

SECTION IV

The Retirement Living Years
1999–2005

-
- *Leaks from the rooftop parking deck were an ongoing*
- *issue in the Mall during the period of NorDev's ownership.*
- *In spite of this problem, NorDev spent relatively paltry*
- *amounts of money to maintain the roof.*
-

New Owner, No New Solutions

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Background to Retirement Living

The genesis and launch of Retirement Living

Non-Profit Retirement Residences of Elliot Lake (Retirement Living) was incorporated as a not-for-profit corporation in February 1991. It carries on business as Elliot Lake Retirement Living.

As I will discuss in greater detail later in this Report, in 1999 Retirement Living incorporated a for-profit subsidiary, NorDev, for the purpose of taking title to, and owning, the Mall and the Hotel. While these corporate entities are technically distinct, they shared common boards of directors and managers for the period that Retirement Living owned the Mall and the Hotel. Unless otherwise specified, a reference in the Report to Retirement Living also includes, where applicable, a reference to NorDev. The reader will see that I make distinct reference to the respective entities when doing so is necessary for a proper description of the evidence.

The roots of the Elliot Lake retirement living program extend back to 1987, when a committee was struck, under the auspices of the City's Economic Development Committee, to address what was already a surplus of housing in Elliot Lake. Even before the uranium mine closures of 1990, the mining companies had built too many homes in the area. The original purpose of the retirement living program was to fill those houses. In the 1980s, even newly built homes were sitting vacant.¹

Initially, very few resources were devoted to either the concept or the committee's work. Denison Mines Corp., Rio Algom Mines Ltd., and the City of Elliot Lake were each asked to contribute \$25,000, which allowed the program to start in 1987 with an initial \$75,000 advertising budget. At this time, the mining companies not only owned their own housing properties but also managed the rentals, though the whole concept was marketed as the Elliot Lake retirement living program.

The situation changed in 1990, when the two primary mining companies began closing their mines in and around Elliot Lake. The closure of the Denison and Rio Algom mines had a devastating impact on the community, and the situation was viewed as a crisis.² As result of the closure of the mines, 4,500 full-time mining jobs were eliminated and approximately 4,000 secondary jobs were expected to be affected.³ In addition, the City stood to lose 45 percent of its tax base, but the service requirements and other demands on the municipality were not proportionately reduced.⁴

As a preliminary response to this impending economic disaster, the City commissioned a study, funded by the Ministry of Northern Development, to determine the feasibility of transitioning Elliot Lake into a retirement community. The study concluded that, in light of the abundance of quality housing and apartments, this objective could be feasible.⁵ The logic behind attracting senior residents to Elliot Lake was to bring in people to occupy the housing that was being abandoned by miners. Moreover, these residents, being self-sufficient retirees with pensions and/or savings, had the added advantage of belonging to a demographic that did not need a job in a community where positions were suddenly scarce.⁶

After its incorporation, Retirement Living was viewed as the vehicle that would salvage the economic viability of Elliot Lake by weaning it from its dependence on the mining industry and giving it a new vocation and renewed vigour. As stated in its letters patent, the corporate objectives of Retirement Living are

- (a) To provide and operate affordable housing units, with or without any public space, recreational facilities, and commercial space or buildings appropriate thereto, primarily for senior citizens of low or modest income in a manner that provides improved quality of life and that supports the economic base of the City of Elliot Lake.
- (b) To ensure the timely delivery of needed services for such housing units.⁷

A not-for-profit company has no shareholders; rather, it has members. A defining characteristic of a not-for-profit corporation, such as Retirement Living, is that its members are not to derive any benefit financially from their membership in the corporation.⁸

Mayor George Farkouh testified that there were two primary reasons for administering the retirement living program through a corporation rather than the municipality: an arm's-length corporation would pay property taxes; and an arm's-length corporation, with representation from the community, could more effectively manage the properties.*

Retirement Living gets off the ground with 1,450 properties and \$3.5 million

The initial capital funding used to launch the Retirement Living project came from the Ontario government, which made available \$7 million to get the corporation off the ground.⁹ The Commission heard evidence that Retirement Living used \$3.5 million of these funds to acquire properties from Denison. This company, which was not in a strong financial position, initially proposed selling units to Retirement Living for \$15,000 each. Following a lengthy negotiation, Retirement Living ultimately acquired 900 units from Denison for \$3.5 million.¹⁰

Rio Algom was in a healthier financial condition. In an agreement negotiated with Revenue Canada and Elliot Lake, rather than selling properties to Retirement Living, it transferred 550 of them to the City of Elliot Lake in exchange for a tax receipt.¹¹ Elliot Lake subsequently transferred the properties to Retirement Living. As a result, Retirement Living began operations in 1991 with 1,450 properties and capital of \$3.5 million.¹²

Composition of the membership of Retirement Living

The composition of the corporate membership of Retirement Living was clearly structured to include representation from interested parties within Elliot Lake. Specifically, the membership includes

- two members appointed by City Council;
- three tenants of Retirement Living properties;
- two members of the community at large, excluding tenants of Retirement Living properties;
- a member of Huron Lodge, an assisted living facility for seniors;
- a member of the board of St. Joseph's General Hospital;
- a member of the Elliot Lake Chamber of Commerce; and
- representatives of Denison and Rio Algom.¹³

The Retirement Living Board of Directors is made up of the members of Retirement Living.¹⁴ The purpose of having representation from these parties was, according to Elliot Lake's chief administrative officer (CAO) at the time Retirement Living was created, to "ensure ... that there would be people with differing backgrounds and expertise coming to the table" and that there was a cross-section of input.¹⁵

.....

* Farkouh testimony, May 2, 2013, pp. 8002–5; Mr. Farkouh acknowledged during his testimony that the City could have compensated for lost property tax revenue through the rental income that it would receive from tenants.

Retirement Living and the City of Elliot Lake were closely linked

The requirement that City Council appoint two members of the Retirement Living Board of Directors is but one indication of the close relationship between the municipal government of Elliot Lake and Retirement Living. More fundamentally, the Commission heard ample evidence that Retirement Living and the City were both deeply and jointly committed to the common purpose of saving Elliot Lake from economic ruin. The councillors who sat on the Retirement Living Board of Directors were called “representatives” of the City.¹⁶

Mayor Farkouh, who served on the Retirement Living Board of Directors for many years as a representative of council, testified that Retirement Living was created to “serve the best interests of Elliot Lake” and to help the city “grow and survive from becoming a ghost town.” He agreed that Retirement Living and the City shared the goal of fostering a healthy economy.¹⁷ In his words, he saw his role on the board as making sure that “Retirement Living is always acting in the best interest of the taxpayers of Elliot Lake.”¹⁸ Another witness testified that, because Retirement Living was a key player in the Elliot Lake economy and viewed as “essential” to the City’s survival, the Retirement Living Board of Directors included representatives from the City of Elliot Lake.¹⁹

In 1996, Retirement Living again added to its housing stock in a transaction that further exemplified the closeness between Retirement Living and the City. At that time Rio Algom, which owned approximately 96 housing units in a series of four-storey buildings, had made an application to the City to tear down the buildings. Instead, the City transferred the units to Retirement Living for a dollar, on the condition that Retirement Living invest \$450,000 to rehabilitate the units. Ultimately, Retirement Living invested approximately \$700,000–\$800,000 to restore them.²⁰

Management of Retirement Living

The first general manager of Retirement Living was Bill Morris, who hired the initial staff and generally began its operations.²¹ In 1993 Richard Kennealy was hired as the general manager – a position he continued to hold at the time of his testimony before the Inquiry. In that role, he reports to the Board of Directors of Retirement Living. Among other responsibilities, the general manager directs the operations of Retirement Living, prepares business plans, and promotes the interests of the corporation with governments, the community, and the public at large.²²

Rhona Guertin was hired in December 1997 as the finance and business development manager, a position she continued to hold at the time of her testimony. She reports to the general manager. She viewed her role as managing the finance department and being the “project person” whenever business development ideas arose. She carried out the background research, feasibility studies, and preliminary plans to the point where they could become actual operations. She looked at operations from a financial perspective.²³

Richard Quinn held the position of property manager from 1991 until 2010. He was responsible for all the physical assets of the corporation, ranging from capital expenses and improvements to the buildings through overseeing daily maintenance and custodians to preparation for move-ins and move-outs. As he said in his testimony: “If you could physically touch it, I took care of it. I ensured its viability.”²⁴

Confidentiality within Retirement Living obstructed the flow of information to the City of Elliot Lake

The Commission heard evidence that the purpose of having a corporation, rather than the municipality, administer the retirement living program was because “it would be logical to do that as a separate housing corporation type of entity ... because ... while it was assisting the City ... it wasn’t the City itself, in terms of [being run by City Council].”²⁵ Fred Bauthus, the City’s chief administrative officer, was asked whether a desire for confidentiality was part of the rationale for this arrangement. He replied: “I would hesitate to say.” He could not recall that confidentiality was a specific argument at the time.²⁶

Although the desire for confidentiality may not have been one of the rationales for establishing Retirement Living, it appears to me that confidentiality was – from the outset – a defining characteristic of the way it conducted its affairs. Although the practice is not uncommon in non-public corporate governance, every member of the Board of Directors was required to sign a confidentiality agreement related to business under consideration by the board.²⁷

On January 30, 1997, the corporate secretary of Retirement Living, Douglas Kearns, issued a report intended to provide all directors of Retirement Living, including new directors, with an understanding of their roles and responsibilities.²⁸ It stated that individual directors had the responsibility “to respect the confidentiality of matters considered by the Board or coming to their notice or attention as directors which are of a confidential or private nature.”²⁹ The report also attached the template of an agreement and undertaking respecting confidentiality of information provided to the Board of Directors (the undertaking). It provided in part:

I understand that in the course of my role as a director of Elliot Lake Retirement Living I will receive information that I must treat as confidential.

The regulations that follow are not intended to discourage me from speaking out about Elliot Lake Retirement Living and my role as a Director.

However, I will respect the following guidelines:

1. Written materials provided to me are not to be shared or distributed.
2. Opinions and voting of individual Directors are not to be commented on.
3. Any issues dealing with employees in general, or a particular employee[,] are not to be commented on.
4. Any ongoing negotiations by the Board or matters that have not come to a vote at the Board are not to be commented on.³⁰

The Commission heard somewhat divergent interpretations of the scope of the confidentiality obligations imposed on the directors of Retirement Living. For example, Mr. Kennealy testified that board members did talk about Retirement Living business on a regular basis. He acknowledged, however, that a board member would interpret the report from Mr. Kearns and the undertaking as meaning that directors were responsible for respecting the confidentiality of matters considered by the board.³¹ Mr. Kennealy further stated that, if a matter came before the board and had not yet been voted on, there was an expectation that it would not be discussed outside the confines of the board.³²

Mr. Farkouh testified that there was always a flow of information between the community, City Council, and Retirement Living. He said he would advocate for the City’s interests and assert council’s position on matters that came before the Retirement Living board.³³ However, the undertaking prevented Retirement Living board members from even commenting on matters that were before the board and that had not yet been voted on. It is therefore not clear how a council representative could adhere to his or her obligation as a board member and,

at the same time, advise council of the matter and receive opinions or instructions. At most, it seems to me, a City representative would have to assume or guess council's position on a matter before the Retirement Living board. Under examination from Commission counsel, Mr. Farkouh acknowledged this tension:

- Q. So what you're telling me sir, if I understand you correctly, is that you knew what Council meant [on a matter before the Retirement Living Board] simply because you knew, and you didn't have to ask them; is that fair?
- A. Well, yes, that's fair.³⁴

Rick Hamilton, who was a City Council representative on the Retirement Living Board of Directors from 2003 until 2009, testified that he did not report to council on matters that were before the board. Like Mr. Farkouh, he acknowledged that councillors could not provide their opinion on matters before Retirement Living if the City's representatives on the board did not report to them:

- Q. But how was it – how would members of Council know what the issues were that were coming up before the Board of Retirement Living if you didn't report to them?
- A. Well, I can't answer that question.
- Q. Well, you'll agree with me they couldn't, right?
- A. No.
- Q. You'll agree with me?
- A. Yeah.
- Q. So what I am trying to understand is how you could have been seen to be a representative of the City if the City didn't know, if Council didn't know what was being discussed, wasn't advised what the issues were and was not given an opportunity to tell you what their views were?
- A. Well, they were more than willing to tell me what their views were.
- Q. But it –
- A. I would be happy to bring that to the Board, sure.
- Q. But they couldn't tell you what their views were about things they didn't know about, right?
- A. Well, you have to be more specific than that. I'm not sure what –
- Q. Leaks on the roof. Did any members of Council while you were a member of the Board of Retirement Living ever tell you, give you any idea of what, if anything, you ought to be doing, what Retirement Living ought to be doing with respect to leaks at the mall?
- A. No.³⁵

Mr. Hamilton testified that he would not disclose information that he obtained as a director of Retirement Living if the information could cause harm to the business of Retirement Living.³⁶ He said there were occasions when Mr. Kennealy and Ms. Guertin met privately with members of City Council to share information they did not want to become public. If he wished to attend such a meeting, he signed a non-disclosure agreement that required him to keep information presented there confidential.³⁷

Evidently, councillors who did not agree to sign the non-disclosure agreement could not attend the private meetings with Retirement Living. The Commission heard evidence from Councillor Don Denley that he did not attend any meetings of the Retirement Living board because he was asked to sign a non-disclosure agreement as a precondition to attending a meeting.³⁸ This agreement, as he understood it, would have prohibited him from disclosing any information obtained at a board meeting.³⁹

The Commission heard other evidence that the City representatives on the board did not discuss matters before the board at council meetings. Mr. Bauthus testified that, during his tenure of more than 10 years as chief administrative officer, the councillors who sat on the board never reported back to council, the CAO, or City staff about issues discussed or decisions made at the board. Mr. Denley testified that, during his time on council, from 2003 to 2006, City Council representatives on the board did not raise issues involving Retirement Living at council meetings.⁴⁰

This trend continued after Retirement Living sold the Mall. Al Collett, who became a member of council in 2008, testified that the City Council representatives on the board of directors did not report to council on the activities of Retirement Living. He further testified that council did not give instructions to those representatives on decisions to be made in relation to Retirement Living.⁴¹ In 2011, Councillor Tom Farquhar resigned as a City representative on the Retirement Living board because he did not think the confidentiality restrictions placed on board members were appropriate for a representative of City Council. The City accepted Mr. Farquhar's resignation and appointed an alternative representative.⁴²

I conclude that the confidentiality obligations imposed on the City representatives who were members of the Retirement Living Board of Directors materially hindered them from fulfilling the very purpose for which they were on the board: to represent the council duly elected by the people of Elliot Lake and to advance the interests of the public.

Unfortunately, the City seemingly did not consider – or did not adequately appreciate – the possible impact of its councillors' obligations as directors of the Retirement Living and the ramifications of those obligations on the ability of councillors to discharge their duties as council members.

It is correct, as counsel for the City pointed out, that members of the board had fiduciary obligations to Retirement Living.⁴³ However, it is not the law that those fiduciary obligations necessarily include a blanket obligation of confidentiality with respect to all information coming their way as members of the board. Rather, board members are required to keep confidential any information which, if disclosed, would harm the corporation. Retirement Living chose to impose a blanket ban on all members of the board, and neither the City nor its appointees to the board objected to it.

Unfortunately, the City seemingly did not consider – or did not adequately appreciate – the possible impact of its councillors' obligations as directors of the Retirement Living and the ramifications of those obligations on the ability of councillors to discharge their duties as council members. Councillors who did not sit on the board also had difficulty obtaining information about Retirement

Living. In April 2005, Mr. Denley requested the minutes from the meetings of the Retirement Living board. Mr. Kearns responded by indicating that Retirement Living was not a public company and that its "records, minutes, financial statements etc. are not public documents, and there is no requirement that they be produced." Mr. Kearns directed Mr. Denley to make requests for such information to the City's representatives on the Retirement Living board.⁴⁴

There is no doubt that, to varying degrees, depending on the circumstances, the law permits, and common sense allows, a not-for-profit corporation the justifiable discretion to conduct some of its business in a confidential manner when necessary to protect its interests. However, as Mr. Farkouh testified, Retirement Living is "part of the fabric of the community."⁴⁵ It remains to this day a unique corporation with a corporate purpose that ties it inextricably to the City of Elliot Lake. In these circumstances, Retirement Living's insistence on an overarching application of the confidentiality requirement resulted, in my opinion, in a disenfranchisement not only of the citizens of Elliot Lake but of all provincial taxpayers, particularly when public funds through grants and tax exemptions constituted its unique source of initial financing.

As a general proposition, there was logic and a clear purpose in structuring the retirement living program around a distinct, not-for-profit corporate entity. Retirement Living certainly appears to have functioned admirably well in achieving its stated objectives. However, I am of the view that its hermetic governance and insular behaviour may well have had a materially deleterious impact on the Mall and the community's appreciation of its problems. That unfortunate result was particularly evident when Retirement Living emerged as a prospective purchaser and, later, as owner of the Algo Mall.

At the time of Retirement Living's incorporation in 1991, the three directors representing the tenants of its properties and the two directors representing the community at large were elected to those positions at separate public meetings of the tenants and the community. By supplementary letters patent in 2011, these elections ceased and the affected directors were thereafter appointed by the board of directors. Although this change occurred after the sale of the Mall to Eastwood, it serves as a further illustration of the disenfranchisement I speak of. Five of the directors are now chosen not by the citizens of Elliot Lake but by the corporation's board in its discretion.

