

**IN THE MATTER OF THE ELLIOT LAKE COMMISSION OF INQUIRY
The Honourable Paul R. Bélanger, Commissioner**

**FINAL SUBMISSIONS
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FINAL SUBMISSIONS

A. INTRODUCTION

1. The Honourable Mr. Justice Paul R. Bélanger was appointed as the Commissioner of the Elliot Lake Commission of Inquiry (“the Inquiry”). Pursuant to the terms of its Mandate, the Commission inquired into and reported on events surrounding the collapse of the Algo Centre Mall (“the mall”) in Elliot Lake on June 23, 2012 (“the collapse”).

2. Rejean Aylwin, Rachelle Aylwin, Stephane Alywin, Teresa Perizzolo, and Cindy Lee Allan are the family members of the two women who the collapse killed, namely Lucie Alywin and Doloris Perizzolo.

3. The evidence confirms that the conditions of the roof of the mall continued to deteriorate due to decades of water and salt penetration that rotted the steel beams supporting the roof-top parking lot. The evidence also made it clear that incompetence, willful neglect and lack of action of several parties led to the collapse.

B. POWERS OF THE CITY OF ELLIOT LAKE UNDER THE *BUILDING CODE ACT*, S.O. 1992, c. 23

4. Under the *Building Code Act*, a municipality has the power to appoint a chief building official and inspectors who are tasked with ensuring that buildings and structures are constructed and maintained in a manner that is in accordance with the standards outlined in the Ontario Building Code. There are four kinds of inspections that can be carried out under the *Building Code Act*: Inspection of Construction and Demolition Sites, Inspection for Compliance with Property Standards, Inspection of Unsafe Buildings, and Maintenance Program Inspections.

Inspection of Buildings for Compliance with Property Standards

5. The council of a municipality has the power to enact by-laws that prescribe maintenance and occupancy standards that a building or site must meet. An inspection officer has the power to enter upon the premises to determine whether the property is being maintained in a manner that is in accordance with these municipal by-laws. The inspector can also issue an order requiring the owner or manager of the building to take positive action to bring the property to a state that conforms to the requisite standards.

***Building Code Act*, S.O. 1992, c. 23, s. 15.1**

Unsafe Buildings

6. A chief building official and his or her inspectors or agents can enter onto a premise without a warrant at any reasonable time to determine whether a building is structurally unsound or is a hazard to the health and safety of persons who normally use the building. If the building is found to be unsafe, the inspector or agent can issue an

order prohibiting the occupancy of the building, or requiring the owner or manager of the building to make repairs and renovations to bring the building up to standard. The inspector or agent can also issue an emergency order requiring the owner or manager of the building to take immediate steps to repair the building so as to terminate the factors posing a danger to persons who normally use the building.

Building Code Act, S.O. 1992, c. 23, s. 15.9

Maintenance Inspection Programs

7. In addition to inspecting buildings for compliance with property standards enacted through a by-law, an inspector may enter upon land and into buildings at any reasonable time without a warrant for the purpose of conducting a maintenance inspection, and to determine whether a violation of the *Building Code Act* or the Ontario Building Code has occurred. If such a violation is found, the inspector can make an order directing immediate compliance, and post the order on the site of the inspection.

Building Code Act, S.O. 1992, c. 23, s. 15.10.1

**C. POWERS OF THE CITY OF ELLIOT LAKE UNDER THE *MUNICIPAL ACT*,
S.O. 2001, c. 25**

8. The City of Elliot Lake has the power to licence, regulate or govern real property used for a business, as well as the persons carrying it on or engaged in it. In enforcing a by-law, a municipality or its agents have the power to enter on land at any reasonable time for the purpose of carrying out an inspection to determine whether a by-law, direction or order issued under the *Municipal Act* has been violated. In carrying

out an inspection, a City's agents have the power to require production of documents relevant to the inspection, inspect and remove relevant documents for the purpose of making copies, require information from any person concerning a matter related to the inspection and make examinations or take tests, samples, or photographs necessary for the purposes of the inspection.

Municipal Act, S.O. 2001, c. 25, ss. 151, 436, 438

9. If the municipality's agents find that a by-law of the municipality has been contravened, it has the power to impose a penalty, prescribe a remedy or restrain the contravention. It may order that the person(s) contravening the by-law to discontinue the contravening activity.

Municipal Act, S.O. 2001, c. 25, ss. 440, 444

D. THE CITY OF ELLIOT LAKE'S ROLE IN THE COLLAPSE

10. The City of Elliot Lake ("the City") failed to utilize the powers granted under the *Municipal Act* and *Building Code Act* (noted above) to prevent the collapse of the mall. The City was aware of water leakage issues for many years prior to the collapse and failed to take appropriate action to require the mall owner to remedy the situation. Specifically, the City neglected to enforce its By-law 03-29, which required the mall to be structurally sound and its roof to be maintained in a watertight condition to prevent leakage.

11. On October 24, 2006, the City's Chief Building Officer ordered the mall owner to provide a report by a professional engineer of the mall's structural frame in leakage areas by December 15, 2006. However, no report was ever submitted to the City and the City never followed up or took any actions against the mall owner for not complying.

12. On September 25, 2009, an Order to Remedy Violation of Standards of Maintenance and Occupancy was issued by the City against the mall as a result of leakage and rust issues in the mall. The Order to Remedy required the mall to have the entire mall inspected by a structural engineer and to correct all deficiencies noted by the structural engineer. However, the City rescinded the Order to Remedy without ensuring that the engineering report satisfied all the requirements of the Order.

i. ***The role played by Sylvester Allard (Chief Building Officer 2001-2008)***

Allard was well versed with property standards by-laws

13. Sylvester Allard served the City of Elliot Lake as its Chief Building Official ("CBO") from 2001 to May 30, 2008. He was the first official to at least acknowledge the risk to the structural integrity of the mall.

14. Mr. Allard was well versed in the property standards by-laws that he was to enforce. On May 26, 2003, City Council passed By-Law 03-29 - Property Standards By-Law (CEL_P000000524, Exhibit 00006-00007). Mr. Allard was involved in the

drafting of this new By-Law. The By-Law required buildings to be maintained in a structurally sound and watertight condition.

