a panel of individuals who contributed to the findings in the NORR report, including Dr. Saffarini and Mr. Hughes (the “**NORR Panel**”) provided oral evidence at the hearing of the Elliot Lake Commission of Inquiry. All participants, or their counsel, were provided with an opportunity to cross-examine the NORR Panel.
4. During the NORR Panel’s testimony, Dr. Saffarini explained that NORR Limited was retained by the Ontario Provincial Police and instructed to provide the basis or foundation for potential findings of negligence or other liability. Attached to this, my affidavit, as **Exhibit “A”** is a true copy of the excerpts of the transcript of May 30, 2013 containing the explanation of NORR’s retainer and instructions.
5. On May 30, 2013, counsel for Mr. Keywan, Mr. Mario Delgado cross-examined the NORR Panel. Attached to this, my affidavit, as **Exhibit “B”** is a true copy of the excerpts of the transcript of May 30, 2013 containing Mr. Delgado’s cross-examination of the NORR Panel.

SWORN BEFORE ME at the City of  
Elliot Lake, on June 24, 2013.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
R.O.  
ROY O'CONNOR LLP

  
\_\_\_\_\_  
ALEXANDRA CARR

**THIS IS EXHIBIT "A" REFERRED TO  
IN THE AFFIDAVIT OF  
ALEXANDRA CARR**

**SWORN BEFORE ME THIS  
24<sup>th</sup> DAY OF JUNE, 2013**

  
\_\_\_\_\_  
Commissioner for Taking Affidavits, etc.  
*JST ROYO'CONNOR/CLP*

ELLIOT LAKE COMMISSION OF INQUIRY

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DAY 53

May 30, 2013

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1 continuing to --

2 A. (Dr. Ghods) In Zellers area, yeah.

3 Q. And my understanding is that  
4 there may have been cladding on both sides, but  
5 we'll have to maybe get that evidence from someone  
6 else, because --

7 A. (Dr. Saffarini) I believe the --

8 Q. -- it was gone when you arrived;  
9 right? Or did you remove it?

10 A. (Dr. Saffarini) No, actually it  
11 was not gone when you we arrived. We did not  
12 literally remove it, but we have seen it being  
13 removed, yes.

14 MR. MacRAE: Thank you very much.  
15 Those are my questions.

16 Thank you very much,  
17 Mr. Commissioner.

18 THE COMMISSIONER: Who is next? Mr.  
19 Bisceglia?

20 CROSS-EXAMINATION BY MR. BISCEGLIA:

21 Q. Good morning. My name is Joe  
22 Bisceglia. I have a few questions to ask of you.

23 First of all, I thank you for the  
24 science and the help that you've been to us this  
25 morning and yesterday. I am more interested today,



1     though, and my question is directed at the process,  
2     as opposed to the science.

3                     My appreciation of the facts are that  
4     you were retained by the Ontario Provincial Police;  
5     is that correct?

6                     A.     (Dr. Saffarini) That's correct,  
7     yes.

8                     Q.     And in order to fulfill your  
9     obligations with the Ontario Provincial Police, I'm  
10    aware that you signed a written retainer agreement;  
11    is that correct?

12                    A.     (Dr. Saffarini) That is correct,  
13    yes.

14                    Q.     And part of the retainer  
15    agreement was a level of confidentiality; is that  
16    right?

17                    A.     (Dr. Saffarini) Yes.

18                    Q.     And at that time, the Ontario  
19    Provincial Police was investigating the matter for  
20    potential criminal charges or other consequences  
21    arising from the collapse; is that fair?

22                    A.     (Dr. Saffarini) Yes. That's  
23    correct.

24                    Q.     And under the terms of  
25    reference, you were also given by the Ontario

1 Provincial Police certain information, documents and  
2 so on, upon which to arrive at a conclusion or a  
3 series of conclusions; is that correct?

4 A. (Dr. Saffarini) Yes.

5 Q. And you were instructed by the  
6 Ontario Provincial Police to provide to the Ontario  
7 Provincial Police the basis or foundation for  
8 potential findings of negligence or other liability;  
9 is that correct?

10 A. (Dr. Saffarini) That was one of  
11 the --

12 Q. Yes.

13 A. (Dr. Saffarini) -- terms in the  
14 scope.

15 Q. So in the course of providing  
16 your opinion to the Ontario Provincial Police and in  
17 the fullness of time after the Commission was  
18 appointed, all of your documents and your -- and you  
19 were summonsed to produce -- I'm sorry.

20 The Ontario Provincial Police were  
21 summonsed to produce all of their documents, and in  
22 the fullness of time, you were asked to testify, to  
23 help us out?