Retirement Living buys the Algo Centre

Algocen intends to shut the Hotel

In the spring of 1997, Robert Leistner, general manager of Algocen, delivered disturbing news to Mayor Farkouh and Mr. Kennealy. He told them that Algocen was losing money on the Hotel and therefore intended to close it and ultimately tear it down.⁴⁶

The Hotel was a vitally important part of the financial health of both Retirement Living and the City. Retirement Living used it to house prospective residents who came to tour the community.⁴⁷ The other hotel options in Elliot Lake were of significantly lower calibre.⁴⁸ From the City's point of view, the mayor worried about the economy of Elliot Lake spiralling into failure without the Hotel.⁴⁹

Mr. Kennealy testified that, at some point, Algocen broached the idea of Retirement Living, as the largest user, buying the Hotel.⁵⁰ Over the next few months the issue of the Hotel's closing was discussed between Mr. Kennealy and his staff as well as with the mayor, City Council, and City staff.⁵¹ On October 29, 1997, the Retirement Living board was given a presentation on regional development strategy. A discussion took place at the meeting concerning the feasibility of Retirement Living becoming involved with the Algo Mall and Hotel. The board directed Mr. Kennealy to investigate its potential involvement in the future of the Algo Hotel and report back. Mr. Kennealy did not believe the board was considering ownership as a possible option; rather, he felt it wanted to gain an understanding of the problem it faced.⁵²

Following on from the discussions among the interested parties about the future of the Mall and Hotel,⁵³ a meeting was arranged with Mr. Leistner. Mr. Farkouh said he would have directed Mr. Bauthus to arrange a meeting to gain some understanding of Algocen's real intentions for the Hotel and to know more about its long-term plans for the Mall.⁵⁴

Algoma is serious about closing the Hotel

On December 5, 1997, a meeting called at the Algocen offices in Sault Ste. Marie included Mr. Leistner, Mayor Farkouh, Mr. Bauthus, and Mr. Kennealy. The meeting revealed that, if nothing changed, Algocen was serious about closing the Hotel.⁵⁵ The mayor came away from the meeting with the understanding that, because Algocen was seeing a lack of enthusiasm from some merchants, it was not prepared to invest any more resources to upgrade the building or recruit new retail business to the Mall. He concluded it would be just a matter of time before Algocen decided its investment was no longer viable and would take steps beyond the City's control – to shut down the Mall.⁵⁶

Mr. Kennealy also believed that Algocen was not fully committed to the long-term commercial success of the Mall. He based this conclusion in part on the fact that Algocen was reorienting its business activities to the south at the same time as it was divesting its other assets in Northern Ontario.⁵⁷ The importance of the Mall and the Hotel to Elliot Lake generally, and to Retirement Living specifically, was undisputed. According to the mayor, the loss of the major commercial retail and hotel complex would have been absolutely devastating to the community.⁵⁸ Retirement Living's success depended on marketing the City, so anything that had a negative impact on the City and its services would necessarily have adverse consequences for Retirement Living. In his testimony, Mr. Bauthus agreed that Retirement Living was the major economic force in the City.⁵⁹ In short, it was widely believed that what was bad for Retirement Living would also be bad for the City of Elliot Lake.

In order to better understand the situation they were facing, the participants at the meeting agreed that a study should be initiated whose terms of reference* would include an examination of both the Hotel and the Mall.⁶⁰ Mr. Bauthus referred to the study as a retail study to better understand the various issues with regard to retail in the City, including, among other things, how the Mall worked and how it could be improved.⁶¹

Retirement Living considers possible ownership of the Mall and the Hotel

On December 8, 1997, Mr. Bauthus faxed Mr. Leistner a copy of the terms of reference for this study as well as the CVs of the persons who were conducting it. The terms of reference were divided into phases:

- Phase I: Retail Study
- Phase II: Physical Building Inspection by engineers and Analysis of Information
- Phase III(a): Determination of Current Fair-Market Value

This valuation included an appraisal of the property to assist in determining a possible offering price for it.

- Phase III(b): Operational Review

This review included

- Identification, assessment, and ranking of the commercial rental space in Elliot Lake
- Assessment of the required space, based on demographics
- Assessment of the quality of leases of the property

.....

* The only copy of the terms of reference that was available to the Commission was missing a page. That page described the retail study: Bauthus testimony March 26, 2013, pp. 2985-88.

- Phase IV: Analysis of Operational Viability of the Property

This analysis included

- A review of factors that may affect the operational viability of the Algo Mall and the Algo Inn, including possible sources of financing for the acquisition and possible ownership and management options of the property.
- Phase V: Reporting.⁶²

Mr. Bauthus testified that he, in consultation with Mr. Kennealy, had probably prepared the terms of reference.⁶³ Mr. Kennealy agreed that it was inconceivable he would not have discussed them with Mr. Bauthus before they were finalized and sent to Mr. Leistner.⁶⁴

The Commission heard somewhat divergent evidence about the underlying purpose of these studies. Mr. Kennealy testified that establishing a fair market value of the property, exploring possible sources of financing, and conducting a building condition assessment are consistent with exploring the possibility of purchasing the Mall and the Hotel. He did not agree, however, that Retirement Living was considering buying the property, though that outcome was conceivable.⁶⁵ Mr. Leistner, for his part, thought the purpose of the exercise was to determine the worth of the Mall and the Hotel in order to set a proper purchase price.⁶⁶ Mr. Bauthus, in contrast, recalled at the time of preparing the terms of reference that there were discussions about the possibility of Retirement Living purchasing the property.⁶⁷ As a potential purchaser, he testified, Retirement Living had an interest in having an assessment of the condition of the building and knowing its fair market value.⁶⁸ It seems clear that the City never seriously considered purchasing the Mall.⁶⁹ The terms of reference had a dual purpose, in Mr. Bauthus's view. They were meant both to evaluate the viability of the Algo Centre and, at least potentially, to further the possible purchase of the Mall and the Hotel by Retirement Living.⁷⁰ This dual-purpose position appears reasonable to me.

Algocen maintains control over its information

The terms of reference specified that a team from the consulting firm KPMG in Sudbury would undertake the study. In addition, it was contemplated that, as part of the project, engineers would be retained to do the physical assessment.⁷¹ Mr. Leistner, in a letter to Mr. Bauthus on December 11, 1997, agreed to the proposed terms of reference, subject to suitable measures being taken to adequately keep the affairs of Algocen confidential, including the physical condition of the building.⁷² The information being sought by the City and by Retirement Living was information Algocen was not obligated to share with them.

Mr. Leistner required that KPMG sign a confidentiality agreement that would include, but would not be limited to, the following restrictions:

- i) All information presented, verbally or in print form to the KPMG team is strictly confidential and will not be reported to any other party in any form, without the prior written approval of Algocen;
- ii) In the case of i) above, where approval may be given, it would be conditional upon receipt of a further confidentiality agreement from said third party;
- iii) No pertinent information given to the KPMG Team will be copied, without the prior written approval of Algocen;
- iv) Any and/or all information, whether prepared, compiled or completed by the KPMG Team or otherwise, will be immediately returned and/or given, as the case may be, to Algocen forthwith upon demand.

In addition to those restrictions, Mr. Leistner retained the authority to approve the membership of the KPMG team and any changes to it. Any new members had to sign the confidentiality agreement. He specified that the reporting protocol for the physical inspection of the building would be determined when the engineer had been retained.⁷³

As a further means of imposing confidentiality over Algocen's information, Mr. Leistner required that a non-disclosure agreement be entered into between Algocen and Retirement Living. In January 1998 he forwarded the proposed agreement to Mr. Kennealy.⁷⁴ It was subject to a number of amendments⁷⁵ before it was finalized and executed on behalf of Retirement Living and Algocen on May 12 and May 15, respectively.⁷⁶

The non-disclosure agreement provided, among other things:

- that Retirement Living undertook that it would not, directly or indirectly, disclose or use, at any time, either during or subsequent to its investigation of the affairs of the corporation, any information acquired by it as a result of its investigation. The information could not be reported to anyone without the prior written approval of Algocen;
- that if Algocen withheld approval to pass on to nine elected officials and senior employees of the City of Elliot Lake a written report containing (a) a summary of the physical condition of the building, (b) a value of the facility, and (c) an oral explanation of the data, Retirement Living would be reimbursed up to \$12,000 for the cost of the summary of the condition of the physical building and up to \$8,000 for appraisal costs. Those nine elected officials and senior employees, all identified by name, included the mayor and the chief administrative officer;
- that if approval was granted, a further confidentiality agreement would be required from those named individuals;
- that no printed material provided could be copied without prior written consent; and
- that Retirement Living representatives with access to the information could only be persons who had the previous written consent of Algocen; they were required to acknowledge their understanding of the agreement and to give their covenant to strictly abide by its terms and conditions.⁷⁷

Ms. Guertin and Mr. Kennealy both executed the necessary acknowledgements and covenants.⁷⁸ They were approved by Mr. Leistner to be the representatives of Retirement Living authorized to receive information from Algocen.⁷⁹ As a result of the confidentiality agreement, they were the only persons able to receive information about the property's value and business performance, as well as the physical condition of the building. If they wished to share information beyond themselves, they needed the approval of Algocen. This agreement would, in the absence of such permission, prohibit sharing information with the Retirement Living Board of Directors, which included City representatives.

Mr. Leistner's rationale for insisting on this rather strict and convoluted form of non-disclosure agreement was apparently rooted in information he received that elected members of City Council (Mayor Farkouh and Councillor Terry Croteau) might not be bound by a typical non-disclosure agreement where execution by persons in authority binds all members of an organization.⁸⁰ In any event, it appears it was an effective method of controlling the dissemination of information to Retirement Living and the City.

Architects provide Retirement Living with a proposal for a building condition assessment

On January 30, 1998, Blaine Nicholls, a principal in the architectural firm of Nicholls Yallowega Bélanger, provided Ms. Guertin with a proposal for a building condition assessment for the Algo Mall.⁸¹ In her testimony, she said she believed that someone else had made initial contact with Mr. Nicholls and she had informed him that she would be his contact person on the project.⁸² Because she had begun working for Retirement Living only on December 1, 1997, she was not aware of the meeting that took place four days later. Mr. Kennealy told her about it in late December or early January. He explained the problem with the Hotel and its importance to Retirement Living, as well as Retirement Living's potential interest in the Hotel.⁸³

In his proposal, Mr. Nicholls stated:

My understanding is that the acquisition of the building is being considered and, as part of a larger Phase 1 analysis, you are interested in establishing the condition of the building, any major deficiencies and the potential costs for repairs.⁸⁴

Ms. Guertin testified that she did not tell Mr. Nicholls that Retirement Living was considering the purchase of the Mall and the Hotel because that was not her understanding of its intentions at that time.⁸⁵

Later in the proposal, Mr. Nicholls noted that, with respect to the building structure: "It is assumed that the key issue will be the condition of the parking deck."⁸⁶ He cited Ms. Guertin in his testimony as the source of this information.⁸⁷ She had no recollection of being the source. She testified that, if she had been the source, it would have been on the basis of information she had received from Mr. Kennealy or Mr. Bauthus, or perhaps both of them.⁸⁸ Because these men were working closely on this matter, it is reasonable to conclude that both were aware that the condition of the parking deck was, potentially, a serious issue.

The reference in the letter of proposal to the possible acquisition of both the Mall and the Hotel is consistent with the purposes of the terms of reference referred to earlier. It is my conclusion that, by this time, Retirement Living was in fact exploring the possibility of purchasing the Mall and the Hotel and that Mr. Nicholls's letter was a true reflection of Retirement Living's intentions.

The City agrees to pay for the retail study

The annual general meeting of Retirement Living took place on January 31, 1998. Mr. Kennealy drafted a report to the board, which included Mayor Farkouh and Councillor Croteau.⁸⁹ One section of the report set out a proposal for a "Community Retail and Hotel Study." The impetus for this study was stated to be Algocen's announcement that it intended to get out of the hotel business in Elliot Lake.⁹⁰

Mr. Kennealy's report noted that there had been ongoing discussions with the City of Elliot Lake and Algocen with respect to vacancy rates in the Mall, limited retail options in the Mall, and the physical condition of the Mall.⁹¹ As a consequence of these talks, he said, the three parties agreed to initiate a comprehensive review of the entire Algo Mall and Hotel complex. The structure of the study was set out as follows:

- Research
 - Inventory of retail and commercial spaces
 - Study of shopping habits and concerns of citizens
 - Scan of retail industry in Northern Ontario

- Review of chain-store requirement profiles
- Scan of the hotel industry in Northern Ontario
- Valuation of the Algocen Mall and Hotel
 - Detailed financials on the Mall and the Hotel
 - Review of in-place leases
 - Review of the physical structure
- Identification of possible solutions⁹²

Commissioning this study appears to have been the first step in implementing the terms of reference.

Mr. Kennealy's report noted that the cost of the study would not be borne by Retirement Living except for the time he and Ms. Guertin spent on it.⁹³ The board approved the study.⁹⁴ Mr. Bauthus acknowledged that the City was interested in the retail information that the study would identify. He said that, because Retirement Living was considering the purchase of both the Mall and the Hotel, it was more interested than the City in the valuation of the properties.⁹⁵

In order to get approval from the City, Mr. Bauthus prepared a report for council, dated March 6, 1998, titled *Review of Retail / Commercial Market in Elliot Lake*. The report recommended that the City enter into an agreement with Retirement Living to conduct this study and that the City pay for it.⁹⁶ The study would consist of a review of the retail / commercial space in Elliot Lake; the retail habits of the consumer in Elliot Lake; and the long-term viability of the Algo Mall and the Hotel.⁹⁷

Mr. Bauthus did not disclose to council in his report that the contemplated work included a building condition assessment and a fair market evaluation of the Mall and the Hotel. In fact, there was nothing in the report to let council know that Retirement Living was considering buying the property. He was aware that the mayor knew of Retirement Living's interest in the property, but not whether the mayor had shared this information with council.⁹⁸ The City clerk, Larry Burling, agreed that if this interest had been mentioned, it would have been big news – so in all likelihood it had been kept quiet.⁹⁹ He testified that a reasonable reader of the report would not have been able to tell that the purpose of the \$30,000 earmarked for the Algo Centre would be primarily to assist Retirement Living in its pursuit of purchasing the property.¹⁰⁰ I agree.

The report's recommendations were adopted by resolution on March 9, 1998, and implemented by By-law 98-13, which was passed by council on March 23 that year. The by-laws authorized the mayor and the City clerk to enter into an agreement with Retirement Living for the provision of professional consulting services with respect to a retail / commercial study.¹⁰¹ The agreement specified three different components to the study:

- Retail / commercial space database
 - A complete review of all the commercial space in Elliot Lake.
- Retail survey
 - Retirement Living to contract with the Elliot Lake Research Field Station to undertake a consumer survey.
- Algo Mall / Hotel
 - An assessment of the Mall and the Hotel to determine the physical condition of the Hotel and the Mall facilities and the fair market value of the property.

With respect to the Algo Centre component of the study, Retirement Living agreed to deliver to the City a summary of the physical condition of the building and a valuation of the facility. The budget for this part of the contract was \$30,000. The total budget was fixed at \$45,000, including \$4,000 for disbursements but excluding taxes.¹⁰²

At the time the contract was signed, Mr. Bauthus expected that the City would be provided with the building condition assessment and the property valuation.¹⁰³ Ultimately, the City received neither.¹⁰⁴ The non-disclosure agreement signed by Mr. Kennealy and Ms. Guertin on May 12, 1998, effectively precluded Retirement Living from delivering the valuation of the facility and the summary of its physical condition to the City without the consent of Algocen.

Mr. Farkouh testified that he was unaware of the non-disclosure agreement until he reviewed documents in preparation for his evidence at this Inquiry.¹⁰⁵ Mr. Bauthus never saw the non-disclosure agreement and learned of it anecdotally sometime after its execution, but he could not say when.¹⁰⁶ In contrast, Mr. Kennealy explained that it was inconceivable he would not have discussed it with both of them, but has no documentation or specific recollection of doing so with either of them.¹⁰⁷ Ms. Guertin testified that she did not tell, nor was she aware of anyone telling, the City about the non-disclosure agreement.¹⁰⁸

Mr. Farkouh said that as a member of the Retirement Living Board of Directors, he expected to have access to all the information in the possession of the managers of the corporation.¹⁰⁹ Mr. Kennealy did not know whether the Retirement Living board received a copy of the non-disclosure agreement, but he knew he would have spoken about it during a board meeting in May 1998.¹¹⁰ The general manager's comments section of the minutes from that meeting included the following statement:

Considerable time has been invested in negotiating acceptable confidentiality agreements with Algoma Central Properties, Elliot Lake Retirement Living and the City of Elliot Lake to ensure all parties have a clear understanding of what can and cannot be disclosed to who.¹¹¹

However, neither Mr. Farkouh¹¹² nor Mr. Bauthus¹¹³ was aware of any negotiations concerning confidentiality agreements.

Given their positions within the municipal government and their experience in dealing with Algocen, Mayor Farkouh and Mr. Bauthus were the logical choices to be representing the City's interest with respect to confidentiality agreements and the most likely to have knowledge of the agreements. Since neither one was aware of them, I conclude that the City was excluded from the process that determined the scope and effect of the non-disclosure agreement. The non-disclosure agreement had the potential to allow Algocen to hide from the City any evidence of dangerous conditions uncovered during the building condition assessment. This possibility would clearly be contrary to the responsibilities of the City's representatives.

It further appears clear that City Council, at the time it authorized the expenditures, would have expected to receive a copy of the building condition assessment as well as a valuation of the property. Troy Speck, who was a member of City Council at the time, testified that if the City was paying for a building condition assessment, he would expect the City to receive it. He did not recall any discussions about Retirement Living not being able to deliver it.¹¹⁴ Put simply, councillors could reasonably expect to receive what they were paying for. The fact that the City was paying for the study that included a building condition assessment further establishes the importance of the Mall to the City itself. Clearly, the City should have insisted on the right to obtain the results of the assessment. Unfortunately, it appears from the evidence that council could not have known it did not have the ability to obtain this information. There appears to be no reliable evidence that councillors were told otherwise – just as there is no evidence that the City even asked for this information.

As the City has subsequently acknowledged, in order for the information to remain confidential, it contracted to have the building condition inspection and the report paid for by the City but delivered only to Retirement Living. In their submission that the City was correct in not insisting that it be provided with a copy of the 1998 Nicholls Yallowega Bélanger report procured by Retirement Living under its agreement with the City, counsel for the City wrote:

Once again, the primary concern of the City and [Retirement Living] was confidentiality. Specifically, the Municipal Freedom of Information and Protection of Privacy Act, RSO 1990 CHAPTER M56, which came into force on January 1, 1991.

...

Since 1991, there have been well over 400 decisions by the Information and Privacy Commissioner relating to third party disclosure held by the City. Many of the decisions have supported the disclosure of the type of information that the City would have received had it performed the deliverables on its own.

To alleviate this concern, the City contracted with [Retirement Living] to protect the confidentiality of the information in support of the deliverables of the Agreement. There was nothing inappropriate or extraordinary about this arrangement. The City was simply acknowledging to private enterprise that it would not risk their private information and, further, that the applicable privacy restrictions did not support the City in obtaining this information.¹¹⁵

It is difficult to understand why a desire to dispel the fears of local business owners about the potential dissemination of private information made it necessary to impose a cloak of total secrecy over all of the operations of Elliot Lake Retirement Living, and the Mall's condition in particular. I fail to see any connection between the Mall's condition and the desire by private enterprise for confidentiality. The unfortunate consequences of this arrangement were to shield Retirement Living's internal operations completely from public scrutiny and to impair the City's ability to adequately address public safety.

Retirement Living examines the books and the building, but Algocen does not provide the Trow or Meyer engineering reports

By letter from Mr. Leistner dated June 2, 1998, Ms. Guertin received copies of the Algo Inn income statements for the years 1993–97 as well as occupancy level reports from 1993 to April 1998.¹¹⁶ This information appears to be the first set of documents that was shared with Retirement Living following the non-disclosure agreement.