**By-Law 03-29 - Property Standards By-Law (CEL_P000000524,
Exhibit 00006-00007)**

Allard's inspection of mall library in October 2006

15. At the direction of the Chief Operating Officer Thomas Derreck, Mr. Allard inspected the mall library leaks on October 18 & 19, 2006. On October 23, 2006, Mr. Allard sent a report to Mr. Derreck outlining his findings arising from the inspection he carried out (CEL_E000140070, Exhibit 01704). To his credit, Mr. Allard was the first official to at least acknowledge the risk to the structural integrity of the building, posed by leaking from the roof and the rusting of the structural steel.

TRANSCRIPT DATE: APRIL 29, 2013; PAGE 7191; LINES 20-25

16. Mr. Allard's report dated October 23, 2006 noted extensive leakage in the library. He confirmed his findings at the Inquiry:

Q. And in the next paragraph, starting in the second sentence: "However, the information that we were given, and the fact that there is substantial rust in the leak areas is testimony that this is a long standing and ongoing leakage problem." Those are your words?

A. Yes, those are my words.

Q. Thank you. Just so it's clear, your conclusion, based on the information that you had at the time and what you saw, and there being substantial rust, you conclude that this is a result of long- and ongoing leakage; right?

A. I don't know if that was directly my conclusion or from some of the information that was being imparted.

Q. At least we can agree that's the information that you're going to base your advice on.

A. Yes.

TRANSCRIPT DATE: APRIL 29, 2013; PAGE 7194; LINES 3-25

17. Mr. Allard testified that at the time of his inspection there had been leakage for a long period of time, and that he was concerned with what may happen in the future if the leakage continued:

Q. Then you go on to say:

"The concern that this raises is that the continuous entry of water onto the steel structure may have had or may still have an adverse impact on the structural elements and its connections." So you are clear as of this point that there has been leakage for a long period of time, but you are also concerned about what may happen in the future, if the leakage continues; correct?

A. Yes, I would say that.

TRANSCRIPT DATE: APRIL 29, 2013; PAGE 7195; LINES 1-15

18. Mr. Allard's evidence was that there needed to be a structural review conducted due to the leakage occurring over a long period of time:

Q. Look, we don't know the extent of the rust, but it's obvious that it's the result of leakage over a long period of time, and because there are structural issues here, we need a structural review; correct?

A. That's what it was getting at,

TRANSCRIPT DATE: APRIL 29, 2013; PAGE 7196; LINES 1-6

19. Mr. Allard confirmed that following his inspection of October 19, 2006, he was going to enforce the Property Standards By-law, specifically focusing on the structural concerns and the leakage:

Q. Thank you. Just to be clear, following your inspection of October 19th, 2006, you are telling the CAO of the City, you are going to enforce the Property Standards by-law, and you are going to focus on the structural concerns and the leakage; right?

A. Those two items, yes.

Q. Thank you. So there should be no doubt as of that date, that it's your intention to make sure that the Property Standards of the City, as it applies to the mall, are going to be enforced; right?

A. I would agree with that.

...

Q. Sure. You saw rust –

A. Uh-hmm.

Q. -- you'd been told it had been leaking for a long time.

A. Right.

Q. You reported to the CAO that you were concerned enough about it, that you wanted an engineer to reassure the City of the structural soundness of the building in those areas of the leaks; right?

A. That's right, yes.

**TRANSCRIPT DATE: APRIL 29, 2013; PAGES 7197-7198; LINES 21-8
PAGE 7200; LINES: 13-23**

Allard issues Notice of Violation dated October 24, 2006

20. On October 24, 2006, Mr. Allard issued a Notice of Violation to the owners of the Mall (CEL_P000000117; Exhibit 00175). The Notice required that: (1) the owner

carry out the repairs of the existing mall roof and provide a written description, within 14 days, of the repair program that will be undertaken, and (2) a review by a professional engineer of the building structure frame in leakage areas must be conducted forthwith and a report certifying the acceptability of the existing condition or the remediation steps necessary to be taken to ensure structural capacity, must be provided to the CBO by December 15, 2006. ***As of this date the City was on notice of the rusting of the steel in the mall and on notice of the ongoing risk to the safety of users of the public posed by the continuing leaking and consequent rust.*** Mr. Allard confirmed at the Inquiry that because of this risk he required a certification by an engineer that the mall was structurally sound before December 15, 2006:

Q. Yes. And you were concerned enough that you wanted that structural review by a competent engineer forthwith; correct?

A. That's the way that the wording of the notice reflects it, yes.

Q. And you were also concerned enough that you wanted, not just a review, but certification by an engineer that the building was sound before December 15th, about six weeks away; correct?

A. That's what the dates were, yes.

TRANSCRIPT DATE: APRIL 29, 2013; PAGE 7203; LINES 5-14

Allard fails to act upon Notice of Violation

21. Unfortunately it is at this point that Mr. Allard failed to do his job. He never followed up on the Notice of Violation. A structural review was never done on Mr. Allard's watch. He did nothing about that:

Q. Six months was the date he gave you, and it didn't happen in that time, did it?

A. No, I will agree with you.

Q. All right. It didn't ever happen in your watch, did it?

A. I'll agree with you on that, yes.

Q. And I suggest to you that you did absolutely nothing about that; correct?

A. I was of the impression that it was on its way...

TRANSCRIPT DATE: APRIL 29, 2013; PAGES 7208-7209; LINES 15-1

22. Mr. Allard testified that neither he nor anyone at the City followed up for the structural review:

Q. Did the Mayor do anything about it?

A. I don't believe that the Mayor had a responsibility to do anything about it.

Q. Did any of the Council members even speak to you about it, let alone do anything else?

A. No, I didn't get any communication from the Mayor or members of Council.

Q. Did Mr. Derreck do anything?

A. I don't believe I had anything from Mr. Derreck either.

TRANSCRIPT DATE: APRIL 29, 2013; PAGE 7209; LINES 2-13

ii. ***Tom Derreck (Chief Operating Officer) attempts to rectify mall situation***

Seriousness of situation at the mall imparted by Mr. Derreck to Mr. Allard

23. Thomas Derreck was only on the job for a few days when he took immediate action with respect to the leaks at the mall. Mr. Derreck testified that one of the elements of his concern was the uncertainty of any damage to the structural integrity of the mall. As noted above, he ordered CBO Allard to do an inspection of the library roof. Mr. Derreck testified that he made the seriousness of the situation clear to Mr. Allard:

Q. I suspect everyone's impressed that you were only on the job a few days and you see the library and the state of the mall generally and you take almost immediate action, right?