24 A. (Dr. Saffarini) That's right.

25 Q. Right. And in the course of

**THIS IS EXHIBIT "B" REFERRED TO  
IN THE AFFIDAVIT OF  
ALEXANDRA CARR**

**SWORN BEFORE ME THIS**

**24<sup>th</sup> DAY OF JUNE, 2013**



\_\_\_\_\_  
Commissioner for Taking Affidavits, etc.

*JTT ROY O'CONNOR LLP.*

# ELLIOT LAKE COMMISSION OF INQUIRY

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DAY 53

May 30, 2013

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1 we cannot associate what he had heard with the  
2 ultimate failure at that point.

3 MR. KEARNS: Very good. Thank you  
4 very much, gentlemen.

5 CROSS-EXAMINATION BY MR. DELGADO:

6 Q. Good afternoon, gentlemen.

7 A. (Dr. Saffarini) Good afternoon.

8 Q. My name is Mario Delgado. I am  
9 one of the lawyers for James Keywan.

10 Dr. Saffarini, I understand that you  
11 were team leader on the forensic investigation; is  
12 that correct?

13 A. (Dr. Saffarini) Yes.

14 Q. And what did that involve, being  
15 team leader?

16 A. (Dr. Saffarini) Well, basically,  
17 I was the project manager by the terminology of  
18 engineers, so I was the project manager for this  
19 as a project.

20 I was the chief forensic engineer on  
21 this, as in I led the team and I wrote a substantial  
22 part of the report.

23 MR. DELGADO: Okay, Ms. Kuka, can  
24 you -- I don't believe this has been made  
25 an exhibit. It's file NL2275.

1 I'd just like to show you a document  
2 produced by NORR. This is your initial statement of  
3 opinion. If I can take you to page 2 of 4,  
4 subparagraph 3.1, the heading is "The Team".

5 A. (Dr. Saffarini) Yes, yes.

6 BY MR. DELGADO:

7 Q. And this document lists a number  
8 of individuals. Is it fair to say that this is  
9 an exhaustive list of the individuals who were  
10 responsible for the final report produced by NORR?

11 A. (Dr. Saffarini) This is actually  
12 the list of people who were on -- on site. That's  
13 all it means.

14 Q. Okay.

15 A. (Dr. Saffarini) These are the  
16 people who went to site between the period of July  
17 22nd and July 29th.

18 Q. And my question is this: Are  
19 these the -- is this an exhaustive list of the  
20 individuals who had an input into the final report  
21 or are there other members who were not listed on  
22 this list who may have had a contribution to the  
23 final report?

24 A. (Dr. Saffarini) Yes, for  
25 instance, you will see that Mr. Dinovitzer is not

1 included in this, so he obviously was a contributor  
2 to the report, but he was not present. His team  
3 were -- members were not present, NRC was not  
4 present and they contributed and we had petrographic  
5 analysis done and the individual concerned is not  
6 included.

7 So these are the people who were on  
8 site. That is all that is describing.

9 Q. Okay. And I guess what I'm  
10 trying to get at, is it fair to say that the only  
11 team member in the drafting of the report, who was  
12 an architect, is Dr. Hughes or were there other  
13 architects?

14 A. (Dr. Saffarini) I believe that  
15 this is a fair statement, yes.

16 Q. So, Dr. Hughes, you were the  
17 only architect responsible for drafting the report?

18 A. (Mr. Hughes) To my knowledge,  
19 yes.

20 Q. Okay. And there was no other  
21 member of the team who was licensed to practice  
22 architecture in the Province of Ontario; is that  
23 fair to say?

24 A. (Dr. Saffarini) You mean other  
25 than Dr. Hughes?

1 Q. Other than Dr. Hughes.

2 A. (Dr. Saffarini) Yes.

3 Q. And so you would agree, Dr.

4 Hughes, that as part of the team, you were the only  
5 person qualified to provide an opinion as it related  
6 to architectural matters?

7 A. (Mr. Hughes) Yes.

8 Q. Dr. Saffarini, yesterday and  
9 today, more particularly yesterday, you were asked  
10 to confirm that you were not criticizing the work  
11 performed by Halsall and you also confirmed that you  
12 weren't criticising anybody for that matter, that  
13 you were not here to criticize anybody.

14 I'm just quoting you from yesterday;  
15 is that a fair statement?

16 A. (Dr. Saffarini) That is a true  
17 statement, yes.

18 Q. So is it fair to say that as far  
19 as NORR is concerned, the purpose of the report is  
20 not to cast blame on the parties involved in the  
21 design. construction or inspection of the  
22 Algo Centre Mall?

23 A. (Dr. Saffarini) I think you are  
24 quoting us, yes.

25 Q. So in drafting the NORR Report,



1 NORR did not review documentation for the purposes  
2 of commenting on whether any particular party failed  
3 to carry out their duties; is that fair to say?

