

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

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

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

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**MOTION RECORD OF JAMES W. KEYWAN**

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**BRUNNER AND LUNDY**

360 Bay Street, Suite 302  
Toronto, ON M5H 2V6

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Lawyers for James W. Keywan

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# **TAB NO. 1**

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

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

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

### **NOTICE OF MOTION**

The moving party, James W. Keywan, will make a motion to the Commissioner of the Elliot Lake Commission of Inquiry in writing (in accordance with the request of the Commissioner).

**THE MOTION IS FOR** an order granting James W. Keywan the right to introduce rebuttal evidence at the Inquiry pursuant to Rule 31 of the Rules of Procedure and Section 17(1)(b) of the *Public Inquiries Act, 2009* by means of an expert report prepared by Allan Larden, Architect dated May 14, 2013, or in the alternative for leave for counsel for James W. Keywan to examine Allan Larden, Architect as a witness under Rule 38 of the Rules of Procedure.

#### **THE GROUNDS FOR THE MOTION ARE:**

1. James W. Keywan ("Keywan") was from April 4, 1952, until his retirement on January 6, 1992, an architect and a member of the Ontario Association of Architects and accordingly entitled to practice architecture under the various *Architects Acts* that were in force from time to time.

2. In or about the year 1976, Keywan was engaged to provide limited and partial architectural services by Algocen Realty Holdings Limited (“Algocen”) with respect to the design of the Elliot Lake Commercial Centre (now known as the Algo Mall).
3. The architectural services were limited to the preparation of preliminary and working drawings which were intended to govern some of the architectural elements of the construction of the Algo Mall.
4. On February 14, 2013, Commission Counsel gave notice to Keywan under Section 17(1) of the *Public Inquiries Act, 2009* of a possible finding of misconduct and a summary of the evidence in support thereof arising out of Keywan’s design of the Algo Mall.
5. On May 24, 2013, Commission Counsel provided a supplementary notice to Keywan under Section 17(1) of the *Public Inquiries Act, 2009*, as to a potential finding of misconduct and a summary of the evidence supporting the same with respect to the execution of a document dated August 5, 1980 ( Inquiry Exhibit No. 275).
6. Keywan gave evidence at the Inquiry on March 11, 2013.
7. On March 13, 2013, the Commission posted to its website and subsequently introduced into evidence a report by Norr Architects Engineers Planners (“Norr”) dated March 8, 2013. (Inquiry Exhibit No. 3007)
8. In Section 4.1.6 of the report dated March 8, 2013, (p.67) under the heading “Final Note on Building Envelope Design Compliance”, Norr states as follows:

“It is Norr’s opinion that a duty of care required in the design and construction of this roof was not exercised.”

9. On March 25, 2013, counsel for Keywan advised Commission Counsel that it had retained an expert on behalf of Keywan to address the opinion expressed by Norr that there had been a breach of duty on the part of Keywan. Counsel proposed at the time that the expert report be filed without the necessity of calling the author as a witness unless one or more of the participants or others were interested in cross-examining the author of the report.
10. On May 15, 2013, Commission Counsel requested the submission of the expert report no later than May 21, 2013, and this was done on May 16, 2013.
11. On May 24, 2013, Commission Counsel confirmed an agreement that the Allan Larden (“Larden”) report dated May 14, 2013, would be entered into Relativity and that participants and Section 17 of the *Public Inquiries Act, 2009*, recipients would be notified that it had been added to the data base and that these persons be asked to advise the Commission if they intended to cross-examine Larden on his report with Commission Counsel also having an opportunity to do so. If no one wished to cross-examine Larden then the report would form part of the evidentiary record of the Commission without the requirement of the attendance of Larden or alternatively if cross-examination was requested, that a date be set for this purpose.
12. Subsequently, Commission Counsel advised that by reason of an objection received from one of the participants, the agreement of May 24, 2013, between counsel could not be carried forward and that leave of the Commissioner to have the Larden report dated May 14, 2013, admitted into evidence and to call Larden as a witness would have to be obtained under Rule 31 of the Rules of Procedure.
13. Keywan wishes to exercise his rights under Section 17(1)(b) of the *Public Inquiries Act, 2009*, to be given a reasonable opportunity to respond to the opinion expressed in the Norr report and specifically adduce rebuttal evidence with respect thereto by means of the

filing of the Larden report, or alternatively for leave to examine Larden as a witness before the Inquiry.

14. Without the Larden report or alternatively his evidence before the Inquiry, Keywan will not have a reasonable opportunity to respond by meaningful and independent evidence to the opinion expressed in the Norr report that he breached his duty of care in the design and construction of the roof.
15. Keywan relies upon Section 17(1)(b) of the *Public Inquiries Act, 2009* and Rules 31 and 38 of the Rules of Procedure.

