

**IN THE MATTER OF
THE ELLIOT LAKE COMMISSION OF
INQUIRY
THE HONOURABLE PAUL R. BELANGER,
COMMISSIONER**

WRITTEN SUBMISSIONS ON BEHALF OF

BRIAN MacDONALD

Date: August 8, 2013

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INTRODUCTION

1. We are counsel for Brian MacDonald who has been granted standing at the Elliot Lake Commission of Inquiry (the "Inquiry") and these are our written submissions which are being filed on his behalf.

2. Brian MacDonald testified before the Inquiry on April 24, 2013 with respect to his involvement in the preparation of the Building Condition Survey Report dated July 6, 2005 prepared by Construction Control Inc. with respect to the Algo Centre for the RBC CMBS Group in accordance with their engagement letter dated June 20, 2005.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; pages 6544-6635.

Exhibit 88 – Construction Control Inc.'s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E000000007 (the "Report").

Exhibit 2349 – RBC CMBS Engagement Letter dated June 20, 2005 – Document ID # CCI P000000001 (the "Engagement Letter").

3. These submissions are supplemental to the Engagement Letter, the Report and Brian MacDonald's evidence and are intended to focus on certain aspects of those materials in order to contribute to the openness and fairness of the Inquiry so that the Commission is in a position to evaluate them within their proper context.

THE SCOPE OF THE BUILDING CONDITION ASSESSMENT

4. The RBC CMBS Group was not the owner of the Algo Centre and was seeking a building condition assessment based on a visual inspection of the property. This is important because the nature and scope of the engagement was limited by the fact that it was not being requested by the owner of the property. Brian MacDonald and Tony Noce, a Professional Engineer, visited the Algo Centre on June 28, 2005 on behalf of Construction Control Inc. ("CCI") to conduct a visual building condition assessment that did not encompass or allow for any destructive investigation or testing.

5. The last sentence of the second paragraph of the Introduction in Section 1 of the Report states that "Destructive investigation and testing was not carried out as part of this survey." This is consistent with Brian MacDonald's testimony with respect to the practice when conducting a visual inspection on a building condition assessment for a financial institution.

Exhibit 88 – Construction Control Inc.'s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E000000007 (the "Report") at page 1-1.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; page 6554 – lines 17-23; page 6551 – lines 3 - 25 and page 6552 – lines 1-9; and 6555 – lines 9 – 13.

6. Brian MacDonald further testified with respect to this aspect of the building condition assessment they were conducting and explained that they were not in a position to even lift or remove ceiling tiles, because doing so would disrupt any fire separation barrier that might exist or disturb any asbestos that might have existed above the ceiling tiles.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; page 6568 – lines 11 - 25 and page 6569 – lines 1 - 25; page 6570 – lines 1 - 19.

7. The scope of the building condition assessment being conducted was also made clear in section 8 of the Report which provided in part as follows:

“The information presented in this report is based on information provided by others and direct visual observation made by personnel with Construction Control Inc. as identified herein. The findings cannot be extended to components of the building or portions of the site that were not reviewed or that were concealed or unavailable for direct observation at the time of our visit. Destructive testing was not undertaken as part of the scope of work for this project. **For this reason, there may be latent, or hidden, deficiencies not evident at the time of our inspection.**” [Emphasis Added]

Exhibit 88 – Construction Control Inc.’s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E0000000007 (the “Report”) at page 8-1.

8. Section 8 of the Report also discussed the range of possible investigative techniques available and pointed out that the terms of reference for this Report were limited:

“The extent to which the condition of a component of a building is evaluated can vary from a simple visual inspection of those parts exposed to view to a program of sophisticated non-destructive and destructive testing designed to reveal information concerning the “as built” conditions, followed by an evaluation carried out to determine the extent of compliance of the building with the requirements detailed in the relevant edition of the Ontario Building Code and documents referenced therein. **Our terms of reference limited the review work to a visual inspection of those parts of the building exposed and readily visible at the time of our visit.**” [Emphasis Added]

Exhibit 88 – Construction Control Inc.’s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E0000000007 (the “Report”) at page 8-2.

