

ELLIOT LAKE COMMISSION OF INQUIRY

WRITTEN SUBMISSIONS OF NICHOLLS YALLOWEGA BELANGER

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TO: The Honourable Paul R. Bélanger, Commissioner
AND TO: Commission Counsel
AND TO: All Participants

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PART I - INTRODUCTION

1. The Elliot Lake Inquiry has been constituted to examine events and circumstances leading up to the structural failure of the Algo Mall (the "Mall") on June 23, 2012. The firm of Nicholls Yallowega Belanger ("NYB") was retained by a prospective purchaser of the Mall, Elliot Lake Retirement Living ("ELRL") to carry out a pre-purchase, "high level" building condition survey. The resulting report dated November 12, 1998 (the "1998 NYB/Halsall Report") prepared by NYB and NYB's sub-consultant, Halsall Associates Ltd. ("Halsall") and a subsequent report dated May 10, 1999 (the "1999 Halsall Report") prepared by Halsall, mark the limits of NYB's brief involvement in a chronology of events which extended from 1979 to 2012, a 33 year period.
2. Blaine Nicholls ("Nicholls") is a former partner of NYB who is now retired from architectural practice and Michael Luciw ("Luciw") who was an associate of NYB in 1998 is now a partner of the successor firm, Yallowega Belanger Architecture. They were asked to provide a pre-purchase report to ELRL on the general condition of the Mall and to coordinate Halsall's structural review and repair proposals.
3. It is the position of NYB, Nicholls and Luciw that they took all reasonable steps as architects to complete their limited retainer for ELRL. The 1998 NYB/Halsall Report and the 1999 Halsall Report (collectively, the "NYB/Halsall Reports") were prepared at a point in time when the Mall was structurally sound; and for a client who sought advice on the estimated cost to repair the Mall roof, for pre-purchase/budgetary purposes. The 1999 Halsall Report was never presented to ELRL as an engineered specification for the actual repair/renovations.
4. In response to the Section 17 notices received pursuant to the *Public Inquiries Act, 2009* (the "Section 17 Notices"), NYB, Nicholls and Luciw respectively deny any misconduct, negligence or oversight in carrying out their limited retainer. They seek findings that individually and as a firm of professional architects, there is no basis for a conclusion that they (i) failed to ensure proper inspections of the Mall by Halsall; or (ii) failed to properly inform ELRL of the structural condition of the Mall and the work recommended to be carried out.

PART II - SUMMARY OF FACTS

Maintenance Issues with Mall Parking Deck under Algoma's Ownership

5. The existence of leakage issues at the Mall were readily apparent to its developer and initial owner, Algocen Realty Holdings Limited ("Algoma"), shortly after the Mall was erected.¹ Algoma's controller, Robert Leistner ("Leistner"), testified to his awareness of leakage issues as early as 1981.
6. Rod Caughill ("Caughill"), hired by Algoma in 1986 as a construction superintendant, also testified that parking deck leakage was an ongoing problem from the outset of his employment.²
7. Following what was described by Caughill as a concentrated but failed effort by Algoma to repair the leaks in 1989, Algoma retained Trow Consulting Engineers Limited ("Trow") to provide expert advice.³
8. Caughill made the arrangements to retain Trow in 1990 to review the parking deck leaks and investigate any structural deterioration and establish a baseline for monitoring the structural condition of the Mall. Caughill was not surprised by Trow's conclusion that the design was inappropriate to achieve a watertight condition. Given the leakage issues, Algoma knew the design obviously was not working.⁴
9. In its 1991 report (the "1991 Trow Report")⁵, Trow recommended two options representing a substantial retrofit of the parking deck, in order to restrict continued water penetration and maintain the structural integrity of the concrete slab.⁶ However, Algoma did not proceed with the proposed repairs estimated to cost in the range of \$1.3 to \$1.6 million and continued its stop gap measures in attempting to correct the leakage.⁷
10. As of January, 1992, Algoma became conscious of the negative financial implications related to the state of the parking deck and was concerned with the capital costs

¹ Leistner – Pg. 14, L. 18-24

² Caughill – Pg. 212 of 291, L. 5-11, March 12/13

³ Caughill – Pg. 78 of 267, L. 6-13, March 13/13; P. 79 – L. 1-7

⁴ Caughill – Pg. 106 of 267 – 107, L. 21; Pg. 155, L. 2-7, March 13th;

⁵ Ex. 35 – Trow Report

⁶ Caughill – March 13 P. 158, L. 10 – to P. 161-L. 10

⁷ Caughill – P. 164, L. 3-14; P. 178, L. 20 – P. 179, L.3

associated with possible repairs. With these issues in mind, Algoma began to consider a possible sale of the Mall.