**THE FOLLOWING DOCUMENTARY EVIDENCE** is submitted in support of the motion:

The affidavit of Mario Delgado sworn June 19, 2013.

DATED: June 19, 2013

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Tel: (416) 966-9955  
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Lawyers for James W. Keywan

TO: **ELLIOT LAKE COMMISSION OF INQUIRY**  
White Mountain Building  
99 Spine Road  
Elliot Lake, ON P5A 3S9

The Honourable Paul R. Belanger, Commissioner  
Tel: 705-848-1910  
[info@elliottlakeinquiry.ca](mailto:info@elliottlakeinquiry.ca)

AND TO: **J. BRUCE CARR-HARRIS**  
Commission Counsel  
Elliot Lake Commission of Inquiry  
White Mountain Building  
99 Spine Road  
Elliot Lake, ON P5A 3S9  
  
Tel: 613-749-3204  
[bcarr-harris@elliottlakeinquiry.ca](mailto:bcarr-harris@elliottlakeinquiry.ca)



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

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

AND IN THE MATTER OF James W. Keywan

NOTICE OF MOTION

**BRUNNER AND LUNDY**  
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Lawyers for James W. Keywan

# **TAB NO. 2**

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

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

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

**AFFIDAVIT OF MARIO DELGADO  
(Sworn June 19, 2013)**

I, Mario Delgado, of the City of Toronto, in the Province of Ontario, lawyer, MAKE  
OATH AND SAY:

1. I am an associate lawyer at the firm of Brunner and Lundy who have been engaged by James W. Keywan with respect to Part 1 of the proceedings of the Elliot Lake Commission of Inquiry.
2. On February 14, 2013, Commission Counsel of the Elliot Lake Commission of Inquiry (“Inquiry”) J. Bruce Carr-Harris, sent a letter to James Keywan in care of P. John Brunner of Brunner and Lundy entitled “Section 17 Notice”.

Hereto annexed and marked as Exhibit “A” to this my affidavit is a true copy of the letter dated February 14, 2013, from J. Bruce Carr-Harris to James W. Keywan c/o P. John Brunner

3. I am advised and verily believe the same to be true that on March 27, 2013, P. John Brunner advised Commission Counsel, Nadia Authier that they had retained an expert on

behalf of Keywan to address the opinion expressed in a report by Norr Architects Engineers Planners (“Norr”) dated March 8, 2013, (Inquiry Exhibit No. 3007) that Keywan breached a duty of care in the design and construction of the roof of the Algo Mall. P. John Brunner proposed at the time that the expert report be filed without the necessity of calling the author as a witness unless one or more of the participants or others were interested in cross-examining the author of the report.

Hereto annexed and marked as Exhibit “B” to this my affidavit is a true copy of an e-mail from P. John Brunner to Nadia Authier dated March 27, 2013.

4. I am further advised and verily believe the same to be true that on May 15, 2013, Commission Counsel, Nadia Authier, requested the submission of the expert report no later than May 21, 2013. This was done on May 16, 2013.

Hereto annexed and marked as Exhibit “C” to this my affidavit is a true copy of an e-mail from Nadia Authier to P. John Brunner dated May 15, 2013.

5. On May 24, 2013, Commission Counsel of the Inquiry, J. Bruce Carr-Harris sent a letter to P. John Brunner of Brunner and Lundy entitled “Supplementary Section 17 Notice”.

Hereto annexed and marked as Exhibit “D” to this my affidavit is a true copy of the letter dated May 24, 2013, from J. Bruce Carr-Harris to P. John Brunner

6. On May 24, 2013, J. Bruce Carr-Harris wrote a letter to P. John Brunner entitled “Report of Allan Larden” respecting James W. Keywan’s wish to adduce rebuttal evidence through the expert report of Allan Larden dated May 14, 2013.

Hereto annexed and marked as Exhibit “E” to this my affidavit is a true copy of the letter dated May 24, 2013, from J. Bruce Carr-Harris to P. John Brunner

7. On May 27, 2013, Commission Counsel advised all participants and their counsel of the

report of Allan Larden and that the same would be entered into evidence and requested advice no later than June 4, 2013, whether or not they wished to cross-examine Allan Larden on his report and if so that Allan Larden would be called as a witness on a date to be scheduled prior to July 19,2013.

Hereto annexed and marked as Exhibit "F" to this my affidavit is a true copy of an e-mail from Nadia Authier to Participants and Counsel dated May 27, 2013

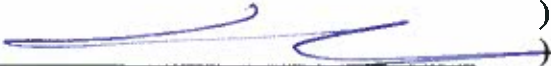
8. On May 28, 2013, R. Douglas Elliott who represents ELMAC at the Inquiry put forward certain objections to the introduction of the report of Allan Larden as evidence before the Inquiry.

