

ELLIOT LAKE COMMISSION OF INQUIRY

DAY 85

August 13, 2013



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ELLIOT LAKE COMMISSION OF INQUIRY

--- This is Day 85 in the Inquiry proceedings held before the Honourable Justice P.R. Bélanger, Commissioner, taken at the White Mountain Academy of the Arts, 99 Spine Road, Elliot Lake, Ontario, on the 13th day of August, 2013, commencing at 9:00 a.m.

REPORTED BY: Deana Santedicola
CSR, CRR, RPR

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8		Professional Engineers
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1 A P P E A R A N C E S (CONT'D):

2

3 Heather MacKay, Ms., Government of Ontario
4 & Judith Parker, Ms.,

5

6 Robert MacRae, Esq., Robert Wood

7

8 John Curtis, Esq., Thomas Derreck

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1 -- Upon commencing at 9:00 a.m.

2

3 THE COMMISSIONER: Good morning,
4 everybody.

5 Just give me a moment to organize my
6 papers here, if you would.

7 Thank you.

8 Mr. Curtis, you are ready to go?

9 MR. CURTIS: I think we have somebody
10 else that is going to be --

11 THE COMMISSIONER: Mr. Elliott is going
12 to be reading. I thought you had agreed amongst
13 yourselves that you were going to go first, but
14 that is fine.

15 Mr. Elliott, you are going to be
16 reading Mr. Shime's message, which I have read but
17 others may not.

18 Thank you.

19 MR. ELLIOTT: Yes, thank you,
20 Mr. Commissioner. I received this message from
21 Mr. Shime last night. He is not able to be here
22 this morning and expresses his regrets, and I
23 agreed to read this into the record on his behalf
24 as his agent.

25 Dear Commissioner Bélanger, on behalf

1 of Alexander Sennett, please be advised that I no
2 longer intend to make oral submissions.

3 The mandate of this Inquiry is to
4 inquire into and report on events surrounding the
5 collapse of the Algo Centre Mall, the deaths of
6 Lucie Aylwin and Doloris Perizzolo, and the
7 injuries to other individuals as well as the
8 emergency management and response.

9 It is my respectful position that
10 Mr. Sennett's involvement falls outside of this
11 mandate. He had a very brief involvement in the
12 history of the mall. His involvement with Empire
13 Roofing was even shorter, June to September of
14 2008. This was four years before the collapse of
15 the mall.

16 Most importantly, the entire Empire
17 Roofing episode had nothing to do with the
18 structural integrity of the mall or its ultimate
19 collapse. In other words, his role is so remote
20 from the collapse that it warrants little, if any,
21 mention at all.

22 It is for that reason that Mr. Sennett
23 was barely mentioned in the parties' written
24 submissions and not mentioned even once during
25 today's -- so that would be yesterday's -- oral

1 submissions.

2 With respect to Empire Roofing, it is
3 Mr. Sennett's position that there was no fraud
4 because there was no risk of deprivation to ELNOS.
5 This was proven beyond any doubt through the
6 cross-examination of Mr. Elliott by Mr. Title. And
7 in any event, even if a fraud could be found, it
8 was clear from the evidence that Mr. Sennett was a
9 mere dupe of Mr. Nazarian.

10 This is set out in detail in our
11 written submissions and requires no further
12 amplification through oral submissions.

13 Given our position that Mr. Sennett had
14 no connection to the collapse of the mall, we would
15 rather give our time in oral submissions to those
16 whose conduct falls clearly within the Inquiry's
17 mandate.

18 On behalf of Mr. Sennett, I wish to
19 thank Commissioner Bélanger. This Inquiry has been
20 handled most professionally and efficiently, thanks
21 to the Commissioner and his excellent Commission
22 Counsel.

23 Mr. Sennett would also like to thank
24 the Commissioner and Commission Counsel for the
25 very fair manner in which he was treated and for

1 the opportunity to be heard.

2 Personally, I would like to thank the
3 Commissioner, Commission Counsel, Commission staff
4 and the parties for the gracious and helpful manner
5 with which I was welcomed at a late stage to the
6 Inquiry. It was a great pleasure and privilege to
7 be amongst such an excellent group who is keenly
8 devoted to finding the truth of what occurred at
9 the mall and to ensure that such a tragedy happens
10 never again.

11 Thank you.

12 And that is from Johnathan Shime on
13 behalf of Alexander Sennett.

14 THE COMMISSIONER: Mr. Curtis.

15 MR. CURTIS: Good morning,
16 Mr. Commissioner.

17 I want to start to thank by -- sorry, I
18 want to begin by thanking the Commissioner and his
19 staff and Commission Counsel for running such a
20 well-organized and efficient Inquiry.

21 This is my first experience with a
22 Commission of Inquiry, and my impression is that it
23 has and will be a highly valuable use of public
24 funds. It has been an honour to take part in this
25 process.

1 It has also been an honour to
2 represent --

3 THE COMMISSIONER: What you say has to
4 be translated, and of course --

5 MR. CURTIS: I'm trying to fit in my
6 half an hour here.

7 THE COMMISSIONER: Actually, weren't
8 you given three-quarters of an hour? I see 75, so
9 slow down by 25 percent.

10 MR. CURTIS: Okay, thank you.

11 It has also been an honour representing
12 Mr. Derreck. He is an extraordinary person,
13 thoughtful, intelligent, well organized,
14 conscientious and principled.

15 I can tell you that he has often been
16 distressed and upset during the course of the
17 Inquiry with the way so few people seem to remember
18 much of anything.

19 As with his testimony before the
20 Commission when he explained how incredulous he was
21 at the answers he got from the Building Department
22 and other officials who claimed not to know about
23 the severe leaks at the mall, he continued to find
24 much of the testimony of the people with whom he
25 worked incredulous and experienced astonishment at

1 how the political culture that enabled the
2 circumstances surrounding the collapse of the mall
3 to have remained largely intact.

4 Some of the recommendations contained
5 in our submission are aimed at encouraging a closer
6 look at that political culture.

7 Given the testimony we heard from
8 Mr. Derreck, and for those of you who know a little
9 bit about what was not allowed -- he was not
10 allowed to share with the Commission, one might
11 think that he came to Elliot Lake with something to
12 prove, that he is a man on a mission looking for
13 serious problems in municipal government and then
14 setting them straight.

15 In fact, Tom is a very relaxed guy who
16 actually looked forward to retiring in Elliot Lake.
17 He liked the place so much. When he came to Elliot
18 Lake as the CAO, he was not looking for trouble,
19 but trouble sure found him.

20 Mr. Kearns criticized our submissions
21 yesterday as being unnecessarily long, suggesting
22 that a one-pager would have sufficed. If that were
23 only so.

24 I do agree with Mr. Kearns that the
25 essence of our written submissions are simple, but

1 I'm afraid that if the world were truly as simple
2 and straightforward as Mr. Kearns and perhaps all
3 of us would like it to be, this Inquiry would never
4 have been necessary.

5 The intention of our written
6 submissions was aimed at reinforcing the
7 understanding of the context in which Mr. Derreck
8 came into the job as Chief Administrative Officer
9 in Elliot Lake. By contrasting his actions with
10 the actions and inactions of others in positions of
11 authority and/or power who, given the knowledge and
12 responsibilities they had, in fact chose to follow
13 very different courses than that which seemed
14 obvious to Mr. Derreck at the time and which I am
15 sure seem obvious to anyone who has followed these
16 proceedings.

17 What seemed obvious to Mr. Derreck on
18 his very first day on the job was that the City had
19 a responsibility to take action with respect to the
20 long-standing problems associated with the leaks
21 from the mall's roof top parking deck and that is
22 exactly what he did.

23 Written submissions on factual findings
24 urged the Commission to conclude that the actions
25 and inactions of municipal officials with the City

1 of Elliot Lake, the owners of the Algo Centre Mall
2 and in some cases their employees and agents
3 collectively contributed to the eventual collapse
4 of the mall.

5 Of key importance to my client is that
6 the Commission find that the only public official
7 with sufficient influence to make something happen
8 who behaved responsibly, indeed decisively and with
9 dispatch, upon first encountering and witnessing
10 for himself the evidence of the eventual threats to
11 public safety at the Algo Mall was Tom Derreck.

12 In his capacity as Chief Administrative
13 Officer for the City of Elliot Lake, Tom Derreck
14 initiated a process under the City's Property
15 Standards By-Law that caused Building and Fire
16 Department inspections, the issue of Violation
17 Notices, caused the first formal policy resolution,
18 Resolution No. 469/06, which is Exhibit No. 167,
19 regarding the state of the mall by City Council
20 when it adopted his recommendations on October
21 23rd.

22 The passing of this resolution was the
23 first formal response by City Council to those
24 mounting threats in the almost three-decade history
25 of the situation, which response, as the Inquiry

1 revealed, also remained the only expression of
2 interest displayed in the matter by a City Council
3 right up until the 2012 collapse.

4 Had the results of Mr. Derreck's
5 timely, professional and forthright work been
6 followed up and continued by his CAO successors,
7 Mayor Rick Hamilton and the other responsible City
8 officials such as Mr. Allard following
9 Mr. Derreck's departure, it is very possible, if
10 actually probable, that the mall would be standing
11 today, repaired and functional to the continuing
12 economic and community benefit of Elliot Lake. As
13 Mr. Elliott said yesterday, the collapse of the
14 mall was not inevitable.

15 I take exception to Mr. Kearns'
16 submission that our submissions and those of
17 Mr. Oatley amounted to some kind of mischief.

18 The only potential lawyerly mischief of
19 which I am aware in connection with this Commission
20 was an attempt by certain Counsel to suggest that
21 if my client was to be allowed to provide certain
22 evidence, that would be countered with a rehashing
23 of his wrongful dismissal suit brought by Mr.
24 Derreck against the City, a suit in which numerous
25 mischievous allegations of wrongdoing by

1 Mr. Derreck were put forward by the City's Council
2 at the time, not Mr. Cassan.

3 These allegations put forward by the
4 City in defence of Mr. Derreck's termination were
5 completely untrue but unfortunately widely
6 published on the internet. They have badly
7 tarnished his reputation and effectively ruined his
8 career in municipal government.

9 The case was settled out of court and
10 the terms of that settlement were not made
11 confidential. I assume this is the result of the
12 fact that the trumped-up allegations against
13 Mr. Derreck were completely without merit.

14 The whole sordid and unnecessarily
15 destructive affair was more of a testament to that
16 adage no good deed will go unpunished.

17 In any case, in response to Mr. Kearns'
18 allegations of mischief, all of the statements
19 contained in our submission are well supported by
20 the evidence received by this Commission and were
21 referenced in our written submission with
22 transcript locations and exhibit numbers.

23 Knowledge is power. We all remember
24 the irony of how former Mayor George Farkouh
25 explained to the Commission that he believes

1 knowledge is power. Mr. Farkouh and his Councils
2 and current Mayor Rick Hamilton and his Councils
3 had knowledge, plenty of knowledge about the
4 threatening and deteriorating conditions at the
5 Algo Centre Mall. This knowledge was imparted to
6 them repeatedly, sometimes frantically, by their
7 own library staff and appointed representatives
8 over the course of decades.

9 And through the evidence of their own
10 observations at the mall, also over the course of
11 decades, campaigning for seats on City Council, as
12 members of Retirement Living's Board of Directors,
13 attending Board meetings at Retirement Living's
14 offices located in the mall within mere feet of the
15 public library, these public officials chose not to
16 use their knowledge to either ensure the integrity
17 of the building that both gentlemen referred to as
18 the City's economic and social hub, nor to ensure
19 the safe use of that facility by the hundreds of
20 workers and thousands of their citizens who passed
21 in and out of it every day.

22 I am not an engineer. How many
23 witnesses defended their inaction with the claim
24 that they were not an engineer? Mr. Commissioner,
25 we all know that water rusts metal. We know that

1 sand and chemicals corrode it. We can all surmise
2 that 30 years of such exposure and movement
3 throughout a steel load-bearing frame stressed by
4 the coming and going of the weight of hundreds of
5 vehicles a day over a period of 10,000 days, which
6 I calculated to roughly be the life of the Algo
7 Centre Mall, will eventually have ruinous
8 consequences.

9 My next section of my submission deals
10 with the City of Elliot Lake's submission.

11 At page 75, paragraph 115, the City
12 made the following submission:

13 "The next CAO (Tom Derreck) took
14 steps necessary to" -- and this is a
15 quote -- "necessary to issue a
16 Notice of Violation because Tom
17 Derreck better understood that this
18 might be a Property Standards Bylaw
19 structural problem from his prior
20 experiences with libraries."

21 Mr. Commissioner, that strikes me as a
22 very unusual thing to say, "experiences with
23 libraries". I suppose that if one had never seen a
24 library other than the one in Elliot Lake, one
25 might be forgiven for thinking that all libraries

1 had buckets in the aisles and tarps draped over the
2 bookshelves and bladders hanging from the ceiling
3 to catch dripping water.

4 No, Mr. Commissioner, Mr. Derreck's
5 prior experience with sitting on a Library Board in
6 St. Catharines had nothing to do with his ability
7 to observe and conclude within a couple of days of
8 arrival in Elliot Lake that the conditions in the
9 mall and at the library overall were well past the
10 point at which the City's attention and response
11 ought to have been engaged.

12 His observations were nothing more than
13 a sensible observer or any responsible City
14 official would have the ability to observe.

15 Again, at page 75, paragraph 115, the
16 City made the following submission:

17 "Further, the individuals who work
18 closely with Mr. Speck and the
19 information obtained by him were
20 clearly of some value to Mr. Derreck
21 moving so quickly with the Notice of
22 Violation when he became CAO in
23 October 2006."

24 Where is the evidence to support this
25 assertion? Mr. Speck left behind no information of

1 any kind that was of use to Mr. Derreck. In fact,
2 this is why Mr. Derreck had to assemble City and
3 library officials for a meeting on October 18th,
4 2006, for the express purpose of gathering the
5 information he needed to determine the City's best
6 course of action.

7 At page 80, paragraph 119, the City
8 made the following written submission:

9 "Mr. Derreck put the concept" --
10 and this is a quote -- "of the
11 Property Standards Bylaw front and
12 centre because he understood that
13 there may be structural aspects to
14 the leaking. However, M.R. Wright
15 ultimately deemed the structure to
16 be sound in 2009 and again in 2012."

17 Again, an odd thing to say. If that
18 submission by the City is intended to propose that
19 Mr. Derreck was mistaken in his notion that 27
20 years of chronic leaking at the mall might be
21 impacting its structural integrity, it would appear
22 that the opposite is actually the truth.

23 We now know M.R. Wright & Associates'
24 opinions as professional engineers and experts on
25 the subject were proven disastrously wrong at the

1 expense of two lives and other serious injuries and
2 losses.

3 At page 80, paragraph 121, the City
4 made another submission, it goes like this:

5 "The City was not equipped and nor
6 are other small municipalities to
7 get expert reports for commercial
8 buildings owned by private
9 enterprise."

10 In our submission, this is a baseless
11 argument. The City Council of 1999 approved the
12 sum of \$45,000 to pay Elliot Lake Retirement
13 Living/NorDev to produce a report that included a
14 section dealing with the Algo Centre Mall's
15 physical condition, an exercise that permitted
16 Elliot Lake Retirement Living's for-profit arm,
17 NorDev, to obtain for itself, wholly at taxpayers'
18 expense, information that it needed as a private
19 enterprise for the purpose of making a commercial
20 acquisition, information which, although it was
21 entitled to receive, the City, Mr. Farkouh and his
22 Council apparently made utterly no effort to
23 obtain.

24 Again, at page 80, paragraph 123, the
25 City made the following submission:

1 "Many of the same City staff who
2 were involved in the City response
3 to complaints from the library in
4 2005 (Ex. 2018 and response 11-100)
5 were involved in Mr. Derreck's
6 efforts, such as Mr. Gagnon, Ms.
7 Leddy and Ms. Williams."

8 While those individuals and other City
9 and library staff did indeed assist Mr. Derreck,
10 Mr. Derreck was the first person in a position of
11 senior municipal authority in Elliot Lake to
12 purposefully engage, formulate and see to the
13 enactment of an official and recorded response by
14 City Council.

15 This statement by the City in their
16 submissions appears intended to diminish
17 Mr. Derreck's initiatives in the matter and to
18 squeeze some little credit for itself for his
19 effectiveness.

20 And my last comment on the City's
21 submissions, again at page 80, paragraph 124, and
22 this is the quote:

23 "Mr. Nazarian references the
24 'clamping down' as some sort of
25 conspiracy against Eastwood Mall

1 when in reality Mr. Derreck's
2 experiences with the library
3 issues/structural concerns/Property
4 Standards Bylaw experience led to
5 the 'clamp down' and this had no
6 connection whatsoever to avoid
7 clamping down on Retirement Living.
8 It is a coincidence that Mr. Derreck
9 started not long after Eastwood
10 acquired the Mall."

11 I am sure it is a coincidence that
12 Mr. Derreck started shortly after Retirement Living
13 sold the mall, but the fact that Mr. Derreck was
14 the first and only CAO to take any action until
15 that moment was no coincidence.

16 I draw your attention to paragraphs 15
17 and 53 of the Ontario Building Officials
18 Association's written submissions. They observe,
19 and I quote:

20 "The appearance of city Council
21 and city staff being deferential to
22 the first two owners of the mall
23 [...]"

24 And then they go on to say that the
25 former Chief Building Official Syl Allard testified

1 to his belief in a, and I quote, "hands-off" policy
2 toward Retirement Living being in effect during his
3 term of service as Chief Building Official.