11. In 1994, Algoma again retained Trow to investigate the Mall and review the rate of deterioration using the 1991 Trow Report as a baseline.⁸ Trow determined that the parking deck leaks were getting worse and advised, with greater emphasis, that they be corrected.⁹ While the traces of corrosion did not yet indicate a structural problem, Algoma was advised by Trow that the condition could accelerate if not treated.¹⁰
12. Algoma regarded its only option to stop the leakage as installing a membrane on the parking deck, however that was not done prior to its sale of the Mall.¹¹
13. Domenic Dell' Aquila of Trow ("Dell' Acquila") stated that the leakage problems observed in 1994 exhibited at least twice the rate of leakage as in 1991 and commented on a troubling lack of action on Algoma's part to follow Trow's waterproofing recommendations.¹² However, he testified that the situation in 1994 did not yet present any structural or public safety concern. As a result, Trow did not consider it necessary or appropriate to direct a copy of its 1994 report (the "1994 Trow Report") to any third party.¹³
14. Caughill testified that Algoma was aware of the potential for concrete degradation and corrosion of steel as well as potential structural concerns in 1994.¹⁴ As of November 6, 1995, Trow advised Caughill in its correspondence of that date that ongoing leakage would continue to cause deterioration of the structure, including corrosion of the steel beams.¹⁵ The installation of a waterproofing system over the parking deck was once again recommended by Trow in the latter report at an estimated cost of approximately \$1.2 million to \$1.5 million.

⁸ Caughill – P. 218, L. 10-18

⁹ Caughill – P. 229, L. 9-L.20

¹⁰ Rayhill – P. 229, L. 21 to P. 230, L. 6

¹¹ Caughill – P. 231, L. 6 to L. 14

¹² Dell' Acquila – March 19, P. 196, L. 3-4; P. 200, L. 21 to Pg. 201, L.6

¹³ Dell' Acquila – P. 128, L. 2 to L. 20

¹⁴ Caughill – March 19/13, P. 106, L. 12-17

¹⁵ Trow Report, Nov. 6, 1995, Ex. 51

15. Leistner stated that as of December, 1995, Algoma was seriously considering selling the Mall.¹⁶ As of late 1998, Algoma had concerns about the long term structural integrity of the parking deck but considered that the building was still safe.¹⁷ By that stage Algoma had already determined that the risk of implementing Trow's repairs was too great versus the benefit of selling the building.¹⁸ It was actively pursuing its objective of selling the Mall.

Creation of ELRL

16. ELRL and its "for profit" arm Nor-Dev, are hereinafter collectively referred to as ELRL.
17. With mine closures in the early 1990's came the loss of thousands of jobs and the creation of surplus residential properties in the City of Elliot Lake ("Elliot Lake" or the "City"), a significant problem which the mining companies and community leaders sought to address. A committee was formed made up of representatives of Algoma, Denison and the City. Its mandate was to explore solutions to the loss of Elliot Lake's economic base and to create a management plan for revitalizing the community. That initiative ultimately resulted in the creation of the Retirement Living Program.¹⁹
18. A consulting company retained to carry out an economic feasibility study advised the committee that the establishment of a retirement program was indeed a viable option for Elliot Lake. As a result, ELRL was created in or about 1991 as a not-for-profit corporation with the objective of shifting the local economy from a mining base to focus on attracting retirees to the community.²⁰
19. The Board of ELRL was made up of two City councillors and other community members and was in that fashion linked to the municipal administration.²¹ It was considered important to have representatives of the City on the Board because ELRL was regarded as a key player in the economy of the City and essential to it's survival.²²

¹⁶ Leistner – March 27/13, P. 164, L. 12

¹⁷ Leistner – March 27, P. 204, L. 7 to P. 205, L. 13

¹⁸ Leistner - March 27/13, P. 181, L. 5 to 22

¹⁹ Bauthus – March 25, P. 224, L. 23 to P. 226, L. 23

²⁰ Bauthus – P. 227, L.2-L.15 and P. 230, L. 16-22

²¹ Bauthus – P. 232, L. 2-16

²² Kennealy – P. 5184, L. 12-23

ELRL's Investigation of the Mall for Acquisition

20. Richard Kennealy ("Kennealy") joined ELRL in 1993 as its General Manager. Kennealy came to understand in March, 1997 that Algoma wished to sell the Mall and the Hotel as it was having trouble attracting quality tenants and experienced significant vacancies.²³ A concern existed that Algoma's closure and possible demolition of the Hotel would have a significant impact on the City.²⁴
21. The Mall was considered an integral part of the economic fabric of the community, providing shopping and hotel facilities as well as being a major local employer. It was regarded by City Council as an important resource to maintain for the well being of the community.²⁵
22. Fred Bauthus ("Bauthus") was Chief Administrative Officer of Elliot Lake between 1990 and 2000 and again between 2007 and 2010. In December, 1997, Bauthus and Kennealy proposed terms of reference for a study of the Mall and Hotel to assist ELRL to determine whether it should acquire those assets from Algoma, consistent with ELRL's mission as an economic engine of the City.²⁶
23. The study would consist of three phases (the "Three Phase Study"): Phase 1 was a retail market analysis, Phase 2 was a physical building inspection and Phase 3 was an appraisal of the fair market value of the real estate. The Phase 2 study was to assist ELRL with the negotiation of the Mall/Hotel purchase from Algoma.²⁷