4 A. (Dr. Saffarini) Yes, only in --  
5 yes, that is a fair statement, yes.

6 Q. And Dr. Hughes, would you agree  
7 with that?

8 A. (Mr. Hughes) At a high-level,  
9 yes, I would agree with that.

10 Q. Okay, you qualified that. In  
11 what sense would you not agree with that statement?

12 A. (Mr. Hughes) Well, I understand  
13 where you're going with this line of questioning,  
14 which would be my final statement on the design  
15 review. However, we are not here to cast blame on  
16 individuals, but we do have a -- we are compelled to  
17 report on our findings.

18 Q. Fair enough. So my question  
19 was: In drafting the NORR Report -- and let's leave  
20 it at that -- did -- your hand in drafting the  
21 NORR Report, did you review documentations for the  
22 purposes of commenting on whether any particular  
23 party failed to carry out its duties?

24 A. (Mr. Hughes) Yes, if the -- if  
25 I found evidence or had a professional opinion as to

1 whether some of the documentation or evidence we had  
2 reviewed was not in compliance with any sort of  
3 codes or standards of practice, that would have made  
4 itself clear in the report.

5 Q. Okay. And so I can take it from  
6 your statement that we can expect, if there is blame  
7 that is being assigned to any given party, that the  
8 report will set out the relevant information that  
9 was considered and provide the reasons for reaching  
10 that opinion; is that fair to say?

11 A. (Mr. Hughes) I think the report  
12 does a very good job of illustrating all parties  
13 that were involved and their level of  
14 responsibilities.

15 Q. So I'll take that as a "yes"?

16 A. (Mr. Hughes) Yes.

17 Q. Okay. And you are a member of  
18 the Ontario Association of Architects; is that  
19 correct?

20 A. (Mr. Hughes) I am.

21 Q. And when did you obtain your  
22 license to practice architecture in Ontario?

23 A. (Mr. Hughes) I believe that was  
24 in 2009.

25 MR. DELGADO: Ms. Kuka, can I call up

1 the NORR Report, Exhibit 3007, I believe. And if  
2 you could turn to page 358.

3 MS. KUKA: Do you want to make this  
4 last document an exhibit, the one that is up on the  
5 screen?

6 MR. DELGADO: Oh, yes. May we make  
7 it an exhibit.

8 MS. KUKA: Exhibit No. 5192.

9 EXHIBIT NO. 5192: Document  
10 No. NL2275, listing a number of  
11 members of the Engineering team.

12 BY MR. DELGADO:

13 Q. So, I'm looking at the final  
14 NORR Report, page 58. This is subheading 4, "Review  
15 of Design".

16 So as I understand it, by looking at  
17 the report, the findings and opinions expressed as  
18 they relate to the architectural design of the  
19 Algo Centre Mall can be found at section 4.1,  
20 "Building Envelope", which span pages 58 to 67; is  
21 that correct?

22 A. (Mr. Hughes) Yes.

23 Q. And so am I correct to say that  
24 under section 4.1 of the report, you state:

25 "All relevant documentation

1                   that you reviewed and all  
2                   material findings in support of  
3                   your opinions and conclusions  
4                   ..."?

5                   A.     (Mr. Hughes) Could you rephrase  
6                   that question?

7                   Q.     Sure. So when I take a look at  
8                   4.1, "Building Envelope", and the subsections  
9                   underneath that, that span to page 67, can I --  
10                  would I be accurate in saying that in those  
11                  sections, you state:

12                                 "All the relevant  
13                                 documentation and all material  
14                                 findings that you rely on to  
15                                 support your opinions and  
16                                 conclusions ..."?

17                  A.     (Mr. Hughes) Yes, my complete  
18                  review of the design is in that section.

19                  Q.     Okay. And am I correct to say  
20                  that you have not left out any relevant  
21                  documentation or material facts that would support  
22                  your opinions and conclusions from this section?

23                  A.     (Mr. Hughes) That's a fair  
24                  statement.

25                  Q.     And therefore, I can conclude

1 that there is nothing outside of this section that  
2 is relevant or material to support the findings,  
3 opinions and conclusions that you draw, as it  
4 relates to the architectural drawings of the  
5 Algo Centre Mall?

6 A. (Mr. Hughes) Any evidence that  
7 would have been brought forward in this Commission,  
8 for instance, I would not have had the benefit of  
9 during the time of the writing of this report.

10 Q. Sorry, and just to qualify that  
11 question, any documentation that was provided to  
12 you, that you thought that was relevant, you  
13 included in the report?

14 A. (Mr. Hughes) Yes.

15 Q. Is it fair to say that the  
16 opinions and conclusions you reach in the final  
17 NORR Report have not changed from when the day you  
18 authored that report to today?

19 A. (Mr. Hughes) No, my opinions  
20 have not materially changed.

21 Q. Now, Dr. Saffarini was asked  
22 yesterday whether he had any personal experience  
23 with respect to the practice of engineering in 1978  
24 and he confirmed that he didn't.