A. Yes.

Q. And I take it that you felt the need for immediate action because you felt that this was a serious situation?

A. Yes.

Q. And one of the elements of your concern was the uncertainty of any damage to the structural integrity of the building?

A. Yes, that's correct.

TRANSCRIPT DATE: MAY 13, 2013; PAGE 9488; LINES 8-21

24. It was Mr. Derreck's evidence that Mr. Allard failed to understand or share his concerns:

Q. Would it be fair to say then, that even though he followed your instructions he failed to understand or share your concerns?

A. I can only give you my impression.

Q. What is that?

A. That would be my impression, yes.

25. Mr. Allard never followed up for the structural engineering report he required under the Notice of Violation he issued. Mr. Derreck confirmed that he would expect a CBO to chase down and find out what happened with respect to the structural engineering report:

Q. It was his duty as Chief Building Official to follow through and make sure the notice was enforced?

A. Yes.

Q. If there was no report from a professional engineer such as was required by the notice of violation by August of 2007, what would you have expected a Chief Building Official doing his job to have done?

A. The obvious answer is to chase it down and find out why it had not been provided.

TRANSCRIPT DATE: MAY 13, 2013; PAGE 9490; LINES 5-8 and 16-22

26. Mr. Derreck testified that the City officials were "seriously asleep at the switch" with respect to taking any action in relation to the leaks at the mall:

Q. Thank you. During your testimony this morning in response to one of Mr. Doody's questions you said, and I believe I have it verbatim, "Some people had been seriously asleep at the switch". Do you remember saying that?

A. Yes, I do.

Q. Who were you referring to?

A. I was referring to everyone who was in place in an official capacity, at a senior level for the City of Elliot Lake who had been apprised of the problem over the years. So we're talking about the City Mayor, the elected officials, my predecessors, the Chief Building Official, whoever was

informed about it and did not contribute to something being done.

TRANSCRIPT DATE: MAY 13, 2013; PAGE 9494; LINES 7-21

27. It was Mr. Derreck's evidence that he found it "astounding" and "incredulous" that no one at the Building Department knew about the leaks at the mall prior to his arrival:

Q. Thank you. You also used these words at a different point in your answers to Mr. Doody's questions. You said you found it "astounding", and at another point you used the word "incredulous" that no one in the Building Department knew about the situation over there. Do you remember saying that?

A. Yes, I do.

Q. Why did you find it incredulous or astounding?

A. Well, I also said that I had never previously worked in a municipality where a building office was not on top of everything going on in the municipality affecting construction, whatever it happens to be. And certainly not -- I had not encountered this kind of a situation before. I know that anyone else I'd worked with would have been on that a long time previously and would have taken some type of action. So it was just incredulous to me that that was the case that I found.

Q. Thank you. And finally I noted another statement that you made pretty much verbatim I believe. "It was nonsense that the library had not been complaining." Why did you use those words?

A. Well because I didn't believe it. And in the early stages I think the communication between Councillor McTaggart and myself started in writing the 16th of October, but we'd had many conversations before that and I'd met with the Library Board Chair. And I just -- and this material had been copied to various people, including Mr. Allard. And so it was nonsense to me that anyone would claim that they didn't know about it.

28. Mr. Derreck served as Chief Operating Officer for only nine months (October 2006 to July 2007). He was ultimately fired by City Council. As far as he knew, he was the only one that took action and brought the issue of the library leaks before Council.

iii. *The role played by Bruce Ewald (CBO July 2008 – collapse)*

29. Bruce Ewald served as the Chief Building Officer from July 2008 until the collapse. Mr. Ewald saw the 2006 Notice of Violation issued by Mr. Allard for the first time in September 2009. It was brought to his attention by Fire Chief Paul Officer. He had been on the job for over a year at this point. No one in his department brought the Notice of Violation to his attention. Before that time, he did not know that the Notice had been issued. There was no system at the City to advise him that a notice was outstanding.

30. Mr. Ewald realized that a Notice had been issued and there had been no follow-up and decided that he needed to conduct an inspection. On September 24, 2009, Mr. Ewald conducted an inspection of the Mall. This inspection revealed signs of rust in several locations including specifically "above the lottery ticket booth adjacent to the food court". This is the area where the eventual collapse of 2012 took place. As a result of the inspection, Mr. Ewald decided to issue a Property Standards Order.

31. On September 25, 2009 Mr. Ewald issued an Order to Remedy Violation of Standards of Maintenance and Occupancy to Eastwood Mall Inc. (owner of the mall). The Order gave the mall owner until October 30, 2009 to take a number of steps including conducting and providing the City with a structural review by an engineer.

Order to Remedy dated September 25, 2009: ELFD_P000000309; Exhibit 04481

32. In response, the owner of Eastwood Mall Inc., Robert Nazarian, employed the engineering firm, M.R. Wright & Associates ("MRW") to perform an inspection of the mall. A structural site visit was made on October 5, 2009.

33. Mr. Ewald received the MRW report dated October 28, 2009. It reported that their visual inspection revealed no concerns with the structural steel. Specifically it stated that, in the Ticket Kiosk area, "much of the exposed steel has only minor rusting".

MRW Report dated October 28, 2009: CEL_E000000135.0002; Exhibit 00103

34. There are several deficiencies with respect to the 2009 MRW report. The report stated that there were no visual structural concerns with the structural steel. However, MRW failed to adequately inspect the mall. Specifically, MRW did not examine the entire mall structure as required by the Order to Remedy issued by the City. MRW limited its inspection to only exposed parts of steel. It did not look at a single structural connection. Despite there being serious concerns regarding the structure over the lottery kiosk (the collapse site), MRW did not conduct a closer

examination of the beams and connections by removing the ceiling tiles in the area.