Algoma's Requirements of Confidentiality

24. Prior to negotiating a sale of the Mall, Algoma determined that it would not be providing a copy of the 1991 and 1994 Trow Reports to ELRL. Nor was there any disclosure to ELRL of Trow's findings and recommendations or the baseline information regarding the structural state of the Mall. ELRL would be left to complete its own due diligence.²⁸

²³ Kennealy – P. 5215, L. 19, P. 5217, L. 6

²⁴ Kennealy – P. 5221, L. 6-24

²⁵ Bauthus – March 26 – P. 35, L. 3-22

²⁶ Bauthus – P. 2990, L. 8-15, P. 2991, L. 8, Pg. 2992, L. 14

²⁷ Bauthus – P. 2995, L. 5-9

²⁸ Leistner – March 27/13 – P. 206 of 331, L. 20 to P. 207, L.3

25. According to Leistner, Algoma's discussions with ELRL to sell the Mall commenced in approximately mid 1997.²⁹ In December, 2007, Leistner met with Kennealy and Bauthus to establish the terms of reference of the Three Phase Study. Algoma imposed a condition that the Phase 2 physical condition of the Mall as ascertained by ELRL or its consultants was to remain confidential; only Kennealy and Ms. Rhona Guertin ("Guertin") could have access to that information on behalf of ELRL. Not even the City or the Board of ELRL could have access.³⁰
26. While the City had agreed to pay for the Phase 2 and 3 studies, it would not be granted access to them under the confidentiality terms negotiated by ELRL with Algoma. Accordingly, the City would not be informed of any findings or recommendations delivered by ELRL's advisors, who themselves were placed under a formal covenant of confidentiality at Algoma's insistence regarding the Phase 2 building condition study.³¹

Retainer of NYB

27. Guertin became employed by ELRL as Manager of Finance and Business Development in December, 1997.³² Guertin approached NYB with ELRL's request to prepare the Phase 2 building condition study. Nicholls, a partner of NYB, understood from Guertin that ELRL was considering the acquisition of the Mall and the Hotel. Nicholls confirmed NYB's retainer to include, *"establishing the condition of the building, any major deficiencies and the potential cost for repairs"*.³³ Nicholls further confirmed that, *"If the results of the [NYB] Phase 1 study indicate that acquisition should be pursued, there will be a more detailed Phase 2 study..."*
28. Nicholls stated in NYB's proposal that the Phase 1 study would identify any major visible deficiencies and, *"allow the development of a budget for the potential immediate major costs"*.
29. Nicholls, Luciw, Guertin, and Richard Quinn ("Quinn"). ELRL's property manager, Kennealy had an introductory meeting at the site on July 23, 1998. Nicholls and Luciw were advised that parking deck leaks had been a long term problem at the Mall, that

²⁹ Leistner – March 27/13, P. 206, L. 14-19

³⁰ Leistner – March 27/13, P. 230, L. 10-22 and P. 238, L. 17-23

³¹ Nicholls – P. 7289, L. 6 to P. 7290, L. 18

³² Guertin – P. 5820, L. 24 to P. 5821, L. 3

³³ Nicholls – P. 7264, L. 18 to 7266, L. 23

ELRL was considering acquiring the Mall and Hotel and that Algoma would continue to manage the Mall, with upgrades.³⁴

30. ELRL also explained at the meeting that Algoma would have final say on the release of NYB's building condition report and confidentiality with respect to same would be maintained. Nicholls testified that NYB expected Algoma to provide, through ELRL "*frank information*" to NYB with respect to the building. Nicholls' concern was to have all pertinent information to enable the study to be completed.³⁵
31. While Nicholls and Luciw subsequently executed formal Non-Disclosure Agreements they did not receive the anticipated "*frank information*" or any meaningful documentation from ELRL/Algoma.³⁶ NYB had requested a complete set of design drawings as well as any reports on the buildings, in particular the Trow Reports which Algoma had already resolved not to disclose.³⁷