Ms. Guertin testified that she met with Mr. Leistner on July 22, 1998. They discussed both the Mall and the Hotel operating numbers. The Hotel numbers showed net losses, whereas the Mall's figures were quite positive. The combined financial performance of the Hotel and the Mall was also positive. Ms. Guertin testified that it made more sense to purchase both properties, rather than just the Hotel, if a deal was going to be done.¹¹⁷ She felt that, as a result of this analysis, the prospect of Retirement Living purchasing the Mall arose around this time.¹¹⁸

On July 23, 1998, a meeting was held at the offices of Retirement Living in the Mall. Present were Mr. Kennealy, Ms. Guertin, and Mr. Quinn from Retirement Living as well as Mr. Nicholls and Michael Luciw from Nicholls Yallowega Bélanger.¹¹⁹ This introductory meeting took place before the building condition assessment had begun.

Mr. Nicholls's proposal stated that his firm would have overall leadership and responsibility for the architectural aspects of the study. The engineering firm of Halsall Associates Ltd. (Halsall) would have responsibility for structural aspects, while another engineering firm looked after the mechanical and electrical details.¹²⁰ Mr. Nicholls was informed by someone during the meeting that the parking deck appeared to be the main

problem: extensive long-term maintenance work had been costly, and the leaks had been going on for a long time.¹²¹ He was also told that Retirement Living was interested in acquiring the Hotel.¹²² He testified that although Retirement Living was his client, he was advised during the meeting that Algocen would make the final determination on the release of the report.¹²³ In addition, each of the consultants was asked to sign a non-disclosure agreement. Mr. Nicholls testified that, from his experience, this request was quite unusual.¹²⁴ In fact, Ms. Guertin agreed that anyone who touched this project had to sign an agreement of this sort.¹²⁵ As a consequence of this privacy issue, Mr. Nicholls was concerned about his ability to access the relevant available information in order to do the work. He was told access would not be a problem.¹²⁶

However, the consultants who worked on the study never received any previous engineering reports, despite Mr. Luciw's request of July 30, 1998, to be provided with copies of construction drawings and any other pertinent reports or information.¹²⁷ This request was made to Ms. Guertin, who testified that she passed it on to Larry Liautaud, the Mall manager.¹²⁸ Mr. Nicholls made a further request on August 20, 1998,¹²⁹ and Mr. Luciw a final one on August 28, 1998.¹³⁰ This information would have allowed the consultants to get a better idea of the building in advance of their site visit.¹³¹ Ultimately, they received only a partial set of structural and architectural drawings.¹³²

Commission counsel provided Mr. Luciw with the three Trow reports referred to earlier in the Report. After reviewing them for the purpose of the Inquiry, he felt they were pertinent and should have been supplied.¹³³

In contrast to the evidence of Ms. Guertin, Mr. Leistner said he was never asked for any previous consultant reports, such as the Trow or Meyer reports. Although he was not asked for them, he said he offered engineering reports to Mr. Kennealy, who turned them down, saying they were doing their own comprehensive report.¹³⁴ Mr. Kennealy disputed Mr. Leistner's evidence on the basis that it was not like him to turn down something he thought was critical.¹³⁵ Given Mr. Leistner's well-established penchant for confidentiality, it seems unlikely that he would offer these engineering reports without prompting. In any event, they were not produced despite specific requests for this type of information.

The actual site visit by Mr. Luciw and his consulting team took place on September 17, 1998.¹³⁶

The Retirement Living board formally pursues the Mall and the Hotel

On September 17, 1998, Ms. Guertin requested permission from Mr. Leistner to share information about the Hotel with the Retirement Living Board of Directors. The information concerned occupancy rates, room designs and layout, the 1997 year-end statement, and historical revenues and profit for the years 1993 through 1997. She hoped to include it in a report to the board, but the non-disclosure agreement required that she first request permission to do so. She informed Mr. Leistner that she would not include any information about the building condition assessment, which was ongoing, but would want to communicate it once Mr. Leistner had approved the assessment report.¹³⁷

Mr. Leistner said his "approval" was not approval of the contents of the report but, rather, of the recipients with whom it could be shared. He wanted to ensure that all members of the Retirement Living board, and in particular the City representatives, were restricted from passing on the contents to the City or anyone else.¹³⁸

On September 22, 1998, Mr. Leistner gave his consent for the Retirement Living board to receive the information about the Hotel.¹³⁹ It was delivered to board members at the September 24, 1998, meeting. The report indicated that the Hotel was an unprofitable business. It could, however, become profitable once management strategies that included capital improvements were initiated. The loss of more than 60 percent of the hotel rooms in

Elliot Lake could have a serious impact on both business and economic development in the community.¹⁴⁰ Mr. Kennealy told the board what Ms. Guertin had learned in July – that the Mall made a profit that more than covered the Hotel's loss. At first blush, then, it was worthwhile to explore the acquisition of both the Hotel and the Mall.¹⁴¹

During the meeting, the board directed the general manager to pursue opportunities related to local ownership of the Algo Mall and the Hotel and to report back at the next board meeting on November 19, 1998, before taking any action.¹⁴² Mr. Kennealy said that "local ownership" really meant Retirement Living.¹⁴³

Mr. Farkouh testified that he saw Retirement Living's interest in these properties as throwing a lifeline to the City, even though he regarded it as a high-risk project. If the deal failed, it could have jeopardized the entire Retirement Living program and, by extension, the community's survival.¹⁴⁴

Retirement Living has a secret meeting with City Council

On October 7, 1998, Ms. Guertin once again sought Mr. Leistner's permission to make a verbal report to City Council concerning the Hotel's break-even point and occupancy as well as the fact that it was losing money.¹⁴⁵ She included in her correspondence the text of what she proposed to say.¹⁴⁶ She informed Mr. Leistner that this information would be shared with council the next week at a meeting she described as "not a regular meeting of Council or a caucus meeting." She informed Mr. Leistner that "[w]e will remind Council of the sensitive nature of the information and that it is not to be disclosed to any one after the meeting."¹⁴⁷

Exhibit 2158 is the retail study the City had commissioned Retirement Living to conduct in March 1998. It was dated October 1998 and entitled *City of Elliot Lake Retail Study: A Close Look at Retailing in Elliot Lake*. On the last page of the body of the report is a note: "We will discuss the potential directions and actions during our meeting on Tuesday, October 13th at 4:00."¹⁴⁸ Mr. Kennealy indicated that this note was his and that it was a communication to City Council.¹⁴⁹

Ms. Guertin was certain that the October 13, 1998, meeting with council took place. She was the one who prepared most of the presentation that Mr. Kennealy gave there. Council was informed at this meeting what Retirement Living had learned about the Hotel, its bleak financial picture, and what the loss of those rooms meant to the community.¹⁵⁰ She testified that council members were ecstatic when they were told that Retirement Living was looking at the possibility of buying the entire complex.¹⁵¹

The fact that the meeting was held cannot be disputed. Because it was private, with no members of the press or the public present, according to Ms. Guertin, it was not a meeting of council sanctioned under the *Municipal Act*.¹⁵² She described it as "a meeting between two organizations."¹⁵³

The *Municipal Act* as it then stood stated, in section 55(3): "Except as provided in this section, all meetings shall be open to the public." Section 55(5) set out a series of exceptions for those occasions when a meeting could be closed to the public. Mr. Bauthus agreed that the meeting proposed by Ms. Guertin would not meet any of those exceptions.¹⁵⁴

The Commission was provided with the minutes of all the meetings of council between the end of September 1998 and year's end. One council meeting was held at 7 p.m. on October 13, 1998, three hours after the time Mr. Kennealy's note indicated the private meeting with council would begin. Mr. Kennealy and Ms. Guertin were not shown as attendees. The minutes do not reveal any discussion of the affairs of Retirement Living.¹⁵⁵

Mr. Kennealy thought the meeting did not take place in the council chambers but, rather, in a small conference room.¹⁵⁶ He said the retail study was reviewed, along with the fact that Retirement Living was considering purchasing both the Mall and the Hotel¹⁵⁷ even though the Hotel was losing money but needed to be kept alive.¹⁵⁸ He testified that the meeting took this unusual form simply because council had been invited to “sit down and review this ... and they would let us know when and where.”¹⁵⁹ Ms. Guertin said she had not been to this type of meeting before. Subsequently, however, she had attended meetings where both staff and councillors were present. Some of these meeting were public and some were not.¹⁶⁰

Consultants reports regarding the building’s structural integrity provided to Retirement Living, but not City Council

On October 8, 1998, Mr. Luciw faxed Ms. Guertin a copy of the first draft of the building condition assessment dated October 7, 1998,¹⁶¹ which included the Halsall report.¹⁶² The draft was sent to Mr. Leistner on October 14, 1998, by Ms. Guertin.¹⁶³ Mr. Kennealy said he would have read it when it was received by Retirement Living.¹⁶⁴ He did not think he told council about the report, nor did he think the subject came up at the October 13, 1998, meeting with council.¹⁶⁵

The final report by Nicholls Yallowega Bélanger, which included Halsall’s report as an appendix, was dated November 12, 1998.¹⁶⁶ That report contained this observation about the parking deck structure:

A rooftop parking deck structure is located on the third floor of the building. The deck surface generally consists of a concrete topping wear layer installed over precast concrete slabs. It is our understanding that the integrity of the waterproofing ability of this structure has been a continuous maintenance issue. From our review of the existing drawings and visual inspection, the presence of an integral waterproofing membrane could not be determined. Based on the extent of surface applied sealants on the concrete topping wear layer, we suspect that the structure was constructed without an integral waterproofing membrane. Maintenance staff confirmed the absence of a waterproofing membrane during repair work that has been recently executed for their parking deck maintenance and concrete repair program.

A more detailed review of the parking deck structure is provided in Appendix ‘A’. Note there are concerns and recommendations expressed by the structural consultant regarding the structural integrity of the concrete slabs. Recommendations are provided for conducting additional inspection and testing to accurately assess the extent of any deterioration. The results of this additional inspection and testing may have significant cost implications if the structural integrity of the slabs has been affected. Concerns and restrictions regarding live loadings and structural capacities are also indicated.¹⁶⁷

Halsall provided a more detailed analysis of the parking deck structure, adding that further studies should be conducted to determine the proper remediation program. The report’s relevant portions state:

2.0 PARKING DECK STRUCTURE

The concrete topping over the precast slabs has been saw cut and caulked at 4’, 8’ or 12’ intervals corresponding to the slab widths. The concrete topping has cracked at several locations where saw cuts were not provided. At these locations, the cracks have been routed and caulked. We observed several locations where the topping was previously repaired. The expansion joints in the roof deck have been recently repaired.

We have had discussions with the building maintenance staff who have indicated that there is a layer of rigid insulation below the concrete topping over the precast concrete slabs. This is consistent with the original details shown on the structural drawings. The maintenance staff also noted that this rigid insulation was not continuous over the parking deck at some locations.

From the underside of the parking deck, we observed some corrosion of the structural steel beams and columns, indicating past leaking of the deck. We were unable to review the condition of the underside of the precast concrete slab panels as they were covered with foiled insulation and wire mesh.

We understand that the parking deck is being sanded during the winter months. However, there is evidence of salt contamination where the snow was stockpiled off the parking deck. We understand that there is no existing waterproofing protection system. It is our opinion there may be chloride contamination in the precast parking deck slabs.

The cause of corrosion is usually chlorides in the concrete (from various sources but primarily road salt) combined with water and oxygen. Chloride contamination acts to break down the protection against corrosion which concrete normally provides for steel.

At this time we cannot render an opinion as to what the true state of the deck is, nor what long term cost could be expected. However, given the age of the structure, deterioration of the concrete slabs may begin to occur now or in the near future. This could result in significant maintenance costs for the remainder of the building life.

There was no evidence of structural distress or excessive deterioration of the structural steel framing observed at the time of the review.

2.1 Further Studies

We advise further studies be carried out to accurately assess the extent of corrosion, if any, of the reinforcement in the precast slabs. A work plan for repair and associated costs could be established once the condition of the steel structure and precast slabs are determined.

The following details the study:

- Drill and obtain powder samples at the underside of the precast concrete slabs at selective locations. The extent of chloride contamination will be determined by lab tests;
- Expose and visually inspect the precast concrete slab prestressing strands at selective locations;
- Expose the topside of the precast concrete panels by removing the concrete topping and rigid insulation to assess leakage along expansion joints, longitudinal joints, the structural steel girders and at previous concrete repairs;
- Obtain samples of the concrete topping to determine the depth of chloride contamination;
- Inspect condition of the supporting structural steel beam lateral restraint connections to the precast slabs; and
- Inspection condition of beam and bracing connections.

2.2 Waterproofing Protection Systems

Should the further testing of the parking structure indicate that there is minimal risk of deterioration of the structure due to chlorides in the slab, then a more positive form of protection of the slab should be considered. A rubberized membrane covered with an asphaltic wear course could be installed above the concrete topping. The existing concrete topping should be sounded and repaired prior to applying the rubberized membrane. There is potential for future concrete deterioration of the existing concrete topping with this protection system.

Alternately, the existing concrete topping and rigid insulation could be removed. A rubberized membrane could then be applied directly to the precast slabs with proper detailing at joints. The rigid insulation could then be reinstated to maintain the thermal protection for the occupied space below. A reinforced concrete topping would then be placed over the insulation to ensure all loads on the parking deck are evenly distributed to the precast concrete panels.¹⁶⁸

From these reports, various issues about the building, and specifically the deck and structure, were identified, including

- It could not be determined whether a waterproofing membrane had been installed.
- Water leakage was a continual maintenance issue.
- Corrosion was observed on some beams and columns.
- There may have been chloride contamination in the precast parking deck slabs.
- The true state of the deck or what the long-term costs might be could not be assessed.
- Further study was recommended, including an inspection of the condition of beam and bracing connections.

Nicholls Yallowega Bélanger provided two preliminary cost estimates to repair the roof deck. They were dependent on the outcome of the further studies that had been recommended:

- Option A involved the installation of a new waterproofing membrane over the existing concrete topping. It would be covered with a protection board and an asphaltic wear layer. The cost was \$606,500.
- Option B involved removing the existing concrete topping and insulation, applying a new waterproofing membrane which would be covered with protection board and reinforced concrete topping. It would cost \$1.8 million.¹⁶⁹

Mr. Nicholls testified that leaking water with chlorides can be a problem for a building. Left uncorrected, he said, it can lead to the loss of structural integrity for a building.¹⁷⁰

The City was never provided with the Nicholls Yallowega Bélanger or the Halsall reports.¹⁷¹ Mr. Kennealy never sought permission from Mr. Leistner to give these reports to the City,¹⁷² nor did Ms. Guertin.¹⁷³

Roger Pigeau, the chief building official at the time, never saw the Nicholls Yallowega Bélanger report. He agreed that it raised issues concerning the structural integrity of the parking deck and whether it was watertight. Had he seen the report, he would have pursued the matter under the relevant provisions of the *Building Code* and the Property Standards By-law.¹⁷⁴

What the Retirement Living board learned of the reports

Limited information given to board about the contents of the reports

Mr. Kennealy acknowledged that the reports indicated that there was much that the architects and the engineers did not know about the condition of the building. They needed to know more because there could be significant issues concerning its structural stability. He also agreed that the cost estimates provided would be significant capital expenditures if they in fact had to be incurred.¹⁷⁵

The first Retirement Living board meeting after the receipt of the Nicholls Yallowega Bélanger report was held on December 3, 1998. At that meeting there was a discussion about the purchase of the Mall by Retirement Living. Mr. Kennealy testified that he took the section of the report dealing with costing with him to the meeting and prepared a hand-out for board members to look at. The board would have discussed, generally and specifically, the costs associated with the repair of the parking deck. Mr. Kennealy did not show members the part of the report dealing with the parking deck. He did say, however, that the board talked about it generally. He said he told the board that the consultants advised that they should investigate the parking deck more closely in order

to really understand its components.¹⁷⁶ The part of the report concerned with the parking deck dealt with further testing to determine the extent of any deterioration of the concrete slabs – thereby raising the spectre of a possible problem with the structural integrity of the building.

I find it is highly doubtful that Mr. Kennealy actually handed out these portions of the Nicholls Yallowega Bélanger report to the board. Ms. Guertin could not recall if he did or not. If he did, it would have been a serious violation of the non-disclosure agreement, and Ms. Guertin would not likely have forgotten it. She was certain, however, that Mr. Kennealy did share some information with the board about the costs of the remediation and the fact that there were issues that needed further exploration.¹⁷⁷ Mr. Farkouh testified that it was likely he was not presented with the numbers from the report.¹⁷⁸

Mr. Kennealy said that Mr. Leistner never orally or in writing relieved Retirement Living of its obligations under the non-disclosure agreement. However, after receiving approval from the board on September 28, 1998, to pursue the purchase of the Mall and the Hotel, he did not feel uncomfortable about failing to honour the non-disclosure agreement by giving information to his board.¹⁷⁹

If Mr. Kennealy felt unrestrained by the non-disclosure agreement, I question why he would reproduce only the costing from the Nicholls Yallowega Bélanger report. Why would he not have given the board members the whole report? I find it more likely that at the board meeting, the discussion was in very general terms, without specifics about the potential problems identified by Nicholls Yallowega Bélanger being mentioned or any portions of its report being handed out. The content of the report could potentially be very troublesome if it were brought to the attention of any City officials. Indeed, it could have prompted the City to require major remedial work to be done on the Mall, as Mr. Pigeau testified.

The board, at the December 3, 1998, meeting, passed a resolution directing three committees (Community Issues, Diversification, and Finance) to meet and report back in writing at the next meeting (December 22, 1998). The committees would each examine specific issues relating to the potential purchase of the Mall and the Hotel. For example, the Finance Committee was to “review the viability of the project itself, and make recommendation on a[n] offering price.”¹⁸⁰

The Board is given false information that the building is structurally sound

Obviously, Ms. Guertin did not share Mr. Kennealy’s view that the non-disclosure agreement did not have to be followed as far as the board of Retirement Living was concerned. She faxed another letter to Mr. Leistner, on December 17, 1998, to obtain his permission to share some information with the board.¹⁸¹ This information included a copy of a brief summary of the Nicholls Yallowega Bélanger report which included this sentence: “The initial inspection indicates that the building is structurally sound, including the parking deck, and has been well maintained.”¹⁸²

Mr. Leistner answered her request and required that certain deletions and protections be put in place before the information could be provided. He did not ask that any change be made to the statement that the building was structurally sound.¹⁸³

In his testimony, Mr. Kennealy very reluctantly conceded that the statement about the building and the parking deck being structurally sound was false. The following exchange took place:

Q. Let’s take this one step at a time. Do you know what “structurally sound” means?

A. Yes.

- Q. It means that the building is capable of supporting its own structure and any weight to which it may be subject; correct?
- A. Yes.
- Q. Do you agree with me that the Nicholls Yallowega report said we don't know if it is structurally sound?
- A. Yes.
- Q. Therefore, do you agree with me that it would be wrong to say that their report indicated that the building was structurally sound?
- A. In that interpretation, yes.
- Q. Is there any other interpretation which could possibly mean anything Sir?
- A. I guess not.
- Q. So that statement is false; correct?
- A. It could be, yes.
- Q. It is, isn't it?
- A. Yes. Yes, it was – yes.¹⁸⁴

Ms. Guertin acknowledged that the statement that the building was structurally sound was not true. She called it a “poor choice of words.”¹⁸⁵ She made no request to Mr. Leistner to share the information about the building's condition with the City, nor did she ask to share the Nicholls Yallowega Bélanger report with the board or the City.¹⁸⁶

I am of the view that it would not have been reasonable for Ms. Guertin to make this request of Mr. Leistner on December 17, 1998, if these issues had already been spoken of at the board meeting of December 3, 1998. Further, it makes little sense for Ms. Guertin to have planned on telling the board that the engineers found the building and parking deck to be structurally sound if Mr. Kennealy had told them that the engineers did not know the true state of the parking deck. This evidence further supports my finding that the board was given very limited information about the condition of the building and parking deck on December 3, 1998.