MRW Report dated October 28, 2009: CEL_E000000135.0002; Exhibit 00103

35. Even with all the obvious deficiencies with the MRW report, Mr. Ewald was satisfied with it. Mr. Ewald was satisfied that the engineers looked at the entire building even though the report does not specifically state that they did. Mr. Ewald agreed that the report does not indicate that the entire mall was inspected and he did not ask Mr. Wood if he had done so:

Q. He clearly does not say, sir, that he looked at the entire mall; can we agree on that?

A. We can agree that he does not say that, yes.

Q. And you did not ask him to explain why he did not say that he looked at the entire mall?

A. No, at that time it wouldn't have made sense to ask a question like that.

Q. Why not? Your order said "look at the entire mall" and the report tells you he looked only at "the areas of significant leakage". Why would it not have made sense to ask him "Well, did you look at the entire mall like I told the owner to do?"

A. I guess the best way is to provide an example. When I go out to do a framing inspection I'm looking at the framing of the entire building. I only make notations about the areas of concern.

Q. But you don't then write a report that says "I looked at the following areas" when you've been asked to look at the entire building.

A. Well, I probably wouldn't have picked up on that, I mean in hindsight, I wouldn't have picked up on that particular nuance to the letter.

...

Q. Well, nowhere in the report does it say that he looked at the connections; right?

A. No.

TRANSCRIPT DATE: MAY 27, 2013; PAGES 11647-11648; LINES 10-13; PAGE 11642; LINES 1-3

36. By February 2010, Mr. Ewald sent Eastwood Mall Inc. a letter stating that all conditions of the Property Standards Order issued on September 25, 2009 have been completed to the satisfaction of the department. Mr. Ewald's performance as CBO was clearly subpar.

Ewald claims unaware leakage occurred from day one

37. Mr. Ewald never asked anyone when leakage started at the mall and no one told him. He testified that he had in his possession a 1999 structural assessment report by the engineering firm, Halsall, but only skimmed it. If he had read the report he would have been aware that leakage was occurring at the mall since day one.

Q. I see. And, sir, I just want to ask you about the Halsall Report from 1999. You've indicated to us that you just skimmed this report?

A. Yes.

Q. And that was back in September of 2009?

A. That's correct.

Q. And you didn't read the whole report?

A. Not until just recently, no.

Q. You knew there were leaks occurring at the mall, but you still didn't read the whole report?

A. No.

Q. And if you had read the entire Halsall Report, you would have been aware that leakage was occurring since day one?

A. I believe so, yes.

Q. And since you didn't read the report, you were under the impression that the mall only leaked from 2006; is that your evidence, sir?

A. Well, in and around that area, I -- I became aware that that's when complaints had been received regarding it.

Q. You didn't ask anyone when the leaks started?

A. I did not.

Q. Mr. Clouthier never told you?

A. No.

Q. No one at the City?

A. No.

Q. No one at the mall?

A. No.

Q. The public, in general?

A. No.

Q. And neither did the previous CBO?

A. I had very little communication with the previous CBO, so no.

**TRANSCRIPT DATE: MAY 28, 2013; PAGES 11934-11936;
LINES 16-5**

38. Mr. Ewald testified that if he had known the leaks were occurring since day one, he would have taken positive action, including having the City step in to make the repairs to the roof of the mall itself:

Q. And, sir, if you knew that leaks were occurring since day one, would you have taken a more proactive role with respect to the leaking at the mall?

A. Yes.

Q. And what would you have done?

A. Something very similar with regards to the order. Obviously, if it had been ingrained in my mind that the leaks had been going on for that length of time, I would have been much more concerned about the structural steel. I can't say for certain, in hindsight, what I would have done. I -- I may have asked for some items to be uncovered, but I -- I can't guarantee that that's what I would have done.

Q. Would you have had the City step in and make the repairs to the mall roof?

A. I believe if that was a step that we were taking, it would have certainly been something that would have been considered, yes.

TRANSCRIPT DATE: MAY 28, 2013; PAGES 11936-11937; LINES 6-1

39. The mall continued to leak from February 2010 until the collapse. Mr. Ewald testified that he neglected to do anything regarding the mall's condition from 2010 to 2011 due to not receiving a formal complaint and because his department was "busy."

TRANSCRIPT DATE: MAY 27, 2013; PAGE 11753; LINE 8

iv. *City Counsellor Al Collett's concerns ignored*

40. Like Mr. Derreck, City Counsellor Al Collett was a city official that gave honest and candid testimony at the Inquiry. Mr. Collett has served on Elliot Lake's City Council for six years. Currently, he also serves as deputy mayor. Mr. Collett testified

that he voiced his concerns about the leakage at the mall on every occasion he had the opportunity to do so:

Q. Okay. During those periods of time and those projects that you had at various times actually in the mall, whether for the mall owner or tenants, et cetera, and when you noticed and observed all these leaking problems and the water, did it ever occur to you to actually approach the municipality or the Building Department and say, look, we have a problem here; there is leaks in this building?

A. When I was on Council, yes, for the last six years, and when I was doing the work, every occasion I had the opportunity to do so, I complained to our City Councillors, as well as our Building Department.

Q. And did you speak to anyone specifically at the Building Department?

A. Yes.

Q. And who would that have been?

A. Mr. Ewald.

TRANSCRIPT DATE: MAY 23, 2013; PAGES 11075-11076; LINES 17-10

41. Mr. Collett confirmed that when he brought his concerns of the leaks to Mr. Ewald, Mr. Ewald was more concerned about the ramifications of closing down the mall:

Q. Sorry, Mr. Collett, so you were just going to describe to us an incident that you had with Mr. Ewald, Bruce Ewald, who was the Chief Building Official?