4 The fact is that whoever the owner of
5 the mall might have been when Mr. Derreck arrived
6 in Elliot Lake, he would have proceeded in
7 precisely the same way he did when he found Mr.
8 Nazarian to be the owner. To him, who owned the
9 mall was not a factor of any consequence. It was
10 about the leaks and the problems and potential
11 threats they posed.

12 Understanding Mr. Derreck's
13 perspective.

14 There is no denying that Mr. Derreck's
15 submission does indeed give much focus to the
16 City's and Retirement Living's substantial roles
17 leading to the fatal tragedy of June 23rd, 2012,
18 and that focus is inspired by the high value and,
19 yes, great pride Mr. Derreck takes in the work of
20 local government throughout this province.

21 Municipal government is an institution
22 that Mr. Derreck and thousands of other highly
23 competent and dedicated men and women serve with
24 unfailing loyalty, diligence and trustworthiness
25 throughout long and honourable careers.

1 That focus is also intended to
2 communicate to Elliot Lake's citizens and to the
3 residents and taxpayers of all Ontario communities
4 that the evidence of sloth, neglect and ineptitude,
5 made crushingly evident in the performance of many
6 of the City's elected and appointed senior
7 officials, is not typical of all of Elliot Lake's
8 public servants, nor of their colleagues and the
9 up-and-comers elsewhere who choose and pursue a
10 career in municipal government.

11 Mr. Commissioner, municipalities were
12 created in and by our Provincial Government to
13 provide our communities with the benefits of good,
14 honest, responsible, participatory self-government,
15 to ensure healthy, safe, economically stable and
16 enjoyable communities.

17 They were not created to be co-opted by
18 the ambitions of private interests, such as much of
19 the evidence in this first phase of your Inquiry
20 sadly appear to be a reality here in Elliot Lake.

21 Mr. Derreck is the second of three
22 family members who have distinguished themselves as
23 senior municipal government practitioners. As a
24 family, the institution of local government is seen
25 and held as the frontline face of our democracy,

1 not to be abused, shamed, misused or misrepresented
2 by anyone privileged to be given the public trust
3 under its mantle.

4 Understanding these values are held
5 dear to Mr. Derreck is the best way to understand
6 why he did as he did here in Elliot Lake.

7 This is the last section, and it's
8 speaking to recommendations.

9 Our written submissions contained a
10 number of recommendations, but because we all had
11 the benefit of the submissions of SAGE well in
12 advance of the deadline, it made sense that in
13 addition to our own recommendations that we adopt
14 those of SAGE.

15 They have watched and observed the
16 proceedings carefully and are a very thoughtful and
17 well-meaning group who have made useful
18 recommendations about legislative and regulatory
19 changes that could help avoid similar tragedies in
20 the future. I am sure that the Commissioner will
21 review the recommendations of SAGE with keen
22 attention.

23 We also wish to endorse the
24 recommendations set out in the submissions of
25 Mr. Oatley and ELMAC.

1 Finally, as we all know, the collapse
2 of the mall is not simply about who did or did not
3 do the right thing. It is about the tragic loss of
4 life, the terrible physical and other losses
5 suffered by the community of Elliot Lake.

6 I would like the Commission to know
7 that Mr. Derreck has frequently expressed not only
8 his anger but his deep regrets about the losses and
9 how, as the only public official with enough
10 authority to make something happen and who was on
11 course to have done something about the leaks at
12 the mall, he was terminated before he had the
13 chance to see it through.

14 Those are our submissions.

15 Thank you, Mr. Commissioner.

16 THE COMMISSIONER: Mr. Curtis, thank
17 you very much for those eloquent comments.

18 Mr. Bisceglia.

19 MR. BISCEGLIA: Good morning,
20 Mr. Commissioner.

21 THE COMMISSIONER: Good morning.

22 MR. BISCEGLIA: At the outset, I would
23 like to thank you for the methodology and approach
24 that you have used during the course of this
25 Inquiry.

1 Personally, this is my first Inquiry
2 and I'm not familiar with the process, but I came
3 away at the end of it all and I am sure that every
4 witness who has testified during the course of this
5 Commission of Inquiry has come away with feeling
6 that they have been heard, treated with civility
7 and, regardless of their testimony, dealt with
8 respect, and for that I thank you on behalf of my
9 client and I am certain on behalf of the witnesses
10 who have testified so far.

11 I would also like to thank Commission
12 Counsel. As a small town practitioner, it is very
13 difficult to deal with Relativity and at my age
14 computerization does have its challenges. Without
15 them and their assistance, I would have had great
16 difficulty. So I thank them personally in their
17 assistance to me during the course of this hearing.

18 I would like to also thank the citizens
19 of Elliot Lake, those that we have seen day in and
20 day out in the gallery and those that we have met
21 in the restaurants and the hotel that we have
22 stayed at. It is not often that lawyers are
23 embraced or welcomed, let alone out-of-town
24 lawyers, but at the end of the day some of the
25 people who have attended here daily have become

1 friends or acquaintances, and those people that
2 have provided us services while we were here truly
3 made us feel welcomed.

4 And I considered that. I thought about
5 that. And the reason I think that that's so is
6 because they looked first of all to you,
7 Mr. Commissioner, for some answers and they don't
8 see the lawyers acting for the participants as
9 adversaries as much as lawyers who are assisting
10 you to find out what happened and why things
11 happened, why certain people continually said I
12 couldn't recall during the course of their
13 testimony, and at the end of the day the influence
14 that politics may or may not have had with respect
15 to the issue of the collapse.

16 And for that, they seek our input, seek
17 our assistance to provide that to you. And I think
18 that is why we have been welcomed, and I thank the
19 people of Elliot Lake. Though tragedy brought us
20 here, I come away feeling like one of them.

21 The disaster at the Algo Centre Mall
22 was a culmination of what can best be described as
23 a perfect storm. The perfect storm consisted of
24 the following convergence of events:

25 An ill-designed building or structure

1 with a roof parking area not suited for its
2 intended purpose.

3 A maintenance approach to the roof
4 leaks that did not work and even failed to meet the
5 rudimentary requirements of stopping water
6 penetration.

7 The unwillingness of owners of the mall
8 at various stages to invest sufficient funds to
9 correct the problem.

10 A policy of silence or non-disclosure
11 by the various owners of the true condition of the
12 roof and the extent of leakage and the fact that
13 leakage had been unabated since construction of the
14 mall.

15 In the alternative, willful blindness
16 on the part of the mall owners or an inability on
17 the part of the mall owners to understand or
18 comprehend that ultimately a structural failure
19 would occur given the nature and extent of the
20 water penetration and leakage that occurred over
21 time.

22 The representations to municipal
23 officials, engineers, consultants and the public by
24 various mall owners or their respective employees
25 that the leaky roof had been repaired, looked

1 after, properly controlled, or a solution was
2 imminent or in fact a permanent solution had been
3 found and it would be a matter of days or weeks
4 before it was installed.

5 A non-interventionist policy on the
6 part of municipal officials.

7 Failure on the part of those
8 responsible to enforce the Property Standards
9 By-Law of the City of Elliot Lake or the Building
10 Code requirements of the Province of Ontario.

11 The inevitable conclusion,
12 Mr. Commissioner, after reviewing all of the
13 evidence is that if a proper and accurate
14 historical record had been kept and disclosed by
15 the mall owners for the consulting engineers, a
16 proper assessment would have been able to be made
17 of the structure, thereby avoiding the catastrophe
18 that occurred.

19 If there had been candid and complete
20 disclosure as to the nature and extent of the
21 leakage over time, more intrusive inspections would
22 have occurred. That would have resulted in the
23 discovery of the continued deterioration of the
24 structure and, with that discovery, appropriate
25 action would have been able to be taken either by

1 the municipal officials or by the provincial
2 officials requiring or ordering a permanent
3 solution.

4 If the owner refused to do so, then the
5 mall would have been condemned, closed and
6 ultimately demolished.

7 Mr. Elliott, during the course of his
8 submissions, indicated that the mall was a Trojan
9 horse. Mr. Howe in response indicated no, he took
10 objection to that. He likened it to a situation
11 where we had a benign cancer that turned malignant,
12 if Mr. Commissioner will recall yesterday.

13 Now, that being said, if we have a
14 patient who has a cancer, then it appears to me, to
15 have a diagnosis made of that patient, the full
16 symptomology has to be disclosed. There has to be
17 an accurate accounting as to what has happened
18 historically so that proper action could be taken.

19 In our written submissions we have
20 reviewed the evidence of the various engineering
21 firms and the engineers. The point of that
22 exercise, sir, on behalf of Mr. Saunders was to
23 establish the protocol and the process whereby the
24 engineering profession did their inspections,
25 conducted their review of the building and did what

1 was asked of them by the owners.

2 And at the end of the day, when you
3 review that evidence, two or three things come
4 through.

5 First and foremost, the owner
6 determines the scope of work.

7 Secondly, the owner is the person or
8 his or her employees is the source of that
9 information upon which the engineers function.

10 And thirdly, in complying with the
11 scope of work and what the engineer in essence is
12 being paid for, they deliver a particular level of
13 inspection and a report.

14 That has to be changed. In our
15 recommendations we address those changes that we
16 suggest you might consider, and to some degree they
17 are not any different than what PEO has suggested
18 in their recommendations, and I will come to that
19 in a minute.

20 In reviewing the evidence, sir, with
21 respect to what a reasonably competent engineer
22 does or should be doing or did at that time, I
23 would ask you to come to the conclusion that
24 Mr. Saunders conducted himself appropriately by the
25 measurement of that standard of the evidence that

1 you have heard during the course of this hearing.

2 The evidence is that Mr. Saunders at
3 the time of conducting the review of Mr. Wood's
4 work had the following knowledge and information
5 that was given to him.

6 Firstly, he knew that Mr. Woods had the
7 appropriate academic background. He knew that
8 Mr. Woods had been a licensed engineer since 1973
9 and that, as a result of choosing not to write
10 exams, his licence was revoked as of November 16th,
11 2011.

12 Mr. Saunders was aware that Mr. Wood
13 had extensive background in structural engineering.
14 He had knowledge that Mr. Wood had constructed
15 significant structures as a structural engineer,
16 including arenas. He knew that Mr. Wood was well
17 regarded and respected as a structural engineer.
18 He was not aware that Mr. Wood suffered any
19 disabilities or any medical problems that would
20 have precluded or prohibited him from conducting a
21 visual inspection of the mall.

22 Notwithstanding the disciplinary issues
23 that were faced by Mr. Wood, Mr. Wood was never
24 found to be an incompetent engineer or an
25 incompetent structural engineer.

1 Notwithstanding that the original
2 complaint against Mr. Wood by PEO was made on or
3 about September 18th of 2007, Mr. Wood continued to
4 practice as a licensed P.Eng. until his licence was
5 revoked in 2011.

6 Now, there was a short period of time
7 of two months that his licence was suspended after
8 the decision came out, and that was from December
9 1st, 2010 to January 31st, 2011. However,
10 thereafter, Mr. Wood was permitted to continue to
11 practice engineering as a P.Eng. to permit him to
12 proceed to write certain exams. Now, when he
13 didn't write the exams, then his licence was
14 revoked.

15 Mr. Saunders, more importantly, sir,
16 had no reason to question Mr. Wood's integrity or
17 credibility with respect to the information that he
18 was given. He had no reason to question that
19 Mr. Wood would lie or do anything that would change
20 or alter the statements to him in terms of the
21 condition of the mall. He was unaware of any
22 reason or motive why Mr. Wood would not provide him
23 with a fair and accurate information as to his
24 observations and visual inspection.

25 And equally important is the fact that

1 Mr. Saunders felt that he had the ability and the
2 competency to supervise and review the work
3 involved in the visual inspection.

4 Mr. Saunders had been told by Mr. Wood
5 that the purpose of the visual inspection was to
6 provide a letter so that the owner could deal with
7 either a renewal of the mortgage or a new mortgage.
8 Mr. Wood was advised -- advised, rather,
9 Mr. Saunders that he had been told by a mall
10 employee as to the areas of most concern and he
11 checked that and he checked those areas.

12 Mr. Saunders was told by Mr. Wood that
13 he also on his own looked at other areas that were
14 available to him. Mr. Saunders asked Mr. Wood if
15 he had in fact inspected the outside of the mall,
16 and he was told by Mr. Wood that he had not only
17 walked throughout the whole mall inside but also at
18 the exterior and the areas most exposed to the
19 elements.

20 Mr. Saunders was also told by Mr. Wood
21 that in an area of the Zellers store he took a
22 ladder and looked up above the ceiling tiles.

23 In short, sir, based upon the evidence
24 of Mr. Saunders and Mr. Wood as to what
25 Mr. Saunders was told by him, I believe that he met

1 the standard of a reasonable, competent engineer.

2 I ask you, sir, in reviewing the
3 actions of Mr. Saunders that you separate any
4 errors or omissions that may have been made by
5 Mr. Wood in conducting the visual inspection
6 leading to the report on May 3rd, 2012. You should
7 not attribute to Mr. Saunders Mr. Wood's lack of
8 candour or powers of observation for whatever
9 reason or cause when conducting the visual
10 inspection and subsequently altering the original
11 May 3rd, 2012 report that was reviewed by
12 Mr. Saunders and sent out by Mr. Saunders
13 personally.

14 There is some suggestion that he should
15 have used perhaps more caution in the sense that
16 someone dealt with this original report and altered
17 that report and he should have had a much more
18 secure type of operation.

19 With the greatest of respect to that
20 suggestion, I can only deal with it by way of
21 analogy. We operate out of offices. What level of
22 security, for the sake of conversation, can a
23 lawyer do that would protect every file and every
24 piece of paper in a file where you have an employee
25 who, for whatever reason, or a junior associate

1 takes it upon himself or herself to go to the file,
2 take out a letter and play with that letter or
3 manipulate the letter in a manner or fashion that
4 is inconsistent with the original intended purpose.

5 I say that that would be almost next to
6 impossible. And I say in this particular
7 situation, Mr. Saunders signing that original
8 report based upon the information that he had and
9 personally sending it out, he didn't delegate that
10 task to anyone else. On the morning of May the
11 4th, early in the morning he personally e-mailed
12 that document and it was put back in the file.

13 Now, I would say that that is
14 reasonable and consistent with normal everyday
15 practice.

16 In our written submissions, sir, we
17 have outlined the evidence of professional
18 engineers who conducted Building Assessments at the
19 Algo Mall before Mr. Wood conducted his inspection
20 leading to the May 3rd, 2012 report.

21 We ask the Commission to place itself
22 in the shoes of Mr. Saunders at the time he dealt
23 with Mr. Wood and reviewed the information and
24 reported findings by Mr. Wood. A fair and
25 reasonable conclusion based on the evidence is that

1 Mr. Saunders followed the acceptable protocol in
2 assessing and evaluating the work of Mr. Wood.

3 All of the questions that were asked by
4 Mr. Saunders and all of the things that he did were
5 consistent with the evidence given by other
6 engineers in reviewing the work of others who
7 attended the Algo Mall and conducted the field
8 work.

9 What Mr. Saunders did was no different
10 than what was done by Mr. Buckley, Mr. Iamónico and
11 Mr. Hass and others. Those were the individuals
12 from the various firms, sir, who did not attend to
13 do the field work but relied on the evidence -- I'm
14 sorry, relied on the reported information of
15 others.

16 In reviewing the evidence of the
17 engineering professionals and what occurred at the
18 Algo Centre Mall brings forth the fact that in
19 Ontario there are no specific guidelines or
20 requirements as to what should be included in a
21 Building Condition Assessment. And as of this day,
22 sir, as you can see from the recommendations that
23 we make and the evidence that you heard from
24 Mr. Jeffries of the Ministry of Labour, there are
25 still no mandatory minimum requirements that must

1 be met in analyzing a building for the purposes of
2 expressing an opinion as to the soundness thereof
3 or the lack thereof.

4 The Professional Engineers of Ontario
5 have made their submission, and we quite frankly
6 adopt what they have said at page 20, paragraph 65,
7 confirming that there is nothing in the
8 Professional Engineers Act or regulation that
9 delineates the responsibility of a professional
10 engineer who supervises or co-signs a report of
11 another person.

12 The standard then that you should
13 consider, in our respectful submission, is what you
14 have heard in the evidence as to what was done by
15 others. There is no specific guidelines as to what
16 Mr. Saunders' responsibility was in reviewing and
17 supervising the work of Mr. Wood.

18 He in his evidence testified that he
19 felt that he conducted himself in accordance with
20 the protocol. He looked at the scope of work, the
21 qualifications of the person who was doing the
22 field work, is it beyond their ability, and he went
23 through all of that evidence. And there is nothing
24 to suggest that that is not and was not the
25 standard by which his conduct should be measured.

1 PEO confirms that that is the case.
2 There are no regulations. There are guidelines.
3 And perhaps there should be. That is one of the
4 recommendations that we make; that is one of the
5 recommendations that they make.

6 Given the review that was conducted by
7 Mr. Saunders, in our respectful submission, there
8 was no reason for him to believe that that
9 information was either inaccurate or incomplete
10 that would have required him to attend personally
11 to the mall. There was no reason to believe that
12 his personal attendance was necessary due to any
13 incomplete aspect of Mr. Wood's inspection and
14 reporting to him.