The Retirement Living board decides to make an offer to purchase the Mall and Hotel – but reports to board committees that the building was structurally sound

Ms. Guertin prepared a report for each of the committees¹⁸⁷ to assist the members to determine their position with respect to the acquisition of the Mall and the Hotel. Mr. Kennealy testified he assumed he had read and approved the reports before they were circulated.¹⁸⁸ The information for which Ms. Guertin sought Mr. Leistner's approval to share was incorporated into the reports for the committees. All three committees received identical information concerning the condition of the building.¹⁸⁹ Ms. Guertin wrote:

Prior to proceeding with a purchase of the property a more thorough review of the property is recommended.

The building condition assessment indicates that the building is structurally sound.¹⁹⁰

Ms. Guertin was unable to explain how she could conclude that the Nicholls Yallowega Bélanger report said the building was structurally sound.¹⁹¹ For his part, Mr. Kennealy tried to maintain that the statement was a true reflection of their belief at the time.¹⁹²

After reading the Nicholls Yallowega Bélanger report myself, I find it difficult to accept that neither Ms. Guertin nor Mr. Kennealy recognized the inaccuracy of that statement.

The committees were provided with cost estimates for a number of different capital expenditures that, in the opinion of Nicholls Yallowega Bélanger, would be required over the next several years. However, the cost estimates given for the parking deck were not included. The reports noted that there had already been significant maintenance and repairs, probably due to the absence of a membrane. Repairs and maintenance would be required in the future unless the deck was resurfaced.¹⁹³ Ms. Guertin said that, although the future expenses for this maintenance were not referred to in the estimates, the board was well aware of the potential costs.¹⁹⁴

On December 30, 1998, the board received the reports of the three committees and a discussion followed. The board authorized Mr. Kennealy to make an offer for the purchase of the Algo Centre for \$2.5 million.¹⁹⁵

Retirement Living agrees to buy the Mall and the Hotel – and tells a potential lender that the building is structurally sound and that it will replace the roof deck “in the distant future”

On January 5, 1999, Mr. Kennealy wrote to Mr. Leistner and informed him that he had been authorized to offer \$2.5 million for the Algo Centre.¹⁹⁶ This offer led to negotiations between the two men that resulted in an agreement¹⁹⁷ on February 26, 1999, to sell the Algo Centre for \$4 million.¹⁹⁸ It was being sold “as is”¹⁹⁹ with a closing date of June 10, 1999.²⁰⁰

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A document titled *Business Plan for the Purchase of the Algo Centre* was prepared for the purpose of obtaining financing for the purchase.²⁰¹ Ms. Guertin was the author of most of it. At page 4 this plan repeated the false statement about the building being structurally sound.²⁰² Mr. Kennealy could provide no explanation for this sentence.²⁰³ The same page provided a list of capital expenditures that would be required over the next several years. However, it too, like the committee reports, failed to include the estimated costs to fix the parking deck. Mr. Kennealy denied that these estimates were omitted because a decision had been made not to incur capital expenses for the parking deck.²⁰⁴

Ms. Guertin indicated that the estimated costs for the parking deck remediation would ultimately show up as a result of the due diligence process, which would be shared with the bank.²⁰⁵ This explanation does not explain why this estimate was left out entirely, rather than giving the lender notice of a significant potential future expenditure, if it was in fact a cost Retirement Living anticipated incurring. It is more logical to conclude, in my view, that not mentioning the cost was consistent with a decision not to spend the money.

Ms. Guertin was the author of a memo dated April 14, 1999, to Michael Collins at the TD Bank in Sudbury. It promised to forward the Nicholls Yallowega Bélanger report to him as well as the Halsall report when it was completed. Ms. Guertin explained in the memo that Retirement Living’s approach to capital spending was, generally, only to spend capital dollars when earned – in other words, not to borrow for capital expenditures. This approach meant that

As far as the Algo Centre is concerned, I anticipate our capital funds for the next few years could be allocated as indicated below. You will notice that the NYB [Nicholls Yallowega Bélanger] report presents options for replacing the parking deck to minimize annual maintenance. We have elected to continue with a maintenance program at this time with hopes of undergoing a replacement program at some point in the distant future.²⁰⁶

Conclusion: Retirement Living had decided, when it purchased the building, that it would not expend large amounts of capital to fix the roof deck

Ms. Guertin said that this statement represented the thinking of the Retirement Living organization at the time, but that this view was subject to the further testing Halsall was doing.²⁰⁷ However, the statement to the TD Bank was not qualified in that fashion. Mr. Kennealy said the statement did not represent his thinking on the subject. As far as he was concerned, no decisions had been made at this point.²⁰⁸

Ms. Guertin was quite clear that, as a finance person, she was not authorized to make this type of decision and would not communicate this fact without proper authorization.²⁰⁹

I find that this memo is a clear articulation of Retirement Living's true intentions with respect to the parking deck. Retirement Living did not intend at that time to spend significant sums on capital expenses to fix the parking deck. It thought that it could simply continue with the same maintenance plan as Algocen had followed. This statement is consistent with the business plan given to the potential lenders and with what the committees had been told – and, more significantly, with how Retirement Living actually dealt with the parking deck during its ownership.

Retirement Living did not intend at that time to spend significant sums on capital expenses to fix the parking deck. It thought that it could simply continue with the same maintenance plan as Algocen had followed.

Retirement Living received the fair market value appraisal for the Mall and the Hotel on April 15, 1999.²¹⁰ It came in at \$5.8 million. The City was not billed for this report. It did, however, pay for the November 12, 1998, Nicholls Yallowega Bélanger report that it never received.²¹¹

May 1999 Halsall report: Past maintenance was inadequate and two options for roof repair

On April 22, 1999,²¹² Retirement Living received a draft of the Halsall structural condition assessment.²¹³ The final report was dated May 10, 1999.²¹⁴

Halsall determined that there was no waterproofing membrane on the parking deck. Moisture penetration was resisted by the concrete topping and the precast panels and by the sealant applied to the joints in both. The final report noted:

Caulked joints and cracks in the concrete topping and precast panels are poorly detailed. They either promote three-sided adhesion within the joint or do not have a proper 1 : 2 depth : width profile. Both conditions reduce the performance of the sealant and can damage the adjacent concrete, resulting in moisture penetration.

Mr. Kennealy agreed that Halsall was saying that what had been done in the past was inadequate; the leaks had not been fixed.²¹⁵

Halsall offered two options. The first option consisted in part of routing and sealing all joints and cracks in the parking deck topping and walkway canopies, ensuring a proper joint profile and surface preparation before the sealant was applied. The cost, inclusive of engineering fees, was \$443,000. The second option was the installation of a waterproof membrane with protective asphalt or concrete topping. This cost was \$776,000. Halsall pointed out that both options would involve ongoing maintenance requirements in the form of sealing cracks. Finally, the report indicated that, “if required,” Halsall was prepared to do a phased approach for the first option “tailored to your financial constraints.”²¹⁶

Mr. Kennealy testified that the Halsall report alleviated his concern about the structural integrity of the building.²¹⁷ He drew this conclusion because the report stated:

Corrosion of the steel support beams was minor consisting of surface corrosion (removing the red oxide coating) or minor scaling (less than 1 mm). Though thicker (3–5 mm) scaling is present in some locations, this still only represents less than 1 mm of original surface loss and is a relatively insignificant portion of the overall steel cross section.

The precast panel concrete is providing sufficient protection to the embedded prestressing tendons. Precast concrete is typically of high quality, limiting chloride penetration, moisture penetration and carbonation of the concrete.²¹⁸

On May 17, 1999, Ms. Guertin provided a binder to the Finance Committee containing due diligence documentation, which included both the Nicholls Yallowega Bélanger report of 1998 and the Halsall report of 1999. At the meeting of the Finance Committee on May 20, 1999, Retirement Living waived the financing condition of the agreement of purchase and sale.²¹⁹ The two reports were discussed at the meeting. Mr. Speck was present at the meeting as a board member appointed by City Council and put forward the motion to waive the financing condition.²²⁰ He testified, however, that he did not recall ever being on the Retirement Living board or ever seeing the two reports.²²¹ He agreed that if the Halsall report had been brought to him as a councillor, he would have brought it to the attention of the chief building official.²²²

This evidence is a clear example of the inevitable conflict in which councillors serving as Retirement Living directors were placed. The City appeared either to have been blind to this conflict or wilfully acquiesced to it.

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June 18, 1999: Retirement Living purchases the Mall for \$4 million

The Retirement Living Board of Directors met on June 3, 1999.²²³ The necessary resolutions were passed to assign the Agreement of Purchase and Sale to a new for-profit corporation created by Retirement Living, 1309900 Ontario Limited, so it could take title.

The deal closed on June 18, 1999. The property was transferred from Algoma Central Properties to 1309900 Ontario Ltd. [NorDev]. The \$4 million purchase price valued the real estate at \$3.75 million and the chattels at \$250,000.²²⁴

The parking deck was now Retirement Living’s responsibility.

Maintenance during the Retirement Living Years

The 1999 Halsall report's observations – warnings about leaks but no mention of connections

In this section of the Report, I examine issues related to the condition and maintenance of the Mall from the time that Retirement Living acquired it until Bob Nazarian actively sought to acquire it in February 2005. I have earlier concluded that the building would likely have survived if Retirement Living had installed a membrane and wearing course when it purchased the building.

When Retirement Living took possession of the Mall as its new owner in June 1999, it did so armed with a fresh engineering report from Halsall. The second Halsall report, dated May 10, 1999, was the more detailed assessment of the rooftop parking deck that had been recommended in the 1998 Nicholls Yallowega Bélanger report. Although I described it earlier, the 1999 Halsall report and Retirement Living's interpretation of it formed the basis of much of Retirement Living's maintenance practices. Accordingly, I begin this analysis with a more detailed examination of the 1999 Halsall report.

Michael Buckley, a professional engineer employed by Halsall, was the project manager for the 1999 report. In that role he had supervisory oversight over the inspection done by Halsall of the rooftop parking deck and over the report that was ultimately issued, including its recommendations.²²⁵ Jeff Truman, a professional engineer who obtained his professional engineering designation in 1998, was employed by Halsall until June 1999. Mr. Truman inspected the Mall in April 1999 and was the author of the 1999 Halsall report.²²⁶

The objectives of the Halsall report, as set out in its executive summary, were to

- identify existing conditions requiring repair;
- identify defects that could affect the durability of the structure;
- establish a basis for making recommendations for the treatment of such deficiencies; and
- develop a repair and maintenance strategy that would minimize current and future repair costs.²²⁷

The report noted the following forms of deterioration observed at the Mall:

- leakage through cracks and construction joints;
- corrosion of steel beams and suspended ceiling hangers; and
- debonded or freeze–thaw damaged concrete topping along the joints.²²⁸

Following its inspection of the Mall, Halsall concluded that a waterproofing membrane had not been applied to the parking deck.²²⁹

With respect to water infiltration that was occurring in the Mall, the report noted:

Moisture that penetrates failed sealants cannot drain, resulting in debonded topping along the joints and freeze–thaw deterioration of the topping concrete at the bottom of the joint. The presence of water at the topping / panel interface may have also contributed to the precast panel deterioration observed at some of the test areas. Though the topping is required to provide adequate load-carrying capacity of the panels, the extent of damaged or debonded topping will not adversely impact the structural performance.

Leakage to the interior typically follows a direct path through the topping joint then through the precast panel joint below. Once through the precast panels, it may run along the steel support beams or become trapped by the batt insulation on the underside of the precast panels. Wet insulation decreases the thermal performance of the roof.

...

Though most leaks are detected by staining on the ceiling tiles or because of direct leakage, many others likely remained undetected.²³⁰

Halsall made the following observation with respect to the impact of the water infiltration on the building:

Corrosion of the steel support beams is minor, consisting of surface corrosion (removing the red oxide coating) or minor scaling (less than 1 mm). Though thicker (3–5 mm) scaling is present in some locations, this still only represents less than 1 mm of original surface loss and is a relatively insignificant portion of the overall steel cross section.

The precast panel concrete is providing sufficient protection to the embedded prestressing tendons. Precast concrete is typically of high quality, limiting chloride penetration, moisture penetration and carbonation of the concrete.²³¹

It should be noted here that, as described earlier, the 1998 Nicholls Yallowega Bélanger Report had recommended that Retirement Living obtain a second Halsall report to carry out, among other things, an inspection of beams and bracing connections. Mr. Buckley confirmed, by letter dated March 9, 1999, that the scope of Halsall's work would include a review of the "condition of beam and bracing connections."²³² There is no reference to the connections, however, in the 1999 Halsall report.

Mr. Truman testified that his review of the structure generally included inspecting beams and connections.²³³ He explained that the report did not specifically comment on the condition of the connections because he observed no defects or issues with them.²³⁴

I have no reason to doubt Mr. Truman's testimony that his inspection of the Mall included a review of at least some connections. Nevertheless, a reader of the 1999 Halsall report would not know whether connections had been inspected and would therefore not be in a position to learn the condition of any such connections. Given that one of the primary purposes of the second Halsall inspection was to review the condition of the beam and bracing connections in the Mall, the 1999 Halsall report should have clearly identified the connections that were inspected and those that were not, as well as their condition.

Halsall recommends two options – rout and seal all cracks or install a membrane

In its report, Halsall recommended two options. The first option (option 1) outlined the following course of action:

- rout and seal all joints and cracks in the parking deck topping and walkway canopies, ensuring a proper joint profile and surface preparation before the sealant was applied;
- remove sealant from the underside of the joints in the walkways;
- clean and paint all exterior structural steel, particularly the beams along the walkways;
- reinstate spray-applied fireproofing to the structural steel;
- replace corroded suspended ceiling hangers (as part of the regular maintenance); and
- reinstate all batt insulation at the underside of the parking deck.

Halsall estimated that option 1 would cost \$433,000. Part of this cost would include \$30,000.00 for what Halsall described in its report as "engineering design and project management."²³⁵ Halsall further stated, "If required, we could prepare a phased repair approach for option 1, tailored to your financial constraints."²³⁶

Halsall described a second option (option 2) as follows:

An alternative to sealing joints in the topping would be to provide a waterproofing membrane, as noted in our initial report, further referred to as Option 2. A membrane will require a protective concrete or asphalt topping, increasing the dead load on the structure. Diligent snow removal or strengthening of the deck would therefore be required to accommodate the increased load. The latter options would involve significant disruption and cost. Maintenance will be required to rout and seal cracks in the asphalt as they appear.²³⁷

Halsall estimated the cost of option 2 as \$776,000.

Ultimately, the Halsall report concluded its recommendations with the following statement: “Either method introduces maintenance requirements in the form of crack sealing. Though the membrane can be expected to provide at least twice the life of the sealants, the savings in initial cost of Option 1 over Option 2 may make it more attractive.”²³⁸ Further, the covering letter under which Halsall enclosed its report stated:

Though leakage through the parking deck has been an ongoing problem, we have found no evidence of structural deterioration compromising the integrity of the structure. While waterproofing the parking deck is feasible, we suggest a program of joint re-sealing be effected instead, with consideration given to proper joint detailing. This approach, in our opinion, is the most cost-effective particularly where financial constraints exist.²³⁹

Halsall should have more clearly described the scope of option 1

As I will discuss in greater detail below, there were divergent views in respect of what Halsall conveyed in its option 1. Mr. Buckley and Mr. Truman more fully described option 1 in their testimony and stated that the scope of work they intended to convey in the report included a requirement that the rout and seal option needed to be implemented with the involvement of qualified engineers and contractors. I heard evidence from Retirement Living, however, that it did not interpret option 1 as requiring anything more than the involvement of Mall maintenance staff. In this regard, it is important to assess the clarity of the Halsall report.

In his evidence, Mr. Buckley referred to option 1 as being a “full-scale repair” to the roof and further elaborated on the scope of work that he considered necessary to effectively implement option 1:

- A. It’s about ... doing a full-scale repair to the roof and then ongoing maintenance, yes.
- Q. So describe for me this full-scale repair to the roof.
- A. You would ... take out the existing joint seals, you would re-apply the joint seals following the appropriate specifications ... both for the installation of the material as well as ... the profiles. This would be done by a contractor who would have experience, who would have employees who would have experience, who would be monitoring the quality of the installation ... he would also have to provide a warranty for the work that he has done which would be backed up by performance bonds. It would involve taking out any routing and sealing with again the proper profiles and bond breakers, any further cracks that have developed that hadn’t been previously repaired properly. In fact, the intent of this was to do the entire deck.
- Q. So every single bit of sealant would be taken out?
- A. Yes.²⁴⁰

The scope of work required to implement option 1 as described in Halsall’s 1999 report does not contain that level of detail. The report does not state that the people doing the work should have a level of experience or that there should be a warranty for the work that is performed.

Mr. Buckley testified that a contractor implementing option 1 would need engineering specifications including the following:

In general, you would have to have the appropriate temperatures, the appropriate moisture contents of the slab, the appropriate materials, the appropriate joint profiles, the appropriate traffic control program so that you're not opening the deck up to use too soon after the installation. The installation has to consider how [sic] the depth of installation so that it's not subject to abuse from snowplows. That's [a] fairly broad statement of the requirements.²⁴¹

This level of detail was well above and beyond what had been provided in the report. There was no reference there to such variables as appropriate temperatures or moisture content of the slabs.

In addition, Mr. Buckley testified that the work should be done by a contractor pre-qualified by Halsall.²⁴² Both Mr. Truman and Mr. Buckley testified that the regular Mall maintenance staff would not be adequately qualified to do the work – particularly where there were indications that the rout and seal work had not been done properly by them in the past.²⁴³ Indeed, given the state of the deck as observed by Mr. Truman, it was clear that the Mall maintenance staff did not have the expertise and knowledge to properly repair the roof.²⁴⁴ Mr. Nicholls of Nicholls Yallowega Bélanger testified that his understanding of the routing and sealing option presented in the report was that it could only be done by a professionally qualified contractor who was overseen by a qualified inspector.²⁴⁵

Mr. Nicholls was of the view that the detail contained in the report for this repair option was not sufficient to allow someone, whether maintenance or contractor, to complete the work. He further testified that the description contained in the report was a high-level description of the repair option. It did not contain the amount of information necessary to be able to undertake the work.²⁴⁶

Although all the professionals appeared to agree that option 1 needed to be carried out by engineers and qualified contractors, this point was never directly or adequately conveyed to Retirement Living. In its absence, Retirement Living thought it could implement option 1 with the regular Mall maintenance staff.