9. The Report and Brian MacDonald’s evidence must be reviewed in the context of this limited scope which is expressly identified in the Report. In addition,

the Engagement Letter expressly states in the Specific Requirements section on page 2 that “The components should be divided into the following four General headings: Site, Exterior, Interior and Mechanical.”, which is how the Report is structured. Section 2.0 addresses the Site Conditions; Section 3.0 addresses the Exterior Conditions; Section 4.0 addresses the Interior Conditions and Section 5.0 addresses the Mechanical and Electrical Installations. The RBC CMBS Group was not seeking a comprehensive analysis of the steel framing inside of the structure of the building and, since it was not the owner of the building, it was not in a position to authorize the type of sophisticated non-destructive and destructive testing necessary to conduct that type of analysis.

10. The fact is the scope of the Report did not include an inspection and analysis of the of the steel framing inside of the structure as suggested in the NORR Report when it stated as follows:

“The inspection of the underside of the HCS and the structural steel framing was limited to exposed areas visible from service areas, places where ceiling finishes has been locally removed, and pedestrian walkways. No comment was made in this report with regards to corrosion of steel framing inside the structure even though it is clear that the steel framing was part of their scope of work. A table summarizing the physical condition of structural components and other elements listed the condition of the roof structure as “good” with no estimated cost with regards to repairs required (Figure 2-15).”

“In 2005 Construction Control Inc. conducted a building condition assessment. They made no comment in their report with regards to corrosion of steel framing inside the structure even though it is clear that the steel framing was part of their scope of work for this inspection. A table summarizing the physical condition of structural components and other elements listed the condition of the roof structure as “good” with no estimated cost with regards to repairs required.”

Exhibit 3007 – Forensic Engineering Investigation – Algo Centre Mall Collapse – March 8, 2013 – Document ID # NL_E000010274 (the “NORR Report”) at pages 28 and 45.

11. While the scope of the building condition assessment requested by the RBC CMBS Group necessarily did take into account and assess those aspects of the building structure that were “exposed and readily visible at the time of the site visit” on June 28, 2005, the scope did not include the steel framing inside the structure except to the extent that it was “exposed and readily visible”. In this regard the NORR Report is simply mistaken. It is inappropriate to criticize CCI’s Report for not identifying “latent, or hidden, deficiencies that were not evident at the time of the visit” on June 28, 2005.

INTERPRETING THE REPORT WITHIN CONTEXT

12. This misinterpretation of the Report by NORR is understandable given that they did not have the benefit of hearing Brian MacDonald’s evidence prior to writing their report.

13. In particular when interpreting the Physical Condition Summary contained in the Executive Summary of the Report the reference to Roof Systems under the Exterior Conditions section of the Report was a reference to the condition of any membrane or waterproofing on top of the Hotel roof and the canopies above the suspended walkways; and the reference to Roof Structure under the Interior Conditions of the Report was a reference to the actual framing of the Hotel roof, the mall roof and the canopies above the suspended walkways to the extent that the framing was exposed and readily visible. Under Section 3.1.3 of the Report addressing Exterior Conditions the following comments are made:

"In our opinion, the roofs of the building are in generally fair condition. The roof systems above the hotel/office and above the stairwells date to the time of original construction of the development. . . . In our opinion, replacement of the roof systems should be anticipated within the next 5 years.

. . .

"The canopies above the suspended walkways do not appear to be watertight. Localized replacement of the sealant material installed at the joints between the precast slabs is required to prevent water leakage and deterioration of the steel framing members that support the slabs.

. . .

"In our opinion, consideration should be given to installing a waterproofing membrane over the top surface of the canopies. We would consider this work to be an upgrade to the original design."

Under Section 4.3 of the Report addressing Interior Conditions the following comments are made:

"The roof structure is concealed by interior finishes within the building, with the exception of the underside of the roof slabs at the hotel/office section of the building (where the precast slabs are exposed but covered with a spray applied stipple finish) and at the canopies above the suspended walkways.

. . .

"Evidence of twisting, sagging or buckling of the exposed roof framing members was not observed during our site visit."

Based on these observations the Report concludes that a reserve for future work on the Roof Systems of the Hotel and canopies should be provided for but that there was no visual evidence at the time of the visit on June 28, 2005 to suggest that the Roof Structure required a reserve. The NORR Report misinterprets these observations and recommendations as referring to all aspects of the roof system and roof structure of the building, including those areas that were not visible because they were concealed by interior finishes, which is incorrect.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; page 6592 – lines 5 - 25 and page 6593 – lines 1 - 25; page 6594 – lines 1 – 25; page 6595 – lines 1 – 25; page 6596 – lines 1 – 12.