15 In our respectful submission, in
16 reviewing the actions of Mr. Saunders, we would ask
17 that you conclude that he met the test that one
18 would have applied to a lawyer and as enunciated by
19 the Court of Appeal in Foland v. Reardon. And I
20 have given the citation in my written submissions
21 to you, Mr. Commissioner, and I am paraphrasing
22 that decision by stating that the Court of Appeal
23 in speaking of a lawyer, but equally applicable, in
24 my submission, to an engineer, a reasonable
25 engineer standard does not call for an assessment

1 of the sagacity of the decision made by the
2 engineer. The standard demands that the engineer
3 bring to the exercise of his or her judgment the
4 effort, knowledge and insight of a reasonably
5 competent engineer. If the engineer has met that
6 standard, his or her duty to the client is
7 discharged.

8 It is submitted that what Justice
9 Doherty was saying in making that quote relative to
10 the lawyer is that a professional engineer should
11 be just not what you would want of them, but what
12 their colleagues, reasonably instructed, would do
13 in a similar situation. "Sagacity" means the
14 quality of being sagacious, and "sagacious" means
15 keenness, perception and the showing of extra
16 discernment in a judgment.

17 In our recommendations, sir, we came in
18 making those recommendations from the perspective
19 that the first and most important person
20 responsible for a building condition is the owner,
21 and our recommendations, sir, are based upon having
22 the owner take responsibility for the maintenance
23 and upkeep of a structure first and foremost.

24 Secondly, in looking at the
25 recommendations, there should be certain buildings

1 that are defined buildings that require proactive
2 inspections over time and not to be inspected on a
3 complaint basis.

4 Thirdly, there should be significant
5 authority given to municipal officials in the
6 enforcement of the Ontario Building Code and not
7 necessarily the Property Standards Act, because as
8 you have heard throughout this Commission of
9 Inquiry, some municipalities do not have building
10 standards by-laws. So you have to have the
11 legislation in place in order to require municipal
12 officials to enforce them.

13 Furthermore, it is our submission that
14 the local Building Officials are in the best
15 position to conduct proactive inspections on an
16 ongoing basis and to take enforcement proceedings
17 as opposed to the provincial Ministry of Labour
18 officials or inspectors.

19 In our recommendations, sir, we
20 indicate that you perhaps consider the
21 establishment of a committee composed of
22 representatives of the engineering profession,
23 architects, municipal officials and the Ministry of
24 Labour.

25 The purpose of that committee would be

1 to consider the concerns of the various parties and
2 establish a regulatory legislative scheme to permit
3 municipalities and the Ministry of Labour to
4 conduct proactive inspections of structures or
5 buildings.

6 Secondly, the first task of that
7 committee would be to determine and define what
8 structures and buildings would be subject to the
9 legislation requiring proactive inspections on a
10 regular basis. Not all buildings should be subject
11 to these recommendations. Consideration should be
12 given to the nature and size of the structure, the
13 use of the structure, the uniqueness of the
14 structures, the complexity of the structures, and
15 whether or not those buildings are considered to be
16 public buildings, i.e., shopping malls or locations
17 where the public generally attends and are
18 considered to be public buildings notwithstanding
19 private ownership.

20 The regulation should also apply to
21 tenancies or tenants, because more often than not
22 the tenant has more of an interest in the condition
23 of the premises and, furthermore, some tenants are
24 there for a significant number of years. So for
25 the purposes of any recommendation in terms of

1 buildings as defined, it should include the tenant.

2 Then we suggest that you consider the
3 following recommendations.

4 Any and all engineers and architects
5 who have provided services to an owner of a
6 building or a structure as defined shall make
7 available to successor engineer or architect
8 requesting such information for and on behalf of a
9 tenant, owner or purchaser any and all information
10 in possession of that engineer or architect.

11 The next recommendation, an owner of a
12 defined structure or building, on the sale of such
13 building or structure or on leasing the building or
14 structure, shall provide to the tenant and/or the
15 purchaser of a building a statutory declaration
16 stating therein the names, addresses and contact
17 information of any and all architects and engineers
18 who have provided services to the owner or tenant
19 for the building or conducted any inspections. If
20 the owner or tenant of the building or structure as
21 defined is in possession of any reports,
22 assessments or letters written by such architect or
23 engineer relating to the building or structure as
24 defined, then the same shall be produced to the
25 purchaser or tenant, as the case may be.

1 The engineers and architectural
2 profession should be required to establish a
3 mandatory minimum guideline that should be followed
4 by engineers and architects, their employees,
5 servants and agents when conducting Building
6 Condition Assessments. I know the PEO would like
7 to change the reference. They don't want to call
8 it Building Condition Assessments and we agree with
9 that, so there is no further confusion in the
10 future.

11 These guidelines should bear in mind
12 and take into consideration the size of the
13 building, the location of the building, use of the
14 building, as well as the structural concerns.

15 The mandatory minimum guidelines should
16 be significantly statistically relevant, bearing in
17 mind the nature of the building as defined.

18 Now, then it would also help the
19 profession if there are mandatory minimum
20 requirements. During the course of this hearing,
21 sir, you had a Trow proposal for Algoma Properties
22 for about \$17,000 to conduct a Building Condition
23 Assessment at one point. And I may be off on the
24 arithmetic, but not by much. They hired Mr. Meyer
25 who provided services, and I think his cost was

1 around \$4,500 or thereabouts.

2 Now, obviously the \$17,000 job was
3 going to include significantly more than what the
4 \$4,500 job was going to provide. Both were
5 Building Condition Assessments. Both met with the
6 requirements of the engineering profession, but
7 there is a significant difference between what I
8 think Trow was proposing at one time and what
9 ultimately Mr. Meyers did.

10 By establishing mandatory minimum
11 requirements, you start with a base that applies to
12 everyone. You have statistically relevant random
13 sampling that has to take place. And all of that
14 establishes a base amount. And that is not
15 dictated by the owner. It takes it out of the
16 owner's hands. The scope of work is defined in a
17 professional fashion and is in the best interests
18 of the public.

19 All Building Condition Assessments
20 should include intrusive and destructive testing as
21 part of the mandatory minimum requirements, and
22 inspections should be conducted on a proactive
23 basis depending upon the building as may be
24 defined.

25 Thank you very much, and those are my

1 submissions.

2 I have a confession to make, though,
3 before I sit down. I had completed my submissions
4 for you, Mr. Commissioner, some weeks ago. On
5 Wednesday last I took it upon myself and decided
6 that the last 15 or 20 pages were not acceptable to
7 me and I wanted that changed, believing that I had
8 until the 9th to submit them to you.

9 On Thursday afternoon of last week, as
10 I returned to my office from Motions Court after
11 arguing a lengthy motion, I saw Mr. MacRae's
12 submission come across my desk, and that was the
13 first one. Then within a matter of minutes there
14 was a barrage of e-mails with all of the other
15 submissions, and I realized that I was off by a
16 day.

17 So I scrambled and at 6:30 I filed my
18 submissions and blamed it that I had technical
19 problems and that is why they were late past 5
20 o'clock.

21 Now, there are some clerical errors
22 because of the panic that had set in in getting
23 them across to you that I will be correcting, but I
24 apologize to you for those errors and in the
25 fullness of time I will give you my corrigenda, so

1 to speak, and I thank you very much, sir, for your
2 kindness throughout this hearing.

3 THE COMMISSIONER: Thank you very much
4 for those comments, Mr. Bisceglia.

5 MR. MacRAE: I'm next,
6 Mr. Commissioner, and I wonder if I might just have
7 five minutes to prepare.

8 THE COMMISSIONER: Let's take five, if
9 that would be helpful.

10 -- RECESSED AT 9:55 A.M.

11 -- RESUMED AT 10:00 A.M.

12 THE COMMISSIONER: Mr. MacRae.

13 MR. MacRAE: Good morning,
14 Mr. Commissioner.

15 First off, I would like to take the
16 opportunity, I believe because of the nature of the
17 proceedings, I haven't had the opportunity up until
18 this point in time to express my sincere
19 condolences to the families, the Aylwin families,
20 and the Perizzolos and also to Mr. Gendron.

21 Watching their testimony last week and
22 watching Mr. Denis Latulippe and watching
23 Mrs. Perizzolo's daughter speak brought home to me
24 as counsel the very real tragedy that occurred on
25 June the 23rd, and so I would like to begin my

1 submissions by talking and making very clear that
2 both myself and Mr. Wood express our condolences to
3 the families and to all of those people affected by
4 this tragic event.

5 There is a number of faces in this City
6 of people who have experienced a loss as a result
7 of the tragic collapse, but at the same time, many
8 difficult questions needed to be asked during this
9 Inquiry and also many difficult questions will have
10 to be answered by this Commission before this
11 process is complete.

12 To many of the people who have put so
13 much effort into attending here at the Commission
14 or watching it at home, it must have seemed
15 sometimes like we were too focussed on certain
16 issues, but as I said, questions needed to be asked
17 in an effort to bring forward the truthful facts
18 about what occurred to lead up to this tragic
19 result in June of 2012.

20 I would also like to begin by
21 indicating that my experience with all of the
22 fellow Counsel have been extremely accommodating to
23 me, to my requests, to my requests for assistance,
24 whether it is looking for a document that I can't
25 locate or looking for important information that I

1 didn't know about.

2 And also the efforts of Commission
3 Counsel have been very visible and I think somewhat
4 less visibly appreciated, and so at this
5 opportunity I would like to very vocally and
6 visibly indicate that Counsel have been incredibly
7 helpful and incredibly accommodating and I think it
8 is driven by professional courtesy and professional
9 reality but I also think it is driven by an
10 overarching desire to make sure that this
11 Commission works.

12 As well, the fact that this Commission
13 has taken place in this community, a community that
14 I have the honour of calling a hometown, and where
15 the tragedy happened has been made possible because
16 so many good people from far-away cities, from
17 Toronto, from Ottawa, have made all the efforts
18 necessary to come here to Elliot Lake and not make
19 Elliot Lake go to Ottawa.

20 And giving up, all of the Commission
21 Counsel, everyone who has worked on the Commission,
22 giving up your day-to-day to come here to Elliot
23 Lake for this Commission has been and will always
24 be appreciated by all of the residents of Elliot
25 Lake and I am sure by all of the participants and

1 the representatives at this Inquiry. Many of us
2 have had to live away from home, but we did have
3 our weekends and we could travel home if we needed
4 to.

5 To all the Counsel who have relocated
6 to Elliot Lake to make this Commission function so
7 well, on behalf of Mr. Wood and myself in
8 particular, I extend my thanks to Mr. Bernard, to
9 Ms. Kuka, and to all of the individuals who
10 captured all of our words and faithfully delivered
11 to us every night by 8 o'clock a copy of the day's
12 testimony, thank you.

13 To the interpreters who so faithfully
14 and sometimes by themselves delivered testimony to
15 all in both of the languages of Canada, I thank
16 them as well.

17 With respect to Mr. Oatley's comments,
18 Mr. Wood has expressed his remorse, and I thank
19 Mr. Oatley for acknowledging that in his
20 submissions.

21 Mr. Wood's actions will be reviewed by
22 many who have been involved in this Commission
23 process, whether as participants, counsel or a
24 member of the community audience. That is fair.
25 Mr. Wood knows this and has come to this Commission

1 and participated fully.

2 Mr. Wood met with the Commission
3 Counsel to assist in their preparation; for
4 Mr. Wood's attendance, he provided a will-say
5 statement and worked with counsel to complete that
6 so that other participants in this Commission would
7 have that opportunity.

8 And while that may have been almost
9 overwhelmingly the case with other participants, I
10 would suggest it is not completely the case, and
11 Mr. Wood worked very hard at coming to Elliot Lake
12 to do that in preparation and then Mr. Wood also
13 testified over two days on June the 6th and June
14 the 7th.

15 I think the best way to put Mr. Wood's
16 testimony is that he is certainly not a shrinking
17 violet. He has had to work in a tough industry.
18 He has been an engineer for almost 40 years. And
19 without exception, when Mr. Wood's name was
20 mentioned by anyone who testified, they spoke about
21 the high regard that they hold Mr. Wood in with
22 respect to his experience and his service to many
23 of the communities in Northern Ontario.

24 Mr. Wood's evidence was that he started
25 out as an engineer at a company and, by the time he

1 retired, he was a partial owner of the company. He
2 stayed with M.R. Wright and worked with M.R. Wright
3 and worked in many communities. His testimony was
4 very clear his experience was vast.

5 Mr. Wood has testified, and my
6 intention in my submissions, I have filed lengthy
7 submissions, Mr. Commissioner, and I do not intend
8 to read you them. I understand that they will be
9 reviewed by counsel and by yourself, and they deal
10 with much of the evidence, much of the submissions.

11 I intend to deal with one specific
12 factor in my closing submission, and that is the
13 testimony as it relates to three witnesses that
14 this Commission has heard from.

15 The reason that I have chosen this
16 focus for my closing submissions is because the
17 Commission has heard from 76 witnesses over 81 days
18 and it required 19,720 pages of typing to capture
19 the evidence that was obtained at this Commission.

20 Mr. Wood's testimony is full of his
21 opinion regarding the events and actions, and the
22 interpretation of his testimony is for all to
23 participate in. Whether it is in the confines of
24 your mind, Mr. Commissioner, or in the confines of
25 the Elliot Lake Tim Hortons, it is for all of the

1 people to come to their conclusions about the
2 evidence.

3 And I submit, in my respectful
4 submissions, that Mr. Wood told the truth when he
5 testified before this Commission.

6 So I'm seeking the opportunity to
7 ensure that anyone who speaks about my client in
8 the future, Mr. Wood will always be remembered and
9 reminded that here before the Commission Mr. Wood
10 told the truth.

11 Mr. Wood answered many tough and
12 difficult questions during his testimony, but
13 answer each question is what Mr. Wood did. Some
14 Counsel, and I am sure others who watched, may not
15 have liked the answers, but I submit that they were
16 truthful.

17 And while a person's reputation may be
18 impacted by a review of decisions that are made,
19 the worst that can happen is for there to be an
20 accusation that a person is not telling the truth.

21 This happened to Mr. Wood, and in these
22 submissions I intend to deal with it head on. Mr.
23 Wood, in my submissions, has told the truth and
24 I'll speak about the three witnesses who do in fact
25 contradict Mr. Wood.

1 The first witness is very easy to deal
2 with, actually. That is the contradictions between
3 Mr. McCowan's evidence and Mr. Wood's. It does not
4 put the two of them into direct conflict. The
5 differences between the testimony of those two
6 individuals can be explained.

7 Mr. McCowan does not recall the exact
8 words that he heard Mr. Wood say about the Algo
9 Mall during their very brief telephone
10 conversation. Mr. Wood does not recall speaking
11 with Mr. McCowan, but Mr. Wood did say that if he
12 spoke with Mr. McCowan, he would have talked about
13 the need for the roof repairs, but he did not,
14 according to Mr. Wood, put a price estimate on it
15 and that had never been part of Mr. Wood's mandate.
16 And clearly, the evidence makes that explicitly
17 clear. Mr. Wood's mandate did not deal with
18 repairing the roof.

19 Now, Mr. McCowan is a businessman and
20 he seized upon the M.R. Wright Report for the
21 purpose of obtaining a reduction of 1.5 million
22 dollars, or 1 million dollars according to Ms.
23 Sherrard's evidence, from the Nazarians as part of
24 the transaction that he was trying to complete in
25 purchasing the Algo Mall.

1 That makes good business sense, and it
2 seems that, and I say this with absolute respect,
3 but it seems that Mr. McCowan does million dollar
4 deals like we would buy a used car. He is very
5 experienced at it. He does it regularly and he
6 does it very quickly, and that may be the secret to
7 his success.

8 But in any event, I suggest that it
9 defies common sense for Mr. McCowan to suggest that
10 Mr. Wood told him that the Algo Mall was going to
11 fall down if it was not fixed immediately.

12 The evidence makes clear that Mr.
13 Wood's report was over two years old at the time
14 that Mr. McCowan first received the Coles Notes
15 about Mr. Wood's report, and Mr. McCowan
16 acknowledged that he did not even ask Mr. Wood if
17 he had been back to the mall in the intervening two
18 years.

19 There is much evidence from Mr. McCowan
20 that underscores the difficulty regarding
21 reconciling Mr. McCowan's testimony with that of
22 Mr. Wood. I want to make clear that I am not
23 suggesting or accusing Mr. McCowan of providing
24 false evidence. Mr. McCowan is to be respected for
25 his depth of experience, and also Mr. McCowan is

1 involved with the people of the City of Elliot Lake
2 regarding the new mall. He is to be thanked for
3 his efforts here in Elliot Lake.

4 The problem that I have as Counsel for
5 Mr. Wood is that, in leaving Mr. McCowan's
6 testimony unchallenged as it was presented, it puts
7 into Mr. Wood's mind knowledge about the structural
8 failings of the Algo Mall.

9 Mr. Wood's evidence was clear and
10 unequivocal. Mr. Wood testified that he did not
11 say anything to anyone about a structural problem
12 at the mall because he did not believe there was
13 one.

14 So in closing, with respect to Mr.
15 McCowan, I ask that this Commission use a common
16 sense approach while reviewing Mr. McCowan's
17 testimony. Mr. Wood told the truth and it was that
18 he had no advanced knowledge about the issues of
19 the structure at the mall.

20 The two other witnesses present a very
21 different story, Mr. Commissioner, in my respectful
22 submission. These two witnesses would have this
23 Commission, this community believe that Mr. Wood
24 was told about a crisis involving falling concrete
25 and that Mr. Wood did nothing about it.