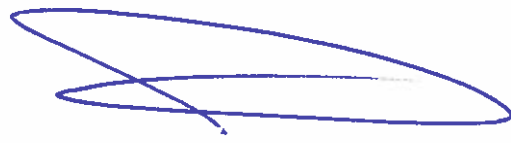
Hereto annexed and marked as Exhibit "G" to this my affidavit is a true copy of the e-mail from R. Douglas Elliott to Nadia Authier, Participants and Counsel dated May 28, 2013 and e-mail from Nadia Authier to P. John Brunner dated May 29, 2013 forwarding the said e-mail from R. Douglas Elliott

9. On May 30, 2013, during the course of a telephone conversation between J. Bruce Carr-Harris and P. John Brunner which was conducted in my presence at the City of Elliot Lake during the lunch break of the Inquiry, J. Bruce Carr-Harris advised P. John Brunner that in view of the objection of R. Douglas Elliott, counsel for one of the participants to the admission of the Report of Allan Larden, the agreement between counsel as reflected in J. Bruce Carr-Harris' letter dated May 24, 2013, could not be carried out and the Report of Allan Larden would not be entered into Relativity and adduced as evidence without leave having been obtained from the Commissioner under Rule 31 of the Rules of Procedure.

10. I make this affidavit in support of a motion for an order granting James W. Keywan the right to introduce rebuttal evidence at the Inquiry pursuant to Rule 31 of the Rules of Procedure and Section 17(1)(b) of the *Public Inquiries Act, 2009* by means of an expert report prepared by Allan Larden, Architect dated May 14, 2013, or in the alternative for leave for counsel for James W. Keywan to examine Allan Larden, Architect as a witness

under Rule 38 of the Rules of Procedure.

SWORN BEFORE ME at the City of )  
of Toronto, in the Province of Ontario )  
this 19<sup>th</sup> day of June, 2013 )  
)  
)  
 )  
A Commissioner for taking affidavits )  
P. John Brunner )

  
\_\_\_\_\_  
MARIO DELGADO

This is Exhibit "A" to the Affidavit of  
Mario Delgado sworn June 19, 2013



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A Commissioner for Taking Affidavits  
P. JOHN BRUNNER

**THE ELLIOT LAKE  
COMMISSION OF INQUIRY**

The Honourable Paul R. Bélanger  
Commissioner



**LA COMMISSION  
D'ENQUÊTE ELLIOT LAKE**

L'honorable Paul R. Bélanger  
Commissaire

**CONFIDENTIAL**

February 14, 2013

Mr. James Keywan c/o  
Mr. P. John Brunner  
Brunner and Lundy Lawyers  
360 Bay St., Suite 302  
Toronto, ON M5H 2V6

Dear Mr. Keywan,

**Re: Elliot Lake Commission of Inquiry, James Keywan, S. 17 Notice**

I am writing to you in your capacity as the architect who oversaw the design and construction of the Algo Centre Mall in Elliot Lake, Ontario.

The purpose of this letter is to provide notice of the potential for a finding of misconduct against you. This letter is confidential; it will not be made public in any way by the Commission.

This Commission is prohibited by its Order in Council, and by the governing jurisprudence, from expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commission is however, required to find the facts in respect of the matters it is directed to inquire into.

One of the guiding principles of this Commission is that it will ensure procedural fairness to those persons who may be affected by its activities. We are well aware that, as Justice Cory noted in *Canada (Attorney General) vs. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] S.C.R. 440, findings of misconduct (which he defined as including “improper or unprofessional behavior” or “bad management”) should not be the principal focus of this public inquiry. They should only be made in those circumstances where they are required to carry out the inquiry’s

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mandate. Nevertheless, it may well be necessary for us to make findings of misconduct. As Justice Cory wrote:

The findings of fact and the conclusions of the Commissioner may well have an adverse effect upon a witness or a party to the inquiry. Yet they must be made in order to define the nature of the responsibility for the tragedy under investigation and to make the helpful suggestions needed to rectify the problem... procedural fairness is essential for the findings of Commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the Commission.

Section 17 of the *Public Inquiries Act, 2009*, is a statutory enactment of that requirement of procedural fairness. It provides that a Commission shall not find misconduct by a person unless reasonable notice of the possible finding and the summary of the evidence supporting the possible finding have been given to that person, and the person has been given a reasonable opportunity to respond.

Neither the statute nor the jurisprudence has set out the standard to be applied when determining whether a notice ought to be issued. In our view, the appropriate standard, keeping in mind our fairness obligation, is whether there is evidence which, if accepted, and in the absence of an explanation, could be the basis for a finding by the Commission that the person had mismanaged matters relating to the structural integrity of the mall.