NYB's Investigation and Reports on the Mall

32. The 1998 NYB/Halsall Report was described by Luciw as a high level review, intended to ascertain the general condition of major elements of the Mall/Hotel. Luciw understood that ELRL was considering significant improvements in the event of its acquisition of the property and NYB provided "*big picture*" budgets in the 1998 Report.³⁸
33. ELRL expressed to NYB that a "*key concern*" was the long term leakage through the parking deck of the Mall and wanted to ensure that the parking deck roof would not represent an ongoing maintenance problem.³⁹ Luciw understood that ELRL wanted NYB to recommend a solution to address the leakage as a large scale capital improvement plan was being considered for the entire facility and ongoing leakage would be especially problematic if interior upgrades were being carried out in the Mall.⁴⁰
34. Luciw expected to be furnished by ELRL with whatever pertinent information about the building existed in Algoma's files. He made a request from Guertin for all architectural, structural, mechanical and electrical drawings for the building as well as any technical

³⁴ Nicholls – P. 7277, L. 7 to P. 7280, L. 7

³⁵ Nicholls – P. 7286, L. 9 to P. 7287, L. 8

³⁶ Luciw, P. 4744, L. 8 to P. 4745, L. 1

³⁷ see 28, *supra*.

³⁸ Luciw – P. 4725, L. 8-16

³⁹ Luciw – P. 4278, L. 22 – P. 4279, L. 15

⁴⁰ Luciw – P. 4729, L. 8-L.15

reports.⁴¹ He had observed during the initial site visit evidence of previous apparent investigation of waterproofing and Luciw wanted to review the anticipated reports arising from same. Despite his follow-up with ELRL, the reports and drawings were never received.⁴²

35. The 1998 NYB/Halsall Report commented upon the presence of some corrosion on the structural beams and columns of the Mall and expressed concerns regarding the structural integrity of the concrete slabs. Citing the potential omission of a waterproofing membrane in the roof of the parking deck and ELRL staff's ongoing maintenance issues, NYB/Halsall included in the 1998 NYB/Halsall Report preliminary cost estimates for the correction of the leaks ranging from approximately \$600,000 to \$1.8 million.⁴³
36. Following consultation between them, NYB/Halsall recommended that ELRL authorize additional due diligence in relation to destructive investigation of the parking deck, to assess the state of the structure prior to planning specific work. In particular, NYB/Halsall wanted to confirm that the structure of the parking deck had not deteriorated beyond the point of repair and had sufficient integrity to rationalize a substantial investment in its retrofit.⁴⁴
37. The 1998 NYB/Halsall Report was relied upon by ELRL in formulating a purchase offer for the Mall. The potential repair expenses ranging from approximately \$600,000 to \$1.8 million were considered by ELRL at the time of the \$2.5 million offer to Algoma.⁴⁵
38. Kennealy testified that ELRL agreed to a \$4 million purchase price on February 26, 1999⁴⁶ before Halsall's preparation of its May, 1999 Report. As a result, the purchase price acknowledged by Kennealy to be low,⁴⁷ must have been based on the NYB/Halsall 1998 Report which had estimated substantially higher repair costs than the 1999 Halsall Report.
39. The 1999 Halsall Report was based on a further assessment of the Mall roof structure by Halsall which included destructive investigation. One of its objectives was to,

⁴¹ Luciw – P. 4738, L. 21 – P.4740, L. 8

⁴² Luciw – P. 4744, L. 22 – P. 4745, L. 1

⁴³ NYB Report, Ex. 66

⁴⁴ Nicholls – P. 7454, L. 24 to P. 7455, L. 24

⁴⁵ Kennealy – P. 5745, L. 14 to P. 5746, L. 6

⁴⁶ Kennealy – P. 5746, L. 7 to L. 19

⁴⁷ Kennealy – P. 5746, L. 20 to P. 5747, L. 13

"Develop a repair and maintenance strategy that will minimize current and future repair costs". Halsall's revised repair proposals fell in the range of \$433,000 to \$776,000, which amounts were also known to ELRL before it finalized its purchase the Mall from Algoma.⁴⁸

40. Kennealy testified that the price for the Mall in the agreement of purchase and sale between ELRL and Algoma was low enough that it would have provided sufficient allowance for significant capital expenditures to be made by ELRL.⁴⁹
41. Unknown to NYB and Halsall, ELRL had no intention when financing the purchase of the Mall, of arranging additional financing for the proposed retrofit of the parking deck as a capital expense.⁵⁰
42. The consequence of ELRL's business decision was that after it acquired the Mall, Halsall's recommended repairs would not be carried out. Notwithstanding the negotiation of a lower purchase price on the strength of the 1998 NYB/Halsall Report, ELRL decided not to apply the savings to the recommended repairs.
43. In contrast, ELRL did apply for a reduction of the property tax assessment of the Mall based on the findings of the 1998 NYB/Halsall Report, citing the risks exposed by Halsall's engineering investigation. A substantial tax reduction was eventually granted to ELRL by the City in 2000.⁵¹