1 Such an allegation goes to the very,
2 very core of Mr. Wood's reputation and his very
3 being.

4 Mr. Wood testified that he would have
5 probably closed the mall if he had been made aware
6 of the fallen concrete. Mr. Wood testified about
7 his long list of experience with structural
8 engineering.

9 Mr. Bob Nazarian, Mr. Commissioner, and
10 Mr. Levon Nazarian, Mr. Commissioner, would have
11 you believe, they want you to believe that Mr. Wood
12 is lying when Mr. Wood clearly testified that no
13 one told him about the fallen concrete.

14 In my respectful submission, and it is
15 a powerful one, I acknowledge that, but I submit,
16 Mr. Commissioner, that both Mr. Bob Nazarian and
17 Mr. Levon Nazarian have lied to this Commission.

18 I leave it to other Counsel to speak
19 about the lies that affect their clients. I intend
20 to deal only with the worst kind of lie that can be
21 used in a situation such as this. It is not lying
22 in saying I forgot when in fact I remember. It is
23 not the type of lying when you say I didn't see it
24 when you did. It is not the type of lying when you
25 suggest I was alone and I didn't do something or I

1 was alone and I did do something when I didn't.

2 I submit with the greatest of respect,
3 Mr. Commissioner, that the terrible lying is when
4 someone says that they told you something and you
5 didn't do anything about it. I submit that this is
6 the worst manner of lying to a Commission because
7 it is lying not only to help yourself out of a
8 problem but to shift the blame to someone else who
9 does not deserve it.

10 Mr. Bob Nazarian has done that by lying
11 under oath when he said he directed Ms. Bear to
12 call Mr. Wood when, in my respectful submission, he
13 never told Ms. Bear any such thing.

14 In fact, I submit that not only did he
15 not tell Ms. Bear to contact Mr. Wood, Mr. Bob
16 Nazarian took active steps to ensure that Mr. Wood
17 never became aware of the fallen concrete.

18 So step one of Mr. Bob Nazarian's
19 process is to involve Ms. Bear and blame Ms. Bear
20 for not calling Mr. Wood, for not following it up.

21 Ms. Bear attended before the Commission
22 and Ms. Bear gave candid, clear and I submit
23 truthful evidence about life at the mall with the
24 Nazarians.

25 Ms. Bear attended without a lawyer and

1 without a lawyer she stood up to cross-examinations
2 when she attended the first time and re-attended
3 the second time again without counsel.

4 It is interesting to note that during
5 her first appearance before the Commission Ms. Bear
6 defended both of the Nazarians. It is also
7 interesting to note that when Ms. Bear re-attended,
8 she indicated to the Commission, to yourself
9 directly, Mr. Commissioner, that she thought that
10 she had some things that she wanted to say and she
11 was declining to say them. One can only speculate
12 what they might be, but again, it is a testament to
13 Ms. Bear's credibility.

14 Within days of the first testimony when
15 Ms. Bear defended both of the Nazarians, I
16 respectfully submit that both Levon Nazarian and
17 Mr. Bob Nazarian used a lie about Ms. Bear to
18 continue their retreat from the truth.

19 I submit they both lied when they
20 testified that they asked Ms. Bear to do anything
21 about the fallen concrete. I submit that Ms. Bear
22 was not asked to speak with Mr. Wood and that Ms.
23 Bear, who was freshly minted as a new, responsible,
24 caring and successful manager of the property, was
25 entitled to properly rely upon the fact that she

1 had informed Mr. Bob Nazarian of the concrete, that
2 she had provided Mr. Bob Nazarian with pictures of
3 the concrete and that she expected Mr. Bob Nazarian
4 to quite properly do the right thing about the
5 concrete.

6 Forgetting about the concrete incident,
7 as Ms. Bear testified may have happened, did not
8 further one thing for Ms. Bear. There was no
9 advantage gained by Ms. Bear. She was working hard
10 for Mr. Nazarian and can reasonably explain as
11 having done the right thing by notifying
12 Mr. Nazarian and sending the pictures.

13 The issue that also arises as a result
14 of the lies of Mr. Nazarian regarding the concrete
15 is that the desire of Bob Nazarian and Mr. Levon
16 Nazarian is to have this Commission believe that
17 Mr. Wood, with almost 40 years of experience as a
18 respected structural engineer, failed to
19 investigate the fallen concrete. I submit this is
20 an absolute fabrication.

21 As I extensively review in my
22 submissions and as I put to Mr. Bob Nazarian during
23 my cross-examination of Mr. Nazarian, he wanted out
24 of the black hole that was the Algo Mall. That was
25 Mr. Nazarian's own testimony.

1 Mr. Levon Nazarian testified that there
2 was a crisis and they would do whatever it took to
3 dispose of the mall.

4 Mr. Nazarian needed to hide the
5 information about the fallen concrete. Mr.
6 Nazarian knew that the information about the fallen
7 concrete would close off any avenue of escape from
8 the money pit that was the Algo Mall.

9 I submit, Mr. Commissioner, that when
10 Mr. Levon Nazarian lied about what he said to Ms.
11 Bear, it is a lie about Mr. Wood as well. Mr. Wood
12 told the truth to this Commission. I respectfully
13 submit that Mr. Wood told this Commission that no
14 one told him about the concrete.

15 And I submit, in almost conclusion,
16 that this Commission should absolutely disregard
17 the evidence of Mr. Bob Nazarian and Mr. Levon
18 Nazarian when it conflicts with any of the other
19 witnesses' testimony or any of the factual
20 exhibits. I submit that they simply cannot be
21 believed.

22 Mr. Wood became entangled in Mr.
23 Nazarian's web of lies, and one can second-guess
24 the wisdom of working for the Nazarians but one
25 cannot second-guess the wisdom of telling the

1 truth. Mr. Wood, in my respectful submission, has
2 told the truth and understands that the Commission
3 will make findings of fact.

4 I ask the Commission to make a very
5 important finding of fact, Mr. Commissioner. I ask
6 you to make a finding of fact that when Mr. Wood
7 appeared before this Commission that he in fact
8 told the truth.

9 I also wish to deal with the section 17
10 notice and indicate that Mr. Bob Nazarian testified
11 without having received a section 17 notice and
12 without any knowledge of the section 17 notice. It
13 is not a complaint. I am not making a complaint as
14 counsel for Mr. Wood. I am using it to draw into
15 sharp relief the fact that the candour that Mr.
16 Wood expressed and obviously carried on in his
17 testimony before the Commission was without the
18 benefit of the information that ultimately was
19 contained in the section 17 notice.

20 Mr. Wood's expressed regrets that he
21 did not see what was to cause this problem, and
22 that is so different from lying about what you did
23 see. And I ask this Commission to consider that.

24 And in closing, I would like to thank
25 you personally, Mr. Commissioner, much as with

1 many, certainly with fellow Counsel, this has been
2 the first time that I have had an opportunity to be
3 involved in the process of a Commission.

4 In order to prepare myself for that, I
5 reviewed many of the other Commission websites that
6 were available as a result of the one that was
7 published for the Elliot Lake Commission of
8 Inquiry, and it is very clear that you steered this
9 ship in such a way that we avoided any of the
10 shoals that many of the other Commissions
11 unfortunately may have hit during the process of
12 the Commission hearing.

13 I don't think that is by chance. I
14 think that is as a result of experience. And I
15 thank you very much on behalf of myself and on
16 behalf of Mr. Wood for having the opportunity and
17 not only the opportunity, Mr. Commissioner, but the
18 privilege of attending before you. And once again,
19 in closing, I would like to thank everyone who has
20 helped me so much and certainly through me assisted
21 my client in attendance and preparation and
22 participation in this Commission.

23 Thank you, Mr. Commissioner.

24 THE COMMISSIONER: Thank you very much,
25 Mr. MacRae.

1 It is 10:30. Let's take our usual
2 morning break, perhaps take 15 minutes, and then
3 next we'll hear from Counsel for Mr. Derreck --
4 sorry, for Mr. Clinckett.

5 -- RECESSED AT 10:30 A.M.

6 -- RESUMED AT 10:46 A.M.

7 THE COMMISSIONER: Yes, sir.

8 MR. LITTLE: Good morning,
9 Mr. Commissioner, citizens of Elliot Lake and
10 Counsel. My name is John Little and I am here to
11 speak on behalf of John Clinckett.

12 Before I do, I want to say, although
13 I'm not from Elliot Lake, as the people from Elliot
14 Lake will know, I do recognize how important this
15 Inquiry is to the people of Elliot Lake and, in
16 particular, the families of those who died
17 tragically in the mall collapse.

18 I grew up myself in a little village
19 that was devastated by the flooding, and this is a
20 long time ago, of the Humber River during Hurricane
21 Hazel in which a number of people that I knew died,
22 a number of businesses were destroyed and a number
23 of houses had to be knocked down.

24 I know that recovery from something
25 like that in a small town takes a long time, and I

1 am certain this Inquiry will go some way in helping
2 people assist in recovering from it.

3 Mr. Commissioner, you have heard
4 obviously a great deal of evidence over a long
5 time. You have received a number of detailed
6 submissions covering the history of the mall
7 relating to its design, construction, maintenance
8 and government regulation.

9 You'll be pleased to know I'm not going
10 to address those issues in any detail. Rather, I
11 want to limit my remarks to the role Mr. Clinckett
12 played in the mall from about late 2007 to
13 mid-2008.

14 As you have heard, Mr. Clinckett is an
15 architect and he was originally retained by Mr. Bob
16 Nazarian to consider the feasibility of putting a
17 roof over the existing roof parking deck sometime
18 in late 2007.

19 Mr. Clinckett, as you will have heard,
20 obtained the original drawings for the building,
21 information from the supplier of the structural
22 slabs Coreslab, consulted his long-time structural
23 engineer, one James Fisher, before issuing a report
24 to Mr. Nazarian which is in evidence and it is
25 dated March 13, 2008.

1 That report indicated that a roof over
2 the parking deck would not be feasible and it would
3 not accomplish the purpose that it was intended to
4 accomplish.

5 The report is on the letter of John
6 Clinckett Architect, and Mr. Clinckett testified
7 that it included conclusions which had been reached
8 by Mr. Clinckett in conjunction with Mr. Fisher,
9 his structural engineer.

10 And I want to say that there is nothing
11 inappropriate about an architect issuing a report
12 that includes information obtained from a
13 structural engineer.

14 Now, to seek to resolve the ongoing
15 leakage problems at the mall, Mr. Clinckett then in
16 conjunction with Mr. Fisher recommended and
17 developed some specifications and tender documents
18 for the application of a waterproof membrane which
19 was to be topped with asphalt to be applied to the
20 parking deck.

21 This solution, as you will have heard,
22 was virtually identical to one which had been
23 proposed in the Halsall Report of 1999 which
24 Mr. Clinckett had received, and it is interesting
25 to point out, and I think other counsel have

1 referred to this in a more general way, that
2 although there were a large number of pre-existing
3 reports, they don't all seem to have been provided
4 to the various consultants down the road. And in
5 particular, Mr. Clinckett only received the Halsall
6 Report, although there had been a number of
7 structural reports issued prior to his involvement
8 in the mall.

9 The remedial work proposed by
10 Mr. Clinckett was tendered around April 26th, 2008,
11 and a contract dated May 14th, 2008, was prepared
12 by Mr. Clinckett for the successful bidder, a
13 company called C3 Harrell Inc., and that was in the
14 amount of its tender of \$903,000.

15 The evidence is clear that contract was
16 never signed by Mr. Nazarian.

17 Now, in my submission, there is very
18 little dispute given all of the evidence, including
19 the evidence of Mr. Nazarian, which was at times
20 contradictory, that the owner simply did not have
21 the funds at that point in time, and I am now
22 talking May 2008, to enter into a \$903,000
23 contract.

24 Although Mr. Clinckett after that time
25 had some sporadic contact with both Mr. Nazarian

1 and his lawyer Mr. Fabris in June and July of 2008,
2 I would suggest that by the end of May 2008 his
3 involvement in the mall had effectively terminated
4 and, as you will have heard, he was not paid in
5 full or even close to that.

6 It is interesting to note that by May
7 26th, 2008, Mr. Nazarian was already consulting
8 with another consultant, in this case a structural
9 engineer, Mr. Andrew Holford, who testified that he
10 was first contacted by Mr. Nazarian on that date.
11 He is with a respected engineering firm, Kleinfeldt
12 Engineering, and he was yet another in what was to
13 become a long line of consultants with whom the
14 mall owners consulted until the ultimate collapse,
15 notwithstanding that they failed to act on his
16 recommendations and those, the recommendations of
17 others thereafter.

18 To summarize, and I am going to be
19 brief this morning, Mr. Commissioner, the evidence
20 indicates that in both the initial conclusion about
21 the feasibility of putting a roof over the existing
22 parking deck and in the subsequent recommendation
23 to install a waterproof membrane with asphalt
24 topping, Mr. Clinckett acted competently as an
25 architect with the assistance of his structural

1 engineer Mr. Fisher.

2 And I would tell you, sir, that
3 although a statement from Mr. Fisher was taken by
4 the OPP and was available to Commission Counsel,
5 Mr. Fisher, as you will know, was not called as a
6 witness at this hearing.

7 The evidence of the Coreslab engineer,
8 Sonia Saari, in my submission, indicates that the
9 remedial work which was being proposed by
10 Mr. Clinckett with the input of his structural
11 engineer could have been supported by the parking
12 deck as designed, but that is something we'll never
13 know. The work simply did not proceed, with the
14 ultimate tragic result of the mall collapse.

15 I would submit that Mr. Clinckett
16 carried out his duties professionally and
17 responsibly, and I think I am fair in saying I have
18 reviewed the various written submissions, which are
19 voluminous and which are before you. It does not
20 appear to me that anyone in those submissions has
21 taken issue with the role which Mr. Clinckett
22 played.

23 This concludes my oral submissions,
24 Mr. Commissioner. Thank you for the opportunity of
25 letting me address you.

1 THE COMMISSIONER: Thank you,
2 Mr. Little. I'll be looking at your submissions
3 carefully.

4 Ms. Price.

5 MS. PRICE: Good morning,
6 Mr. Commissioner.

7 THE COMMISSIONER: Good morning.

8 MS. PRICE: My name is Leah Price. I
9 represent the Association of Professional Engineers
10 of Ontario, PEO.

11 As you know, the PEO regulates
12 professional engineers and professional engineering
13 in Ontario. In that capacity, the PEO sought and
14 obtained standing in order to assist the Commission
15 in providing information concerning the regulation
16 of professional engineers and professional
17 engineering and recommending appropriate changes or
18 additions to applicable legislation, regulations,
19 standards and codes in relation to professional
20 engineers in areas relevant to these tragic events.

21 In that, the PEO has carefully
22 considered a number of the issues and we have
23 noticed that a number of issues relating to
24 professional engineering have been raised through
25 the course of this Inquiry.

1 And as a result, the PEO struck a
2 committee for the purpose of carefully considering
3 what the PEO could do in cooperation with the
4 Commission and with the assistance of the Ontario
5 Government, because I need to point out right at
6 the outset that any recommendations relating to
7 legislation or regulations must be supported by the
8 Ontario Government. The Ontario Government must
9 not only pass any amendments to legislation but
10 also proclaim them into force and regulations have
11 to be passed.

12 So the committee gave careful thought
13 to the possible approaches and recommendations that
14 PEO could make to you, and we have provided them in
15 some detail in our written submissions. Our
16 written submissions and our recommendations are
17 intended as a starting point for discussion.

18 It is our hope and our expectation that
19 these will be further developed, possibly amended,
20 changed and refined through the course of the
21 upcoming roundtable sessions and of course in your
22 considerations when you come to look at the whole
23 of the evidence and the whole of the policy issues
24 when you come to do your report.

25 We thought the improvements that could

1 be made in legislation and regulations, and it is
2 our hope that improvements that can be made, that
3 are recommended and supported and passed might
4 avert a tragedy such as occurred in this case and
5 that such will not occur in the future.

6 The recommendations include proposals,
7 as I said, to amend PEO's own legislation and
8 regulations and also some comments on, in
9 particular, the Building Code.

10 To the extent that some of these
11 proposals are considered useful by you and come to
12 be supported in your recommendations, or some
13 variation of these, your support and
14 recommendations would undoubtedly be influential in
15 persuading the Ontario Government to support and to
16 pass necessary legislation proclaiming into force
17 legislation and regulations.

18 We believe that this Inquiry and your
19 report will go a long way towards assisting the
20 process of change and improvement.

21 Now, in our submissions, as you know,
22 we have concentrated on five areas of particular
23 relevance to PEO's mandate. They are listed on
24 page 3, but they are in particular the issue, as I
25 put it, of structural review, structural

1 engineering review and what has been identified
2 through the course of this Inquiry as a lack of
3 detailed legislative standards or requirements
4 concerning structural engineering inspections with
5 regard to existing buildings such as this mall.

6 There are some standards relating to
7 other kinds of structures, but with regards to
8 existing buildings such as this mall, there isn't a
9 specific standard.

10 The second issue is the apparent
11 unavailability of prior Inspection Reports, and the
12 general question of the availability of information
13 both to owners, to tenants, subsequent engineers,
14 subsequent architects and might I say possibly to
15 members of the public who may have some concern.

16 So that is the second area that we have
17 looked at.

18 And the third is the inaccessibility of
19 comprehensive information concerning licensing and
20 discipline history of professional engineers.

21 The fourth is the qualification of the
22 professional engineers conducting or supervising
23 inspections of large structures such as the mall.

24 And the fifth is the standards
25 applicable to supervision by professional engineers

1 of work carried out by people who are either not
2 licensed or people whose licences have been
3 suspended or revoked.