As Justice Cory noted, the timing of notices will always depend upon the circumstances. You have not applied to become a participant in this Commission of Inquiry. As a result, we have closely scrutinized the documents collected to date which may well become evidence in the inquiry. The purpose of that scrutiny was to ensure that, if there was the potential for a finding of misconduct against you, a notice be issued now so that you are provided with an opportunity to take part in the inquiry in order to protect your reputation.

It appears that facts set out in documents obtained by the Commission could, if accepted, and in the absence of an explanation, be the basis for a finding that you failed to:

- (a) ensure that the building envelope of the Algo Centre Mall, and in particular the roof top parking, was properly designed so as to ensure a watertight condition so as to prevent leakage of water into the building;
- (b) prepare a proper design for the waterproof membrane system to be installed over the hollow core pre-cast concrete slabs which formed part of the roof top parking for the Algo Centre Mall.

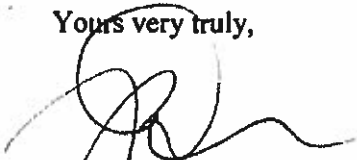
We will provide you with copies of the more significant documents which could support this potential finding.

Subsection 17(2) of the *Public Inquiries Act, 2009* provides that a person who has been given a notice under subsection 17(1) has the same rights as has a person who has been

granted standing as a participant under section 15 of the statute. They have the right to participate in the inquiry and may be represented by a lawyer. You may wish to consider applying for standing as a participant pursuant to the *Revised Rules of Standing and Funding*. All of the Commission's rules may be found on our website, [www.elliottlakeinquiry.ca](http://www.elliottlakeinquiry.ca).

I want to make it very clear that by providing this notice to you now, we are not indicating that we have reached any conclusions whatsoever as to the underlying facts giving rise to the collapse of the mall. No evidence has yet been called. The purpose of this notice is simply to ensure that we are fair to you so that, if the Commissioner comes to the conclusion that the evidence requires him to make a finding of misconduct against you, he will be satisfied that procedural fairness was accorded.

Yours very truly,

A handwritten signature in black ink, appearing to be 'J. Carr-Harris', written over a circular stamp or mark.

J. Bruce Carr-Harris  
Commission Counsel  
[bcarr-harris@elliottlakeinquiry.ca](mailto:bcarr-harris@elliottlakeinquiry.ca)  
(613) 749-3204

BCH/na

This is Exhibit "B" to the Affidavit of  
Mario Delgado sworn June 19, 2013

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

A Commissioner for Taking Affidavits  
P. JOHN BRUNNER

## John Brunner

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**From:** P. John Brunner <pjbrunner@brunnerandlundy.com>  
**Sent:** Wednesday, March 27, 2013 10:10 AM  
**To:** Nadia Authier  
**Subject:** Elliot Lake Inquiry - James Keywan

Nadia:

I write to you further to our telephone conversation of March 25, 2013, with respect to the following issues:

I would like to cross-examine Chris Hughes who was one of the authors of the Norr Final Report dated March 8, 2013, as he appears to be the only architect who had any involvement in the preparation of this report. As I am not interested in any of the other experts who will form part of the panel, is it possible that we could cross-examine Chris Hughes at the very opening of the examination of the members of the panel? If you have no objections to this, I would like to write to other counsel and hopefully seek their agreement in so proceeding. I do not anticipate that my cross-examination will last more than one hour.

As I indicated to you in our telephone conversation, I have retained an expert on behalf of James Keywan. It would be my preference to simply submit his expert report and would welcome your views as to whether this is satisfactory to the Commission. It is my understanding that several other participants have also retained experts and there is no doubt that the progress of the Inquiry would be much enhanced if the experts reports could simply be submitted to the Commission without calling their authors as witnesses unless one or more of the participants are interested in cross-examining the author of the report.

I look forward to hearing from you at your earliest convenience.

Regards,

John

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This is Exhibit "C" to the Affidavit of  
Mario Delgado sworn June 19, 2013



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A Commissioner for Taking Affidavits  
P. JOHN BRUNNER

## John Brunner

---

**From:** Nadia Authier <NAuthier@elliottlakeinquiry.ca>  
**Sent:** Wednesday, May 15, 2013 7:20 PM  
**To:** P. John Brunner; Mario E. Delgado  
**Subject:** Elliot Lake Inquiry - Expert Reports

John,

We have now had an opportunity to discuss the issue of the expert report you have obtained. Firstly, we require that you deliver your expert report by no later than Tuesday, May 21, 2013, in order to provide Commission Counsel an opportunity to review the report and decide whether or not the report will be entered as an exhibit at the Hearing and whether the author of the report is to be called as a witness.

If Commission Counsel decide to enter this report as evidence at the Hearing and call the author of the report as a witness, then the participants would have an opportunity to cross-examine the author of the report. If upon reviewing the report, it is decided that it will not be entered as evidence in the Hearing and the author will not be called as a witness by Commission Counsel, then you will have the right under the Rules to apply to the Commissioner for leave to call this evidence.