A. Yes, and I think you might be referencing to this. It was a concern that one of the merchants had in the mall, Mr. Jack Quinte. He asked me to attend his restaurant where he showed me a piece of concrete that had fallen through his ceiling tile and into his kitchen. He told me -- he showed me this, and after discussions with Mr. Quinte, I went to Mr.

Bruce Ewald, attended his office, told him what I saw and asked him the question what are we going to do about this, because this was not the first occasion of things like this. And his response to me was it is difficult, it would be very -- it would look very bad for the City to shut the mall down. My response to that, and I regret saying it now, was, What are we waiting for, somebody to die? And I do regret saying that.

TRANSCRIPT DATE: MAY 23, 2013; PAGES 11077-11078; LINES 8-3

42. Asked if people were aware of the mall's leaks, Mr. Collett testified that you would have to be "deaf, dumb, and blind" if you were not aware of the mall's leaks:

Q. And when you joined Council, were you aware of the fact that the library had been complaining about leaks in their premises for a number of years?

A. Most certainly.

Q. And how were you aware of that?

A. Oh, boy, to put it lightly, if you weren't aware, you would have to be deaf, dumb and blind. The citizens were well aware. Every day you would walk in the mall, if you weren't aware, like I said, you would have to be deaf, dumb and blind. But you know, there were jokes being made about the condition of our mall, comments to the tune of if you ever wanted to know the weather outside the mall, just walk inside the mall and you would find out. Yeah, there were numerous complaints. I think everyone complained.

TRANSCRIPT DATE: MAY 23, 2013; PAGES 11121-11122; LINES 19-11

v. *Mayor Hamilton's testimony - confirmed lack of action by City*

43. Rick Hamilton has served as Mayor of Elliot Lake since December 2006. At the Inquiry Mayor Hamilton was asked if any municipal department head, municipal employee or any member of council raised the issue of mall leakage during his 14 years

at City Hall. Mayor Hamilton's response was a simple "no". Questioned whether he ever raised these issues with the Chief Building Official or with Council, Mr. Hamilton again replied "no". Asked to point out what City Council had done over 30 years to address the leaking roof, Mr. Hamilton answered: "I can't speak to that".

TRANSCRIPT DATE: JULY 10, 2013; PAGE 15434; LINE 10

vi. Conclusion

44. The City of Elliot Lake did not exercise a reasonable level of diligence to prevent this disaster. The actions noted above clearly evidence the level of incompetence and willful neglect of its City Officials. The City is incapable of administering the powers provided under the *Building Code Act* and *Municipal Act* as it relates to buildings.

E. M.R. WRIGHT & ASSOCIATES ROLE IN THE COLLAPSE

i. Deficiencies in MRW Report Dated October 28, 2009

45. The Inquiry heard from the M.R Wright Engineers, Gregory Saunders and Robert Wood. Messrs. Saunders and Wood both owned part of the now defunct M.R. Wright & Associates engineering firm. As noted above, in response to the Order to Remedy issued by the City on September 25, 2009, MRW was retained to conduct a structural inspection of the mall. The inspection was carried out by the president of MRW, Robert Wood. As already noted above, MRW's 2009 inspection was wholly inadequate.

ii. ***Deficiencies in MRW Report Dated May 3, 2012***

46. Less than two months before it collapsed, the mall was cleared as structurally sound by Robert Wood. Mr. Wood sent his inspection report to Eastwood Mall Inc. on May 3, 2012, and gave a “thumbs-up” to the mall’s leaky parking deck. The report concluded: “It is our opinion that severe rusting at this time has not detrimentally changed the load carry capacities of the structure, and no visual signs of structural distress were observed”.

MRW report dated May 3, 2012: MRW_P0000003300; Exhibit 00110

47. With respect to Mr. Wood’s April 12, 2012 inspection, the following are notable deficiencies:

- MRW completely ignored the structure over the lottery kiosk (collapse site) and failed to look at any structural connections.
- MRW did not take any measurements of the corroded steel to verify section loss.
- MRW failed to observe/react to indications of corrosion that were openly visible on the exposed external structure outside of Foodland.

48. Most disturbing is that MRW willfully concealed the true state of the mall's condition by removing photos that showed leakage and rusted beams from its May 3, 2012 report. The first excluded photo showed a tarp hanging from the ceiling in Zellers that was being used to collect leaking water. The second excluded photo showed a rusted beam in Zellers. Wood falsified his report because the owner of the mall, Nazarian, asked him to do so.

iii. Gregory Saunders' Testimony – MRW 2012 report is summary in nature and misleading

49. Due to the revocation of his licence by the Professional Engineers of Ontario, Mr. Wood's work required certification by a professional engineer. Gregory Saunders signed off on Mr. Wood's 2012 inspection report about the mall. Wood did not tell him about the changes. Mr. Saunders told the Inquiry he signed off on Mr. Wood's 2012 report based on a 45-minute conversation. Mr. Saunders' approval was based on what Mr. Wood told him.

TRANSCRIPT DATE: JUNE 6, 2013; PAGE 13149

50. Mr. Wood based his report on a visual inspection he conducted on April 12, 2012 with mall maintenance staff. His notes show the inspection was conducted during a 5 hour inspection from 9 a.m. to 2 p.m. Mr. Saunders testified that the notes taken by Mr. Wood were not up to his standards and felt they were summary in nature:

Q. But if it's not, does it meet your standard? Because we don't have any other measurements. Does this meet your standard, Mr. Saunders?

A. No, it doesn't. I would like to see more detail. I would like to see notes from the field, which Bob typically does.

Q. So this wouldn't pass muster if this was the only inspection notes that existed? For you anyway?

A. For me. It would if it was a summary.

TRANSCRIPT DATE: JUNE 6, 2013; PAGE 13161; LINES 8-19

51. Mr. Saunders testified that knowledge about the mall's history of leakage was not provided to him before he approved Mr. Wood's report. He stated that it may have been helpful. If he had had the history, he may have asked more questions of Mr. Wood.

iv. Gregory Saunders' Testimony – Robert Wood acted unprofessionally

52. Before verifying Mr. Wood's report, Mr. Saunders testified that he reviewed the document and photos of the mall. Without informing Mr. Saunders, Wood removed photos and altered two critical details. Leakage was described as "ongoing" and a steel beam beneath Zellers was classified as "heavily oxidized" in the version signed by Mr. Saunders. *However*, in the final edition sent to Eastwood Mall, Wood removed the two terms. Mr. Saunders confirmed that he "wouldn't agree to those changes". Mr. Saunders also stated that Mr. Wood's action was of an unprofessional behaviour and noted that changing the wording *does not give an accurate condition of* what was seen:

Q. ...with respect to the steel, the heavily oxidized picture was taken out and the reference to it being of particular concern was taken out with it. Would you have agreed to those changes?