It is clear that the report does not make the statement that the Mall maintenance personnel were *not* qualified to implement option 1. In addition, the report seems to refer to the involvement of engineers and/or qualified contractors in an indirect, almost incidental manner. The authors of the report placed greater emphasis on the necessity for option 1 to be implemented by specifically qualified personnel in their testimony than they did in the report itself.

The 1999 Halsall report should have been clearer about the scope of work that option 1 required. Halsall should also have been explicit that option 1 required properly and specifically trained personnel to implement this work. The importance of this deficiency in the Halsall report becomes more evident when I examine the manner in which Retirement Living interpreted the report.

Halsall should have recommended a membrane

The 1998 Halsall report, attached as an appendix to the Nicholls Yallowega Bélanger report, recommended two options for the rooftop parking deck, both of which entailed the application of a waterproof membrane. In contrast, the 1999 Halsall report included an option, option 1, which did not include the installation of a membrane. Mr. Buckley agreed that option 1 was recommended over option 2, although he could not recall the reason why. He characterized option 1 as a viable option at a lower price.²⁴⁷ Mr. Truman, in contrast, testified that the 1999 Halsall report recommended both options.

The language used in the 1999 Halsall report could be seen as discouraging Retirement Living from implementing option 2. The report states that “[t]hrough the membrane can be expected to provide at least twice the life of the sealants, the savings in initial cost of Option 1 over Option 2 may make it more attractive.”²⁴⁸ As noted, in its letter enclosing the report, Halsall states that “[w]hile waterproofing the parking deck is feasible,” it “suggest[s]” the routing and sealing as the “cost-effective” approach.²⁴⁹ I find that this wording clearly indicates that Halsall placed undue emphasis on its option 1. It characterized option 2 as less attractive and more costly.

The 1999 Halsall report actively downplayed the desirability of proceeding with the more comprehensive option of installing a waterproof membrane over the rooftop parking deck. In setting out the costs of option 2, the report included a glaring caveat that the costs of implementing it could run much higher than estimated. The first and only note to the report’s summary of costs for option 2 warned that “[t]opping removal or slab strengthening may also be employed, but at significant cost and disruption.”²⁵⁰ As a result, option 1 was presented as having a fixed cost that is little more than half the cost of option 2, while option 2 was presented as involving potential contingencies that would significantly increase its costs.

Mr. Truman told the Commission he suspected that option 1 was recommended over the application of a membrane so that the work could practicably be done within the client’s budget.²⁵¹ However, as I will note below, Retirement Living (and its subsidiary NorDev) enjoyed a strong financial position throughout the period that it owned the Mall.

It is regrettable that the application of a membrane was not more strongly encouraged. If money was no object, it is clear that the application of a membrane was a better option to attenuate the leaks.²⁵² The manner in which the repair options were presented in the report led reasonable readers to conclude that they could get the same result by proceeding with option 1 as with option 2 – but for about half the money. However, the options were not equal. The report should have been much more explicit about the difference in the effectiveness of the two options. In this regard, I view the 1999 Halsall report as, at the very least, a missed opportunity.

The 1999 Halsall report should not have recommended that Retirement Living proceed with an option of routing and sealing all joints and cracks in the parking deck. This recommendation was essentially a repetitive variation of the practice that had been employed by the previous owner. I note that Dr. Hassan Saffarini and Christopher Hughes of NORR Limited were both of the view that the rout and seal option would not be effective in making the parking deck waterproof.²⁵³ Halsall should have recommended the installation of a membrane over the entire deck.

Halsall did not adequately warn about risks of structural deterioration

The Halsall report included observations of some water damage. Specifically, it noted some corrosion of steel beams, but observed that severe scaling had generally not occurred. However, it did not go the further step to advise of the potential outcome of continued and unabated water penetration, such as increase in corrosion, severe scaling, and the potential of section loss. Mr. Truman testified that he did not think it was necessary to do so because the effect of water and salt penetration should be “fairly obvious” to a building owner in Northern Ontario.²⁵⁴

In addition, the covering letter that enclosed the Halsall report stated: “Though leakage through the parking deck has been an ongoing problem, we have found no evidence of structural deterioration compromising the integrity of the structure.”²⁵⁵ Mr. Truman agreed that this statement conveys the message that the building continues to be in fine condition despite its exposure to water leaks.²⁵⁶ It does not state what will or could occur if the water leaks are not stopped.

Mr. Buckley testified that Halsall was aware there were problems with leaks from the rooftop parking deck when its second report was prepared. He also knew that the maintenance crew at the Mall had been using a form of rout and seal repairs on the roof to address the leaks. There were indications that the rout and seal work that was being done on the roof was not being done properly.²⁵⁷

Mr. Truman acknowledged that the report did not recommend any ongoing inspection of the steel in the Mall until the repairs were made. He characterized his report as being a “high level report” intended to provide a prospective purchaser with “an expectation of what their financial commitments are going to be over the five to ten year near-term future.”²⁵⁸

Mr. Truman and Mr. Buckley testified that, in their view, the Halsall report provided a warning that the owner of the building must address the leaks because it gave only repair options. It did not contemplate an “as is” option.²⁵⁹ I can appreciate the seeming obviousness that a leaking roof that allows penetration of water and chlorides into a structure is something that needs to be fixed. However, this warning by omission in the Halsall report was unfortunately too oblique. It did not adequately convey the severity of the consequences should the owner fail to properly fix the roof.

I agree with the testimony of Dr. Saffarini, who indicated that, while a proper waterproofing system in 1999 could have allowed the building to survive for its design life, there was enough information for alarm bells to ring, requiring that the risks of continued deterioration be brought to the owner’s attention.²⁶⁰

In my view, Halsall did not adequately provide a cautionary warning that future corrosion could lead to a critical condition.

Retirement Living’s maintenance program was not what Halsall recommended but a continuation of existing practice

Of the two options recommended by Halsall, it is clear that Retirement Living purported to proceed with the first. I will next consider whether Retirement Living actually did what was recommended.

Mr. Quinn testified that in talks with Mr. Kennealy and Ms. Guertin, they would have considered the pros and cons of the options listed in the Halsall report. Although he could not recall the specifics of the conversation, he indicated that they discussed how both options would require ongoing maintenance.²⁶¹

I note that in both places where Halsall particularized the costs of option 1, it included reference to costs associated with engineering services.

Notwithstanding that option 1 contemplated the involvement of professional engineering services in its implementation, Retirement Living did not in fact employ the services of an engineer. Mr. Quinn testified that in his view an engineer was not required to implement the repair and maintenance of the parking deck as set out in option 1.²⁶² Rather, he interpreted Halsall’s references to engineers and contractors as, in effect, a sales pitch by Halsall for follow-up work.²⁶³

Retirement Living appeared overly confident that it could handle the maintenance of the rooftop parking deck without the advice of an engineer. Mr. Quinn testified that, in his view, the elements of option 1 were well within his own capabilities and those of his team.²⁶⁴ Together they were qualified to address the roof maintenance, without having to rely on an engineer, because of their relative experience. Mr. Quinn testified: “I pre-qualified Ken Snow [Mall maintenance supervisor] and his crew because there was nobody in Ontario that is more experienced in grouting and sealing that particular deck than them.”²⁶⁵

Despite my conclusion that the Halsall report could have been clearer that its option 1 required the participation of an engineer and qualified contractors, Retirement Living's interpretation that it could undertake option 1 on its own, with the regular Mall maintenance staff, was not reasonable.

It is baffling to me that Mr. Quinn could give Mr. Snow and his crew such a superlative endorsement. They had been unable to stop the leaks under Algocen, and they continued to be unable to do so under Retirement Living. The maintenance crew became adept at playing catch-up, but not at preventing the leaks from occurring.

Halsall stated in respect of its option 1: "If required, we could prepare a phased repair approach for Option 1, tailored to your financial constraints."²⁶⁶ Retirement Living seemed to interpret this sentence as meaning that Retirement Living could itself phase in grouting and sealing work over time. As Mr. Kennealy explained when questioned by Commission counsel:

Q. If you want to do it over time, talk to us and we'll tell you how to do it. Isn't that what they are saying?

A. I can understand your interpretation of it. That is not how I interpreted it when I was reading it.

...

That is not how I interpreted it when I read the document. I read it and it basically told me you need to do the routing and sealing. You need to get all of the joints done ... you are reading into it that, okay, you have got to do every joint today, and then you have got to get into a maintenance. I did not read it that way. I read it as you need to be doing the rout and sealing. You need to do it in a deliberate manner. And if you need to phase it in, you can phase it in.²⁶⁷

I find that Mr. Kennealy's interpretation is not reasonable. His position, it seems to me, is an after-the-fact attempt to equate what they did (staying the course) to what they did not do (implementing Halsall's option 1 over time). If staying the course was a viable option, Halsall would have said so. Halsall did not recommend the status quo for the obvious reason that it was not working. It is very difficult for me to accept that this astute businessman could honestly hold that belief. In any event, Retirement Living did not materially change the manner in which the rooftop parking deck was maintained.

The evidence of Mr. Snow, who worked at the Mall in maintenance on the rooftop parking deck for more than 16 years, was most revealing. His involvement extended over the ownership periods of both Algocen and Retirement Living. He testified that the techniques used to deal with the leaks did not change over all 16 years.²⁶⁸ His evidence is made even more compelling by the fact that Retirement Living appears to have delegated the manner in which the roof was repaired entirely to him.²⁶⁹

By Mr. Quinn's own admission, the maintenance plan he put into place was essentially a continuation of the program that Algocen had followed. This conclusion is illustrated by this exchange between Mr. Quinn and Commission counsel:

Q. Do you agree that Retirement Living, instead of adopting the recommendation of Halsall, decided to adopt their own kind of approach and continue what Algoma had been doing? He seems to be saying here that the only thing they did not fully address, that Halsall did not fully address in their report is the "continue as is" scenario, which Mr. Beltramin [an engineer with STEM Engineering] here opines and says this is what Retirement Living is doing?

A. You'll have to explain to me what the difference is between the Halsall Report and what ACP [Algoma Central Properties] was doing before, because I don't see a lot of difference.

Q. ... I'm not here to answer a question from you, Mr. Quinn.

A. No, okay.

Q. But if that is what your understanding is –

A. But you are asking me if we continued the ACP process or did we do what Halsall asked us to do. In my view, both of them were the same.

Q. Okay. So your understanding was that Halsall had basically approved what ACP had been doing, so you continued doing that?

A. I think anybody that reads the report and knows what ACP was doing before, they are the same.²⁷⁰

This exchange could not more clearly illustrate that Retirement Living did not implement Halsall's option 1. Worse, it fundamentally misinterpreted the Halsall report as blessing the deficient maintenance practices that had, since the Mall was built, allowed water and chlorides to infiltrate the building. That is not a reasonable interpretation of the Halsall report. It would mean that Halsall would advise Retirement Living to spend the better part of \$500,000 so that it and the Mall's tenants could continue to endure a leaky roof. It was not reasonable for Retirement Living to think that continuation of a practice that had failed for years would suddenly start to work.

Mr. Quinn did not ask either Mr. Buckley or Mr. Truman whether his approach to maintenance was what they had recommended in their Report – in spite of the fact that Mr. Quinn acknowledged that the roof was never leak free. This failure corroborates my earlier conclusion that Retirement Living thought it could simply continue with the maintenance plan that had been in place under Algocen – and not implement Halsall's remedial options.

Mr. Truman stated that if Halsall had been told that Retirement Living intended to continue repairing the roof with the regular maintenance staff, it would have advised it not to do so. Instead Halsall would have recommended that the work be tendered out to a qualified contractor.²⁷¹ Mr. Truman indicated that it is common practice for clients to contact engineers if they do not understand a recommendation.

Prudence and common sense required that Retirement Living go back to Nicholls Yallowega Bélanger or Halsall for confirmation or clarification that the way they intended to address the leaks was within the meaning of what Halsall had recommended in its option 1.

The leaks continued during the ownership of Retirement Living

From the moment Retirement Living became the owner of the Mall in June 1999, it noticed that there was leaking from the roof.²⁷² Beginning as early as September that year, Retirement Living had to take steps to address the effects of the leaking, such as changing water-stained ceiling tiles in the Library.²⁷³

Mr. Quinn testified that, by September 1999, he would have expected that all the leaks had been stopped. He acknowledged, however, that the leaks returned during Retirement Living's ownership of the Mall.²⁷⁴ The cycle of leaks seemed to be the same. They would become more pronounced in the spring thaw. Water would enter the building, and tenants would complain to the Mall maintenance. In the spring, Retirement Living would address leaks in much the same fashion as Algocen had done: attempt to stop the leaks as they occurred. Mr. Quinn testified that, by summer, most of the common sources of leaks that year would have been identified, and the summer maintenance program of routing and sealing the problematic leak areas would start again.²⁷⁵

Over time, Mr. Quinn testified, Retirement Living generally got better at addressing the leaks in the Mall. When Retirement Living sold the Mall, he said, the leaks were minimal.²⁷⁶ I heard ample evidence, however, that the leaks continued.

The chief librarian, Barbara Fazekas, testified that the leaking that had become chronic in the Library did not improve after 1999. She said that the problem regarding leaks in the Mall generally showed no improvement after Retirement Living acquired the Mall.

The problem areas continued to be the same. During the Retirement Living ownership of the Mall, these areas included the Library, Scotiabank, and Zellers. Other areas that continued to suffer from leaking included the area around the food court, around the escalators, and around the premises that were eventually occupied by Dollarama.²⁷⁷

Barbara Cloughley worked at the Mall as an employee of NorDev from 1999 to 2002.²⁷⁸ She testified that Retirement Living kept the Mall clean and made improvements such as replacing furniture. The leaks, however, continued. Ms. Cloughley noticed that the leaks seemed to be “worse around that [lottery] kiosk area there. There would be buckets if it was raining.”²⁷⁹

The leaks in the Library were particularly bad. They were so bad, in fact, that in 2000 Retirement Living looked at the possibility of moving the Library to a different location.²⁸⁰

By letter dated November 22, 2002, Ms. Fazekas complained, in dramatic and prescient language, to Mr. Kennealy about the “deplorable condition” of the Library premises as a result of the leaks, and the dangers that the leaking created:

The Library Board has asked me to write another letter of complaint regarding the deplorable condition of the ceiling over the Library space.

Considerable money and effort were expended to paint our premises in September. However, our site can never look attractive given the state of the ceiling and concomitantly, the look of the library with plastic covering over the bookshelves, drip buckets in the aisles to protect the rug and gaps in the ceiling where tiles have become so water laden that they have fallen on the floor. Fortunately, no patron or staff member has been hit by one of these yet!

You may not be aware that many of your potential clients often come to the Library while waiting for Retirement Living tours, or before or after visiting your office. Is this the impression of your values as a landlord that you want these people to have?

As I sit at my computer to write this letter, I am listening to the drips in the ceiling, wondering when the ceiling tile will fall on my head.²⁸¹

Ms. Fazekas did not recall getting a response to this letter from Retirement Living.²⁸²

Despite acknowledging that he received the letter, Mr. Kennealy said under examination by Commission counsel that the correspondence did not change his perception about the state of the leaks from the rooftop parking deck; he did not consult with a professional to see if a different course should be pursued; and Retirement Living stayed the course even though at least some of the Mall’s tenants were not satisfied with the situation:

Q. Okay, Sir, you were in the residential housing rental market, right?

A. Yes.

Q. That is the mainstay of your business?

A. Yes.

Q. You have been doing that for now nigh on 20 years?

A. Yes.

Q. And you have done very, very well in that business; correct?

A. Yes.

- Q. And if one of your residential tenants was telling you that they had to continually put tarp over their furniture and buckets in the house because it continually leaked, would you not, sir, fix it?
- A. We would do everything in our power to fix it.
- Q. And if it continued to leak when you were simply trying – when you were attempting to merely patch the leaks, would you not go to a professional and ask for advice on how to change what you had been doing so that tarps were no longer and buckets were no longer required?
- A. We thought we were doing quite well, Mr. Doody. I understand you –
- Q. No, but listen, sir, with respect[,] the question was –
- A. Yes.
- Q. – would you not, if you had a similar situation with one of your residential housing units where the tenant was making similar complaints that over a number of years they had had to have tarps and buckets, would you not seek advice as to how to change what you had been doing to try and stop the leaks?
- A. If I was unable to satisfy the customer, I would try and do whatever I could to satisfy them.
- Q. And you never satisfied Ms. Fazekas, did you?
- A. It would appear not.
- Q. Did you seek advice from a professional as to how to do something different than what you had been doing?
- A. At that point, no, we did not.
- Q. Did you ever?
- A. I'm trying to think if we ever. I believe we just continued to work very hard at doing what we were doing.²⁸³

In March 2003 the tenants from the store A Buck or Two, located close to the food court, complained of “significant leaks throughout our store.”²⁸⁴ Mr. Quinn agreed that this description accurately reflected the condition of the store at that time.²⁸⁵ Subsequently, the head office of A Buck or Two wrote to Mr. Quinn to formally request structural repairs to the roof: it had, he said, caused damage by water infiltration to the store premises. The letter read:

As per the lease, it is the Landlords responsibility for structural repairs to the roof, due to the fact that there is a parking lot situated above the leased premises. With respect to our insurance policy, the Landlord is responsible for any damages that occur within the premises, which are a direct result of structural damage to the building.

Please take this letter as our formal request for you to remedy this situation immediately, and we look forward to your anticipated co-operation.²⁸⁶

Mr. Quinn testified that he did not believe he responded to this correspondence.²⁸⁷

In June 2003, A Buck or Two pressed the issue of the Retirement Living's inaction to attenuate the leaking from the roof. The director of Legal Services for A Buck or Two wrote to Mr. Quinn:

We have been advising you about this ongoing problem regarding the roof leaks for several years now, both verbally and in writing. Now, not only has your lack of action had an impact on the sales of the store (as customers don't like water dripping on their heads while they shop), this has also destroyed inventory in the store, as well as the ceiling tiles and now the electrical system. Moreover, further complications will arise if a customer slips and falls as a result of the water on the floor from the leaking roof.