Please note, although your client has received a section 17 notice, he has not applied for standing. Therefore, if you are required to seek leave to call this evidence, counsel for the participants may object on the basis that you do not have standing as a participant, at which point you would have to reveal that your client has received a section 17 notice, which affords you all the same rights as a participant with standing. This same principle applies if you intend to cross-examine Mr. Chris Hughes, the architect on the NORR panel.

In order to avoid having to reveal that your client has received a section 17 notice, you can apply for standing as a participant. I would suggest that you look at the applications submitted by other participants, which are all available on the website and use one of them as a precedent. The Trow (exp. Global) application was fairly short and could be used as an appropriate precedent if your client decided to apply for standing.

I trust that this answers the questions you had regarding your report. If you have any additional questions or concerns please do not hesitate to contact me.

Yours very truly,

**Nadia J. Authier**

Commission Counsel | Procureure de la Commission  
Elliot Lake Commission of Inquiry | Commission d'enquête Elliot Lake  
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Elliot Lake, Ontario, P5A 3S9  
Tel : 705-848-1032  
[nauthier@elliottlakeinquiry.ca](mailto:nauthier@elliottlakeinquiry.ca)

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This is Exhibit "D" to the Affidavit of  
Mario Delgado sworn June 19, 2013



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A Commissioner for Taking Affidavits  
P. JOHN BRUNNER

**THE ELLIOT LAKE  
COMMISSION OF INQUIRY**

The Honourable Paul R. Bélanger  
Commissioner



**LA COMMISSION D'ENQUÊTE  
SUR ELLIOT LAKE**

L'honorable Paul R. Bélanger  
Commissaire

Delivered by Email ([pjbrunner@brunnerandlundy.com](mailto:pjbrunner@brunnerandlundy.com))

CONFIDENTIAL

May 24, 2013

Mr. P. John Brunner  
Brunner and Lundy Lawyers  
360 Bay St., Suite 302  
Toronto, ON M5H 2V6

Dear Mr. Brunner,

**Re: James Keywan - Supplementary Section 17 Notice**

I am writing to you in your capacity as counsel to James Keywan. The purpose of this letter is to provide notice of the potential for a finding of misconduct against your client, in addition to the potential findings set out in my letter to you of February 14, 2013. This letter is confidential; it will not be made public in any way by the Commission.

It appears that facts set out in documents obtained by the Commission and evidence obtained during the Hearing, if accepted, and in the absence of an explanation, could be the basis for a finding that Mr. Keywan did not provide his architectural services with reasonable care and skill and in accordance with the accepted standards of a reasonably competent architect, as those standards existed at the time of the design of the Algo Centre Mall. In particular, he signed the letter of substantial compliance on the basis that the owner/developer of the Algo Centre Mall did not advise him of any deficiencies or problems with the construction or design of the mall and allowed it to be filed with the building department of the City of Elliot Lake. He signed the letter of substantial compliance although he never attended at the mall during construction or otherwise, and had not conducted any inspection of the ongoing construction prior to signing the letter which has been entered as Exhibit 275 in the Inquiry.

The evidence which could support these potential findings is found in:

- (a) Exhibit 275;
- (b) The testimony provided by Mr. Keywan during examination in-chief by Commission Counsel and during cross-examination was to the

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Elliot Lake, Ontario P5A 3S9

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effect that his signature of the letter of conformance/completion for the whole building was based on information provided to him by Mr. Hirt, in particular, Mr. Keywan testified as follows:

- i. The owner conducted the general review of the installation and construction of his (Keywan) design [p. 975, ln. 11-16];
- ii. When he references the "owner" he is referring to Nick Hirt of Algocen [p. 975, ln. 17-21];
- iii. When asked if Mr. Hirt provided him with inspection reports of the review of his design, Mr. Keywan responded as follows:
  - A. *I saw Mr. Hirt quite often and we were always in touch by phone and he would tell me if there was any problem on the project, he would have told me, but I didn't hear of any, so that was it.*

*He told me that – he asked me to write this letter [in reference to Exhibit 275] and, in fact, I believe at the time he – I shouldn't say that because I don't know, but it sounds like he would have asked me in those specific words to assign a certificate on it. [pp. 975-976, ln. 23-25 and 1-10]*

- iv. When asked if apart from conversations with Mr. Hirt from time to time what he would have looked at to satisfy himself that his design had been substantially completed, Mr. Keywan responded as follows:
  - A. *No I took – it is not a question of looking I think. But you mentioned about Trow, et cetera. I received all those. Now, my men never heard – didn't hear any problems that were in response and in response to anything that my office or the structural engineer's office did.*