A. Not with -- no, I wouldn't. No.

Q. And why not?

A. Although it still provides the same opinion, it doesn't change it -- our opinion. It doesn't -- in my opinion, it doesn't give an accurate picture of what was seen.

Q. And would you regard the act of changing the document, particularly as you were the engineer that was signing off on it, was unprofessional behaviour?

A. Yes, I think so. It also raises flags as to why they were taken out.

...

Q. And there is a -- do you agree there is a risk if that's allowed to happen, as it appears to have been here, that it will mislead the ultimate recipient of the report -- it may mislead the ultimate recipient of the report as to, as you said, the condition of the mall?

A. Yeah. It does not show an accurate condition of what was seen in the field.

**TRANSCRIPT DATE: JUNE 6, 2013; PAGE 13181; LINES 1-16
PAGE 13182; LINES 6-13**

v. *Robert Wood's Testimony – Acknowledges inappropriate behaviour*

53. Robert Wood took the stand after Mr. Saunders at the Inquiry. When questioned as to why he did not inspect the entire mall in 2009, Mr. Wood's simple response was, "I did what I thought I was expected to do".

TRANSCRIPT DATE: JUNE 6, 2013; PAGE 13305; LINES 15-16

54. Mr. Wood admitted he altered his 2012 inspection report about the mall, at the request of the mall owner, Robert Nazarian. Mr. Nazarian hired Mr. Wood to review the mall to facilitate a refinancing loan that Mr. Nazarian intended to seek. After Mr. Wood submitted his inspection report on May 3, 2012, Mr. Nazarian asked for the changes to the report. Mr. Wood testified that he made alternations with the belief that

Mr. Nazarian would rectify concerns raised by the information removed. Mr. Wood admitted that he “gullibly believed him (Mr. Nazarian)”.

TRANSCRIPT DATE: JUNE 7, 2013; PAGE 13391; LINES 24-25

55. Mr. Wood apologized to Mr. Saunders for his actions afterwards. He also acknowledged that his behavior was inappropriate.

TRANSCRIPT DATE: JUNE 7, 2013; PAGE 13397; LINES 5-10

v. *Conclusion*

56. MRW was negligent in carrying out its inspection by inadequately inspecting various sites of the mall. Most disturbing is the fact that it concealed the negative condition of the mall's condition by removing pictures that showed leakage and rusted beams from its report. Thus, MRW had a hand in the collapse.

F. THE ROLE PLAYED BY ROBERT NAZARIAN OF EASTWOOD MALL INC.

57. Robert Nazarian purchased the mall under the corporate name of Eastwood Mall Inc. on August 2005 and was the owner of the mall at the time of the collapse. Mr. Nazarian was aware of the serious state of disrepair of the mall's steel structure, which was caused by water leakage over the course of the years leading up to the collapse. Despite this knowledge, Mr. Nazarian and his employees (mall management) failed to take appropriate action.

58. Mr. Nazarian was aware of a report issued by the engineering firm Caughill Consulting on September 22, 2008 that found the effectiveness of repairs to prevent water leakage in the mall was doubtful and that the leaks continue to persist.

59. The commission heard from Dimitri Yakimov, a former employee of Eastwood Mall. Mr. Nazarian hired Mr. Yakimov in the summer of 2009 to remodel rooms in the hotel mall. Learning more of Mr. Yakimov's experience with managing construction projects, Mr. Nazarian was keen to hear his suggestions regarding fixing the leaking roof. Mr. Yakimov testified that he "basically told him that the exercise was useless. It will not stop the leaking," referring to the work done by Peak Roofing and Restoration. Peak Roofing was using Blueskin to patch the leak. Blueskin is a waterproofing membrane commonly used to seal residential basements. Mr. Yakimov testified that patching a flat roof with Blueskin constitutes "gross incompetence":

A. Yes. They were putting Blueskin to patch the roof leaks, which in construction industry is unheard of.

Q. And why is it -- what's wrong with Blueskin?

A. Well, it's not designed to stop roof leaks unless maybe it's a continuous membrane of such and specified by an engineer in some fashion to apply it. But I've never seen it, I've never heard of it that a flat roof would be fixed with Blueskin.

Q. And if you, as with your experience, when you saw that, was that a sign of incompetence from your perspective?

A. Gross incompetence.

TRANSCRIPT DATE: MAY 15, 2013; PAGE 9840; LINES 3-17

60. After his inspection, Mr. Yakimov believed the situation was “extremely unsafe”. Mr. Yakimov testified that “there were many leaky spots, too numerous to remember”. The only solution to remedy the problem, Yakimov explained, was to strip the entire roof, install a rubberized membrane, and re-pave the lot.

TRANSCRIPT DATE: MAY 15, 2013; PAGE 9856

61. Mr. Yakimov also voiced his concerns to MRW engineer, Robert Wood, regarding the roof. “I have never seen structural steel move, it wasn’t designed for that,” Yakimov testified, regarding the section of parking lot near the mall’s entrance. Mr. Wood tried to convince him that this movement was a normal consequence of the mall’s construction. Mr. Yakimov voiced his disagreement. Mr. Yakimov also informed city officials about his concerns over the mall’s roof. He also told the commission that he mentioned to “anyone who would listen” about the problems at the mall. “Nobody wanted to hear it. “You name a person at the city, they didn’t want to hear it.” After these events, Mr. Yakimov was fired by Mr. Nazarian. Mr. Yakimov testified that he was fired after choosing “to do the right thing”.