25 So similarly, I'll ask you, given

1 that you only received your certificate to practice  
2 in 2009 --

3 A. (Mr. Hughes) Sorry, that's  
4 not --

5 Q. And graduate --

6 A. (Mr. Hughes) Sorry, that's --  
7 sorry, certificate of practice is not what you are  
8 asking me. You are asking me if I had a license.

9 Q. Sorry, license to practice, 2009  
10 and you graduated in 1995; am I correct to say that  
11 you do not have any personal experience with the --  
12 with respect to the practice of architecture between  
13 the period of 1975 and 1981?

14 A. (Mr. Hughes) That's a fair  
15 statement, yes.

16 Q. Okay. So, yesterday you  
17 testified that -- I'll try to quote you as much as  
18 I can -- that the review of the original design  
19 consisted of obtaining -- of the architectural  
20 drawings from James Keywan Architect, along with  
21 some other structural drawings -- I believe you may  
22 have had some shop drawings you mentioned?

23 A. (Mr. Hughes) Yes, there is.

24 Q. And that the review of the  
25 design consisted of looking at the building

1 envelope, primarily the roof, and looking at the  
2 code that was in play at the time to see if those  
3 documents were, in fact, compliant with the current  
4 Ontario Building Code regulations.

5 A. (Mr. Hughes) To see if there --  
6 at the time?

7 Q. Complied with the 1975 Ontario  
8 Building Code?

9 A. (Mr. Hughes) That's correct.

10 Q. So, just in layman's speak, is  
11 it fair to say that you looked at Mr. Keywan's  
12 architectural drawings, compared it to the code and  
13 determined whether or not, in fact, those drawings  
14 met that standard?

15 A. (Mr. Hughes) Generally, yes.

16 Q. In your review of the 1975  
17 Building Code, would you agree with me that there is  
18 nothing in that code or in any other regulation,  
19 setting out the extent to which an architect had to  
20 design in detail, a building or portions of the  
21 building -- of components of the building --

22 THE COMMISSIONER: Go slow -- you are  
23 just reading and I'm having just a little trouble  
24 following you. Perhaps slow down a little bit.

25 MR. DELGADO: I'll slow down on the

1 question.

2 BY MR. DELGADO:

3 Q. In your review of the 1975  
4 Ontario Building Code, would you agree with me that  
5 there was nothing in that code or in any other  
6 regulation, setting out the extent to which  
7 an architect had to design and detail a building or  
8 portions or components of a building?

9 A. (Mr. Hughes) The code does not  
10 list specifics regarding the design and detailing of  
11 a building, that an architect is responsible for.  
12 It does, however, contain general language about  
13 review and building performance.

14 Q. So you don't dispute the  
15 statement I just made?

16 A. (Mr. Hughes) I don't dispute it.

17 Q. Okay. Now, if I may take you to  
18 page 63 of your report. Second full paragraph, last  
19 sentence. You agree with me that as at the date of  
20 the final report and even today, as you have  
21 mentioned that your opinion has not changed, NORR is  
22 of the opinion that --

23 THE COMMISSIONER: I'm sorry, have we  
24 got that on screen?

25 MR. DELGADO: I believe --



1 THE COMMISSIONER: Where are you  
2 reading from?

3 MR. DELGADO: Second paragraph, the  
4 second full paragraph, "The architectural drawings,"  
5 last sentence.

6 THE COMMISSIONER: Okay.

7 BY MR. DELGADO:

8 Q. Do you agree with me that you  
9 maintain that proposition that's mentioned in the  
10 last sentence, namely that you are:

11 "Reasonably confident that the  
12 roof construction conforms to  
13 part 3 of the Ontario Building  
14 Code"?

15 A. (Mr. Hughes) Yes, part 3 deals  
16 with fire protection and life safety measures of the  
17 Building Code.

18 Q. Okay, and now turning your  
19 attention to page 67.

20 Section 4.1.6, first sentence, you  
21 will agree with me that as of the date of the final  
22 report and even today, NORR maintains the opinion  
23 that the design of the --

24 THE COMMISSIONER: Excuse me, 4.1.6?

25 MR. DELGADO: 4.1.6.

1 THE COMMISSIONER: Where in 4.1.6 are  
2 you reading from?

3 MR. DELGADO: First paragraph, first  
4 sentence.

5 THE COMMISSIONER: "The design"? All  
6 right. Let me know where you are reading from, just  
7 so I can follow you.

8 BY MR. DELGADO:

9 Q. Okay, so I'll just summarize the  
10 question for you.

11 You will agree with me that it's your  
12 position that the original design met part 4 of the  
13 Ontario Building Code?