The situation has become intolerable. The Landlord's lack of action is bordering on gross negligence. Should this situation not be resolved by July 7, 2003, we will pursue all of our legal remedies available at law.²⁸⁸

Mr. Quinn did not recall what actions, if any, Retirement Living undertook in response to this letter.²⁸⁹

Rachelle Lalonde, a long-time resident of Elliot Lake who worked at the SAAN store in the early 1990s and from 2002 to 2006, observed extensive leaking, electrical issues, and falling tiles in the store. She described putting plastic tarps over the cash registers at the end of each shift and said the employees sometimes referred to the Mall as "Algo Falls." She said that, one weekend, employees needed umbrellas over their heads while they worked.²⁹⁰

Retirement Living also received complaints from Scotiabank. By letter dated February 4, 2005, Robert Jurmalietis, the branch manager, complained of the ongoing water leaks:

Further to our conversation in the branch last week, would you kindly have your maint folk drop into the branch to replace the water damaged ceiling tile in my office, as well as in the Personal Bankers office area.

In addition, we have developed a substantial leak in the ABM area, so a tile or 2 will have to be replaced there as well.²⁹¹

The following week, a water-saturated ceiling tile fell in Scotiabank. Mr. Jurmalietis again wrote to Mr. Quinn:

You may recall that a few days ago a ceiling tile collapsed in the Bank, from the weight of water stemming from a leak in our roof. This damaged tile remains in place, and creates an unsightly and unprofessional image for us.

Would you kindly have your maint people attend the branch and replace the destroyed tile, as well as have them replace the numerous water damaged tiles previously reported to you.²⁹²

The leaks in the Mall did not stop while Retirement Living owned it.²⁹³ Mr. Kennealy testified that Retirement Living dealt with leaks promptly and quickly, which he said was reflected in the fact that he did not receive many complaints from tenants.²⁹⁴ Although Retirement Living may well have been a diligent landlord in responding to leaks, there is no doubt that water infiltration into the Mall continued to be problematic throughout its ownership.

Retirement Living does not second-guess its maintenance regime

Mr. Kennealy testified that he thought Retirement Living did "very, very well" in keeping water from leaking into the Mall during the time it owned the Mall.²⁹⁵

Mr. Quinn recalled that Retirement Living had confidence in its own ability to attenuate the leaks: "[W]e were being optimists that we thought ... given a really good valiant effort ... we could do this. We could stop the water."²⁹⁶

Mr. Kennealy sensed that Retirement Living did a good job in managing and responding to what its customers asked it to do.²⁹⁷

Unfortunately, despite Retirement Living's assertions, the leaks continued. Reality belies its principals' rose-coloured retrospection. This emperor had no clothes!

Unfortunately, despite Retirement Living's assertions, the leaks continued. Reality belies its principals' rose-coloured retrospection. This emperor had no clothes!

Equally regrettable, Retirement Living chose not to revisit its course of action or re-examine the problem. Richard Hamilton, who was a director of Retirement Living from 2003 until 2009 (for three years of which he was mayor), acknowledged under questioning by Commission counsel that Retirement Living did not reconsider its maintenance strategy despite the persistence of leaks:

Q. But it continued to leak, sir, right?

A. Yes.

Q. So they weren't fixing them, right?

A. No, I wouldn't agree. They were fixing them. They weren't stopping them all. One would pop up here and one would pop up there, yes.

Q. Right, so they would fix one and one or two more would pop up, as you said?

A. Uhm-hmm.

Q. And yet you never said to them, why don't you do more to make it actually stop leaking, instead of getting worse?

A. No.

Q. If this was your house, sir, and it continued to leak over a period of 20, 25 years, and the leaks were getting worse, would you continue to treat it the way you had been treating it or would you do something different?

A. I would likely do something different.

Q. Can you tell us why you didn't ask Retirement Living as a member of the Board why they weren't doing something different?

A. No.

Q. But there was no discussion, to your recollection, about that topic of doing something different?

A. That's correct.²⁹⁸

Despite clear evidence to the contrary, Mr. Quinn testified that he believed the leaks were improving and that Retirement Living was, in fact, "winning the battle" against the leaks.²⁹⁹ Even if Retirement Living was winning some battles against the leaks, those victories were hollow and short-lived. Retirement Living clearly worked hard with diligent patchwork to stay on top of leaks that occurred. But it never addressed the underlying cause of the problem. As a result, the water and chlorides continued to penetrate the edifice and corrode its structural steel.

Bruce Caughill provides advice to Retirement Living about the Mall

Extensive work for Retirement Living between 1999 and 2002

Bruce Caughill is a Sault Ste. Marie-based architect and engineer. His practice is approximately 90 percent related to architecture and 10 percent to engineering. He testified that he considers himself to be a civil engineer. He does not do any mechanical or electrical engineering work but does do some structural engineering.³⁰⁰ He is the brother of Algocen's Rod Caughill.³⁰¹

During the time that Algocen owned the Mall, Mr. Caughill did work (not related to the rooftop parking deck) on three occasions at the Mall.³⁰² He testified that he was "generally" aware of Algocen's issues with the rooftop parking deck but denied knowing the extent of the leaks when Algocen owned the Mall.³⁰³ He stated further that he and his brother never discussed the leaks at the Mall.³⁰⁴ During the time that it owned the Mall, Retirement Living often consulted Mr. Caughill when it had a question about architectural or engineering needs. Mr. Caughill dealt exclusively with Mr. Quinn.³⁰⁵

Mr. Caughill was familiar with the Mall and its rooftop parking deck because Mr. Quinn would consult him regularly on matters related to it. For example:

- In April and May 2000 Mr. Caughill provided advice in connection with the installation of a new cooling tower at the Mall. Specifically, he provided advice about the structural implications and the relative load capacity of the roof.³⁰⁶
- In 1999–2000, Mr. Caughill provided services to Retirement Living in connection with the renovation of premises for the Algoma District Services Administration Board (ADSAB).³⁰⁷
- Mr. Caughill testified that he received the 1998 Nicholls Yallowega Bélanger report and the 1999 Halsall report in connection with his work to renovate the ADSAB premises.³⁰⁸
- In January 2001, Mr. Quinn contacted Mr. Caughill about snow removal practices on the rooftop parking deck. In the notes he made from his conversation with Mr. Quinn, Mr. Caughill wrote “hairline cracks show up in sealant.” Mr. Caughill testified that Mr. Quinn advised him that the cracks in the sealant were related to the snow-removal procedures.³⁰⁹ Ultimately, Mr. Caughill was not able to provide advice about these procedures.
- In July 2002, Retirement Living asked Mr. Caughill to investigate two visible cracks in the precast slabs which made up the exterior walkway at the upper Mall level. His report set out a solution to fix the problem and also referred to the Halsall report. He noted: “[Y]ou received opinions and advice on the concrete and steel floor and roof systems that should be reviewed and followed as part of your maintenance procedures.”³¹⁰ Mr. Caughill was asked if this suggestion was included in the report because he felt that Retirement Living was not following the recommendations in the Halsall report. He testified that Retirement Living was not maintaining the paint on the beams; although in his opinion they were not ready to fail or be subject to failure, they had some corrosion, which was not being addressed. Mr. Caughill testified that he felt that the corrosion on these exterior beams needed to be addressed as part of their ongoing maintenance.³¹¹

As a result of this involvement with the Mall, Mr. Caughill was familiar with the Mall and was aware that Retirement Living relied on him for structural and architectural advice.

2003: Mr. Caughill does not advise Retirement Living of his and another engineer’s concerns about the long-term detrimental effects of maintenance practices on structure

Mr. Caughill testified that, in July 2003, Mr. Quinn contacted him because the Mall maintenance staff had noted an issue with the perimeter wall at the parking deck on the east side – the wall closest to Ontario Avenue. Mr. Quinn said that the wall was bowed out in the area where it met the parking deck. Mr. Caughill told the Commission that these perimeter walls were steel framed and clad with steel siding.³¹² He explained that he did not go to the site but, rather, referred Mr. Quinn to STEM Engineering (STEM). He did very little structural work himself and felt that this issue was beyond his capabilities.³¹³ When Retirement Living retained STEM directly, Mr. Caughill provided some drawings to STEM, but nothing else.³¹⁴

In his memo to Mr. Quinn recommending STEM for the job, Mr. Caughill referred to a structural audit that had been done by Trow. He wrote:

We do not have the resources and experience to take this further and I recommend hiring a structural engineer that does. It is my understanding that the previous owners had a structural audit done by Trow Consulting Engineers at one time and that Halsall and Associates did a report for NorDev (through Nichols Yallowega) when the property was purchased. I don’t know if their files would be of benefit here but I suspect this problem is so specific, they wouldn’t.³¹⁵

Mr. Caughill neither had the Trow report referred to in his memo nor took steps to obtain it. He agreed that, in retrospect, it probably would have been a good idea to obtain it or to ensure that STEM had it.³¹⁶

A site visit in connection with this issue took place on August 5, 2003. In attendance were Messrs. Caughill, Quinn, and Randy Beltramin of STEM.³¹⁷ On September 8, 2003, Mr. Beltramin sent an email to Mr. Caughill expressing clear concern about the maintenance practices of Retirement Living:

I will have a report and reinforcing detail tomorrow for the damaged panel. As discussed earlier[,] the panel is not in a precarious state at present but needs repairs to prevent water penetration and to reinstate its structural integrity.

I don't know if you read Halsall's last report, but they conducted a very detailed investigation of the parking deck. The resulting report pretty much reiterates what the first one recommended but with more detail. *The only thing they did not fully address was the "continue as is" scenario, which NorDev is doing. As you and I discussed[,] this can have long term detrimental results as the structure slowly deteriorates. Some of the structural repairs that you have already done and other visible areas of concern (precast cracks) will be an ongoing issue. Hopefully the areas of concern can be found and repaired before a failure occurs.* The job of chasing down and resealing cracks is also becoming a larger job each successive year as existing cracks are reinspected and new ones found. It appears that the eventual scenario will be that each precast panel joint (both longitudinal and lateral) will be caulked. In addition, students[,] instead of experienced personnel[,] are doing the work.³¹⁸ [Emphasis added].

Mr. Beltramin's email is striking for its prescient assessment of the implications of the maintenance regime being followed on the Mall.

In his email, Mr. Beltramin made note of the fact that the only thing not addressed in the Halsall report was the Retirement Living "continue as is" scenario. Mr. Caughill agreed that what Mr. Beltramin had meant in his email was that the Halsall report did not address the consequences if Retirement Living simply perpetuated Algocen's maintenance practices on the parking deck. Yet, despite the fact that Mr. Beltramin's email made reference to a discussion between himself and Mr. Caughill about the long-term detrimental effect on the deterioration of the structure from the "continue as is" scenario, Mr. Caughill testified that he did not recall having a discussion with him on these issues.³¹⁹

Mr. Caughill stated that he did not forward the email to Mr. Quinn or anyone else at Retirement Living because STEM was working directly for Retirement Living. He expected that if Mr. Beltramin had those concerns, he would speak to Mr. Quinn about them. Mr. Caughill confirmed that he did not follow up with Mr. Beltramin following receipt of the email, nor did he contact Mr. Quinn about the concerns or offer to assist Retirement Living in dealing with those issues.³²⁰

Mr. Quinn testified that Mr. Beltramin did not express those concerns to him, nor did he recall Mr. Caughill ever talking to him about them.³²¹

Mr. Beltramin's email of September 8, 2003, is a clearly worded and accurate description of the deficiencies of Retirement Living's maintenance practices and the long-term implications of continuing them. In my view, on receipt of Mr. Beltramin's email, Mr. Caughill should have immediately provided it to the principals of Retirement Living – particularly as Mr. Quinn relied on him for architectural and structural advice. Unfortunately, Mr. Beltramin's clear-sighted concerns never reached Retirement Living.

2005: Retirement Living consults Mr. Caughill about loads on the parking deck

In January 2005, after owning the Mall for five years, Retirement Living returned to Mr. Caughill to inquire about the loading of the parking deck. In response, he advised Retirement Living to refer to the 1998 Halsall report, pointing out that it was the latest structural information at Retirement Living's disposal and should be used as the guideline for loading the parking deck.³²²

Specifically, Mr. Caughill wrote:

Your 1988 [clearly 1998 was intended] Building Condition Assessment, Appendix A Structural Review Report by Halsall Associates Limited, provides the basic information on parking deck loading. This is the latest structural information that you have unless you commission another study, [and] should be used as the guidelines for loading the parking deck.

...

In addition to the prospect of structural failure due to equipment and snow loads, there are vibration and deflection issues to be considered. Maintaining water-tight joints and preventing delamination of the wear and base courses of concrete will be difficult when deck sections are over-loaded but do not fail.³²³

Mr. Caughill testified that he did not feel at that time that Retirement Living should obtain an updated survey of the condition of the building.³²⁴

When asked if he included the warning in the final paragraph about the importance of joints being watertight because he was aware of the continued water leaks, Mr. Caughill did not answer the questions directly. Rather, he testified that he was aware that the entire roof structure was subject to ongoing maintenance with caulking and sealing. He also testified that he was not concerned about the joints being watertight at that point.³²⁵

Mr. Caughill testified that, after providing information in connection with Mr. Quinn's inquiry regarding snow removal, the only other work he performed at the Mall for Retirement Living before the sale of the Mall to its third owner was the design of a hotel lobby. He added that the work to implement his design was never carried out.³²⁶

Ministry of Labour during the Retirement Living years

It is noteworthy that, during the time Retirement Living owned the Mall, the Ontario Ministry of Labour was not involved with issues resulting from the leaks from the roof even though one of its inspectors, Ralph Regan, had been in the Mall several times for other reasons.

Mr. Regan conducted an inspection of the SAAN store on March 29, 2001. He indicated that there were water-stained ceiling tiles in the store and issued an order that provided, in part, that "[t]he ceiling tiles and area above the tiles shall be checked for mould by a competent person."³²⁷ Mr. Regan testified that this order was prompted by the fact that there had been complaints about mould in the Library.³²⁸ Mr. Regan could not recall if he observed signs of leaking elsewhere in the Mall around that period.³²⁹

In May 2002, Mr. Regan conducted an inspection of the Library. Although he had previously responded to complaints about leaks there, in 1995, and the Health and Safety Committee had recommended at that time that the source of leaks be corrected, Mr. Regan testified that he did not take any steps during his 2002 visit to inquire about any continuing leaks in the Library. He did not follow up on the committee's recommendation and could not recall whether he was informed that the leaking had decreased in the Library.³³⁰

Mr. Regan's report of his November 2003 inspection of Zellers does not mention any concern expressed about leaks in the store. He testified that he saw the "odd stained [ceiling] tile," but he did not observe buckets or tarps. He said that a stained ceiling tile would not likely be a contravention of the *Occupational Health and Safety Act*.³³¹

However, as I discuss below, Mr. Regan did investigate complaints about leaking in the Library in 2005.

The City's Response to the Leaks

The City could have ordered that the leaks be fixed

All the City officials who testified before the Commission had some knowledge of the leaks at the Mall throughout its history. The City had a Property Standards By-law that it could have enforced, as a means of dealing with the leaks, had it chosen to do so. Unfortunately, the City took no steps to invoke such power until after Retirement Living had sold the Algo Centre.

By-law No. 79-15 was passed by Council on January 24, 1979.³³² It was repealed and replaced by By-law No. 03-29333 on May 26, 2003. The structural standards and the requirement for water tightness were identical in both versions. With respect to structural soundness, they required:

Every part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected³³⁴

With regard to roofs in particular, these successive by-laws stated:

The roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings.³³⁵

Property standards are enforced by municipally appointed property standards officers.³³⁶ These officers are empowered to issue orders to the owner of a property to remediate the deficiency. The owner has the ability to challenge the order, first to the municipality's Property Standards Committee and then in court. If the order is not challenged, or if the challenge has not been upheld, the owner must comply with the order. If the owner does not comply, then the municipality can perform the work and take steps to recover the costs from the owner. The main difference between the two by-laws is in its means of enforcement. The earlier by-law provided for its own enforcement. The later version was enforced through the provisions of the *Building Code Act*.³³⁷

Progressive and complaint-driven by-law enforcement policy

As I described earlier, the City of Elliot Lake adopted a policy of *complaint-driven* by-law enforcement. Generally speaking, the City reacted to complaints about possible violations rather than proactively conducting inspections to identify contraventions. As the first step in the process, a complaint had to be received. Once a complaint was received, the City practised what it characterized as "progressive enforcement." This process was described in the clerk's report:

Most by-laws are administered using a progressive enforcement practice. The objective of progressive enforcement is to achieve compliance without laying a charge.* It can be described as an escalating

.....

* Failure to comply with Property Standards By-laws could result in a charge being laid in addition to an order being issued requiring that the deficient property be repaired. In the case of By-law 79-15, the charge would be under the by-law itself. In the case of By-law 03-29, the charge would be under the *Building Code Act*.

system that elicits a stronger response at each step until compliance is achieved. Progressive enforcement is dynamic. It changes according to the nature of the by-law, the enforcement history, the nature of the circumstances and the responses received.³³⁸

As a general matter, it seems to me that the progressive enforcement policy is a sensible approach. It is one of general application in many parts of the province. However, its effectiveness depends on actually escalating the response when warranted. In this regard, as I discuss below, the City's approach left much to be desired.

The Library complains to City in 1998, and nothing is done

The Library's complaints to the City about the leakage from the roof have been noted earlier. These complaints persisted. In fact, by coincidence, City Council was learning of the possible purchase of the Mall by Retirement Living just as events that resulted in yet another complaint were unfolding.

The City's Joint Health and Safety Committee conducted an inspection of the Library on August 26, 1998. On November 4 that same year, the committee reviewed the inspection report and made recommendations. The following day Phil Butler, the secretary of the committee, wrote to Ms. Fazekas, the chief librarian, and outlined the recommendations – including the replacement of missing ceiling tiles.³³⁹ The tiles had become water-laden from the leaks and had fallen.

Ms. Fazekas responded to Mr. Butler on December 9, 1998. She informed him that she had had discussions about the ceiling tiles with Mr. Bauthus two months previously, on October 9. Mr. Bauthus had informed her that he had met and discussed this issue earlier that day with Mr. Liautaud, the Mall manager. The matter was not resolved. She felt that Mr. Bauthus was reluctant to pressure the Mall on these issues. She further informed Mr. Butler that the Library board had passed a resolution at the November board meeting and hoped to appear before council on January 11, 1999, to request a budget increase.³⁴⁰

The resolution read as follows:

Whereas the Library is constantly subject to water damage from the leaky roof,

Whereas this water affects the condition of the collection, presents health and safety problems and presents an unpleasant aesthetic appearance in a public building,

Whereas the Library has repeatedly approached the landlord but has not received a positive response,

Whereas there is concern that municipal insurance coverage may be affected by lack of action

Be it resolved that the City Council be approached to increase the Library's operating budget sufficiently that the Library Board can address these ongoing maintenance concerns.³⁴¹

Ms. Fazekas also told Mr. Butler that Merlyn Bishop, the City treasurer, had suggested that the Library board withhold rent in protest.³⁴² The board did, in fact, recommend to the City that it withhold rent. However, the City never took that action.³⁴³

In his testimony, Mr. Bauthus agreed that he had talked to Ms. Fazekas about this issue but said he had not been reluctant to press the landlord. He had spoken to Mr. Liautaud. In response, Mr. Liautaud said that Algocen was working to fix the leaks; he also said that the terms of the lease required the tenant to pay for the consequential damage from the leaks. Mr. Bauthus did not refer the issue of the leaks to Mr. Pigeau at that time. As a result, there was no follow-up by Mr. Pigeau of this apparent breach of the Property Standards By-law. Mr. Bauthus testified that he did not refer the issue to Mr. Pigeau because he could see that Algocen was trying to fix, or at least lessen, the damage caused by the leaks. It does not appear that Mr. Bauthus asked Mr. Liautaud if Algocen had received any professional advice about this ongoing problem.³⁴⁴

In December 1998, while the Library board was engaged in this discussion with City officials, the Board of Directors of Retirement Living was deciding whether to make an offer to purchase the Algo Centre. As part of that process, as described above, board members had been told that “the building is structurally sound.” Mayor Farkouh and Councillor Croteau were both members of the board. If the board had received accurate information about the Nicholls Yallowega Bélanger and the Halsall reports, if the Library complaints had been more widely circulated within the City, and if all parties engaged in this discussion had been more open about the appropriate way to deal with a capital asset of significance to the community, different decisions might well have been made.