Halsall's Recommendations

44. In the 1999 Halsall Report, Halsall identified that the "*major forms of deterioration*" of the parking deck and structure included leakage through cracks and construction joints, corrosion of steel beams and debonded concrete topping. It recommended a retrofit project with an engineering presence which would include the preparation of detailed specifications, tendering, construction review, contract administration and project management.⁵²

⁴⁸ Kennealy, P. 5753, L. 13- L.20

⁴⁹ Kennealy – P. 5747, L. 14-L.18

⁵⁰ Kennealy – P. 5563, L. 6 to P. 5564, L. 5 Guertin -

⁵¹ Kennealy – P. 5525, L. 6 to P. 5577, L. 9

⁵² Halsall Report, May 1999, Ex. 72

45. Nicholls testified that Halsall's general description of the "rout and seal" option 1 as it is referred to in the 1999 Halsall Report ("Option 1"), did not provide the construction details necessary for a contractor to undertake or proceed with such work. ERLR advised Nicholls that the purpose of the NYB/Halsall Reports was to provide pre-purchase budget information and was never intended to provide construction details. Nicholls stated that the work, if undertaken, would have to be defined in a way that a contractor would understand including a detailed specification with precise illustrations, construction materials to be used and directions for how the work was to be carried out.⁵³
46. In contrast, Quinn, the property manager of ERLR testified that in his view, Hasall's Option 1 proposal which required an engineer to be retained to provide engineering specifications, meant additional costs being added to a very "simple procedure". ERLR did not hire an engineer because it did not need someone to write specifications.⁵⁴
47. It is submitted that Quinn grossly over-simplified the technical challenges of the proposed parking deck repairs in attempting to avoid the cost of Halsall's engineering services coupled with the added cost of third party contractors proposed by Halsall. Furthermore, the approach taken by ERLR in relation to roof repairs was obviously not working and that reality was known to ERLR.

PART III - THE ERLR MAINTENANCE PROGRAM

48. Ken Snow ("Snow") was employed as the maintenance supervisor at the Mall between 1989-2005, first by Algoma and subsequently as an employee of ERLR, reporting to Quinn. Snow acknowledged in his testimony that the techniques he and his staff utilized to deal with the parking deck leaks did not change over the 16 years of his employment.⁵⁵
49. Quinn delegated the work of maintaining the parking deck to Snow, as the latter's knowledge was more extensive.⁵⁶ However, Snow had testified that he only began to learn about roofing when he became employed at the Mall. He did not have anyone with

⁵³ Nicholls – P. 7337, L. 24 to P. 7339, L. 5

⁵⁴ Quinn – P. 4895, L. 16 to P.4896, L. 4

⁵⁵ Snow – P. 3973, L. 19 to 25

⁵⁶ Quinn – P. 4904, L. 18 to P. 4906, L. 19

technical knowledge guiding or assisting him, other than suppliers that were selling him products to be used on the parking deck roof.⁵⁷

50. Following delivery of the 1999 Halsall Report, no contact was initiated with either Halsall or NYB by ELRL seeking help with rectifying the leaks and Nicholls was unaware that ELRL had purchased the Mall.⁵⁸ Snow's 6 year effort to combat the continuing leaks, admittedly using the same methods as Algoma, became a predictable, long term failure.

Tenant Experiences

51. The repair costs incurred on the parking deck roof from year to year were charged by ELRL to its tenants as maintenance fees. Had a retrofit project been undertaken as recommended by Halsall, it would have been treated as a capital expense for ELRL's account under the lease terms. By treating the leaks as a maintenance item, ELRL avoided much of the expense of day-to-day roof repairs.⁵⁹
52. Barbara Fazekas ("Fazekas") was Chief Librarian of Elliot Lake Public Library which was a tenant in the Mall starting in 1990. She worked in that location until her retirement in 2006.⁶⁰ Fazekas testified that she had complained over the 16 year period of her employment at the Mall to Caughill of Algoma, Troy Speck of the City ("Speck"), Kennealy of ELRL, the Mayor and the City Health and Safety Committee about her concerns regarding roof leaks.⁶¹
53. Fazekas had experienced water pooling in light fixtures, ceiling tiles dangling due to water damage and the placement of tarps over library books to protect them from roof leaks.⁶² Areas of the library and other tenanted space were closed due to safety concerns.⁶³ Fazekas stated that work was performed by ELRL staff on the roof of the Mall each summer, however leaks into the library persisted without any change between 1991 and 2006 and the situation had not improved after ELRL became owner of the Mall.⁶⁴

⁵⁷ Snow – P. 3962, L. 16-22

⁵⁸ Nicholls – P. 7465, L. 12 to L. 19

⁵⁹ Guertin – P. 5977, L. 17 to P. 5978, L.8

⁶⁰ Fazekas – P. 1100, L. 5-13

⁶¹ Fazekas – P. 1142, L. 21 to P. 1143, L. 9; P. 1236, L.18-23; P. 1243, L. 24 to P. 1244, L. 4