4 And within the submissions, what we
5 have done is looked at each of these areas,
6 examined some evidence, certainly nothing like the
7 totality of the evidence before you, that indicates
8 what we see as a need for some change or
9 recommendations and then outlined the process and
10 the thinking process that we have gone through and
11 where we have ended up at this stage with the
12 proposals that we make to you, Mr. Commissioner.

13 Now, in two of the areas that are
14 identified in our submissions and that we deal
15 with, I might say that the PEO has in fact taken
16 steps that are within its own powers.

17 So following the tragedy, the PEO did
18 issue a Practice Bulletin that specifically relates
19 to structural review of existing buildings, and
20 that was done in November, and the collapse
21 occurred in July and it was done in November. And
22 this is the area, the area of structural review
23 that has been, in my submission, from my
24 observation the one of most concern with regard to
25 the engineering profession to this Inquiry.

1 And I want to talk in some detail about
2 that portion of our submissions, not in so much
3 detail that I will spend the day, but in a little
4 bit of detail in any event.

5 The other area that the PEO has made
6 some changes is by improving transparency on its
7 website to make it easier for people to get
8 information concerning discipline history and
9 current status of engineers, and that is addressed
10 in the area "C" within our submissions and I
11 explain that in paragraph 37. But however, it
12 should be noted that more detailed changes -- that
13 is paragraph 37 of our submissions. But I note at
14 paragraph 49 that more detailed changes with regard
15 to the contents of public information do require
16 amendment to the legislation, and that is
17 identified in paragraph 49 of our submissions where
18 we explain that enhanced transparency serves the
19 public interest and is consistent with the modern
20 trend towards greater openness.

21 To that end, we do recommend that the
22 PEA be amended, that is, the Engineering Act be
23 amended to include additional information in the
24 register and that information in the register be
25 posted on the website. So this additional

1 transparency would require legislative amendment.

2 As I said, from a review of the
3 submissions of other parties, it is clear that the
4 issues of greatest concern that affect engineers
5 are issues "A" and "B", that is, the issue of
6 structural review and the issue of availability of
7 information, and it is perhaps fitting that our
8 submissions devote the most time to those two
9 issues.

10 I do want to briefly highlight a couple
11 of issues relating to a couple of the comments that
12 we make relating to these two.

13 And again, first and most importantly,
14 the issue of structural review of existing
15 buildings, we do identify in our submissions the
16 details of the Practice Bulletin that was issued
17 regarding structural engineering assessment of
18 existing buildings and at paragraph 13 there is a
19 fairly detailed extract from that Bulletin.

20 It is, however, important to note that
21 that Bulletin at the moment doesn't have the force
22 of law. More particularly, under Regulation 941
23 under the Professional Engineers Act it is
24 professional misconduct to fail to make responsible
25 provision for complying with applicable statutes,

1 regulations, standards, codes, by-laws and rules,
2 and it is also professional misconduct to breach
3 the Professional Engineers Act itself or any
4 regulation passed, other than something that is
5 solely a breach of the code of ethics. And this is
6 paragraph 15.

7 It is important to note that it is not
8 necessarily professional misconduct to fail to
9 comply with or breach requirements set out in
10 guidelines. Guidelines and the Practice Bulletin,
11 as we speak, has the force only of a guideline and
12 therefore does not have the force of law.

13 It is therefore of crucial importance,
14 in our respectful submission, that the Commission
15 look at these issues because we do recommend that a
16 regulation be passed, as I say, that the Bulletin
17 be made binding and enforceable by way of a
18 regulation as a performance standard under section
19 7(1)(17) of the PEA.

20 If that were done, that would -- and
21 you have heard other people say in both their
22 written and in their oral submissions that
23 mandatory guidelines would, as I believe
24 Mr. Bisceglia said, sever the control and the link,
25 if you will, between the owner and an engineer

1 whereby the owner can choose to limit the scope of
2 an inspection. So that is the first and perhaps
3 most important recommendation we make, and we urge
4 you to consider.

5 We do say that what we should -- we go
6 on to talk about when a report such as would be
7 mandated under the performance standard should be
8 prepared, and we have given it a name. The name
9 is -- there is no magic in the name. We call it a
10 Structural Adequacy Report for purposes of -- it is
11 the SAR, not a SARS but a SAR, but something just
12 for a name, but clearly there is no magic in the
13 name.

14 The upcoming roundtable process we
15 believe will be helpful to tease out the details of
16 such a report and the details of such a
17 requirement.

18 You will see that we have also given
19 thought in paragraph 18 as to triggering mechanisms
20 that may require such a report to be prepared by an
21 engineer, and that is another important question
22 that has been raised several times by a number of
23 people. When should such a report be prepared?
24 Clearly, not every little house that has an
25 engineer come look at it requires that detailed a

1 report. Yet where will the line be drawn? And it
2 is a difficult line to draw. And as you can see,
3 we have made an effort to suggest appropriate
4 triggering mechanisms in our submissions.

5 So those are the first two and perhaps
6 the first and most important of the
7 recommendations.

8 We then go on to examine the issue of
9 availability of engineering Inspection Reports, and
10 you can see that this works together because what
11 we are talking about as being more available is
12 this more formal report that would be required in
13 circumstances where there is a concern or a danger
14 or where there is a particular type of structure
15 that may create a problem for public safety.

16 So it does appear in the evidence of a
17 number of witnesses that there was a general lack
18 of information, and we do agree that structural
19 engineering reports should be provided to the local
20 CBO. That we explain in paragraph 29.

21 And again, we have given some thought
22 to the circumstances under which that requirement
23 should exist. But again, this is a proposal, a
24 first step, but you can see that we have identified
25 the Building Code provisions that are referred to

1 in division "A" as being the kinds of buildings
2 that may trigger or require reports to be provided.
3 And of course, once a report is provided to the
4 Chief Building Official, it can be acted upon by
5 the municipal officials.

6 That would require, again, legislative
7 change, and again, we urge and submit to you,
8 Mr. Commissioner, that legislative changes that are
9 deemed appropriate to help prevent these tragedies
10 in future be recommended by you and that would
11 assist the process.

12 So the other areas are dealt with.
13 They aren't as much of a concern, but what you can
14 see in examining our written submissions and what I
15 urge in my oral submissions is that these kinds of
16 concerns are of a piece, if you will, that they
17 work together for the purpose of assisting in
18 protecting public safety.

19 So the key then, in our submissions at
20 least, the key recommendation is, as I said,
21 recommendation number one which creates, if passed,
22 a mandatory standard for these kinds of reports.

23 That works then together with the
24 contents of such a report, which is referred to in
25 recommendations 2 and 3. That then links into the

1 sharing of information by recommendation 4 which
2 requires that such reports be provided to the Chief
3 Building Official in circumstances to be
4 delineated.

5 And as well, the building -- the
6 official -- the Building Code should contain
7 triggering requirements which again will link into
8 the contents of the report, the requirements of the
9 report and the sharing of information.

10 So we link as well to this the
11 recommendation that there be a development of a
12 specialist certification, and that is addressed in
13 our issue "D", which is specialist certification.

14 That links together with the other
15 recommendations that deal with structural concerns
16 because we are proposing that specialist
17 certification criteria be developed and a
18 structural engineering specialist would be the
19 person who would take responsibility for the
20 structural adequacy reports that are to be mandated
21 and the contents of which are to be mandated in
22 accordance with these recommendations.

23 So with that combination, if you will,
24 of thoughts that we put forward to you and for your
25 consideration, and of course we look forward to

1 developing further in the upcoming policy
2 roundtable process and look forward to your
3 development in the process of writing your report,
4 the PEO hopes that the regulation of professional
5 engineering and professional engineering in Ontario
6 and the regulation and protection of existing
7 structures such as the mall will be improved such
8 that the terrible events of last year will not be
9 repeated.

10 As I said at the outset, our proposals
11 are intended as a starting point. We look forward
12 to being able to assist the Inquiry in any way we
13 can and thank you very much for your time and for
14 your attention.

15 THE COMMISSIONER: And I thank you, Ms.
16 Price, and PEO for these very detailed and very
17 carefully considered and critically useful
18 recommendations. Certainly I was very impressed
19 reading them, as were Counsel, and we very much
20 look forward to PEO's further participation in the
21 roundtables later on.

22 So thank you very much for being here
23 this morning.

24 MS. PRICE: Thank you.

25 THE COMMISSIONER: And thank you for

1 this work.

2 And then Counsel for Mr. MacDonald,
3 Mr. Thompson.

4 MR. THOMPSON: Good morning,
5 Mr. Commissioner. My name is Scott Thompson. I'm
6 counsel for Brian McDonald.

7 As you know, Brian testified with
8 respect to a Building Condition Assessment done in
9 2005.

10 We have reviewed the submissions of
11 everyone here and no one has taken issue with
12 respect to his conduct, so I won't be making any
13 further comments to our written submissions with
14 respect to that.

15 But I do have a few brief comments that
16 I would like to make respect to probably what feeds
17 into the recommendation process.

18 And part of that is I think what has
19 become apparent is there is different types of
20 reports that engineers perform, and one of the
21 things that makes a big difference is whether the
22 report is done for the owner or whether it is done
23 for a third party.

24 And there is different types of
25 reports, and as is pointed out in Trow's

1 submissions at paragraph 124, there is different
2 elements that can be involved in these and
3 different degrees of comprehension.

4 So I think when the Commission is
5 looking at recommendations in this area, they need
6 to keep in mind those variations and the fact that
7 not everything is a structural assessment; not all
8 engineering reports are structural assessments, and
9 so there is different practical factors that has to
10 be taken into account in considering these issues.

11 And that really leads into the other
12 aspect that we wanted to touch base on, which is
13 making this information available for subsequent,
14 and we suggested a record or a log at the building
15 site similar to what in some respects under the
16 Occupational Health and Safety Act for equipment.
17 Equipment has a record of the maintenance that
18 takes place with respect to that.

19 But there will also be we think
20 practical considerations that have to be taken into
21 account with that, because some of these reports
22 have confidential aspects to them. I suppose one
23 of the things to keep in mind is sometimes reports
24 are prepared in contemplation of litigation, but
25 even a record at the work site that an engineer had

1 been there and prepared a report, even if it is of
2 a confidential nature and not available, that even
3 that would help alert subsequent people that the
4 issues had been addressed.

5 So we want to thank you for giving us
6 the opportunity to participate in the Inquiry and
7 look forward to your report.

8 Those are my comments.

9 THE COMMISSIONER: Thank you very much,
10 Mr. Thompson.

11 Mr. Longo, I think you are next.

12 MR. LONGO: Good morning,
13 Mr. Commissioner, and thank you.

14 Sir, the Ontario Building Officials
15 Association's written submissions that have been
16 filed request that this Commission reach eleven
17 general findings and conclusions respecting the
18 construction and the maintenance of the Algo Centre
19 Mall.

20 Firstly, at all times the City has had
21 detailed and comprehensive building by-laws which
22 were enacted pursuant to and complemented Ontario's
23 in force Building Code Acts and Building Codes.

24 Secondly, the circumstances surrounding
25 the issuance of the building permits for the mall

1 and the inspections during its construction suggest
2 that less than rigorous municipal scrutiny, review
3 and approval processes were undertaken.

4 Third, while there is some doubt as to
5 whether the design drawings of the mall met the
6 requirements of the applicable Building Code, there
7 is no doubt that the actual mall structure as
8 constructed failed to meet the then worded general
9 code requirement that roofing be, quote, "installed
10 so as to shed or drain water effectively".

11 Fourth, once the mall was constructed
12 and the building permit file closed, the matter
13 became a, quote, "property standards" building
14 maintenance issue.

15 Number five, while possessing the
16 explicit power to do so, the Province has not in
17 the past two decades established any minimum
18 building maintenance standards for constructed
19 buildings.

20 Six, at all relevant times while the
21 City exercised its discretion and enacted detailed,
22 comprehensive Property Standards By-Laws, the
23 existence and content of those by-laws were little
24 known, if at all, in the community.

25 Seven, coupled with the City's

1 complaint-based enforcement policy, a property
2 standards inspection was rarely, if ever,
3 triggered.

4 Number eight, other than two instances,
5 no proactive investigation and enforcement of the
6 Property Standards By-Law were ever initiated by
7 the City respecting the mall's well-known leaking
8 roof situation.

9 Number nine, in the two instances where
10 the City's Chief Building Official took action
11 pursuant to the Property Standards By-Law, the
12 required follow-up was either non-existent or
13 inappropriately concluded.

14 Number ten, it would appear that the
15 City Council and staff were deferential to the
16 first two owners of the mall.

17 And finally, number eleven, there was
18 never any reason apparent to the City's Chief
19 Building Officials that the mall's structural
20 integrity was so compromised at any point by the
21 roof leaks as to warrant the issuance of an Unsafe
22 Building Order pursuant to section 15.9(4) of the
23 Building Code Act, 1992.

24 Mr. Commissioner, my client's written
25 submissions elaborate upon each of these topics and

1 provides a basis for reaching these conclusions. I
2 will assume that the submission will be carefully
3 read and will not elaborate further on these unless
4 the Commissioner requests additional comment or
5 clarification.

6 Sir, I would like to turn to comments
7 that are contained in other written submissions
8 that have been filed, and there are three that I
9 would like to highlight for making some
10 clarification points.

11 The first is the one that is filed by
12 the Province. Part 3 of the Province's written
13 submission contains a very useful and neutral
14 discussion respecting many aspects of the Building
15 Code Act, 1992 and the Building Code.

16 There is, however, one aspect of that
17 submission which the OBOA feels requires further
18 clarification and elaboration and that deals with
19 the Province's comments on training of Building
20 Officials.

21 Sir, the comments that my client takes
22 some exception to are found in paragraphs 172 of
23 the Province's brief and paragraphs 205 to 209
24 inclusive.

25 I won't read those paragraphs to you,

1 having noted them for the record, but I would
2 provide the following observations respecting
3 provincial training of Building Officials in no
4 particular order.

5 Number one, with respect to
6 qualifications and training, I would like to
7 reinforce that the current mandatory framework that
8 the Province has established has no regard for
9 mandatory experience and/or education, leaving
10 Building Officials, unlike other professions who
11 practice in the realm of public safety and are
12 required to complete, achieve and demonstrate these
13 elements of experience and education prior to
14 practice.

15 Number two, the Ministry of Municipal
16 Affairs and Housing, which is the responsible
17 Ministry, has had a diminishing role as an
18 administrator of training for the Building Code Act
19 and Ontario Building Code in recent years.

20 Since mandatory qualifications were
21 first introduced in 2006, MMAH developed basic
22 examinations which were concerned with locating
23 information within the Act and the Code and
24 refresher courses designed to facilitate exam
25 completion. But no real step has been taken by the

1 Province to improve education or attempt at any
2 skills-based training approaches.

3 We respectfully submit that the
4 Ministry relied on my client to deliver new
5 material to Building Officials and the Province
6 made no process to deliver any such materials. My
7 client has become the de facto training body for
8 the entire industry at this time.

9 Ontario colleges have now been
10 sub-licensed to do certain training, as the
11 Province continues to devolve that aspect of its
12 mandate.

13 And, sir, it was respectfully submitted
14 that the provincial submission does not indicate or
15 reflect the fact that the Ministry has been getting
16 out of the business of training over the last eight
17 years. And the training, as I indicate, that is
18 provided is not best practice advice in any way,
19 shape or form.

20 As I have indicated, the exams of the
21 Province are Code-based only and do not take into
22 account job skills or experience, and my client
23 looks forward to continuing to fill that void and
24 provide training and education and skill, life set
25 skills to these Building Officials.

1 I would like to turn to the City
2 submission that has been filed and to focus solely
3 on recommendations 181, 182 and 183, and in these,
4 Mr. Commissioner, the City seems to be taking the
5 position that building safety, structural
6 integrity, building maintenance are outside the
7 knowledge of members of municipal staff in a
8 community the size of Elliot Lake, that Chief
9 Building Officials and their staff are generalists
10 and perhaps the Ministry of Labour should be more
11 greatly involved in matters dealing with the
12 Building Code dealing with safety issues.

13 Sir, I would strongly resist the
14 Commission endorsing any sense that the Ministry of
15 Labour take over these roles.

16 First of all, it is respectfully
17 submitted that the Ministry of Labour does not have
18 the expertise that I believe the City believes it
19 does.

20 Secondly, Building Officials and Chief
21 Building Officials are required to have technical
22 training to identify what is or could become an
23 issue, in other words, to flag potential issues of
24 structural concerns.

25 Once identified, the Chief Building

1 Official has the tools set out in the Building Code
2 Act to administer that Act and issue orders and
3 gain compliance. That is the role of the Chief
4 Building Official, and my client certainly does not
5 want to see that role given up to others such as
6 the Ministry of Labour.

7 Quite frankly, those kind of
8 inspections are best done locally and in response
9 to local situations, and to think that the Province
10 would have the staffing or the manpower to fill
11 that role I think is unrealistic.

12 There is also a concern expressed in
13 the City recommendations that there is an overlap
14 between property standards in the Building Code
15 that is confusing and perhaps blurs what one's
16 obligations are.

17 Well, I respond to that in two ways.

18 The first is the City itself has chosen
19 the structure in which it wishes to enforce
20 property standards and it has assigned that task to
21 the Chief Building Official. So they have piled
22 on, if you will, added responsibility to the Chief
23 Building Official for property standards, along
24 with animal control, parking, lottery licences and
25 all those other things that they have given.