On December 30, 1998, Ms. Fazekas wrote to City clerk Larry Burling and informed him of the resolution passed by the Library board on November 12, 1998. She requested that the board be permitted to appear before the mayor and council on January 11, 1999, to address these concerns. She attached a report she had prepared, to provide council with background information concerning the physical plant at the Library.³⁴⁵

Her report stated in part:

In 1989, the Library was moved to the Algo Centre Mall, an area of some 8500 s.f. At the time of negotiation, the Library Board was assured that the mall’s chronic problem with a leaky roof had been dealt with. From that time on, the Library has had problems with water damage, poor air quality and decrease in the aesthetic quality of the Library’s appearance. Despite considerable correspondence with the Mall Manager, the situation has not been improved to the satisfaction of the Library Board.³⁴⁶

Ms. Fazekas could not recall whether this report was actually considered by council on January 11, 1999.³⁴⁷ The minutes for the meeting of council of that date indicate that a resolution was passed to receive the Library board’s November 12, 1998 Resolution No. 37/98 “concerning a request for an increase in their operating budget to deal with maintenance concerns.”³⁴⁸ Ms. Fazekas could not recall a further response to her report, nor could she remember whether the City spoke to Mall management about fixing the leaks.³⁴⁹

Mr. Bauthus saw Ms. Fazekas’s report when it was submitted to Mr. Burling. Again, he did not refer it to Mr. Pigeau before its presentation to council. He was unable to explain his failure to do so.³⁵⁰ He viewed the report as a complaint within the meaning of the by-law enforcement policy.³⁵¹ That would have required Mr. Pigeau to at least conduct an inspection and take what steps he saw fit³⁵² under the Property Standards By-law.³⁵³

On January 11, 1999, City Council received the resolution of the Library board. Council directed City staff to approach the landlord in an attempt to resolve the issues.³⁵⁴ Mr. Bauthus viewed this decision as a two-part direction: the City had two roles with respect to the Mall in connection with the leaks. It had a role as a regulator (with respect to property standards) and a role as the representative of the Library (given that it was a tenant in the Mall). As the tenant’s representative, Mr. Bauthus would try to get the landlord to fix the roof. He expected Mr. Pigeau, as a regulator, to consider his options under the Property Standards By-law. However, he does not recall making the referral to Mr. Pigeau or ever asking him what he actually did.³⁵⁵

Mr. Pigeau testified that he was not aware that Ms. Fazekas had written to Mr. Burling on December 30, 1998. He knew nothing about the content of her letter, the fact that she wanted to appear before council, or the outcome of the meeting. Had he been aware of the letter, he says, with hindsight, that he would have interpreted it as a complaint and pursued it under the Property Standards By-law.³⁵⁶

Also with the benefit of hindsight, Mr. Farkouh said he now sees Ms. Fazekas’s November resolution and report as a property standards complaint. However, quite inexplicably, he testified that at the time it did not occur to him or the entire council that this complaint was a property standards issue.³⁵⁷

Equally baffling is the fact that Mr. Burling did not consider the letter as a property standards complaint but simply a budget issue. His curious rationale was that the report and resolution of the Library board made no reference to the by-law. In addition, he thought that Ms. Fazekas had not considered the possible consequences of her complaint: potentially, they could include the displacement of all the businesses in the Mall.³⁵⁸ By these standards, it is difficult to conceive of any complaint concerning the Mall ever satisfying Mr. Burling.

According to Mr. Bauthus, the Library board ultimately received more funding, pursuant to its request. This increased budget would allow the Library to clear up the mess caused by the leaks.³⁵⁹ It could only treat the symptoms, however, and not cure the problem. Despite direct and clear complaints from the Library, the City's regulatory powers lay dormant simply because City officials neglected to take any action. They failed to generate any form of enforcement response from the City. Although the City had the power under its own property standards to insist that Algocen make the parking deck watertight, it did not. The City merely gave the Library funds to pay for damage caused by the parking deck leaks and ignored the contravention of the City's by-law. The Library's complaint about Algocen's anemic efforts to stop the leaks fell on deaf or indifferent ears. Meanwhile, the situation continued, unabated.

The City has Retirement Living to deal with about the leaks

Retirement Living became the new owner of the Algo Centre on June 18, 1999. The change in ownership of the Mall did not alter the fact that the roof continued to leak. On July 14, 1999, Ms. Fazekas sent a memo to Bonnie deBortoli, a member of the Joint Health and Safety Committee. She reported that Mr. Bauthus had not taken any action on the leaking issues that had been brought to council's attention on January 11, 1999. His only suggestion had been that the Library approach Mr. Liautaud with invoices for the repair work they had initiated. She noted that the Mall maintenance staff was once again trying to fix the chronic problems on the roof. However, she held out little hope that this effort would be any more effective than the previous ones.³⁶⁰ Mr. Bauthus confirmed that the advice he gave to Ms. Fazekas was to wait until the mess was cleaned up and to ask Mr. Liautaud to pay for it.³⁶¹

The Joint Health and Safety Committee inspected the Library premises again on July 23, 1999. As with the inspection carried out almost a year earlier, this visit again revealed issues caused by water leakage.³⁶² In an effort to have those issues dealt with, Andrea Leddy, the City's personnel manager, wrote to Retirement Living on September 29, 1999. To give some background to the new Mall owner, she included with her letter a number of documents:

- the July 23, 1999 inspection report;
- the July 14 memo from Ms. Fazekas to Bonnie deBortoli;
- the November 5, 1998, memo from Mr. Butler to Ms. Fazekas which confirmed the recommendations made after the August 1998 inspection;
- the December 9, 1998, response by Ms. Fazekas to Mr. Butler's November 5, 1998, memo which contained the Library board's resolution; and
- the December 30, 1998, letter from Ms. Fazekas to Mr. Burling attaching the Library report; this document included Ms. Fazekas's report of the chronic leaking problems dating back to 1989.³⁶³

Ms. Fazekas did not recall if Ms. Leddy got a response. She did remember, however, that at some point in the early years of Retirement Living's ownership, she and Mr. Butler spoke to Mr. Quinn to familiarize him with their concerns.³⁶⁴ Despite these efforts, Ms. Fazekas did not believe that the leak situation improved under the ownership of Retirement Living.³⁶⁵

On November 22, 2002, as noted above, Ms. Fazekas, at the request of the Library board, wrote to Mr. Kennealy, complaining again about "the deplorable condition of the ceiling over the Library space." She stated in this letter:

Considerable money and effort were expended to paint our premises in September. However, our site can never look attractive given the state of the ceiling and concomitantly, the look of the library with plastic covering over the bookshelves, drip buckets in the aisle to protect the rug and gaps in the ceiling where tiles have become so water laden that they have fallen on the floor. Fortunately, no patron or staff member has been hit by one of these yet!³⁶⁶

Because she was acting at the request of the board, its members would be aware of the letter, but not necessarily its contents.³⁶⁷ The City clerk and all the board members received copies of the minutes of the board meetings.³⁶⁸

I have no evidence to allow me to conclude that the City was actually aware of the contents of this letter. However, the City's track record makes it unrealistic to expect that, if its officials had read the contents of the letter, they would have acted differently.

2004: Councillor Denley's efforts to get something done about the leaks

Don Denley is a retired Metro Toronto Police officer. He moved to Elliot Lake in December 2000 and was elected as a City councillor for the term December 1, 2003, to November 30, 2006.³⁶⁹ In the 2003 election campaign, he made an issue of the fact that the City was paying Retirement Living \$77,000 per year in rent for a leaky library.³⁷⁰ During his time on council, the leaks at the Library were a constant issue.³⁷¹ As will be seen below, City officials during this period received many emails about the state of the Library from Councillor McTaggart, who sat on the Library board.

On April 8, 2004, Mr. Denley made a presentation to the Library board. Cathy McTaggart, a City councillor and member of the board who was in attendance, was quite upset about some of his remarks. She sent an email to Mr. Speck, the City's chief administrative officer, on April 15, 2004. It read:

Troy: (I apologize for the length of this e-mail.) With reference to our chat in your office this morning (after the Budget meeting), I am forwarding the Minutes of the Library Board meeting that I was referring to which I received today. Please believe me, Barbara Fazekas is being very kind with regard to the reference to Councillor Denley's remarks at the beginning of the meeting. I still maintain that Don's words were presented in an entirely different way than is written here. Barbara was exercising her "Editorial skills." He most definitely stated that the Library was very low on the list of priorities with the Council (nothing to do with funding). He also said (and I failed to mention this to you this morning, for which I apologize because it is definitely worthy of mention) that the Golf Course and the Medical Clinic for the doctors were the priorities (but he said that he wouldn't get into that). I hope that you will be able to get Barbara to speak openly with you about what Don really said. If you wish to contact any of the other Board members, here are their numbers ...

As I mentioned to you, Councillor Denley's presentation was extremely brief (he found out that Heather was on the Board and worked for Retirement Living) and he clammed up. (I was absolutely amazed.) Prior to that he had been so extremely verbal concerning the fact that he wanted the Library to re-locate and the landlord of the mall should repair the roof & the library should not have to put up with the leaks, etc., etc., (he had been to the Civic Centre to check out the space available) and then his presentation

came & Heather was sitting directly across from him & Don was at a loss for words. And then, when he began to make his remarks about Council, I held my tongue because I did not want to embarrass Don by confronting him in front of the Library Board. It was extremely awkward for me. That is why I came to see you, Troy. I need your input and that of Mayor Farkouh.

I will leave this Issue with you and hope that you will be able to provide me with some feedback and whether or not this is going to go any further (to Caucus. I am absolutely willing to speak about this at Caucus. This is not a personal Issue. It is a Council Issue which I believe needs to be addressed.) I personally feel that it is extremely important for City Council to maintain as positive an image as possible in the Public Eye and Council needs to project this image to all of the sub-committees, that is why I do not like the idea or the suggestion that the City Council has any negative vibes towards any of the committees, including the Library Board. That just simply is not true and if any misconception has been created by Councillor Denley's presentation, it must be corrected. Simple as that!

Thank you for your time this morning and for your willingness to look into this concern. Best regards, Cathy McTaggart

(Councillor)³⁷²

It would appear that Mr. Denley's remarks had struck a nerve.

Mr. Denley, when he testified, did not deny making the comment; he simply did not recall it. His evidence was that he told the Library board that the leaks were grounds for breaking the lease. He described the leaks as being the equivalent of two months per year of continuous leaks.³⁷³ Mr. Denley's rationale for the comment about the Library being a low priority for council was the fact that, because its ceiling leaked so badly (and Council was well aware of the extent of the leakage), the Library had to be a low priority.³⁷⁴ I find, based on the roughly contemporaneous and detailed email of Ms. McTaggart and her concern about those words, that he did make that statement.

The reference to "caucus" in the email was a reference to council "caucus" meetings. These monthly meetings were held, without any notice to the public, where subjects that council was required by law to discuss in public were, in fact, discussed secretly behind closed doors.³⁷⁵ I will say more below about this practice.

A caucus meeting was held on May 3, 2004. The agenda prepared before that meeting indicates that the following item was to be discussed: "Library Board – referral from Councillor McTaggart."³⁷⁶

Mr. Denley described the meeting as confrontational. He was told that the Library structure and its board were sensitive issues. One of the councillors described Mr. Denley as being dangerous and said that, henceforth, he would keep an eye on him (Mr. Denley).³⁷⁷ According to Mr. Denley, the mayor told everyone to calm down because the discussion was getting out of hand.³⁷⁸ For his part, Mr. Denley could not understand why the leaks were not being fixed.³⁷⁹

Mr. Hamilton did not recall the issue of leaks at the Library ever being discussed at any caucus meetings, although he had to concede that the topic must have been discussed because it was on at least one agenda. He also testified that he did not recall Mr. Denley speaking about the leaks at the meeting.³⁸⁰ Mayor Farkouh did not remember the issue of leaks at the Library being discussed at the May 3, 2004, caucus meeting.³⁸¹ Mr. Speck did not recall the meeting at all.³⁸²

I have no difficulty concluding that the Library situation and the treatment of the problem by City Council were discussed at the caucus meeting of May 3, 2004. Considering her email and the fact that Ms. McTaggart went to the trouble to put this item on the agenda, it is hardly reasonable to conclude that it was not discussed at the caucus meeting. The sad reality, however, is that whatever was actually said did not result in any remedial action on the City's part.

Mr. Denley attended one other Library board meeting after the April 8, 2004, meeting, although he did not indicate when it was. This time he proposed that the Library relocate to the Pearson Centre, a municipally owned facility. The board, however, was not receptive to that idea.³⁸³ Mr. Denley never requested that the Library be included on council's agenda for public debate. He felt that, because Ms. McTaggart sat on the Library board, he did not need to bring the matter forward.³⁸⁴ He raised the issue of the leaks at the caucus meetings twice, and he thought Ms. McTaggart also raised it two or three times.³⁸⁵

Up to February 2005, the City had taken no action against either of the two Mall owners to fix the leaks. The City had shown no appetite to remediate the pathetic state of the Library. The Property Standards By-law, rather than being an effective public safety tool for the City, was allowed to atrophy because of the inaction of City officials.

During the ownership of the Mall by both Algocen and Retirement Living, the City's approach to the leaks was the same. It did not insist on a fix, as it could have through the by-law process, but rather hoped that a simple timid request would solve the problem. It did not.

During Retirement Living's ownership period, the City was in a most anomalous position: It was, at the same time, the regulator, the arbiter, and the enforcer of its by-law. It was, vicariously through the Library, a tenant of the Mall and, by virtue of its board membership, its (conceptual) owner. A situation more likely to lead to conflict of interest could hardly be imagined.

Caucus meetings – illegal regular secret meetings of council

As noted above, a caucus meeting was a meeting of Council held without notice to the public. At these meetings, Council discussed, secretly and behind closed doors, matters that the *Municipal Act* required to be discussed in public.

On April 25, 2013, as Mr. Speck was testifying, counsel for the City of Elliott Lake provided Commission counsel with agendas for 28 caucus meetings that had just been discovered by City staff. These agendas cover the period from January 6, 2004, until May 2006. All the agendas were created by Mr. Speck.³⁸⁶

The *Municipal Act* has, since 1994, required that all meetings of council be open to the public, subject to certain exceptions that provide for in camera meetings.* The majority of the items for discussion on the agendas do not appear to involve subjects properly discussed in camera. Mr. Speck acknowledged this point in his testimony.³⁸⁷

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* *Municipal Act*, RSO 1980, c 303, s 55(1), M.45 555; *Municipal Act 2001*, SO 2001, c 25, s 239. The *Municipal Act* in force up to 1994 provided in section 55(1) that "The meetings, except meetings of a committee including a committee of the whole, of every council and of every local board as defined by the *Municipal Affairs Act*, except boards or commissioners of police and school boards[,] shall be open to the public, and no person shall be excluded therefrom except for improper conduct."

In 1994, section 55(1) was amended. It came into force on December 9, 1994. It extended the requirement of public meetings to committees of council by enacting an amended definition of "meeting" to mean "any regular, special, committee or other meeting of a council or local board." Section 55(3) provided that, "except as provided in this section, all meetings shall be open to the public."

In 2002 the *Municipal Act* was overhauled, with the new Act coming into effect on January 1, 2003. The new Act maintained the open meeting requirement.

A revision of the Act came into force on January 1, 2007, which authorized the provincial ombudsman or an investigator appointed by the municipality to investigate complaints of breaches of the public meeting requirement. That amendment made no substantive change to the open meeting requirement: SO 2006, c 32, Schedule A, s 104.

Mr. Speck explained that the practice of calling caucus meetings began when he was a councillor and continued for almost the entire time he held positions with the City – a period of approximately 12 years ending in July 2006.³⁸⁸ He testified that these caucus meetings were initiated by Mayor Farkouh,³⁸⁹ who wanted an opportunity for council to get together to discuss what was going on in the community and to receive progress reports on current projects.³⁹⁰ These discussions were not made public.³⁹¹ Moreover, no minutes were kept of these meetings.³⁹² The only records were whatever notes the chief administrative officer may have taken, if any.³⁹³ The public was not given notice of any of the meetings.³⁹⁴

Members of council and the chief administrative officer were the regular attendees. From time to time, a department head might attend, or a delegation from the public with a specific topic they wished to discuss with council. The chief administrative officer prepared an agenda, based mainly on the suggestions of councillors.³⁹⁵

The caucus meetings were regularly scheduled for the first Monday of the month at 4 p.m. They were held in the committee room,³⁹⁶ not the council chambers, which was the venue for regular council meetings. The regular council meetings took place at 7 p.m. on other Mondays of the month.³⁹⁷ Although the public was not given notice of the meetings, there was some level of awareness of them because of the delegations that, from time to time, asked to speak to council on specific issues.³⁹⁸

There was a divergence of opinion on whether the caucus meetings could have been attended by the public. Mr. Denley gave evidence that the public was not allowed to attend; however, there were sometimes invited guests from the public.³⁹⁹ On some occasions the doors to the committee room were locked during caucus meetings.⁴⁰⁰ The doors to city hall were locked at either 4:30 or 5:00 p.m., as early as half an hour after the meetings started.⁴⁰¹ Syl Allard, who was the chief building official for the City from September 2002 until May 2008,⁴⁰² described a caucus meeting as an in camera council gathering. Mr. Speck similarly referred to a caucus meeting as being in camera in an email he wrote.⁴⁰³ Likewise, Mr. Kennealy from Retirement Living described a caucus meeting as being like an in camera meeting.⁴⁰⁴

Mayor Farkouh, for his part, testified that, to the best of his knowledge, caucus meetings were open to the public. He never saw any members of the public at a caucus meeting, however, unless they had been invited.⁴⁰⁵

The following exchange between Mr. Speck and Commission counsel offers insight into whether caucus meetings were open to the public:

Q. And what was the purpose of discussing things in secret, Sir?

A. ... I don't recall the purpose of it being secrecy. I recall the purpose of it being sharing information ... giving updates on projects that are being worked on. Allowing members of Council to understand and ask questions about where certain things were. *The fact is that they were not open to the public, but the purpose – there wasn't a purpose for them to be behind closed doors.*⁴⁰⁶ [Emphasis added].