14 A. (Mr. Hughes) I believe the term  
15 I used was "narrowly".

16 Q. Let me just check the wording  
17 here.

18 A. (Mr. Hughes) Second line.

19 Q. Yeah, I agree with you on that.

20 You are familiar with the sports term  
21 being onside versus being offside?

22 A. (Mr. Hughes) Sure.

23 Q. And you would agree with me that  
24 a player, if he's onside, by very definition can't  
25 be offside?

1 A. (Mr. Hughes) Okay.

2 Q. Okay. You're with me so far?

3 A. (Mr. Hughes) Sure.

4 Q. Generally speaking, if a design  
5 meets the OBC requirements, by that very definition,  
6 you can't also say that it doesn't meet them. That  
7 it's -- that that design is in contravention of the  
8 OBC?

9 A. (Mr. Hughes) Yes.

10 Q. Okay. So borrowing from that  
11 analogy, you acknowledge that the original design  
12 was onside of the prevailing Ontario Building Code?

13 A. (Mr. Hughes) As I have stated  
14 before --

15 Q. You can't either be -- you are  
16 either onside or you are not. And your position  
17 is --

18 THE COMMISSIONER: You can be  
19 narrowly onside.

20 A. (Mr. Hughes) I can be narrowly  
21 onside.

22 THE COMMISSIONER: You can be  
23 narrowly offside.

24 A. (Mr. Hughes) I can be just on  
25 the line.

1 BY MR. DELGADO:

2 Q. But it is onside?

3 THE COMMISSIONER: Whether it is  
4 onside or it's offside is ...

5 It is like passing or failing law  
6 school exams, you can barely make it, but make it,  
7 or you can barely not make it or you can come out  
8 with flying colours or you can be dead last.

9 MR. DELGADO: With respect, if you --

10 THE COMMISSIONER: I understand -- we  
11 all understand the distinction.

12 BY MR. DELGADO:

13 Q. And you agree with me that it  
14 was Peterson who provided the waterproofing membrane  
15 system that was going to go on the parking deck?

16 A. (Mr. Hughes) Yes.

17 Q. And you agree with me or you're  
18 aware that the owner through Nick Hirt, an engineer,  
19 retained Peterson to provide this preparatory  
20 system?

21 A. (Mr. Hughes) That appears to  
22 have been the case, yes.

23 Q. And I think you mentioned this  
24 earlier and I just want clarification, but you are  
25 aware that Peterson had its own engineers and own

1 people to provide the owner with drawing details of  
2 its proprietary system?

3 A. (Mr. Hughes) I've only seen what  
4 Peterson provided that's been submitted and that is  
5 entirely letters and a couple of sketches, as we saw  
6 this morning.

7 Q. You would expect that they would  
8 have engineers that would be able to provide the  
9 information?

10 A. (Mr. Hughes) They held  
11 themselves out as sealant engineers. It seems  
12 reasonable to assume they had engineers on staff.

13 Q. Fair enough. And you are aware  
14 that Mr. Nick Hirt was a licensed engineer and  
15 a former Chief Plan Examiner with the City of Sault  
16 Ste. Marie and was in charge of the project on  
17 behalf of the owner?

18 A. (Mr. Hughes) I'm aware of that.

19 Q. And would you agree with me that  
20 at the time the Algo Centre Mall was designed, there  
21 was nothing in the Building Code, the Architect's  
22 Act, the Professional Engineer's Act, which would  
23 have prevented a licensed engineer from assuming  
24 responsibility for designing, reviewing and  
25 approving the installation of a waterproofing

1 system?

2 A. (Mr. Hughes) That is correct.

3 Q. And I would submit to you -- I'm  
4 going to make a submission to you and you can -- and  
5 then I'm going to ask you a question whether you  
6 agree or disagree with the statement, okay?

7 A. (Mr. Hughes) Uh-hmm.

8 Q. That when the Algo Centre Mall  
9 was designed and constructed, it would have been  
10 acceptable practice for an architect to prepare  
11 building plans that would suffice for enabling other  
12 members of the design team to prepare their  
13 documents for obtaining a building permit, but which  
14 did not include all the details of features of  
15 a complete building, if that level of service was  
16 acceptable to the owner. In such cases, the  
17 owner/builder, and its various trades would be  
18 expected to have sufficient knowledge and experience  
19 to construct the elements of the building that were  
20 not detailed by the architect.

21 And my question to you is this: Given  
22 your admission that you have no personal experience  
23 with the practice of architecture between that time  
24 period, you will agree with me that you do not have  
25 any information to disagree with the

1 characterization that I have just mentioned to you?

2 A. (Mr. Hughes) I'm not sure I have  
3 enough information to agree with the  
4 characterization you just made. I would need to  
5 know more about the so-called team members, as you  
6 put it, on the design team that were expected to  
7 produce documents relating to the building of this  
8 facility.