TRANSCRIPT DATE: MAY 15, 2013; PAGE 9967

62. On November 28, 2011, Zellers, a tenant of the mall, wrote to Mr. Nazarian about water leakage issues causing significant water damage to their store, and requested that the premises be repaired. Zellers informed Mr. Nazarian that the roof work undertaken to fix this problem had been inadequate and that recurring leaks were still an issue.

63. Robert Nazarian failed in his duty to maintain the mall in a structurally sound condition as required by the City's by-laws. Mr. Nazarian ultimately had the power and resources to rectify the leaks at the mall by installing a waterproof membrane. However, he found the cost too prohibitive. He knew or should have known that his inaction put the safety of users of the mall at risk.

G. THE ROLE OF PREVIOUS OWNERS OF THE MALL

64. Owners of the mall did not disclose engineering reports pertaining to the condition of the structure of the mall to subsequent owners. This delayed and hampered the effective repair of the rooftop waterproofing. Disclosure of the reports would have put owners, engineering professionals, financial institutions and the city on notice of the growing evidence concerning the structural integrity of the building.

65. The legal requirements surrounding a vendor's obligation to disclose structural defects and safety issues of a building being sold to the purchaser are found in the common law. In the past, the doctrine of *caveat emptor* ("buyer beware") was strictly applied to real estate transactions, requiring the buyer to take all available precautions to inspect the property for defects and safety issues before buying. This common law doctrine has evolved to provide buyers with more protection. Several exceptions to the doctrine of *caveat emptor* have been carved out in the case law, including fraudulent misrepresentation, negligent misrepresentation or misstatement, and negligent construction. These exceptions all require that vendors disclose latent defects to the

purchaser (i.e. defects that are not readily apparent to a purchaser during his or her examination of the structure).

***Krawchuk v. Sherbak*, 2011 CarswellOnt 3015 (Ont. C.A.)**

***Mariani v. Lemstra*, 2004 CarswellOnt 5126 (OAC)**

66. Of particular relevance is the negligent misrepresentation exception, the test for which requires that:

- 1) The vendor owed the purchaser a duty of care based on a special relationship;
- 2) The vendor made representations to the purchaser that were untrue, misleading or inaccurate;
- 3) The vendor acted negligently in making those representations to the purchaser;
- 4) The purchaser reasonably relied on those representations; and
- 5) The purchaser sustained damages as a result of relying on those representations.

***Mariani v. Lemstra*, 2004 CarswellOnt 5126 (OAC)**

67. In this case, the first criterion is met. Elliot Lake Retirement Living (“Retirement Living”), the former owner of the mall who sold the property to Mr. Nazarian, entered into a special relationship that placed it under a duty of care because it was involved in the sale of a commercial building that was being financed by a third party. Not only did the parties to the transaction owe each other certain obligations, they also owed the third-party financier, Royal Bank of Canada (“RBC”), the duty to be honest and diligent when reporting the condition of the property and the terms of the sale. RBC commissioned Brian MacDonald of the engineering firm CCI Group to complete a “property condition survey” of the mall in order to gather information before it

would agree to finance the sale. By agreeing to provide Mr. MacDonald with information pertaining to the condition of the property in order to facilitate the purchase and sale, Retirement Living entered into a special relationship with RBC that placed it under a duty to make accurate representations of the property. Thus, the first criterion of the test is met.

68. The second criterion of the exception is also met. The property condition survey that was produced by Mr. MacDonald, and that was based on the information provided to him by Retirement Living, constituted legal representations of the condition of the property. In the process of providing Mr. MacDonald with information relating to the structural soundness of the mall, Retirement deliberately concealed the troubling findings of several engineering reports within its possession, which made the information that it did provide to RBC misleading. This satisfies the second criteria. These previous engineering reports in its possession noted issues with respect to the integrity of the rooftop parking lot, the particulars of which are set out in the subsequent paragraphs.

69. The initial owner of the mall, Algo Central Properties (“Algo”) had three reports in its possession that were conducted by the engineering firm, Trow Associates Inc. in 1991, 1994 and 1995. The reports flagged the issue of structural integrity and recommended that repairs (such as waterproofing of the slab, bonding of the top coat and repairs to the surface rust on the structural steel) be carried out as soon as possible in order to maintain structural integrity of the slab and reduce potential for further

deterioration leakage. Trow recommended a complete waterproofing of roof deck to protect structural element.

Trow reports: MOL_E000007989; MOL_E000007990; MOL_E000007991

70. The Commission heard from Rodney Caughill, former development supervisor for Algo. Mr. Caughill testified that by 1994 Algo was aware that over the long term there was a potential issue with regards to structural integrity, and that the structure was under threat in two ways: (1) concrete disintegration, and (2) corrosion of the steel.

TRANSCRIPT DATE: MARCH 19, 2013; PAGE 1841; LINES 2-6

71. With respect to the sale of the mall to Retirement Living in 1999, Mr. Caughill does not recall discussing the repairs with the new owners. He also confirmed that Algo never provided the Trow engineering reports to Retirement Living.

TRANSCRIPT DATE: MARCH 19, 2013; PAGE 1908

72. Before their purchase of the Algo Centre Mall, Retirement Living had its own engineering assessment done on the mall. Nicholls Yallowega Belanger Associates and Halsall Associates Limited ("Halsall") submitted a building condition assessment of the mall for Retirement Living on November 12, 1998. They observed corrosion of the steel beams and columns as well as signs of salt contamination where snow was stockpiled off the parking deck. Halsall noted that there was concern as to the structural integrity of the hollow core precast panels. The Halsall report warned that

prolonged exposure to leaks could affect the integrity of the building. They recommended that a rubberized membrane be installed.

**Nicholls Yallowega Belanger Associates and Halsall Associates Limited Report:
AAGC_P000001258; Exhibit 03278**

73. The Inquiry heard testimony from Michael Buckley, an engineer with Halsall. Mr. Buckley served as project manager for the reports prepared by the firm detailing the structural properties of the mall. Mr. Buckley testified that he had not seen the Trow reports until preparing for the Inquiry. He and his colleagues were also unaware that the mall had leaked since day one, another fact he would have learned if the previous Trow reports were provided. Mr. Buckley testified that having known about the Trow report would have impacted how he went about his assessment.