⁶² Fazekas – P. 1263, L. 2-9; P. 1276, L. 24 to P. 1277, L.8

⁶³ Fazekas – P. 1218, L. 6 to L. 16

⁶⁴ Fazekas – P. 1204, L. 15-20

54. One particularly bad leak in April, 2005 triggered a face-to-face meeting between Fazekas, Kennealy, Speck and the Mayor, to discuss the problem. According to Fazekas, Kennealy stated that ELRL was attempting to find the correct sealant to stop the leaks. At the meeting, Kennealy also distributed copies of the lease and pointed out that tenants, not the Mall owner, were responsible for water damage to tenant property.⁶⁵
55. As tenants were responsible for property damage created by water entry in addition to ELRL's maintenance costs incurred to respond to roof leaks, there was little incentive for ELRL to make the substantial capital investment required to create a watertight roof. This unsatisfactory state of affairs persisted over many years for tenants of the Mall.

Warnings

56. After investigating the structure in 1990, Trow had no immediate concern that the continued deterioration of the Mall might lead to a structural failure. Warning of a potential collapse in the Trow Reports was regarded by Dell' Acquilla as being inappropriate.⁶⁶ He also regarded the 1991 Trow Report as containing sufficient warnings and he felt confident that the Algoma understood what the report was saying.⁶⁷
57. Similarly, when Halsall reviewed the structure in 1999, there was no immediate concern that the continued deterioration of the Mall might lead to a structural failure. Albert Celli of Halsall ("Celli") stated that the issue was not significant enough at the time of the 1998 report to include a warning regarding a potential collapse.⁶⁸
58. In response to the suggestion that Halsall ought to have included a written warning in its reports, Truman stated that Halsall never provided a do-nothing, "as-is" maintenance option to ELRL. There was an inherent expectation on Halsall's part that ELRL would not allow its roof to leak if it purchased the Mall. Halsall was not aware that ELRL would allow so much time to pass without repairing the leaks and NYB was advised that Algoma would also receive its reports. Truman reasonably expected that ELRL (or

⁶⁵ Fazekas – P. 1267, L. 1 to L. 19

⁶⁶ Dell' Acquilla – P. 2142, L. 17 to 24

⁶⁷ Dell' Acquilla – P. 2144, L. 18 to P. 2145, L. 2

⁶⁸ Celli – P. 4290, L. 1 to L. 13

Algoma) would repair the roof. In any event, he did not see anything which could lead to a critical condition.⁶⁹

59. Nicholls regarded the 1999 Halsall Report, taken as a whole, to constitute an appropriate warning because there was no "maintain as-is" scenario in the Report; the client was most aware of the leakage problem; and the focus of the 1999 Report on steel corrosion was to determine whether the parking deck had already deteriorated beyond the point of repair.⁷⁰
60. Kennealy also acknowledged his understanding that steel corrodes when exposed to water and if the exposure continues, so will the corrosion. He was aware during ELRL's ownership that water leaks were causing the steel structure of the Mall to corrode.⁷¹

The Review of Connections

61. Truman testified that when he inspected the ceiling space beneath the parking deck, he was able to observe some of the structure including a sampling of beams, columns, connections and braces.⁷² His primary focus was to observe the impact of moisture penetration on the structure, including any impact on the connections. His superior, Michael Buckley as well as Halsall's VP of Building Science, Ed Welch had also advised him to check the beams and connections.⁷³
62. The 1999 Halsall Report did not make specific mention of connections because its reference to the "structure" included beams and connections; and "connections" are commonly referred to as part of the structure.⁷⁴ There were no issues observed specifically with the connections and as a result, they were not distinguished in the 1999 Halsall Report from the overall steel structure.⁷⁵

⁶⁹ Truman – P. 4676, L. 4-10; P. 4677, L. 5-10

⁷⁰ Nicholls – P. 7335, L. 13-16; P. 7454, L. 24 to P. 7455, L. 12

⁷¹ Kennealy – P. 5769, L. 2 – P. 5770, L. 6

⁷² Truman – P. 4519, L. 13-21

⁷³ Truman - P. 4521, L. 10 to P. 4522, L. 5

⁷⁴ Truman - P. 4557, L. 18 – P. 4558, L. 5

⁷⁵ Truman – P. 4552, L. 17-21

63. Nicholls read and understood Halsall's comments in the 1999 Halsall Report to refer to the steel structure as an integrated system, including the steel connections. There were photographs of beams as well as connections as part of the 1999 Halsall Report.⁷⁶
64. Dell'Acquilla also testified that the supporting steel under the parking deck as well as the connections, were part of the parking structure even though the individual elements were not specifically mentioned in Trow's proposal to Algoma. Dell'Acquilla also stated that the use of the word, "beam" in engineering terms, refers to the beam and the assembly. He also stated that a "connection" is incorporated in the references to steel member.⁷⁷