1 That shouldn't then be a reason for
2 saying there is too much confusion and overlap,
3 somebody else should be doing it. It is, I
4 respectfully submit, the City's responsibility to
5 maintain and enforce its own by-laws and it has the
6 options of how to enforce them. And to simply say
7 that they have failed in it is a reason to change
8 the law is not one that we think should find favour
9 with this Commission.

10 And finally, briefly, a brief
11 correction on the filing of Mr. Oatley concerning
12 the Aylwin and Perizzolo families.

13 In his introduction of his written
14 submissions, Mr. Oatley's submission incorrectly
15 states that the Building Code addresses both the
16 construction and maintenance of buildings, and
17 clearly, I think the evidence is clear that
18 maintenance of buildings is not so covered by the
19 Building Code.

20 And the maintenance program that is
21 referred to in paragraph 7 of Mr. Oatley's written
22 submission is a maintenance program that is
23 directed solely to septic systems and not to
24 building construction.

25 So I would like to make those

1 clarifications on those three submissions.

2 I would now like to turn to those that
3 my client would like to thank for the supportive
4 submissions that they have made and note that many
5 of these, Mr. Commissioner, voice the same
6 recommendations that I will be referring to
7 momentarily that my client wishes to advance before
8 the Commission.

9 In no particular order, EXP
10 Global/Trow, Mr. Outerbridge. If you review
11 paragraph 30 of his written submission, he notes
12 that there appears to be sufficient municipal
13 inspection powers, and instead of expanding those
14 powers, he said other options that would be
15 suggested include, A, improving the credentials or
16 expanding the training required for a person to
17 assume the role of Chief Building Official; and
18 two, providing better guidance to Chief Building
19 Officials about what powers they possess and when
20 to exercise them in the public interest.

21 And, Mr. Commissioner, those are
22 precisely the roles that my client performs and
23 would like to enhance through the recommendations
24 that it will be advancing.

25 Secondly, the PEO. The submission that

1 you have just heard from my friend Ms. Price and
2 the written submission, I would simply say that I
3 compliment them with that detailed submission and
4 the suggested legislative reforms which I agree
5 will greatly assist in closing certain regulatory
6 gaps in that profession, and I look forward to
7 having those discussions in Phase II with her and
8 filling those out.

9 I note that Tom Derreck, his
10 recommendation number 8 was that Chief Building
11 Officials be required to report every six months on
12 unresolved by-law infractions or violations. That
13 seems to me to be an appropriate, quote, "best
14 practice" to follow.

15 ELMAC at page 130 of their submission
16 state that Ontario should support the establishment
17 of improved and mandatory training of all municipal
18 Building Inspectors.

19 SAGE, I would like to thank Mr. Myles
20 and his group for their recommendations, but I'll
21 especially point out recommendation 9, both in
22 their written submission and recommendation 9 in
23 their recommendations which note correctly that
24 municipal Building Officials are not required to
25 become certified under law and those who do become

1 so do so on a voluntary basis.

2 It is felt that the requirement of full
3 certification and stages of same would establish
4 uniform standards for all municipal Building
5 Officials and allow municipalities to be aware that
6 all Applicants would be fully trained in
7 professional standards and the position will be
8 governed by the association, my client, as to
9 ethics standards and requirements. And I
10 appreciate that observation and trust that they
11 seem to see my client and the role it can play.

12 So, Mr. Commissioner, I would like to
13 review briefly then the policy issues that my
14 client would like to see this Inquiry address in
15 Phase II, and there are ten of them.

16 But before reading them, I would like
17 to read a quote from the Ontario Superior Court
18 Division that is referred to as APEO v Ontario
19 (MMAH), which is reported at 2007 CanLII 17629.
20 And in this decision, the Court said the following:

21 "The Building Code certainly bears
22 the distinctive characteristics of a
23 professional regulatory statute. It
24 regulates the requirements for
25 admission to practice in the field

1 of submitting building plans to the
2 various building officials for
3 approval. There are educational and
4 insurance requirements, allocations
5 of responsibility for various kinds
6 of work, rules as to the stamping of
7 work product, administrative
8 obligations such as giving access to
9 client files and information,
10 disciplinary sanctions, revocation
11 powers on character grounds. In
12 scope and function it is
13 indistinguishable from professional
14 regulatory acts. If truth be told,
15 the Building Code is a professional
16 regulatory act in search of a
17 profession."

18 [As read.]

19 And it is my respectful submission,
20 sir, that that is a proper assessment of the law as
21 it is now and why recommendation number one that we
22 would hope this Commission will advance is that
23 there would be mandatory CBCO certification; that
24 is, Certified Building Code Official certification
25 for all Building Officials.

1 In light of the stated purpose of the
2 Building Code and the roles and responsibilities of
3 Building Officials and inspectors under the Act, we
4 pose the question: Should it be a mandatory
5 requirement that every Building Official and
6 inspector be certified as a CBCO to be employed and
7 practice in Ontario?

8 And of course, we submit that the
9 answer should be yes.

10 Secondly, the establishment of a
11 minimum, quote, "competence qualification
12 standard". Due to the ever-increasing complexity
13 of the Building Code's provision and the
14 significance of their duties protecting the public
15 life, health and safety, should minimum competency
16 qualifications, experience and knowledge
17 maintenance standards be established and enforced
18 for all Building Officials and inspectors?

19 And again, my client submits in the
20 affirmative.

21 And following the quote that I had from
22 the judicial decision, our third submission is
23 regulation of Building Officials. Is it in the
24 public interest that all Building Officials and
25 inspectors be regulated as a profession?

1 I would like to turn to our fourth
2 submission that we hope will be discussed, and that
3 is the independence of a Chief Building Official.
4 The CBO performs a statutory role and duties
5 assigned under the Building Code Act which are
6 independent of the municipal Council, and I think
7 many court cases have acknowledged that
8 independence.

9 Nevertheless, the CBO is also a
10 municipal employee and usually performs a variety
11 of other municipal duties and tasks for which
12 municipal direction is appropriate, and we ask:
13 Should the Building Code Act, 1992 explicitly
14 enshrine the independence of the CBO from Council
15 when performing its statutory role and fulfilling
16 the duties assigned to that official?

17 We believe it ought to.

18 Point number five, establishment of a
19 minimum mandatory provincial building maintenance
20 standard. Should the province establish an Ontario
21 building maintenance code setting minimum
22 provincial-wide standards for the maintenance,
23 occupancy and repair of certain existing buildings?

24 Mr. Commissioner, you have heard for
25 over 20 years the power has resided with the

1 Province to create such a Code that could apply to
2 existing buildings. We think the time has come
3 that that power be exercised and we look forward to
4 discussing in Phase II the types of buildings to
5 which that power ought to apply.

6 Number six, establishment of minimum
7 mandatory municipal property standards. In the
8 alternative to province-wide minimum standards,
9 should there be a requirement that all Ontario
10 municipalities be required to enact a Property
11 Standards By-Law which contains minimum standards
12 for the maintenance, occupancy and repair of
13 certain existing buildings?

14 In this municipality, their by-law does
15 that, but as you heard from the evidence during
16 this Inquiry, many municipalities have no such
17 control and we believe that is an absence that
18 needs to be resolved.

19 Number seven, we would like to address
20 the public awareness of municipal Property
21 Standards By-Laws. How can the public become
22 better informed about the existence and content of
23 municipal Property Standards By-Laws and, more
24 importantly, the municipality's chosen enforcement
25 policy respecting those?

1 We think it is very important that this
2 Commission address that and correct what clearly
3 seemed to be an instance here of a very good by-law
4 that no one was aware of.

5 Number eight, complaint-driven
6 municipal by-law enforcement. On this one,
7 Mr. Chairman, my experience tells me that
8 complaint-driven municipal by-law enforcement is,
9 in part, a response to the current state of the law
10 respecting liability that arises out of the
11 negligent performance of an operational policy
12 decision to undertake proactive by-law enforcement,
13 and it is simply a response to the law but in
14 essence penalizes a municipality of choosing
15 anything other than a complaint-based system.

16 And we would like to raise for
17 roundtable discussions should municipalities be
18 given sufficient statutory protection from
19 liability to encourage them to institute and
20 undertake proactive enforcement of the Property
21 Standards By-Laws, including the determination of
22 the structural sufficiency of existing buildings?

23 The final two recommendations.
24 Registry of professional engineering reports,
25 should there be a statutory requirement that

1 professional engineering reports which address the
2 structural condition of certain buildings, for
3 example, those that are open to the public or meet
4 other established criteria, be filed in a publicly
5 accessible registry?

6 And, sir, I refer in my submission to
7 both records of site condition under the
8 Environmental Protection Act and its regulation and
9 archaeologists' reports and the registry that had
10 been set up under the Ontario Heritage Act as
11 examples of public registries that have
12 professional reports that are publicly accessible
13 as perhaps a guide for determining the issues that
14 you have been dealing with in this submission.

15 And then finally, definition of a prime
16 consultant. Should the term "prime consultant" be
17 defined in the Architects Act, the Professional
18 Engineers Act and the Building Code? And should
19 the roles, duties and obligations be set out in
20 those documents to ensure that such are generally
21 understood by the profession, by clients and by the
22 public?

23 Mr. Chairman, in closing, my client and
24 I wish to express our gratitude to you, all
25 Commission Counsel and staff and all the

1 participants' Counsel and representatives for three
2 things.

3 Number one, the attention and
4 consideration you have all given to the aspects of
5 my client's Inquiry participation.

6 Secondly, to the courtesies extended to
7 myself throughout the Part I, Phase I proceedings.

8 And thirdly, I compliment everyone on
9 their common effort and shared goal of ensuring the
10 complete and successful fulfillment of this
11 Inquiry's Terms of Reference.

12 Mr. Commissioner, in my opening
13 statement to you, I think it was on March 5th, I
14 advised that, quote:

15 "The OBA perceives its role at
16 this Inquiry as being twofold.

17 The first is that of offering
18 assistance to the Commission and all
19 participants in better understanding
20 the state of the law and practices
21 respecting the inspection of
22 buildings while under construction
23 and code enforcement and the
24 inspection and maintenance of
25 buildings once constructed.

1 The second role was to suggest
2 legislative and policy changes that
3 will address and positively improve
4 upon the matters the Commission has
5 been charged to investigate and
6 consider as part of its terms of
7 reference."

8 [As read.]

9 Sir, I sincerely hope that I have
10 appropriately discharged that first stated task
11 over the past five months, and I look forward to
12 participating in the Inquiry's second phase of
13 policy roundtables in Ottawa later this fall.

14 Thank you for your attention.

15 THE COMMISSIONER: Thank you very much,
16 Mr. Longo, and thank you for your highly competent
17 and evidently knowledgeable assistance and
18 participation throughout Phase I, and we certainly
19 do look forward to the CBAO's continued
20 participation, assistance and advice during the
21 roundtable phase of our work.

22 Thank you very much.

23 MR. LONGO: Thank you very much, sir.

24 THE COMMISSIONER: And Mr. Cassan.

25 MR. CASSAN: Thank you,

1 Mr. Commissioner.

2 And I suppose that I'll start by
3 thanking you and Commission staff and Commission
4 Counsel as well for their assistance to the City
5 during Phase I. Of course, I'll be continuing to
6 sit with you every morning as we proceed through
7 Phase II.

8 I'm not intending, Mr. Commissioner, in
9 my submissions to deal with a lot of the extensive
10 evidence that you have heard. It is dealt with in
11 our written submissions and you have certainly sat
12 through it extensively.

13 [REPORTER'S NOTE: The sound of an
14 alarm can be heard in the hearing
15 room.]

16 MR. CASSAN: You were on time.

17 MR. LONGO: Sorry, that was my 30
18 minutes running out. I'm glad I was sitting down
19 when that went off. Sorry.

20 Sorry, Mr. Cassan.

21 MR. CASSAN: That is fine, thanks,
22 Mr. Longo.

23 Instead, Mr. Commissioner, I'm going to
24 comment about how the City believes some of the
25 evidence should be interpreted and provide you with

1 some tools for its interpretation and your
2 understanding of it.

3 Now, we all know that on June 23rd,
4 2012, the Algo Mall collapsed and the occurrence of
5 that event commenced the analysis of the mall
6 construction, ownership, inspection and maintenance
7 from a perspective of perfect hindsight.

8 With respect to that concept, I want to
9 read you a quote from Leo Tolstoy's War and Peace,
10 and he writes:

11 "But all these hints at foreseeing
12 what actually did happen on the
13 French as well as on the Russian
14 side are only conspicuous now
15 because the event has justified
16 them. If the event had not come to
17 pass, these hints would have been
18 forgotten, as thousands and millions
19 of suggestions and suppositions are
20 now forgotten that were current at
21 the period but have been shown by
22 time to be unfounded and so have
23 been consigned to oblivion."

24 THE COMMISSIONER: I just hope your
25 submissions aren't as long as War and Peace.

1 MR. CASSAN: Thank you,
2 Mr. Commissioner, I promise they won't be. I have
3 certainly learned, Mr. Commissioner, not to
4 interfere with the commencement of the lunch break,
5 and I undertake to be complete before then.

6 So building on Tolstoy's lesson to us,
7 the concept of hindsight bias from a legal
8 perspective is when people who know the answer
9 vastly overestimate its predictably or obviousness,
10 compared to the estimates of subjects who must
11 guess without advanced knowledge. Hindsight bias
12 is sometimes called the "I knew it all along"
13 effect.

14 It is critically important when looking
15 at the actions of the City or really anyone
16 involved with the mall not to be poisoned by
17 hindsight bias, and it will be a challenge for you
18 in your task of distilling the evidence and
19 considering it to keep in mind what the people
20 whose actions you are evaluating knew at the time
21 as compared with what you now know through sitting
22 through 81 days of testimony.

23 Hindsight bias is rampant in the
24 evidence of various of the witnesses when they say
25 they knew the mall would fall down.

1 Does it make sense to say that Lesley
2 Sprague knew the mall was going to fall down when
3 she was actually there on the day of the collapse?

4 Does it make sense for the Mayor to
5 have known of the fallen concrete in 2011 and yet
6 to have continued to allow his family and
7 grandchildren in the mall up to its collapse?

8 Does it make sense that the Quintes
9 knew the mall was going to collapse, yet they went
10 to work every day and allowed their workers and
11 customers to enter the mall?

12 Does it make sense that Al Collett knew
13 of the concrete falling and he knew of the
14 potential for roof collapse, yet did not tell the
15 Quintes to complain to the Building Department and
16 did not put the mall on the agenda of a Council
17 meeting or make a motion before Council to deal
18 with the mall?

19 The same can be said of Mr. Denley.

20 When I talk of hindsight bias,
21 Mr. Commissioner, it is important therefore to
22 realize the tendency of people to recall events in
23 a manner consistent with the known outcome. It is
24 therefore critically important for you and for
25 Commission Counsel assisting you to be on guard for

1 hindsight bias in your review of the evidence.

2 Something very important to consider as
3 well when evaluating the City and the City's
4 personnel is the context in which they operated and
5 the economic context of the City of Elliot Lake.

6 We heard Mayor Farkouh say in his
7 testimony that the City lost an entire industry in
8 which all in was about 9,000 jobs. To put that in
9 perspective, in Ottawa that would be 300,000 jobs
10 that would be lost.

11 You heard testimony of the level of
12 service analysis that was done. You heard
13 testimony of the cost-cutting that was done by the
14 City in order to keep the City alive and the
15 fantastic efforts of various people, both inside
16 the City and in supporting organizations, to keep
17 Elliot Lake on the map of Ontario.

18 And that context needs to be kept in
19 mind as you analyze the evidence, because one of
20 the dangers of the intensity of the evidence in
21 this Commission is that you might look at it with
22 or expect the City to have looked at it or expect
23 any of the relevant parties to have looked at it in
24 the same Petrie dish that the Commission can in
25 going through all of the evidence that we have

1 heard.

2 It is important for you to keep in
3 mind, Mr. Commissioner, that municipalities are
4 entirely creatures of statute and that means that
5 their powers are given by legislation and that they
6 act by by-law or resolution.

7 Municipalities are set up as a
8 governance board where Councillors make policy
9 decisions as a Council. You have heard that a
10 single Councillor cannot bind Council, nor can the
11 Mayor.

12 It is important to realize in your
13 deliberations, Mr. Commissioner, that Councillors
14 are lay people. They are not typically lawyers or
15 engineers or doctors. The theory of municipal
16 government is that it is government by our peers,
17 and we need to ensure that the findings and
18 recommendations that you make in this Commission
19 are not such that discourage people from continuing
20 to run for municipal Council and to give their time
21 to their municipality.

22 In considering the municipal actions,
23 it is important not to view the global array of
24 evidence that you have heard, but rather to be
25 concerned about what evidence people within the

1 municipality had at what time. Consider what the
2 assortment of evidence was that they had in making
3 their decision and be alert for hindsight bias.

4 It is also important to keep this
5 Commission's mandate in reviewing the actions of
6 the municipality in mind. We heard a significant
7 amount of evidence about caucus meetings and the
8 fact that they were contrary to the Municipal Act.
9 Perhaps less well emphasized was the fact that the
10 caucus meetings ended. But the fact is that the
11 caucus meetings have nothing to do with the mall
12 collapse and should not be part of your analysis.

13 I want to talk a bit about the
14 engineering reports. It is clear that the
15 municipality relied upon reports of experts, but it
16 is also clear that many experts' reports were not
17 provided to the municipality, and certainly many of
18 my friends have provided recommendations consistent
19 with ours that emphasize the need for sharing
20 information.