TRANSCRIPT DATE: APRIL 8, 2013; PAGE 4390

74. Retirement Living willfully concealed the Halsall report from the subsequent and final owner of the mall, Eastwood Mall Inc. The commission heard from Richard Kennealy, the general manager of Retirement Living. With respect to the sale to Eastwood Mall Inc., Mr. Kennealy confirmed that Retirement Living concealed from Mr. Nazarian that the previous engineering reports existed.

75. Both Algo and Retirement Living were aware of the mall's structural deficiencies and had documentation substantiating those deficiencies. Competent engineering professionals had warned both Algo and Retirement Living of the structural issues posed by continuing leakage. Algo made negligent representations to

Retirement Living by concealing this information. In turn Retirement Living made negligent representations to Mr. MacDonald during his assessment of the property by excluding relevant information pertaining to the mall's structural soundness in making those representations. Thus, Retirement Living made negligent representations and the third criterion of the exception is also satisfied.

76. The fourth criterion of the exception is also met because Eastwood (Mr. Nazarian) and RBC relied on Retirement Living's misrepresentations in the course of completing the purchase and sale transaction and the financing of the transaction. As mentioned above, RBC commissioned Mr. MacDonald to complete the property condition survey for the very purpose of helping it determine whether it ought to finance Eastwood's purchase of the mall. RBC relied on the findings conveyed in Mr. MacDonald's report and the misrepresentations made by Retirement Living that were included therein.

77. Finally, the fifth criterion requires that the purchaser sustained damages as a result of relying on those representations, which is indisputably satisfied in this case given the collapse of the roof, the deaths of Ms. Aylwin and Ms. Perizzolo, the legal proceedings that have been commenced against Eastwood and Mr. Nazarian, and the amount of time and energy that have been dedicated to this Inquiry.

H. THE ROLE OF MAYOR FARKOUH AND MAYOR, FORMERLY COUNCILLOR, RICK HAMILTON

78. The role of Mayors George Farkouh and Rick Hamilton are particularly disturbing to the families. The families are shocked by the incompetence or willful neglect of City staff. They are shocked by the incompetence of engineering professionals. And they are shocked that officers and directors of corporations would withhold reports warning of serious risk to public safety. But they are even more disturbed by the failure of senior elected city officials to disclose such information in violation of an obvious duty to do so.

79. George Farkouh was both the Mayor of Elliot Lake and a Director of Retirement Living when Retirement Living received the Halsall Report and subsequently sold the mall to Eastwood in August of 2005. Retirement Living's Board of Directors deliberately concealed the Halsall report from Eastwood. Rick Hamilton was also a second term council member and a Director of Retirement Living at the time of sale. The Commission can reach no other conclusion than that the members of the Board of Directors, including George Farkouh and Rick Hamilton, deliberately chose to put the financial interests of Retirement Living ahead of the safety of the public.

80. The families invite the Commissioner to find that Mayor Farkouh and Mayor Hamilton lied to the Commission when they claimed that they were unaware of the Halsall Report. Because the Halsall report's finding concerning the threat of leaking and rust went to the fundamental value of a major asset of Retirement Living it is inconceivable that as Board Members they would not know about such an important report. The company had the report in its possession for 7 years before the company

sold the building. As members of the Board of Directors, Mayor George Farkouh and Mayor Rick Hamilton must have known of the Halsall report and been party to the concealment of this information from Eastwood and from the public whose safety they were sworn to protect as members of City Council. Perhaps the significance of the dual roles played by Mayor Farkouh and Mayor Hamilton explain their extraordinary claim before the Commission not to be aware of leaks in the Mall roof, in contrast to Mr. Collett who said you would have to be “deaf, dumb and blind” to be unaware of leaking that continued for decades. The Commission has no alternative but to conclude that these two senior elected public officials willfully misled the Commission during their testimony. The families ask the Commission to find that Mayor George Farkouh when he was Mayor and member of the Board of Directors of Retirement Living and that Mayor Rick Hamilton when he was a councillor and member of the Board withheld information from the public that could have prevented this tragedy.

TRANSCRIPT DATE: May 2, 2013; PAGE 8185; LINES 23-25

TRANSCRIPT DATE: May 2, 2013; PAGE 8190; LINES 1-20

TRANSCRIPT DATE: July 8, 2013; PAGE 14970; LINES 18-24

H. RECOMMENDATIONS

We respectfully make the following recommendations:

81. That the Commissioner recommend to the Province of Ontario that it enact legislation making it an offence for the owner of a building and the directors of any corporation that owns a building to withhold any information that has an impact on the structural integrity of a building or on the safety of users of the building. The statute

should create a positive duty to disclose such information forthwith after execution of any agreement of purchase and sale. Further, the statute should create a civil cause of action as well as a significant financial penalty for failure to breach the requirements of the statute.

82. The Province of Ontario should remove responsibility for enforcement of local or provincial legislation concerning health and safety from small municipalities that do not have the resources for proper enforcement. The responsibility should instead rest with District or County governments.

83. The Province of Ontario should amend the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 to provide that any elected official of a municipal corporation who deliberately withholds information from the public that bears on public safety should be barred from ever holding public office anywhere in Ontario.

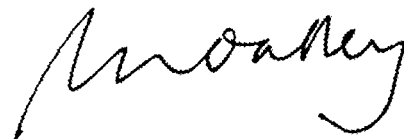
84. The Province of Ontario should enact legislation placing a positive duty on municipal corporations to ensure that professionals to be retained to report on public safety are in good standing with their governing professional body.

85. The Province of Ontario should enact legislation prohibiting any professional who has lost his or her license from engaging in the work of his or her profession in any manner. The sanction for breach of this prohibition should be a significant fine. Further the legislation should forbid a licensed professional firm from

employing an unlicensed professional from effectively carrying on the work of his or her profession for the firm.

ALL OF WHICH IS RESPECTIVELY SUBMITTED.

DATE: August 7, 2013



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