*Q. Okay*

*A. So in that case it was quite acceptable to sign this on the word of Mr. Hirt, who was the owner/developer. [pp. 976-977, ln. 14-25 and 1-3]*

- v. He acknowledged that Mr. Hirt provided no periodic reports in writing of his inspections of Mr. Keywan's design and the installation of it from the architectural design perspective [p. 977, ln. 12-15];
- vi. Mr. Keywan further acknowledged that he did not talk to Mr. Hirt in any formal way about the state of the design installation that they just discussed it in the sense of "*How is the job*

going? *Very well*". He further acknowledged that from the response he received from Mr. Hirt of "*Very well*" he knew the project was substantially complete because he believed Mr. Hirt and he took his word for it [pp.977-978, ln 16-25 and 1-2];

- vii. When Mr. Keywan was asked if he regarded Mr. Hirt, who was the owner as well as the construction manager, to be entirely independent, Mr. Keywan responded:

*A. Well, with his knowledge and the fact that I had known the man on other projects to be completely open and knowledgeable about everything, and certainly I made the reasonably logical assumption that he wouldn't pay for any work that wasn't properly done. [p. 978, ln. 3-11]*

- viii. In relation to the position that he was not responsible for the waterproofing of the roof, when Mr. Keywan was asked what he would know about the status of the roof construction he responded that he did not know anything specific about it, but was not told anything otherwise. He indicated that he took Mr. Hirt's word for it that it was a good system because:

*A. Absolutely. He was the man who paid for things and in this world it is very common that if you are not happy with work, you don't pay the man [pp. 978-979, ln. 12-25 and 1-25];*

- ix. Mr. Keywan gave further evidence that he did not know it was the first time the Peterson system had been installed on hollow core slabs:

*A. I didn't know it was the first time, and I would have assumed that the owner and developer would have made himself aware of how it should be installed [p. 980, ln. 1-13];*

- x. On cross-examination, when asked if at the time of stamping and signing the letter, whether the building had to comply with the Ontario Building Code he answered yes [p. 1014, ln. 11-14];
- xi. Mr. Keywan was further asked in cross-examination if on the date that he signed the letter entered as Exhibit 275 the building needed to be watertight. He answered that he would assume so [p. 1014, ln. 15-24];
- xii. When asked in cross-examination how he ensured that the building was watertight he answered that he asked Mr. Hirt. When pressed further on whether Mr. Hirt told Mr. Keywan that there were no leaks on August 5, 1980, he responded:

*A. He didn't say it in those words, and I don't think we had discussed watertight as such;*

*Q. Did you ask Mr. Hirt whether the building was watertight?*

*A. No, I didn't. I was not aware of any water problems on it other than hearsay.*

*Q. Can you explain what you mean by hearsay?*

*A. Well, I was doing work for Algocen continuously, and anybody I spoke to, they may have mentioned, if I asked, How is the job going in Elliot Lake? Oh, it is fine, but we got a few water problems. That is all. Nobody said fix it up.*

*Q. Was that conversation prior to your signing this certificate?*

*A. It could have been. Then it becomes either service or maintenance. I don't know specifically, because nobody ever told me that it is not repairable. In fact, many buildings are completed substantially and still have minor adjustments or whatever.*

*Q. But you don't remember specifically whether you heard about the leaks in these hearsay conversations, as you have called them, before signing this certificate?*

*A. I can specifically say that I didn't know.*

[pp. 1015-1016, ln. 3-25 and 1-8]

- (c) The City of Elliot Lake Building By-law No. 78-47 (Exhibit 00006-00005; docnumber CEL\_P000000453), which was in force at the time of the construction of the Algo Centre Mall included the following requirement:

*s. 8(4) Where such buildings and/or structures are required to be designed by an architect or professional engineer or both, are reviewed in the field during construction in accordance with the Ontario Building Code, Part 2, section 2.3.1 (a) (b); 2.3.2; 2.4; and upon completion of the work for which the review was required a report shall be submitted to the "Authority Having Jurisdiction" by the architect or professional engineer both stating what was reviewed and where applicable, what was not reviewed and*

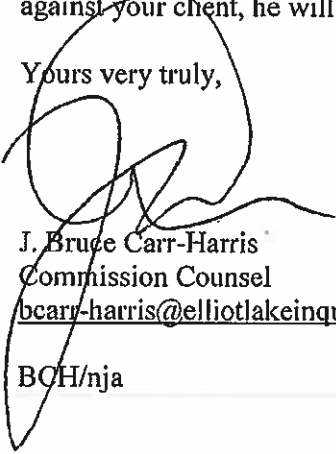
*stating the extent to which the construction conforms to this by-law and the Ontario Building Code.*

The other significant documents which could support these potential findings were delivered to Mr. Keywan before he was interviewed by Commission Counsel.