PART IV - ISSUES

65. On March 4, 2013, Nicholls and Luciw received the Section 17 Notices which state that facts set out in documents obtained by the Commission could, if accepted, and in the absence of an explanation, be a basis for a finding that NYB and Nicholls failed to ensure that the Mall was properly inspected and failed to ensure that the resulting reports identified deficiencies in the structural integrity of the Mall in that:
 - (a) NYB and Nicholls failed to ensure that Halsall inspected the condition of the supporting structural beam lateral restraint connections to the precast slabs as outlined in their proposal to NYB dated March 9, 1999;
 - (b) NYB and Nicholls failed to ensure that Halsall inspected the condition of the beam and bracing connections as outlined in their proposal to NYB dated March 9, 1999;
 - (c) NYB and Nicholls failed to ensure that the 1999 Halsall Report properly identified and reported on the conditions in (a) and (b) above;
 - (d) NYB and Nicholls failed to notify the owner in writing that the design of the waterproofing system installed at the Mall was not appropriate for providing a watertight roof as to prevent water from entering the Mall;

⁷⁶ Nicholls – P. 7318, L. 13-19

⁷⁷ Dell-Acq – P. 2154, L. 16-23; P. 2170, L. 10-14

- (e) NYB and Nicholls failed to notify the owner that the ongoing water infiltration at the mall, if not stopped, would affect the structural stability of the mall. (ref: Section 17 Notices)

Luciw

- 66. Luciw departed from NYB in November, 1998, shortly after delivery of the 1998 NYB/Halsall Report and approximately four months prior to Halsall's March, 1999 proposal to further assess the Mall's roof structure. Luciw had no involvement in Halsall's subsequent investigation or its reported findings or recommendations set out in the 1999 Halsall Report.
- 67. It is respectfully submitted that there is no basis for a finding that Luciw, a recipient of a Section 17 Notice, failed to carry out any of the matters referred to in para. 67(a) to (e) above. Luciw should accordingly be exonerated as a partner of Yallowega Belanger Architects of any alleged misconduct in relation to the above matters.

NYB and Nicholls – Issues (a), (b) and (c)

- 68. Architects are not qualified or licensed to perform structural engineering services and are entitled to rely on the professional expertise of engineers to provide specialized advice within their disciplines. There is no evidence that NYB or Nicholls failed to ensure that Halsall, a well known firm of consulting engineers retained to investigate and recommend a retrofit for the roofing deck, was not properly qualified to do the work.
- 69. In the 1999 Halsall Report, one of Halsall's stated objectives was to identify defects that could affect the durability of the structure. Halsall undertook to review the Mall roof structure and it did so, reporting on conditions observed through destructive investigation and by reviewing conditions at the steel structure above the ceilings. Corrosion was measured and assessed and Halsall opined on its structural significance. Photographs recorded the existing conditions, including the conditions of the steel connections. The report contained no obvious errors on review by Nicholls in his capacity as an architect.
- 70. There is no suggestion in the Norr Report⁷⁸ that Nicholls acted improperly in arranging Halsall's retainer to prepare the 1999 Report or in his review of the 1999 Halsall Report

⁷⁸ Norr Report, Ex. 3007

after its completion. There is no evidence or opinion of any architectural misconduct on the part of Nicholls or NYB.⁷⁹

71. The Halsall witnesses explained that steel connections were not distinguished from the steel structure because it was regarded as an integrated system. Trow gave evidence to the same effect.
72. It is submitted that it was reasonable for an architect in the position of NYB and Nicholls to rely on the representations of Halsall and its engineers, experts in their field, that they were investigating the Mall roof structure in a sufficiently detailed fashion to meet the professional standards of their profession.
73. Furthermore, Halsall has given a proper account of the status of the connections at the time of its report through photographic and oral testimony. Halsall's objective in its report was to only identify items requiring repair, not the numerous components of the roof structure which did not. Halsall's witnesses stated that if the connections were observed to be affected by corrosion, that would have been specifically identified. The 1999 Halsall Report would not be required to comment on all of the steel structural elements which were not corroded, a pointless exercise having regard for the purpose of the Report.
74. Even if the 1999 Halsall Report was insufficiently detailed, which is denied, it was not for the Architect to instruct Halsall on the presentation of its findings to an extent that any alleged omission in the said Report would amount to architectural wrongdoing or misconduct.
75. It is submitted that no evidence has been presented to suggest that NYB or Nicholls had reason as architects to question Halsall's expertise, the competence of its investigation or the quality of its structural opinion and recommendations. NYB and Nicholls should be exonerated in respect of such allegations with a finding that an adequate explanation for their conduct has been given.