21 Certainly, it is clear that the City at
22 the time of building -- at the time of the mall
23 being built relied on the document that has been
24 called a Certificate of Substantial Completion or a
25 Letter of Substantial Completion which is executed

1 and sealed by Messrs. Keywan and Kadlec, and that
2 is found at Exhibit No. 275.

3 It is clear that the City relied on the
4 plans and drawings, properly prepared and stamped
5 by the architects and the engineers involved in the
6 design and construction.

7 The Supreme Court of Canada in 2000 in
8 a case called Ingles v Tutkaluk Construction
9 Limited, which is a 2000 case from 1 SCR 298, said
10 that the duty of the municipality is to take
11 whatever steps are appropriate to ensure that the
12 premises that are under construction are going to
13 be built in a manner that ensures the safety of
14 future occupants.

15 They went on to say that obligation
16 does not cast upon the municipality a duty to
17 ensure that the building is completed exactly in
18 accordance with the specifications set out for the
19 developer by the owner.

20 It is submitted by the City that that
21 is exactly what the City did at the time of
22 construction. Certainly both NORR and other
23 engineers have indicated that the construction was
24 or the plans certainly were to the Ontario Building
25 Code of the day.

1 With respect to City personnel, Mr.
2 Elliott said yesterday that the City has an
3 engineer on staff. That is true, but the evidence
4 is clear that Mr. Perkins, who was the City
5 engineer, was a civil engineer, not a structural
6 engineer, and I just wanted to clear that up, that
7 lest you think that Mr. Elliott was suggesting that
8 there was a structural engineer on staff because
9 that is not accurate.

10 A large part of the difficulty with
11 respect to the mall came from what I would call a
12 failure to inform the City. The information that
13 was disclosed to the City was fraught with error
14 and potentially dishonesty.

15 The only engineering reports that were
16 provided to the City were the Halsall Report and
17 Mr. Wood's report. The Halsall Report was provided
18 almost ten years after it was authored, and
19 Mr. Wood's report, as we know, indicated that he
20 found no structural issues with the mall.

21 You have heard of intentional efforts
22 at deception and obfuscation by the Algo Mall
23 owners, particularly Mr. Nazarian, with respect to
24 keeping Building Inspectors out of the mall.

25 Without the full information that we

1 know now exists, the City believed that the issues
2 at the mall were a maintenance issue from 1990 to
3 2006 and that the maintenance of the mall roof was
4 being addressed.

5 The other engineering reports,
6 Mr. Commissioner, as you know, did not find their
7 way to the City. That being said, all of the
8 engineers that I cross-examined indicated that they
9 did not find a situation that presented a danger to
10 public safety, and for that reason they did not
11 report their findings to the City.

12 Of course, this shortcoming requires
13 rectification in the form of a recommendation, and
14 certainly my friends from the PEO and Mr. Longo
15 have spoken on that issue.

16 You have heard that the City had and
17 has an enforcement policy that is complaint-based.
18 It is important to keep in mind the legal framework
19 upon which a system like that is built, and it
20 comes from another Supreme Court case called the
21 City of Toronto v Polai, and that is found at 1971
22 O.R. 483, and the Supreme Court ruled that a
23 municipality's discretion in its administration of
24 its by-laws is not reviewable by the courts. The
25 Court of Appeal further found that there is no

1 legal duty on a municipality to enforce its
2 by-laws.

3 Polai was followed and cited with
4 approval by Justice Gray in 2011 in a case called
5 Peel Condominium Corp. No. 108 v. Young; that is
6 2011 Ontario Judgments No. 1203 at paragraphs 22 to
7 26. Justice Gray found that the facts at bar were
8 analogous to a municipality selectively enforcing
9 its by-laws.

10 Polai and the notion that a
11 municipality possesses the discretion to enforce
12 its own by-laws was also cited with approval by the
13 Ontario Court of Appeal in Sapone v Clarington,
14 which is 2001 Ontario Judgments No. 4991.

15 That factual legal background sets the
16 stage for the understanding of the complaint-driven
17 process and the enforcement of the Property
18 Standards By-Law, and if you find that that
19 enforcement is not appropriate, recommendations
20 need to be made that the law change with respect to
21 a municipality's discretion and a complaints-driven
22 process.

23 But that is the process that was in
24 place at the time, and certainly you have heard
25 evidence from all of the municipal employees that

1 that was the process under which they were
2 proceeding.

3 We know that tenants did not complain
4 to the City, for instance, Zellers did not complain
5 to the City; Tim Hortons didn't complain to the
6 City; Woolco and Scotiabank did not complain to the
7 City.

8 The process that was in place is that
9 complaints were to be provided in writing. They
10 were to be linked with a complainant. And it makes
11 ample sense and it should be a recommendation we
12 submit, if you support the complaints-driven
13 process, that complaints be in writing to a
14 specific person with the complainant identifying
15 him or herself and perhaps, as Mr. Longo suggested,
16 that the complaint process be publicized so that
17 people within the municipality fully understand the
18 process by which they must follow in order to bring
19 information forward to the City and the City
20 officials can understand their expectations.

21 This becomes abundantly clear in the
22 evidence that you have seen and the dispute about
23 what is and what is not a complaint, and certainly
24 various of the municipal witnesses in hindsight in
25 questioning by Commission Counsel admitted that

1 certain e-mails, for instance, could be considered
2 a complaint. It is clear that they were not at the
3 time, but they could be now. And so that process
4 needs to be clarified.

5 Mr. Elliott yesterday in his
6 submissions indicated that this event was so
7 unusual that it shocked the world. The NORR Report
8 supports that, and I am quoting from the page Roman
9 numeral ten of Exhibit No. 3077, and the NORR
10 Report says that:

11 "One explanation that comes to
12 mind about why this collapse
13 happened is that building structural
14 engineers are not typically
15 acquainted with failures due to
16 corrosion. In digging into the
17 literature, one is hard-pressed to
18 find a similar example where a
19 carbon steel framed building in
20 North America or Europe continued to
21 corrode to the point of failure when
22 no other extreme case of loading
23 contributes to failure."

24 And Dr. Saffarini in his evidence when
25 being cross-examined by Mr. Hodgson said, and this

1 is at page 12358, line 21 of the transcript:

2 "My opinion is that even some of
3 the professional engineers had
4 missed the severity and the
5 seriousness, so I would safely say
6 that a layman would be oblivious to
7 this."

8 We have heard a lot, Mr. Commissioner,
9 about leaks, but in reality the leaks did not cause
10 the collapse. And you may raise your eyebrow to
11 that statement, but in fact, the understanding is
12 that corrosion caused the collapse.

13 What seems to have happened here,
14 Mr. Commissioner, is that nobody equated the
15 leaking with the corrosion and the potential
16 collapse of the mall. It seems that the leaks were
17 very well known. It seems, though, that they were
18 seen as an annoyance and as a nuisance and not as a
19 structural issue.

20 To borrow from my good friend
21 Mr. Kearns, Mr. Commissioner, we ask you in your
22 findings and in your report not to fall into the
23 trap of hindsight bias, not to be simply levelling
24 blame in your findings, but to help the City of
25 Elliot Lake move forward and to make the City of

1 Elliot Lake, the Province of Ontario and perhaps
2 even the world a better place to live by your
3 recommendations.

4 I thank you very much for allowing me
5 to participate in Phase I. Those are my
6 submissions.

7 THE COMMISSIONER: Thank you very much,
8 Mr. Cassan, for your work to date and obviously for
9 your continuing participation in relation to Part
10 II.

11 Is the Province ready to --

12 MS. MACKAY: Yes. May I have five
13 minutes, Commissioner? And I can finish before the
14 lunch break.

15 THE COMMISSIONER: Thank you.

16 -- RECESSED AT 12:05 P.M.

17 -- RESUMED AT 12:10 P.M.

18 MS. MACKAY: Thank you, Commissioner.

19 Commissioner, as you know, I am one of
20 a team of lawyers that represents the Province of
21 Ontario at this Inquiry.

22 On behalf of the Province, I want to
23 thank Commission Counsel and staff, the
24 interpreters and the reporters for their extremely
25 hard work and the long hours they have put in

1 during Phase I.

2 The determination of Commission Counsel
3 to get to the bottom of the issues and the root
4 causes of the collapse is commendable.

5 I would also like to thank you,
6 Commissioner, for the great attention you have paid
7 to the evidence at this Inquiry, which at times has
8 been highly technical engineering evidence which
9 can sound like another language to us mere lawyers.

10 I also want to thank you for the
11 fairness and respect you have shown all the
12 witnesses and for your good humour.

13 The dedication of the Commission will
14 serve the people of Elliot Lake and the Province of
15 Ontario well in preventing a terrible tragedy like
16 this from happening again.

17 I must also thank those citizens of
18 Elliot Lake I have had the pleasure to meet who
19 have been warm and welcoming and have a real
20 interest in the well-being of their community.
21 Ontario hopes that this Inquiry will be part of the
22 healing process.

23 The Terms of Reference of this Inquiry
24 charged the Commission with reviewing relevant
25 legislation, regulations and by-laws and relevant

1 policies, processes and procedures of provincial
2 and municipal governments and other parties with
3 respect to the structural integrity and safety of
4 the Algo Centre Mall and to make recommendations in
5 that regard.

6 We have read with interest the
7 recommendations put forward by various parties to
8 this Inquiry, and we thank those parties for their
9 thoughtful consideration of the issues surrounding
10 the collapse and their suggestions for how such
11 tragedies might be avoided in the future.

12 We look forward to fully exploring
13 those recommendations and the feasibility of their
14 implementation at the policy roundtables scheduled
15 for October.

16 Ontario also looks forward to
17 participating in that process through witnesses
18 from the Ministry of Labour and the Ministry of
19 Municipal Affairs and Housing.

20 As our written submissions deal in
21 detail with the Occupational Health and Safety Act
22 and the Building Code Act and the legislative
23 regimes thereunder, I won't repeat those
24 submissions here today.

25 Instead, I'm going to concentrate on

1 the evidence at this Inquiry as it relates to the
2 Ministry of Labour and to respond to some of the
3 submissions made by other parties.

4 I would like to turn first to the
5 allegation made by ELMAC yesterday that the
6 Ministry of Labour has blamed workers in the mall,
7 including Lucie Aylwin, for the collapse. There is
8 absolutely no foundation whatsoever for this
9 serious, spurious and offensive allegation and it
10 has no place at this Commission of Inquiry which
11 has been conducted with the utmost respect for all
12 parties and their Counsel.

13 The allegation is clearly meant to
14 provoke the Ministry and to demean Ms. Dennis, who
15 was invited to this Commission as a witness by
16 Commission Counsel so that she could explain to
17 this Inquiry the mandate and scope of
18 responsibilities of the Ministry of Labour.

19 The Government of Ontario and the
20 Ministry of Labour certainly do not attempt to lay
21 blame on any of the victims of this tragedy, and it
22 is important for Ontario that the families of Lucie
23 Aylwin and Doloris Perizzolo know that this is
24 certainly not the case. Ontario has only the
25 utmost sympathy for those families.

1 In our written submissions Ontario does
2 explain the Internal Responsibility System and that
3 the ultimate responsibility for employee safety
4 lies with the employer.

5 And we do indicate, as a matter of
6 fact, that Mr. Hudson did not receive any
7 complaints about the ongoing leaks at the mall from
8 any workplace parties during the 30 field visits he
9 conducted at the Algo Centre Mall.

10 This, however, is not meant to ascribe
11 blame to anyone, but instead to indicate what level
12 of knowledge Mr. Hudson had when he conducted his
13 only field visit dealing with leaks in January
14 2012.

15 Additionally, Ontario's submissions are
16 intended to explain the Internal Responsibility
17 System, which is a key feature of health and safety
18 legislation not only in Ontario but across Canada,
19 and it cannot simply be ignored in any discussion
20 of health and safety legislation and we cannot
21 pretend that it does not exist.

22 Ontario's explanation of the Internal
23 Responsibility System is not an attempt to push
24 blame on the workplace parties, as suggested by
25 ELMAC in their written submissions, or evidence of

1 a cavalier attitude by the Ministry of Labour to
2 workplace safety, as suggested by the City in their
3 submissions.

4 It is an attempt to explain the
5 legislative regime and the key feature of Canadian
6 health and safety law, and this is with good
7 reason, because workplace parties are in the
8 workplace every day when it is simply not possible
9 for the Ministry of Labour to be there.

10 ELMAC also made an allegation about the
11 veracity of those who testified that they did not
12 know about the leaks, indicating they had to be
13 blind or lying. There is absolutely no foundation
14 to suggest that any witnesses from the Ministry of
15 Labour, including Ed Hudson who testified that he
16 saw no evidence of leaks in the mall, were
17 untruthful during their testimony.

18 With respect to the Ministry of Labour,
19 ELMAC has pointed to no evidence to support that
20 allegation, such as a Field Visit Report or a note
21 that mentions leaks, and there is no such evidence.
22 The Ministry of Labour's witnesses at this Inquiry
23 have been truthful and candid.

24 We will address the allegation that MOL
25 should have surmised there was a structural issue

1 with the mall throughout our submissions.

2 ELMAC has further alleged that the
3 regulators involved in this matter failed in their
4 duties and indicated that all workers could do was
5 complain about the leaks and that there had been
6 many complaints. With respect to the Ministry of
7 Labour, that simply is not true. There were two
8 complaints to the Ministry of Labour from the
9 library, one in 1995 and one a decade later in
10 2005, which were complaints about air quality and
11 mold with no structural concerns raised or
12 apparent.

13 There were no other complaints from any
14 other workers at the mall until an e-mail to MOL in
15 June 2012.

16 It is therefore simply not accurate to
17 say there were many complaints to MOL from workers
18 in the mall about the mall's serious water issues.

19 I would like to turn next to the issue
20 that has been raised in this Inquiry about the
21 Ministry of Labour investigating itself.

22 It has been suggested by parties to
23 this Inquiry that while the Ministry of Labour has
24 investigated other parties' role in the collapse,
25 it has failed to investigate itself.

1 It is not entirely clear what sort of
2 investigation of the Ministry of Labour the parties
3 think may be appropriate, but if the parties are
4 suggesting an investigation of the Ministry of
5 Labour as an employer under the Occupational Health
6 and Safety Act, it is submitted as a matter of law,
7 in fact, this is not possible.

8 Section 69 of the Ontario Occupational
9 Health and Safety Act provides a one-year
10 limitation period for prosecutions under the Act.
11 That time period starts to run on the day on which
12 the act occurred, not the day upon which an act was
13 discovered or ought to have been known.

14 The Ministry of Labour was not an
15 employer in the mall at the time of the collapse
16 and, in fact, had not been an employer in the mall
17 since about 1992, 20 years before the collapse.

18 Further, the evidence at the Inquiry is
19 that the Ministry of Labour's office at the mall
20 was on the hotel level, an area that never
21 experienced leaks.

22 There is therefore no evidence to
23 suggest that the Ministry of Labour ever
24 experienced any leaks in its office and certainly
25 no evidence to suggest there was any hazard to any

1 worker in the Ministry of Labour office while it
2 was in the mall. There was therefore no reason for
3 the Ministry of Labour to complain to the owner or
4 to the City about the leaks, as it is suggested it
5 should have in the City's submissions.

6 The Ministry of Labour office did not
7 experience any and the inspector charged with
8 Elliot Lake at the time received his first
9 complaint that had some relation to water in 1995,
10 after the Ministry of Labour left the mall.

11 As a result, there is no basis to
12 suggest that the Ministry of Labour should be
13 investigated as an employer under the Act, legally
14 or factually. There is no evidence before this
15 Inquiry that the Ministry of Labour failed to live
16 up to its obligations as an employer under the Act,
17 and in any event, its time as an employer in the
18 mall had long passed at the time of the collapse.

19 If the parties to the Inquiry are
20 suggesting some other investigation of the Ministry
21 of Labour, the Ministry of Labour submits it has
22 been and is being investigated in three other ways.

23 The actions of the inspectors were
24 examined internally by Assistant Deputy Minister
25 Sophie Dennis. She did review the field visits to

1 the mall since 2009 and saw nothing in those Field
2 Visit Reports that indicated that the Ministry of
3 Labour had been alerted to any structural issue and
4 nothing that caused her to be concerned that the
5 MOL inspectors could have taken steps to prevent
6 the collapse of the mall.

7 She also investigated the response
8 given to Mr. Comeau to his e-mail complaint through
9 the Ministry of Labour's website Web OHS.

10 Only one of the visits Ms. Dennis
11 reviewed, it must be recalled, dealt with a
12 complaint about the leaking roof.

13 While this investigation has been
14 criticized because it was conducted internally, it
15 has resulted in changes. Ms. Dennis identified
16 training opportunities regarding report-writing and
17 note-taking and, as discussed in more detail below,
18 resulted in a change of policy with respect to
19 complaints that are sent to the Ministry of Labour
20 through its website.

21 Secondly, Mr. Jeffries closely looked
22 at the conduct of the Ministry of Labour
23 investigators in the mall as part of his report
24 into the root causes of the collapse.

25 While it was suggested to him that he

1 looked at other parties who may have been
2 responsible but not the MOL, that is unsupported by
3 the evidence. Mr. Jeffries indicated he looked
4 carefully at all the Field Visit Reports associated
5 with the mall, including those of Ralph Regan in
6 the library and Ed Hudson's January 2012 field
7 visit.