Subsection 17(2) of the *Public Inquiries Act, 2009* provides that a person who has been given a notice under subsection 17(1) has the same rights as has a person who has been granted standing as a participant under section 15 of the statute. They have the right to participate in the inquiry and may be represented by a lawyer. Your client may wish to consider applying for standing as a participant pursuant to the *Revised Rules of Standing and Funding*. All of the Commission's rules may be found on our website, [www.elliottlakeinquiry.ca](http://www.elliottlakeinquiry.ca).

I want to make it very clear that by providing this notice to your client now, we are not indicating that we have reached any conclusions whatsoever as to the underlying facts giving rise to the collapse of the mall. Much evidence has yet to be called. The purpose of this notice is simply to ensure that we are fair to your client so that, if the Commissioner comes to the conclusion that the evidence requires him to make a finding of misconduct against your client, he will be satisfied that procedural fairness was accorded.

Yours very truly,



J. Bruce Carr-Harris  
Commission Counsel  
[bcarr-harris@elliottlakeinquiry.ca](mailto:bcarr-harris@elliottlakeinquiry.ca)

BOH/nja

This is Exhibit "E" to the Affidavit of  
Mario Delgado sworn June 19, 2013



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A Commissioner for Taking Affidavits  
P. JOHN BRUNNER

**THE ELLIOT LAKE  
COMMISSION OF INQUIRY**

The Honourable Paul R. Bélanger,  
Commissioner



**LA COMMISSION  
D'ENQUÊTE ELLIOT LAKE**

L'honorable Paul R. Bélanger,  
Commissaire

**DELIVERED BY EMAIL**

May 24, 2013

P. John Brunner  
Brunner and Lundy  
Barrister and Solicitors  
360 Bay Street, Suite 302  
Toronto, ON M5H 2V6

Dear Mr. Brunner,

**Re: Elliot Lake Commission of Inquiry  
Report of Allen Larden**

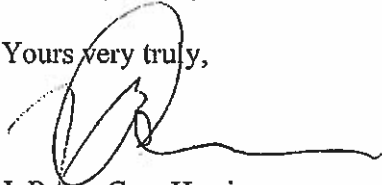
Your client, Mr. Keywan wishes to adduce rebuttal evidence through an expert Report of Mr. Allen Larden, dated May 14, 2013, This will confirm our agreement to address Mr. Larden's evidence before the Inquiry as follows:

1. The Commission will enter the Report into Relativity and notify the Participants and Section 17 recipients that it has been added to the database. At the same time, the Participants and Section 17 recipients will be asked to advise the Commission if they intend to cross-examine Mr. Larden on his Report. Commission Counsel will also have an opportunity to cross-examine Mr. Larden. If no one, so entitled to do so, wishes to cross-examine Mr. Larden, then the Report will form part of the evidentiary record of the Commission without the requirement of an attendance by Mr. Larden or yourselves.
2. Alternatively, if cross-examinations are requested, they will be set to proceed on a date to be scheduled prior to July 19, 2013. Mr. Larden will be required to attend before the Commission and you or your colleague, if necessary, will qualify him for the Record.

Please confirm that the forgoing reflects our agreement as soon as possible so that I can proceed to advise the Participants, Section 17 recipients and NORR accordingly.

On the subject of the Section 17 Notice previously sent to Mr. Keywan, I indicated to you yesterday in our telephone call that we will be sending a revised version adding a further particular to do with the Certificate of Substantial Compliance signed and sealed by your client. I understand you will consider whether an addenda to Mr Larden's report will be necessary once you have received the revised version, which we expect will be today.

Yours very truly,

A handwritten signature in black ink, appearing to read 'J. Bruce Carr-Harris', with a long horizontal flourish extending to the right.

J. Bruce Carr-Harris  
Commission Counsel  
(705) 848-7920  
[bcarr-harris@elliottlakeinquiry.ca](mailto:bcarr-harris@elliottlakeinquiry.ca)

This is Exhibit "F" to the Affidavit of  
Mario Delgado sworn June 19, 2013

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke.

---

A Commissioner for Taking Affidavits  
P. JOHN BRUNNER



From: Nadia Authier [mailto:[NAuthier@elliottlakeinquiry.ca](mailto:NAuthier@elliottlakeinquiry.ca)]  
Sent: Mon 5/27/2013 1:22 PM  
To: Participants; Counsel  
Cc: Marc-Andre Bernard; Jennifer Caissy; Sujethra Nadarajah  
Subject: Elliot Lake Inquiry - James Keywan

The Commission has received the attached report of Allan Larden, from Mr. John Brunner, counsel for James Keywan. This report will be entered into evidence. Once you have had an opportunity to review the comments and conclusions set out within the report, we would ask that counsel advise us by no later than June 4th, of whether they wish to cross-examine Mr. Larden on his report. If cross-examinations are requested, Mr. Larden will be called for cross-examination on a date to be scheduled prior to July 19, 2013.