Exhibit 88 – Construction Control Inc.'s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E000000007 (the "Report") at Executive Summary pages I to ii; Exterior Conditions at page 3-5 and Interior Conditions at pages 4-4 to 4-5.

14. On the other hand the condition of the rooftop parking deck and the suspended pedestrian walkways are referred to in the Physical Condition Summary contained in the Executive Summary of the Report under Site Conditions as Parking, Paving and Exterior Stairs. The condition of the parking deck is discussed in the Site Conditions section of the Report as follows:

"Currently, repairs to the concrete forming the traffic topping at the parking deck are being carried out as part of routine building maintenance. . . .

"Evidence of water leakage at the interior of the building (in the form of water damaged ceiling finishes) was not observed during our site visit, although we understand that water leakage has occurred in the past. In the event of water leakage, repairs are carried out at the concrete topping covering the parking deck.

"The precast concrete slabs forming the roof of the mall are covered by a concrete topping at the exterior and by interior finishes at the interior and were not visible for assessment. The condition of the concrete forming the mall roof slabs was not assessed." [Emphasis Added]

The condition of the suspended pedestrian walkway is discussed in the Site Conditions section of the Report as follows:

"Water leakage is currently occurring at the joints between adjacent precast slabs forming the suspended pedestrian walkway. The water leakage is causing deterioration (corrosion) of the steel framing members that support the precast slabs. Repair of the caulking material sealing the joints is required."

In addition, the condition of the Superstructure and Floors is discussed under Interior Conditions as follows:

“The structural framing of the suspended floors and walkways appears to consist of precast concrete slabs that span between steel beams that frame into steel columns and reinforced concrete foundation walls.

“Typically the top surface of the floor slabs were concealed by floor coverings, while the soffit (underside) of the floor framing was concealed by ceiling finishes. **Our inspection of the floor framing was limited to the exposed areas of framing visible within the service areas, at areas where ceiling finishes had been locally removed and at the suspended walkways.** . . . [Emphasis Added]

. . .

“Based on our visual inspection of the exposed areas of the floor framing, we are of the opinion that the following repair work is currently required

- Carry out repairs to the corroded area of steel framing at the soffit of the suspended walkways, **under the direction of a professional engineer.**
- Carry out repairs to the areas of deteriorated concrete at the soffit of the suspended walkways, **under the direction of a professional engineer.**

“Refer to section 2.1 of this report for repairs that, in our opinion, are required to prevent water leakage at the suspended walkways.” [Emphasis Added]

It is important to note that, where the corrosion of the steel framing and deterioration of the concrete was visible under the suspended pedestrian walkways, the Report recommends not only that it be repaired, but that those repairs occur “under the direction of a professional engineer.” What is also clear from a careful reading of the Report is that the scope of the Report is limited to what could be observed through a visual inspection of those parts of the building that were exposed and readily visible at the time of the visit on June 28, 2005 and any information that was provided to Brian Macdonald and Tony Noce, P. Eng. at that time.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; page 6571 – lines 17 - 25 and page 6572 – lines 1 - 25; page 6573 – lines 1 – 25; page 6574 – lines 1 – 25; page 6575 – lines 1 – 25; page 6576 – lines 1 – 25; page 6577 – lines 1 – 10.

Exhibit 88 – Construction Control Inc.'s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E0000000007 (the "Report") at Executive Summary pages I to ii; Exterior Conditions at page 3-5 and Interior Conditions at pages 4-2 to 4-3.

SITE CONDITIONS ON JUNE 28, 2005

15. Section 8 of the Report expressly identifies the fact that the conclusions and recommendations are based on the information available at the time of preparation.

"The conclusions and recommendations detailed in this report are based upon the information at the time of preparation of the report. No investigative method eliminates the possibility of obtaining imprecise or incomplete information."

Exhibit 88 – Construction Control Inc.'s Building Condition Survey Report dated July 6, 2005 – Document ID # CTCC E0000000007 (the "Report") at page 8-2.

16. Brian Macdonald and Tony Noce, P. Eng. did not have access to any prior building condition assessments or engineering reports to assist them with respect to their site visit on June 28, 2005 and this limited their knowledge of the history of the building.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; page 6558 – lines 15 – 25; page 6559 – lines 1 - 25; page 6560 – lines 1 – 25; and page 6561 lines 1 - 11.