NYB and Nicholls – Issue (d)

76. It is submitted that the evidence clearly shows that Halsall was retained to undertake a review of the waterproofing in the 1999 Halsall Report. The 1998 NYB/Halsall Report

⁷⁹ Norr Report, Ex. 3007

questioned whether the structure was built with or without a waterproofing membrane and related the roof leaks to the corrosion of steel structures. The 1999 Halsall Report summarized the results of a destructive investigation and recommended alternate repair schemes to prevent water leakage.

77. The prospective owner, ELRL was advised that the Mall roof did not contain a waterproofing system.⁸⁰ Leakage was commonly known to penetrate into the Mall and represented a key "pre-purchase" issue for ELRL from the outset of NYB's retainer. Repair options were proposed by Halsall to correct the leaks and stop the corrosion.
78. It is submitted that ELRL knew about the absence of waterproofing and the persistent leaks. ELRL in fact, was first to identify the "key issue" to NYB. It is further submitted that NYB and Nicholls committed no misconduct if Halsall did not state the obvious, ie, that the absence of waterproofing meant that the waterproofing system was not appropriate for preventing water entry. Effectively, the system did not exist at all. It is respectfully submitted that the information provided to ELRL was adequate and this allegation should not support a finding of misconduct.

NYB and Nicholls – item (e)

79. Halsall completed the 1999 Halsall Report approximately 13 years and 1 month before the structural collapse. During the intervening period, no communication existed between ELRL and NYB or Nicholls or anyone else connected or involved with the Mall, notwithstanding continuing leakage. NYB and Nicholls had no knowledge whether or not ELRL had acquired the Mall. While Halsall had offered its services to create repair specifications and oversee the retrofit of the Mall roof structure, it was never consulted by ELRL which felt that its professional involvement would just add unnecessary cost.
80. As defined by Beverley M. MacLachlin (as she then was) in her often cited text⁸¹, "*...in all the work done for the client, the architect or engineer owes a duty to exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard of the time*".

⁸⁰ 1999 Halsall Report, Page 1, Ex. 70

⁸¹ MacLachlin, B.M., *The Canadian Law of Architecture and Engineering* (1994, 2d Ed.), Butterworths Canada Ltd.

81. It is submitted that it is an accepted standard in Canada with its predictably harsh weather, for owners of inhabited homes or commercial buildings to act accordingly when roofs are leaking, in order to avoid such commonly known hazards of property damage, mould and structural rot. There is an inherent expectation, as Dell'Aquila stated, that property owners acting reasonably, will not allow roofs to leak over extended periods of time.
82. In the case of the Mall, ELRL represented to NYB and Nicholls that it was considering an acquisition of the building and was interested in establishing its physical condition, any major deficiencies and the potential costs for repair.⁸² Having completed the assignment under conditions of strict confidentiality, the prospective owner failed to engage the consultants to carry out the recommended work.
83. ELRL presented itself as a sophisticated landlord with substantial property holdings including high-rise apartment buildings, parking garages, houses and townhomes. It was not within NYB's or Nicholl's reasonable expectation that a landlord of such substance would acquire a large commercial building and allow it to be subjected to long term water penetration. It was not within the architect's reasonable understanding that a specific warning would be required in the circumstances to advise a property manager to stop a roof from leaking and to follow an engineer's recommendations.


PART V - CONCLUSIONS & RECOMMENDATIONS

84. The Mall collapse reflects an extraordinary confluence of events: the development of a new building not erected as a watertight structure; subsequent failures by owners and regulators to address the costly issue; and a community in transition, economically vulnerable with limited options for access to well maintained, and available commercial space.
85. The Trow and NYB/Halsall Reports were delivered under covenants of confidentiality, or simply withheld by their recipients from third party scrutiny in an atmosphere of *caveat emptor*. Professional recommendations for costly retrofits were anathema to successive owners either attempting to control maintenance costs or seeking to dispose of the building for optimum value. The failure to disclose technical reports impaired the ability of interested parties to monitor and fully understand progressive conditions at the Mall.

⁸² January 30, 1998 letter from Nicholls to Guertin – Ex. 874

86. It is also respectfully submitted that the act of a prospective purchaser, allowing a building to continue to deteriorate through visible water leakage following its acquisition, is not conduct which is reasonably foreseeable to ordinary design consultants.
87. In all of the circumstances, there was no impropriety in the professional services rendered by NYB, Nicholls or Luciw.
88. The Architect agrees with those who have suggested that professional reports of architects, engineers or other specialist consultants which contain findings regarding the physical condition of buildings, should be easily accessible to regulatory authorities responsible for the oversight of property standards.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8TH day of August, 2013.



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