Nadia J. Authier  
Commission Counsel | Procureure de la Commission  
Elliot Lake Commission of Inquiry | Commission d'enquête Elliot Lake  
99 Spine Road, 2nd Floor | 99, rue Spine, 2e étage  
Elliot Lake, Ontario, P5A 3S9  
Tel : 705-848-1032  
[nauthier@elliottlakeinquiry.ca](mailto:nauthier@elliottlakeinquiry.ca)<<mailto:nauthier@elliottlakeinquiry.ca>>

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This is Exhibit "G" to the Affidavit of  
Mario Delgado sworn June 19, 2013

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

A Commissioner for Taking Affidavits  
P. JOHN BRUNNER

**From:** Nadia Authier <NAuthier@elliottlakeinquiry.ca>  
**Date:** May 29, 2013, 7:54:23 AM EDT  
**To:** "P. John Brunner" <pjbrunner@brunnerandlundy.com>, "Mario E. Delgado" <mdelgado@brunnerandlundy.com>  
**Subject:** FW: Elliot Lake Inquiry - James Keywan

Please see the email from Mr. Elliott.

**Nadia J. Authier**

Commission Counsel | Procureure de la Commission  
Elliot Lake Commission of Inquiry | Commission d'enquête Elliot Lake  
99 Spine Road, 2nd Floor | 99, rue Spine, 2e étage  
Elliot Lake, Ontario, P5A 3S9  
Tel : 705-848-1032  
[nauthier@elliottlakeinquiry.ca](mailto:nauthier@elliottlakeinquiry.ca)

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**From:** R. Douglas Elliott [<mailto:RDE@reolaw.ca>]  
**Sent:** May-28-13 11:26 PM  
**To:** Nadia Authier; Participants; Counsel  
**Cc:** Marc-Andre Bernard; Jennifer Caissy; Sujethra Nadarajah  
**Subject:** RE: Elliot Lake Inquiry - James Keywan

Dear Ms. Authier:

We have serious objections to the filing of this opinion in its current form.

The Commission of Inquiry is not a trial. The Commissioner may not make findings of civil or criminal liability.

Mr. Larden is not a fact witness. He has no personal knowledge of the facts described in his report, all of which were or could have been elicited from Mr. Keywan.

Although the Commissioner may make findings of "misconduct", it is not the role of the Commissioner to make legal findings of negligence. "Misconduct" in the context of the Public Inquiries Act was defined by the Supreme Court of Canada in the Krever Inquiry ruling as improper or unprofessional behaviour, or bad management. This is the relevant standard against which Mr. Keywan's actions or inaction should be measured.

Mr. Larden expresses an opinion on Mr. Keywan's possible tortious conduct. References to "duty of care" and "foreseeable risk of harm" demonstrate that Mr. Larden was concerned primarily with negligence, not "misconduct", when drafting his opinion. We have many architects who have testified at the Inquiry, from whom opinions about "misconduct" have been and will be elicited.

Much of Mr. Larden's opinion is in a familiar form, and his comments are directed to the issue of Mr. Keywan's possible civil liability. There are parallel civil proceedings in which this type of evidence would be appropriate. Paragraph 2 in particular is clearly framed as a question of whether Mr. Keywan breached his duty of care, or simply put, whether or not he was negligent.

If this type of evidence is admitted for Mr. Keywan, it will open the door for others to follow suit. We might seek to

file rebuttal evidence that Mr. Keywan was negligent, for example. It would be difficult to understand on what basis such evidence offered by others could be excluded once the precedent is set by admitting Mr. Larden's letter into evidence. The negative impact on the Inquiry schedule this would entail, and the increased risk of judicial review, are both to be avoided. We do not believe Mr. Larden's evidence or any similar opinions on civil liability should be admitted into evidence.

If Commission counsel does not agree with us, then we will want an opportunity to make submissions to the Commissioner prior to this document being filed.

Douglas Elliott

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

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

AND IN THE MATTER OF James W. Keywan

AFFIDAVIT OF MARIO DELGADO  
(Sworn June 19, 2013)

**BRUNNER AND LUNDY**  
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Toronto, ON M5H 2V6

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Tel: 416-966-9955  
Fax: 416-966-9325  
E-mail: [pjbrunner@brunnerandlundy.com](mailto:pjbrunner@brunnerandlundy.com)

Lawyers for James W. Keywan

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

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

AND IN THE MATTER OF James W. Keywan

MOTION RECORD OF  
JAMES W. KEYWAN

**BRUNNER AND LUNDY**  
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Toronto, ON M5H 2V6

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Lawyers for James W. Keywan