17. More importantly the interior conditions of the building including the library did not show any visible signs of leaking or water damage. Brian Mac Donald gave extensive testimony on the condition of the interior conditions at the time of his visit on June 28, 2005. When shown pictures of the library taken in March 2005,

which showed considerable water damage, Brian MacDonald confirmed that they didn't see anything similar to the water damage displayed in the pictures in the library or elsewhere through the interior of the mall. Brian MacDonald confirmed that this lack of evidence of water damage was one of the reasons he accepted the explanation he received that the roof was watertight. He also confirmed that if he had seen evidence of water damage similar to that shown in the pictures they would recommend that additional investigation work be undertaken, including looking at the condition of things above the ceiling level.

Evidence of Brian MacDonald – Transcript of Day 32 – April 24, 2013; page 6577 – lines 11 – 25; page 6578 – lines 1 – 25; page 6579 – lines 1 – 8 & lines; page 6580 – lines 1 – 16; page 6582 – lines 20 – 25; page 6583 – lines 1 – 25; page 6584 – lines 1 – 25.

Exhibits 2031; 2032; 2039 and 2044 – Photos of Water Damage March 2005.

18. Similar site conditions were observed a month later by Alan Chattaway and recorded in his Site Inspection Report of July 22, 2005 which states on ;page 1 that "Parking areas and mall very clean. Floors in mall are tile and 'sparkle' showing high degree of maintenance." And on page 2 "No significant deferred maintenance observed."

Exhibit 5360 – RBC Site Inspection Report by Alan Chattaway dated July 22, 2005 - Document ID # CTCC E0000000011 - at page 8-2.

19. A partial explanation for the dramatic change in site conditions between the photos taken in March 2005 and the time of the site visit on June 28, 2005 is found in the minutes of the Joint Health & Safety Committee Meeting that took place on June 22, 2005 or six days before June 28, 2005. Those minutes reveal as follows:

"2. Review of Complaint Report and Recommendation from the Library was discussed and the following was reported:
Recommendation: Ensure the landlord has the problem of roof leakage fixed to eliminate the hazardous conditions that occur when it rains.
Action Taken: The roof was resealed by the landlord. **COMPLETE**

...
"Recommendation: Replace the drywall with moisture-resistant material that will not support the growth of mould.
Action taken: The drywall was replaced and repainted. **COMPLETE**

...
"Recommendation: Ceiling tiles are to be replaced when damaged by the leaking condition.
Action Taken: The landlord has replaced the ceiling tiles. **COMPLETE"**

Exhibit 00011-00104 – Minutes of Joint Health & Safety Meeting June 22, 2005 – Document ID # P000004573 at page 1.

20. Clearly the fact that Brian Macdonald and Tony Noce, P. Eng. did not have access to any prior building condition assessments or engineering reports coupled with the actual site conditions as they existed on June 28, 2005 had a material impact upon the conclusions and recommendations contained in their Report.

CONCLUSION & RECOMMENDATION

21. In conclusion, we would like to reiterate that our submissions are supplemental to the Engagement Letter, the Report and Brian MacDonald's evidence and are intended to assist the Commission to evaluate those materials within the appropriate context in order to contribute to the openness and fairness of the Inquiry. The scope of the building condition assessment being conducted on June 28, 2005 was limited to a visual inspection of the property, which scope was clearly articulated in the Report. In addition, the conclusions and recommendations of the Report were based on the information available at the time of its preparation

and the fact that prior building condition assessments or engineering reports were not made available to Brian Macdonald and Tony Noce, P. Eng. is material. Further the fact that there was no visible evidence of water damage on June 28, 2005 when the site visit occurred is also material. Within this context, it is our submission that the Report was a fair and reasonable assessment of the condition of the property as it existed on June 28, 2005.

22. One recommendation that would address the issue of non-disclosure of prior maintenance efforts and the existence of prior engineering reports and would be to require the owners of properties to maintain a maintenance record or log book on site for review by all interested parties, including occupants, government officials and those assessing the condition of the property, that would address all major issues that affect life safety, including but not limited to structural, mechanical and electrical components of the property, which record or log book should be updated periodically at regular intervals. In addition all engineering reports and property condition assessments conducted for the owner of the property should be recorded and made available to interested parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

A handwritten signature in blue ink, appearing to read "S. G. Thompson".

Scott G. Thompson
Of Counsel for Brian MacDonald

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