9 Q. Okay. If there were individuals  
10 who purported that they could carry out the design  
11 and provide details, the practice at the time, I'm  
12 suggesting to you, was that the architect can rely  
13 on that and not provide all the details, because  
14 they would be provided by other parties. That's --  
15 I'm just proposing that that was the practice at the  
16 time.

17 Do you have any reason to doubt that  
18 was the practice at the time?

19 A. (Mr. Hughes) I have no reason to  
20 doubt that that was the practice at the time.

21 THE COMMISSIONER: I'm sorry, sir,  
22 I didn't hear your answer.

23 A. (Mr. Hughes) I have no reason to  
24 doubt that that was the practice at the time.

25 BY MR. DELGADO:

1 Q. Thank you. And we have heard  
2 evidence that the design in question was a novel  
3 idea at the time. Do you disagree with that?

4 A. (Mr. Hughes) "Novel" is  
5 an interesting characterization of it, but --

6 Q. "Novel" as in new.

7 A. (Mr. Hughes) It appears to have  
8 been new, yes. HSP held out that their system had  
9 some history, although I've never seen -- I've seen  
10 no evidence that they had ever used this system on  
11 an occupied space before.

12 Q. Okay. Now, Mr. Keywan asserted  
13 that he was not familiar with the system and  
14 therefore could not provide with -- could not  
15 provide the owner with meaningful input into such  
16 design.

17 Do you have any evidence to the  
18 contrary?

19 A. (Mr. Hughes) No.

20 Q. Now, Mr. Keywan also said that  
21 he didn't provide, specifically, general review for  
22 the Peterson System.

23 Do you have any evidence to the  
24 contrary?

25 A. (Mr. Hughes) I have no evidence



1 that he did not review that system.

2 Q. Well, you just finished saying  
3 that you have no evidence to his assertion that he  
4 was not familiar with the system and could not  
5 provide anything meaningful.

6 A. (Mr. Hughes) I've seen no  
7 documentation that --

8 Q. Okay. You haven't --

9 A. (Mr. Hughes) -- Mr. Keywan  
10 reviewed that system in any way.

11 Q. Okay.

12 And do you agree with me that at that  
13 material time, 1978, 1981, that it was not  
14 a requirement for an architect to do the general  
15 review of the design?

16 A. (Mr. Hughes) Not sure I would  
17 agree with that entirely. There are provisions in  
18 the OBC at the time that require an engineer or  
19 an architect to perform general review.

20 Q. An engineer or an architect,  
21 either one?

22 A. (Mr. Hughes) Yes.

23 Q. And in this case, we already  
24 know that it's Mr. Nick Hirt who undertook to  
25 oversee that Peterson System?

1 A. (Mr. Hughes) The owner?

2 Q. The owner, he retained Peterson?

3 A. (Mr. Hughes) The owner selected  
4 Peterson, yes.

5 Q. Yes, okay. Now, Mr. Keywan's  
6 evidence was that he did express some reservations  
7 to the owner, Nick Hirt, or the owner's  
8 representative/builder regarding the placing of  
9 a vehicle parking lot on the roof of the mall, but  
10 that the owner decided that he was going to go ahead  
11 and do it anyway.

12 Do you have any evidence to the  
13 contrary?

14 A. (Mr. Hughes) No.

15 Q. And his evidence was also that  
16 he made suggestions that if it was going to be  
17 located on the mall, that perhaps he could put  
18 a roof canopy on top of the -- on top of that  
19 structure.

20 Do you have any evidence to the  
21 contrary?

22 A. (Mr. Hughes) No, I'm --  
23 I believe I had seen that Mr. Keywan's testimony  
24 that he had suggested such things, yes.

25 Q. I believe that was Mr. Keywan's

1 testimony, that Mr. Nick Hirt was going to undertake  
2 the design supervision, construction of that  
3 Peterson System in the parking lot deck.

4 Do you have any evidence to the  
5 contrary?

6 A. (Mr. Hughes) No, I have no  
7 evidence to the contrary. I think there was  
8 a larger question of appropriateness in this matter  
9 but ...

10 Q. Now, in the circumstances there,  
11 what the standards are, that the codes, regulations,  
12 do not set out the extent to which an architect had  
13 to design or provide details of a building or  
14 portions of the components thereof, that the  
15 regulations, codes, et cetera, did not prevent  
16 an engineer from assuming that responsibility, and  
17 where the architect has advised the owner he does  
18 not have the expertise, and where the architect  
19 provides alternatives to the location of the parking  
20 lot, and provides options, if the owner decides to  
21 put that parking lot there, and where the owner  
22 nonetheless chooses to proceed with the Peterson  
23 System; would you agree with me, in those  
24 circumstances, that it is likely that the owner is  
25 not going to be relying on the architect to provide

1     them with the necessary details and specifications  
2     required for that system?