8 Mr. Jeffries testified that the MOL
9 investigators had nothing to do with the structural
10 collapse, which was the focus of his report, that
11 there was nothing in their field visits that would
12 lead him to believe they had any indication there
13 was any structural problem in the mall.

14 He also noted that it was reasonable
15 that they would not have surmised that a collapse
16 could occur from the information they had.

17 Mr. Jeffries testified specifically
18 about the fact that Mr. Regan was told about rust
19 on beams in the library in 1995. Mr. Regan
20 testified that he was somewhat familiar with
21 rusting in larger structures given his experience
22 in the mining industry and where rusting did not
23 cause structural concerns and that he did not
24 follow up on the rust.

25 As Mr. Jeffries testified, we now know

1 the mall was not experiencing severe corrosion
2 caused by rust in 1995. The NORR experts have
3 stated that severe corrosion did not occur until
4 about ten years before the collapse. Therefore,
5 even if Mr. Regan had suspected a structural issue
6 as a result of the rust, one would not have been
7 found in 1995.

8 Mr. Jeffries also testified that it was
9 reasonable that Mr. Hudson did not ask how long the
10 mall was leaking during his meeting with Rhonda
11 Bear in January 2012 because it would not have
12 occurred to anyone that a leaking problem would
13 have been allowed to continue largely unabated for
14 30 years and that before asking that question one
15 would have to have some knowledge of an ongoing
16 problem, which we now have but Mr. Hudson clearly
17 did not.

18 Finally, the conduct of the Ministry of
19 Labour investigators and all those who had
20 involvement with the Algo Centre Mall is being
21 closely examined by an objective third party, this
22 Commission.

23 It must be remembered that the
24 Commission's Terms of Reference state that it is to
25 be an independent process to examine the

1 circumstances surrounding the collapse and it must
2 also be remembered that this Commission was created
3 by the Province of Ontario.

4 It is therefore difficult to understand
5 how anyone could make the submission that the
6 Ministry of Labour or Ontario is not causing itself
7 to be investigated by an independent objective
8 party. All parties' conduct with respect to the
9 mall is being investigated. There is therefore no
10 purpose to be served by an additional third party
11 investigation.

12 I would now like to turn briefly to the
13 conduct of the actual inspectors involved with the
14 mall.

15 In our submission, the Ministry of
16 Labour investigators with responsibility for Elliot
17 Lake cannot be faulted for their conduct in the
18 course of their health and safety inspections at
19 the mall.

20 As we heard, Mr. Regan dealt with two
21 isolated complaints from the library, in 1995 and
22 in 2005, and neither of them was a complaint about
23 the leaking roof but instead about air quality and
24 a request for air quality monitoring, which is a
25 matter that is within the mandate of the health and

1 safety inspector.

2 Because of these two complaints, it has
3 been suggested that Mr. Regan was therefore aware
4 of a decade-long leaking problem in the mall. That
5 is an unfounded extrapolation of what knowledge
6 Mr. Regan actually had.

7 He received two complaints ten years
8 apart about air quality and mold in the library.
9 He responded to those complaints. He brought in
10 the appropriate specialist who made recommendations
11 to the Joint Health and Safety Committee and
12 management about how to remedy the problem. The
13 specialist did not recommend the MOL inspector
14 write any orders. No structural concerns were
15 brought to his attention, and he therefore issued
16 no orders in that regard arising out of the either
17 visit.

18 No further complaints were made to the
19 Ministry of Labour by the library or anyone else
20 from the City after 2005.

21 Although ELMAC makes several
22 allegations against Mr. Regan, what he saw in the
23 library during his inspections, much of it is based
24 on what is the word they use, "probable", including
25 what is probable that Ms. Fazekas told Mr. Regan.

1 Ms. Fazekas testified at this Inquiry.
2 We have her evidence about what actually occurred,
3 and it is therefore unnecessary to speculate about
4 what she may have told Mr. Regan.

5 Further, ELMAC speculates about what
6 Mr. Regan was told by Zellers about the leaks.
7 There is no evidence whatsoever that Mr. Regan saw
8 any evidence of leaks during his visits to Zellers
9 or was advised of them, and there is no basis in
10 the evidence for these speculations.

11 As we heard, Ed Hudson conducted field
12 visits at the mall on 25 different days in all four
13 seasons and conducted about 30 field visits.

14 He testified that he was never advised
15 by any workplace parties during these visits that
16 there was any leaking problem at the mall, let
17 alone a serious long-term one, and there is
18 absolutely no evidence to contradict him. For
19 example, none of his Field Visit Reports refer to a
20 leaking roof.

21 Further, during Mr. Hudson's tenure,
22 the Ministry of Labour did not receive a complaint
23 from any workplace party related to the mall about
24 anything to do with water leakage.

25 The first complaint received from

1 anyone was the anonymous complaint about a leaking
2 roof from a member of the public in December of
3 2011.

4 Ontario deals in detail in its written
5 submissions with Mr. Hudson's field visit on
6 January 11, 2012, and I won't repeat all of those
7 submissions here. But what must be remembered is
8 what level of knowledge Mr. Hudson had when he
9 walked in the mall to conduct that visit, and these
10 are set out in paragraph 118 of our written
11 submissions.

12 This was the first indication that
13 Mr. Hudson had that there were any leaking issues
14 in the mall. The inspection resulted from an
15 anonymous complaint that did not in any way mention
16 the duration or location of the leaks. A leaking
17 roof is not necessarily a contravention of the
18 Occupational Health and Safety Act.

19 Ms. Bear told Mr. Hudson that the leaks
20 were under control and that she had a system for
21 dealing with the leaks. She told him she was
22 researching a permanent solution. Ms. Bear was
23 extremely forthcoming about the fact that there
24 were leaks, where they were coming from and what
25 was being done about them. This negated the need

1 for any further investigation on Mr. Hudson's part
2 at the time.

3 A follow-up visit for July was planned
4 to ensure Ms. Bear's intentions were put into
5 action. Nothing further would have been gained
6 from further investigation on January 11, 2012,
7 which would have only confirmed the information
8 that Ms. Bear gave to Mr. Hudson. And Mr. Hudson
9 never saw any evidence of leaks on his 25 visits to
10 the mall.

11 Similarly, Ontario deals in detail with
12 the issues surrounding the Zellers store, so I will
13 only make three brief points.

14 It is important to stress that no
15 proactive inspection of Zellers was ever done by
16 Mr. Hudson because Zellers never met the criteria
17 of a high priority workplace while Mr. Hudson was
18 the Occupational Health and Safety Inspector for
19 Elliot Lake.

20 No evidence of leaks is noted during
21 the two proactive field visits to Zellers that
22 Ralph Regan conducted in 2001 and 2003.

23 And as we now know, there were no
24 complaints made by Zellers to the Ministry of
25 Labour until June 2012 through MOL's website, which

1 unfortunately did not make its way to Mr. Hudson,
2 and which I will deal with in more detail shortly.

3 There was therefore no opportunity for
4 him to conduct a reactive visit.

5 Further, in his testimony
6 Mr. Cuthbertson testified there was a fear that MOL
7 will come and shut down the store, and this fear
8 was shared by upper management at Hudson's Bay
9 Company as expressed in their e-mails.

10 The Commission heard evidence about a
11 complaint to the Ministry of Labour made through its
12 website just weeks before the collapse that
13 unfortunately did not result in the creation of a
14 complaint and reactive field visit.

15 Nevertheless, the Web OHS officer who
16 handled the e-mail acted appropriately and in
17 accordance with the service standards in place at
18 the time. He responded within the requisite time,
19 and his response to the complainant was an attempt
20 to engage the IRS by letting him know his first
21 point of contact for attempting to solve a
22 potential workplace hazard should be within the
23 workplace.

24 However, in its examination of MOL's
25 involvement with the mall after the collapse, the

1 Ministry looked at this response and determined
2 that while it met current service standards, those
3 standards could be improved.

4 Now, where Web OHS receives a similar
5 complaint, that is, one with enough information to
6 identify the workplace and the potential hazard,
7 MOL will forward the complaint directly to the
8 Contact Centre, cutting out a step for the worker.

9 This is an example of where the
10 Ministry of Labour has shown that it is willing to
11 improve on its procedures where there is room for
12 improvement.

13 And the final issue I wish to cover,
14 Commissioner, is the differences in the legislative
15 responsibilities between the provincial and
16 municipal governments with respect to this matter.

17 The Province submits that it is an
18 error to lump the two regulators together and to
19 suggest that two parallel regimes of property
20 inspections exist in Ontario, one carried out by
21 the MOL and one by municipal Building Officials.

22 In fact, there is one property
23 standards inspection regime in Ontario, and the
24 legislative mandate for carrying out that regime
25 lies with the municipalities and not the Province.

1 It must be remembered that Ministry of
2 Labour inspectors are charged with applying and
3 enforcing the Occupational Health and Safety Act,
4 not the Building Code, the Building Code Act or
5 Property Standards By-Laws.

6 The regulatory responsibility for
7 enforcing those laws lies elsewhere with those with
8 specialized expertise and training in those areas.

9 I would like to respond directly to two
10 allegations in the City's written submissions in
11 this regard.

12 One, that the Ministry of Labour has a
13 cavalier attitude in suggesting employers are
14 responsible for the health and safety of their
15 employees when it comes to serious structural
16 issues.

17 With respect, the health and safety of
18 employees is precisely the responsibility of
19 employers under the Occupational Health and Safety
20 Act. It is extraordinary to suggest that employers
21 are not responsible for the health and safety of
22 their own employees.

23 If employers have a concern about
24 structural integrity, it is their responsibility to
25 make those concerns known to the building owner

1 and, if the concerns are not resolved, then the
2 employers can make those concerns known to the
3 Ministry of Labour. This last step was never done.

4 In the case of both the City and
5 Zellers, there is some suggestion that this step
6 was not done because of an apprehension that the
7 Ministry of Labour would close the mall and
8 therefore they were not told.

9 The second submission which I would
10 like to respond to is that the Ministry of Labour
11 is a massive organization with government funding
12 at its source and numerous specialists in which to
13 handle inspections of buildings in a wide variety
14 of areas of engineering, health and safety, and
15 that is at paragraph 178 of the City's submissions.

16 In the Province's view, this is
17 actually a better description of municipal
18 resources than Ministry of Labour resources. As
19 Warwick Perrin testified, the President of the
20 Ontario Association of Property Standards Officers,
21 there are 444 municipalities in Ontario, each with
22 a CBO and a Building Department that has expertise
23 in Building Code matters, property standards and
24 regularly conducts inspections.

25 MOL has 430 inspectors in total in

1 Ontario and only 180 in the industrial sector who
2 are responsible for all matters relating to health
3 and safety in industrial buildings, including
4 commercial buildings.

5 The Ministry of Labour has only 18
6 engineers across the Province, and only a fraction
7 of those are structural engineers.

8 The municipalities are far better
9 equipped and have far more resources to deal with
10 matters relating to building inspections.

11 Municipalities are responsible for the
12 structural integrity of buildings across Ontario.
13 The City is also a government organization and,
14 like the Ministry of Labour, relies on taxpayers'
15 funding for its resources. It makes no sense to
16 create a parallel authority in the Ministry of
17 Labour for structural inspections when the
18 authority for Building Code enforcement and
19 property standards lies with the municipalities.

20 We agree with the submissions made by
21 the OBOA that it is the municipality that is best
22 placed to do building inspections, not the Ministry
23 of Labour.

24 Finally, Commissioner, with respect to
25 ELMAC's allegations of inadequate training of

1 Ministry of Labour inspectors, it is true that
2 Ministry of Labour Health and Safety Inspectors are
3 not trained to identify the specific indicia of
4 structural failure. The reason for that is simple.
5 The inspection of buildings and the maintenance of
6 property standards is a municipal responsibility.

7 MOL investigators exercise their powers
8 under the Occupational Health and Safety Act with
9 respect to workplace hazards, while building
10 officials exercise their responsibilities under the
11 Building Code and Property Standards By-Laws to
12 ensure the safety of buildings.

13 The responsibility for structural
14 integrity again lies within municipalities and not
15 with the MOL.

16 And in conclusion, Commissioner, I
17 would state that it is misguided in the extreme to
18 attempt to equate the MOL inspectors who were not
19 aware of an ongoing serious leaking problem in the
20 mall with those individuals that we now know had
21 such knowledge.

22 It is also misguided in the extreme to
23 attempt to place the failure to regulate on the MOL
24 when the responsibility for the regulation of
25 buildings lies elsewhere.

1 This Commission simply has not heard
2 the evidence that would support these allegations,
3 nor do the legislative regimes in place provide a
4 legal basis to do so.

5 I thank you very much, Commissioner,
6 for your attention, and those are the Province's
7 submissions.

8 THE COMMISSIONER: Thank you, Ms.
9 MacKay.

10 Mr. MacRae, you are on your feet?

11 MR. MacRAE: I am, Mr. Commissioner. I
12 wonder if I might just take three moments, or three
13 minutes.

14 There were two recommendations that I
15 had chosen to deal with in my submissions. This
16 isn't an attempt to get the last word in, but I
17 wonder if I might be provided the opportunity to
18 deal with those recommendations?

19 THE COMMISSIONER: Go ahead,
20 Mr. MacRae.

21 MR. MacRAE: Thank you.

22 Thank you very much, Mr. Carr-Harris.

23 The two recommendations that I would
24 ask the Commission to deal with, aside from the
25 ones that are mentioned in the written submissions

1 on behalf of Mr. Wood, is one is a requirement to
2 utilize intumescent paint.

3 THE COMMISSIONER: I'm sorry, I didn't
4 hear.

5 MR. MacRAE: To utilize intumescent
6 paint, and that is a type of paint that provides
7 fireproofing to metal structures such as the Algo
8 Mall but is transparent. And my understanding of
9 how it is utilized is that it expands only with
10 heat, and prior to that expansion, it is opaque
11 enough or clear enough that you can see through the
12 application. And if there was a consideration by
13 this Commission that it be a requirement in the
14 Building Code to utilize the intumescent paint on
15 connections so that they are clearly visible, I
16 think that would be most helpful.

17 The last issue I wanted to deal with
18 was the consideration of the utilization in future
19 Commissions of duty counsel. I know from your vast
20 experience in court proceedings, Mr. Commissioner,
21 that you know the value of duty counsel and it
22 appears to me -- in my submissions I dealt with the
23 appearance of Ms. Bear.

24 There were a number of witnesses who
25 appeared before the Commission without the

1 assistance of legal counsel, and I would ask that
2 as part of the roundtable discussions as well that
3 a component of that be that there be serious
4 consideration given to the position of a duty
5 counsel at future commissions so that all
6 participants have access to legal advice.

7 And we see a situation with respect to
8 Mr. Sennett where he appeared on his own and
9 testified and, as a result of the unfolding events
10 at the Commission, retained Counsel and obtained a
11 position of standing.

12 So I think it is a worthwhile
13 recommendation with respect to duty counsel, and
14 thank you very much for permitting me to file those
15 both.

16 Oh, and one thing my friend has pointed
17 out as well too, in my submissions I may have
18 incorrectly indicated with respect to the section
19 17 notice that it was Mr. Nazarian who received the
20 notice. My intention was not to do that. My
21 intention was to indicate that Mr. Wood testified
22 without having received a section 17 notice prior
23 to his testimony.

24 THE COMMISSIONER: Yes, I picked up on
25 that and evidently you misspoke and there is no

1 problem arising out of that.

2 MR. MacRAE: Thank you,
3 Mr. Commissioner.

4 THE COMMISSIONER: Does Commission
5 Counsel, Mr. Carr-Harris, wish to make any
6 concluding comments?

7 MR. CARR-HARRIS: None except to say
8 that we should probably call to see if Mr. Russo is
9 here on behalf of Pinchin, which we don't expect he
10 or she is. And in that case, I think we are
11 concluded, Mr. Commissioner.

12 I would like to thank all the
13 participants for their submissions and they are
14 going to be extremely helpful, as you pointed out,
15 to Counsel and to the Commissioner in resolving the
16 issues that arise here, and all Counsel have taken
17 this role very seriously, very professionally, and
18 we are most grateful to them.

19 THE COMMISSIONER: Thank you, ladies
20 and gentlemen.

21 A significant part of this Inquiry
22 concludes now, but clearly the most important part
23 of our work still lies ahead of us, digesting and
24 analyzing your useful and carefully crafted
25 submissions, reviewing the mountains of documentary

1 and viva voce evidence, and of course drawing
2 conclusions and making recommendations justified by
3 those recommendations and by the evidence. As
4 Mr. MacRae put it, difficult questions must be
5 asked and difficult answers must be found.

6 And all the while, of course, we have
7 to repeat this entire process with Part II, which
8 has just barely begun.

9 I do sincerely thank those of you whose
10 role ends with these submissions. Your
11 professionalism, your courtesy, your expertise,
12 your cooperation and your useful assistance has
13 been of immense value to me and to Commission
14 Counsel and a great comfort, and for that I'm
15 profoundly grateful and I at this point thank you
16 very much. I'll express my gratitude perhaps more
17 formally in the eventual report of the Commission.

18 And with that then, we rise.
19 Unfortunately, that leaves us with little to do
20 tomorrow, but we start again Thursday morning,
21 Mr. Registrar, at 9 o'clock.

22
23 -- Adjourned at 12:48 p.m.

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REPORTER'S CERTIFICATE

I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify:

That the foregoing proceedings were
taken before me at the time and place therein set
forth;

That the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 13th day of August, 2013.

Deana Santedicola

NEESON & ASSOCIATES

COURT REPORTING AND CAPTIONING INC.

PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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