3                     A.     (Mr. Hughes) From what I have  
4     seen, Mr. Keywan was not given the responsibility  
5     for that system.

6                     Q.     Okay, bearing in mind what  
7     I just said about all the things I just listed,  
8     would you agree with me that in those circumstances,  
9     the owner would be relying upon other individuals,  
10    such as Peterson or other engineers, for the  
11    necessary details and specifications to that system?

12                    A.     (Mr. Hughes) Yes, assuming that  
13    HSP had, in fact, engineers that were licensed and  
14    were giving advice.

15                    Q.     And it's your understanding that  
16    they were holding themselves out as such?

17                    A.     (Mr. Hughes) I can only -- I can  
18    only make that statement based on what I've seen in  
19    front of me, which is letters attesting to sealant  
20    engineers being present at HSP.

21                    Q.     I'd like to turn your attention  
22    to your interim report and I believe that's Exhibit  
23    No. 119. Page 19 of 55. I would put it to you that  
24    the section in the interim report titled, "Building  
25    Envelope - Review of Design" is almost identically

1 the same as that of the final report other than you  
2 cite new sections of the Ontario Building Code that  
3 have come to pass since 1975; is that an accurate  
4 statement?

5 A. (Mr. Hughes) I would -- I can't  
6 remember the exact timeframe, but it's a fair  
7 statement. I can't say definitively what the  
8 changes were between the interim and the final.

9 Q. Okay, if I were to take you  
10 through a couple of pages, I would suggest to you  
11 that they're almost -- they are identical, even in  
12 paragraph format.

13 A. (Mr. Hughes) Uh-hmm.

14 Q. Other than you insert sections  
15 of the -- new sections of the OBC. Would you like  
16 to take some time to look at that? Or would you  
17 just say that's --

18 A. (Mr. Hughes) I'm at your  
19 disposal on this matter.

20 Q. Why don't you take -- I don't  
21 know if you can take a look at them both, but  
22 I would suggest to you that that's the case.

23 A. (Mr. Hughes) Okay.

24 Q. You wouldn't dispute that?

25 A. (Mr. Hughes) I'm not

1 disagreeing.

2 Q. Okay. So you wouldn't dispute  
3 that, other than citing those new sections, there is  
4 no other new material that you incorporate, that  
5 you're aware of?

6 A. (Mr. Hughes) I would -- I'm not  
7 sure I can definitively agree with that. I mean, we  
8 received documentation at several periods along the  
9 writing of this report, so how much documentation we  
10 received between the interim report and the final  
11 report is a matter I would not be able to speak  
12 definitively to.

13 There may have been some tweaking of  
14 the language between the interim and the final,  
15 based on information that we've received  
16 subsequently.

17 Q. Okay. But I would submit to you  
18 that the wording, as to whether or not the  
19 architectural designs -- I'm going to call it the  
20 design in general, because you were looking at the  
21 building envelope design, you kept the same wording  
22 both in the interim report and in the final report,  
23 in saying that it met the standard of care or  
24 narrowly met the standard -- sorry, narrowly met the  
25 Ontario Building Code with respect to the section 4

1 and conclusively with respect to part 3.

2 A. (Mr. Hughes) I'm not going to  
3 disagree with that.

4 Q. Okay. And I think throughout  
5 your testimony, you've been very consistent in  
6 holding that opinion that the design met the Ontario  
7 Building Code of the time. However, you have  
8 expressed some concerns about the detail of  
9 specifications in the drawings -- sorry, the amount  
10 of detail in the drawings and the specifications.

11 Given your admission that you don't  
12 really have experience about what the nature of the  
13 practice was back in 1975, to 1981, it's my  
14 impression of what you are telling us, that the  
15 concerns that you raise, is that if you were to be  
16 working on that project -- if you would have been in  
17 his shoes, in Mr. Keywan's shoes, you would have  
18 done things a little bit differently; is that fair  
19 to say?

20 A. (Mr. Hughes) I would hope so.

21 Q. And is it also fair to say that  
22 when you make those assertions, that you have the  
23 benefit of hindsight?

24 A. (Mr. Hughes) Of course.

25 Q. Okay, and it's also fair to say

1 that when you're making those assertions, that you  
2 have the benefit of receiving training where the  
3 standards are higher than what they were back in  
4 1975?

5 A. (Mr. Hughes) I think that's  
6 subjective, but, yes, that is more or less accurate.

7 Q. Okay, so turning your attention  
8 to section -- of the final report, so that's Exhibit  
9 No. 3007, section 4.1.6. The last sentence in  
10 section 4.1.6 reads:

11 "It is NORR's opinion that  
12 a duty of care required in the  
13 design and construction of this  
14 roof was not exercised."

15 I note that you have not attributed  
16 the failure to exercise a duty of care to the  
17 architect; it's a general statement. Can this  
18 sentence be read to mean that whoever is responsible  
19 for the design and construction of the waterproofing  
20 system, in your opinion, failed to exercise their  
21 duty of care?

22 A. (Mr. Hughes) Inasmuch as the  
23 responsibility for the building envelope, as  
24 a whole, fell on Mr. Keywan's shoulders, there is  
25 some measure of -- there was some duty of care that



1 was not exercised by him individually. However, as  
2 I've not disagreed with, the specification and  
3 selection of that waterproofing system fell to  
4 Mr. Hirt and HSP, in turn.

5 Q. Okay, given that you've  
6 concluded that the design itself met the 1975  
7 Ontario Building Code, and your admission that you  
8 have put all the material findings under section 4.1  
9 as it relates to the architectural design, your  
10 admission that your analysis focused on looking at  
11 the design and then looking at the code, where in  
12 this report do you say that you define what the duty  
13 of care is, that was required in the design and  
14 construction of the roof, which was not exercised?

15 A. (Mr. Hughes) The duty of care in  
16 this case would have been taking into account the  
17 level of complexity that the program of this roof  
18 required, which is to serve not only as a roof over  
19 occupied space, but also as a traffic deck subjected  
20 to enormous loads and a very harsh environment.

21 Q. Where do you define the duty in  
22 your report -- in the section? Because I didn't see  
23 it.

24 A. (Mr. Hughes) The duty of ...?

25 Q. The duty of care that you speak

1 of.

2 A. (Mr. Hughes) "The duty of care"  
3 is a term that is used to describe a level of  
4 responsibility that a professional brings and it is  
5 commensurate upon that person to exercise a duty --

6 Q. Right, and I appreciate that,  
7 but where in that section do you define what that  
8 duty and standard is? Because you've told us that  
9 all you did was take a look at the architectural  
10 drawings and see if they complied with the Ontario  
11 Building Code. I don't see a definition of duty of  
12 care in your report.

13 A. (Mr. Hughes) I don't think you  
14 will find a definition of the term "duty of care" in  
15 the report.

16 Q. Well, I don't see your own  
17 personal view -- I mean, you say that a duty of care  
18 was not exercised. You would think that if it  
19 was -- this is a material point in your final  
20 report, you would think that you would define at  
21 least what your thoughts are of duty of care?

22 A. (Mr. Hughes) As I've just  
23 explained to you, in my opinion, a duty of care  
24 would have been rising -- raising the level of  
25 sophistication and durability of this roof to meet

1 the challenges of the program.

2 Let's not forget, Mr. Keywan is  
3 a registered professional in the province. He has  
4 a duty of care to protect the public health.

5 Q. Yeah, I appreciate that. Where  
6 in your report, do you define that duty of care?  
7 I take it you don't?

8 A. (Mr. Hughes) I think we've --  
9 I think we've covered this ground.

10 Q. You don't?

11 A. (Mr. Hughes) The term "duty of  
12 care" is not defined in the report.

13 Q. And your analysis of that  
14 failure is also not included in that report?

15 A. (Mr. Hughes) The analysis of the  
16 structural failure?

17 Q. No, of the duty of care, the  
18 failure to exercise it.

19 A. (Mr. Hughes) No.

20 Q. You would agree with me that  
21 that's a material point in the report?

22 A. (Mr. Hughes) The fact that this  
23 roof was a failure since the get go and is, in some  
24 measure, reliant upon the design shortcomings for  
25 that failure, is indicative of the fact that it

1 was -- that -- I mean, that is the result of that  
2 duty of care not being present.

3 Q. Well, I think what you are  
4 doing, with all due respect, perhaps, and you  
5 already mentioned this, you have the benefit of  
6 hindsight. You are looking at it from --

7 A. (Mr. Hughes) As do the rest of  
8 this panel.

9 Q. So it's fair to say that your  
10 criticism comes, in part, from the benefit of  
11 hindsight?

12 A. (Mr. Hughes) I can only speak in  
13 my present terms and review documents of a historic  
14 nature. My entire job on this has been hindsight.

15 MR. DELGADO: Well, then, thank you.  
16 I have no further questions.

17 THE COMMISSIONER: Thank you. Thank  
18 you. Mr. Cassan.

19 CROSS-EXAMINATION BY MR. CASSAN:

20 MR. CASSAN: Good afternoon, my name  
21 is Paul Cassan. I am counsel for the City of  
22 Elliot Lake.

23 Mr. Kearns was asking you in his  
24 cross about Mr. Yakimov's statements and I think it  
25 was Dr. Saffarini, you indicated that you asked BMT

**ONTARIO**

COMMISSION OF INQUIRY

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(SWORN JUNE 24, 2013)**

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