And later:

Q. And certainly one feature of a secret – a regular secret meeting was to provide for an opportunity to discuss matters that would not be made public.

A. That would be a feature, yes.⁴⁰⁷

An email written by Lesley Sprague, the City clerk, about a November 7, 2005, meeting shows just how open caucus meetings were:

Subject: Nov 7 – Caucus Meeting

Denley and McTaggart were absent. Shannon from the Standard [a local newspaper] attended. Dan showed his 20 minute BR+E video and re-explained the purpose of the one year project.

We discussed the distribution of draft minutes. The consensus was that the minutes should still be pre-distributed to Council, with a “draft” stamp. The minutes will be distributed with the agenda package and posted after Council has formally adopted them.

Once these two items were dealt with, the Mayor wound up the meeting and welcomed Shannon once again, while escorting him out the door. We all then went to the Mayor’s office to finish off the “meeting”, except for Dan.⁴⁰⁸

Mr. Farkouh accepted that, since it was Ms. Sprague who wrote the email, these events must have taken place as she related. He concluded that this email showed that this particular meeting was not an open meeting, but that barring members of the public was not his practice.⁴⁰⁹

In my opinion, the argument made by some that caucus meetings were open to the public is a disingenuous artifice that might be described as defensively self-serving, particularly at this remove. They were a vehicle designed to meet and discuss matters away from public scrutiny. I note with interest that the City’s written submissions to me in respect of the evidence heard during the first phase of the Inquiry states that caucus meetings were not open to the public.⁴¹⁰

Council received a legal opinion dated April 5, 2007, from the City’s solicitor, Virginia MacLean. It stated that caucus meetings were meetings of council and, therefore, that public notice had to be given about them; the meeting might be closed to the public in certain well-defined situations, but a record of the meeting had to be kept.⁴¹¹ Following this opinion, the City’s procedural by-law was amended to include the term “caucus” within the definition of a “meeting.”⁴¹² According to Mayor Hamilton and Ms. Sprague, no more caucus meetings were held after this amendment.⁴¹³

The relevance of the discussions that took place at the caucus meetings is largely speculative. Because no records were kept, I am not able to determine the extent to which the leaking of the Mall generally, and at the Library specifically, was discussed. Had these discussions taken place at regular council meetings, there would have been a record and, if appropriate, a means of holding persons accountable. In the absence of a record, it is not possible to do so. Was there discussion involving the protection or promotion of special interests? We will never know. All that can be said with certainty is that the electorate was disenfranchised by the process.

Furthermore, this process was part of a disturbing pattern on the part of those charged with the stewardship of the public good in Elliot Lake. Information appears to have been confined to those who were thought to have a “need to know.” Retirement Living management did not tell its own board members everything they knew about the condition of the Mall. Retirement Living board members were told not to tell anyone about issues being considered at the board, even if they were members of City Council. Council members were told that what they learned about Retirement Living at secret meetings with its management could not be disclosed to anyone else. Public officials who had a real reason to know about the physical condition of the Mall were not told about lengthy written complaints from the Library or assessments by the Joint Health and Safety Committee. And issues that were important to public policy were discussed by members of council behind closed doors. In my view, greater sharing of information, both among the decision makers and with the public, would have led to better decision making.

Retirement Living Should Have Invested More in the Roof

The Mall was a major investment for Retirement Living

The purchase of the Algo Mall was a singularly significant event in the history of Retirement Living. It was the first time that Retirement Living ever acquired something other than housing and residential-related properties.⁴¹⁴ The investment in the Mall increased Retirement Living's capital assets by almost 20 percent.⁴¹⁵ It also meant that Retirement Living, which had no debt before this acquisition, had to incur a long-term debt of \$3 million.⁴¹⁶ For the first time, Retirement Living undertook a for-profit enterprise – and in that regard it proved decidedly successful.

As noted previously, Retirement Living was incorporated as a not-for-profit company. Before Retirement Living completed its acquisition of the Mall, it created a for-profit company, 1309900 Ontario Ltd., which carried on business as NorDev,⁴¹⁷ to acquire and own the Mall.

One of the important reasons that Retirement Living created its subsidiary NorDev was to allow the company to maintain its not-for-profit status.⁴¹⁸ Retirement Living is the only shareholder of NorDev. Accordingly, NorDev's after-tax profits would be paid as a dividend to Retirement Living.⁴¹⁹ Further demonstrating the proximity between the two companies, the composition of the Retirement Living Board of Directors has always been identical to the composition of the NorDev Board of Directors.⁴²⁰

NorDev and Retirement Living were in a strong financial position while NorDev owned the Mall

During the time that it owned the Algo Mall, NorDev performed well financially. It enjoyed significant profits and generally increased its retained earnings (a company's net profits that are not distributed to shareholders) year over year. Indeed, NorDev increased its retained earnings from \$157,214 in 1999 to \$601,024 in 2004. Throughout that period, NorDev also maintained significant current assets, which included the company's cash and investments, accounts receivable, prepaid expenses, and tax receivables (but do not include the value of revenue-producing properties). In 2004, NorDev's current assets amounted to \$206,922.⁴²¹

Table 1.6.1 sets out in summary form the figures demonstrating NorDev's strong financial performance from 1999 to 2004.

The purchase of the Algo Mall was a singularly significant event in the history of Retirement Living. It was the first time that Retirement Living ever acquired something other than housing and residential-related properties.

Table 1.6.1 NorDev financial performance, 1999–2004

Year	Total revenue (including Hotel)	Total revenue (from commercial rents)	Retained earnings (net income retained by the corporation)	Current assets ^a
1999 ^b	\$1,387,578	\$1,085,397	\$157,214	\$536,267
2000 ^c	\$2,453,036	\$1,819,443	\$322,313	\$318,628
2001 ^d	\$2,592,479	\$1,846,372	\$385,029	\$265,267
2002 ^e	\$2,555,553	\$1,789,436	\$370,771	\$282,495
2003 ^f	\$2,912,535	\$2,032,123	\$516,614	\$430,557
2004 ^g	\$2,990,943	\$2,054,908	\$601,024	\$206,922

^a Current assets include cash and investments, accounts receivable, prepaid expenses, and tax receivables. They do not include the value of revenue-producing properties.

^b Exhibit 678.

^c Exhibit 680.

^d Exhibit 682.

^e Exhibit 685.

^f Exhibit 686.

^g Exhibit 687.

As can be seen from table 1.6.1, and as Ms. Guertin confirmed in her evidence, NorDev's revenue and retained earnings generally increased year over year.⁴²²

Generally speaking, NorDev's financial performance was not just profitable but regularly surpassed its business plan expectations and goals. For example, at a NorDev board meeting in October 2001, Mr. Kennealy reported that NorDev had achieved an operating profit of \$422,541, compared with a business plan projection of \$289,651. Mr. Kennealy noted that "these results are driven by higher than forecast revenues from the Mall and Hotel / Lodge."⁴²³

Three years later into NorDev's ownership of the Mall, at a NorDev Board of Directors meeting in December 2004, Mr. Kennealy reported that NorDev had achieved an operating profit of \$654,987, compared with a business plan projection of \$454,323 – an excess of \$200,000 from the business plan. Mr. Kennealy further advised that the \$200,000 was attributable to higher than expected revenues and better than expected control of expenses.⁴²⁴

NorDev's parent company, Retirement Living, similarly enjoyed a strong financial performance throughout the time that NorDev owned the Mall. Like NorDev, Retirement Living experienced a financial performance that generally improved year over year. For example, in the first year that NorDev owned the Mall, Retirement Living realized an excess of revenues over expenses (which is synonymous with profits but for the fact that it is a not-for-profit company) of \$722,733. In the year before NorDev sold the Mall, Retirement Living realized an excess of revenues over expenses of \$1,084,668.

Table 1.6.2 clearly sets out Retirement Living's financial performance from 1999 to 2005.

Table 1.6.2 Retirement Living financial performance, 1999–2005

Year	Total revenue	Excess of revenue over expenses	Current assets ^a	Total assets
1999 ^b	\$7,023,735	\$722,733	\$2,417,439	\$24,063,138
2000 ^c	\$6,973,257	\$1,150,446	\$2,760,347	\$24,778,345
2001 ^d	\$7,310,281	\$1,002,830	\$2,389,579	\$21,542,782
2002 ^e	\$7,613,010	\$612,860	\$2,428,049	\$22,102,754
2003 ^f	\$7,979,833	\$999,814	\$3,482,495	\$23,339,420
2004 ^g	\$8,344,905	\$1,084,668	\$3,188,974	\$23,543,276
2005 ^h	\$9,706,697	\$2,207,603 ⁱ	\$6,552,646	\$25,025,373

^a Current assets are primarily made up of cash and investments. They also include accounts receivable, receivables from funding agencies, tax receivables, and prepaid expenses. Current assets do not include capital assets such as revenue-producing properties.

^b Exhibit 1613; the figures are taken from the consolidated financial statement.

^c Exhibit 1613; the figures are taken from consolidated financial statement.

^d The figures are taken from non-consolidated financial statement.

^e Exhibit 1599; the figures are taken from non-consolidated financial statement.

^f Exhibit 1599; the figures are taken from non-consolidated financial statement.

^g Exhibit 688; the figures are taken from non-consolidated financial statement.

^h Exhibit 2313; the figures are taken from non-consolidated financial statement.

ⁱ Retirement Living realized an increase in its cash and investments on hand to \$6,010,642 at year-end 2005 from \$2,849,537 at year-end 2004 attributable to the proceeds on disposal of revenue-producing properties.

NorDev could afford to fix the roof

Before Retirement Living and NorDev completed their acquisition of the Mall, the principals of these two companies were generally aware of the capital expenditure that would be required to fix the roof. The Halsall report in 1999 was clear: the capital costs required to maintain and fix the roof ranged from \$443,000 under the first option to \$776,000 under the second.

The financial statements of NorDev and Retirement Living show that these related companies, individually or together, could have afforded to dedicate significant resources to repairing the roof during the time Retirement Living owned the Mall. Indeed, given the financial wherewithal of each company, it is clear to me that even Halsall's more comprehensive second option of finally installing a waterproof membrane could have been pursued.

In concluding that Retirement Living and NorDev had the capital available to pursue the options set out in the Halsall report, I am supported by Ms. Guertin's similar conclusion on this matter. During her examination by Commission counsel, Ms. Guertin made the following concession:

Q. ... [I]t is clear from looking at the financial performance of both companies that a different strategy could have been employed that would have involved a capital expenditure along the lines as was being proposed by Halsall, a one-time capital expenditure?

A. Halsall gave us two options.

Q. Right.

A. They recommended the first and that is what we implemented. If you are asking is there availability for capital projects? *Yes, the financial statements show that there is availability for capital projects.*⁴²⁵

[Emphasis added].

NorDev and Retirement Living chose to invest in other priorities, including \$1.3 million to attract Zellers, and \$1.4 to \$1.5 million in the golf course

In 2001, the NorDev Board of Directors made the decision to attract the department store Zellers as a tenant. As part of its effort, NorDev paid Zellers a lump sum of \$900,000 as an incentive and paid the then-tenant of the Zellers space, SAAN, a lump sum of \$400,000 to relocate.⁴²⁶ In addition, NorDev invested \$81,100 in the food court area. Mr. Kennealy agreed that these were capital expenditures that the NorDev board decided to make.⁴²⁷ Mr. Kennealy further agreed that NorDev had made the decision to invest its capital in projects *other than fixing the roof*. The following exchange between Commission counsel and Mr. Kennealy is revealing:

Q. [W]ould I be correct in concluding that at least at this stage [October 2001] NorDev had made decisions as to where it would spend its capital and it had decided to spend what capital it had available to it in the areas we have seen, rather than spend them in making capital improvements on the roof deck? That was a decision that the company made?

A. We had made a decision to manage it in the manner we did, yes.⁴²⁸

At the annual meeting of Retirement Living and NorDev held in February 2002, Mr. Farkouh presented the City's plans for a golf course and requested that Retirement Living and/or NorDev commit to supporting the initiative. The amount being requested by the City was \$1.1 million. At the meeting, the NorDev Board of Directors passed a resolution which provided that "the Board supports in principle, a significant contribution in 2004/2005 to the construction of a municipal golf course."⁴²⁹

Mr. Kennealy testified that, ultimately, NorDev invested approximately \$1.4 million to \$1.5 million in the golf course project.⁴³⁰

At a board of directors meeting of both Retirement Living and NorDev, Mr. Kennealy outlined the capital investments that would be undertaken in 2002. These included the renovation in the Hotel, a new Retirement Living customer lounge, and investments into the cosmetic appearance of Denison House (a lodge north of Elliot Lake that NorDev had purchased).⁴³¹

Mr. Kennealy testified that, as these capital expenditures were being made in 2002, he did not recall any major issues with leaks in the Mall. In contrast, as noted above, in November 2002 Ms. Fazekas had complained to Mr. Kennealy of the "deplorable condition" at the Library from the water leaks.⁴³²

NorDev paid Retirement Living over \$2 million

As previously mentioned, Retirement Living and NorDev were (and continue to be) intimately related companies. Among other things, they shared a board of directors, and Retirement Living was NorDev's only shareholder. Retirement Living had loaned NorDev \$2 million, which was secured by two mortgages.* From 1999 until the mortgages were discharged on the sale of the Mall, NorDev paid Retirement Living \$698,398 in interest payments on those loans.⁴³³

• • • • •

* See Exhibit 2334: Retirement Living held a mortgage in the amount of \$1 million with interest payments of 6.5 percent due semi-annually from 1999 to the sale of the Mall, and from 2001 to the sale of the Mall a second mortgage in the amount of \$1 million with interest payments of 7.4 percent due monthly.

In the period that NorDev owned the Mall, NorDev paid management fees to Retirement Living for the services of Mr. Kennealy, Ms. Guertin, and Mr. Quinn.⁴³⁴ These management fees totalled \$392,167 from 1999 to 2005.⁴³⁵ In addition, following the sale of the Mall, NorDev paid Retirement Living a dividend of \$1 million and a commission of \$186,000.⁴³⁶

In total, NorDev paid Retirement Living \$2,276,565 from the time that it acquired the Mall to the sale of the Mall by NorDev in 2005.⁴³⁷

NorDev invested comparatively little to maintain the roof

In stark contrast to NorDev's investments of capital in other projects and its payments to Retirement Living described above, the company spent relatively minuscule amounts on the rooftop parking deck. The only capital investment that NorDev made in the roof was the erection of a steel barricade in 2003 at a cost of \$2,676.⁴³⁸

As I described above, leaks from the rooftop parking deck were an ongoing issue in the Mall during the period of NorDev's ownership. In spite of this problem, NorDev spent relatively paltry amounts of money to maintain the roof.

To determine the amount of money that NorDev expended on the maintenance of the parking deck during the period it owned the Mall, Ms. Guertin prepared for the Commission an analysis in which she estimated that NorDev likely expended approximately \$323,139 on maintenance of the rooftop parking deck.⁴³⁹ Even accepting Ms. Guertin's analysis as being accurate, NorDev recovered more than half of these costs from the tenants of the Mall in the form of common area charges added to the tenants' rent.⁴⁴⁰

NorDev and Retirement Living should have invested in the rooftop parking deck

The NorDev financial statements constitute clear evidence that it had the financial wherewithal to make meaningful capital expenditures to repair the rooftop parking deck – and perhaps to repair it permanently. As well, NorDev's parent company, Retirement Living, from whom it could readily borrow money, exhibited a consistently strong financial position throughout the time of its ownership of the Mall.

I described above some of the capital investments NorDev undertook while it owned the Mall, including the significant capital expenditures it made to attract Zellers to the Mall and to help build the golf course in Elliot Lake. These expenditures are manifest examples of the capital accessible to NorDev, but which it consistently dedicated to priorities other than repairing the roof.

I find that the amount NorDev ultimately allocated to the repair and maintenance of the roof – no more than \$160,000, net of common area charges recovered from the tenants – to be woefully low, particularly when juxtaposed against NorDev's other major expenditures and its strong financial position generally. In retrospect, these maintenance expenditures seem tragically inadequate.

The NorDev financial statements constitute clear evidence that it had the financial wherewithal to make meaningful capital expenditures to repair the rooftop parking deck – and perhaps to repair it permanently.

It is not my mandate, nor am I qualified, to say how Retirement Living and NorDev should have run their businesses. The impressive financial condition of both companies during the time that NorDev owned the Mall is doubtlessly attributable to their sound management and astute business practices. Nevertheless, I believe I can fairly comment on the decisions that were made in connection with the rooftop parking deck. In this regard, I find that the principals of NorDev and Retirement Living had their priorities wrong. If they had not invested in business opportunities to the exclusion of adequately repairing and maintaining the roof, perhaps the tragedy that befell Elliot Lake on June 23, 2012, could have been avoided. Even after making these investments, NorDev was evidently in a position to dedicate substantial monies to repair and maintain the rooftop parking deck. Regrettably, it chose not to make the needed repairs.

Notes

- ¹ Farkouh testimony, May 15, 2013, pp. 10052–3.
- ² Bauthus testimony, March 25, 2013, pp. 2877–80.
- ³ Farkouh testimony, May 2, 2013, pp. 7964–6.
- ⁴ Bauthus testimony, March 25, 2013, p. 2883.
- ⁵ Farkouh testimony, May 2, 2013, pp. 7964–6.
- ⁶ Farkouh testimony, May 15, 2013, pp. 10053–4.
- ⁷ Exhibit 2143; see also Exhibit 2144.
- ⁸ Kennealy testimony, April 16, 2013, pp. 5165–6.
- ⁹ Farkouh testimony, May 2, 2013, pp. 7966–7.
- ¹⁰ Farkouh testimony, May 2, 2013, pp. 7966–7.
- ¹¹ Farkouh testimony, May 2, 2013, pp. 7966–8.
- ¹² Farkouh testimony, May 2, 2013, pp. 7966–8.
- ¹³ Exhibits 2143, 2144.
- ¹⁴ Kennealy testimony, April 16, 2013, p. 5166; Exhibit 2143.
- ¹⁵ Bauthus testimony, March 25, 2013, pp. 2885–7.
- ¹⁶ Kennealy testimony, April 16, 2013, pp. 5179–81.
- ¹⁷ Farkouh testimony, May 2, 2013, pp. 7973–4.
- ¹⁸ Farkouh testimony, May 2, 2013, p. 7974.
- ¹⁹ Kennealy testimony, April 16, 2013, p. 5184.
- ²⁰ Kennealy testimony, April 16, 2013, pp. 5177–9.
- ²¹ Bauthus testimony, March 25, 2013, pp. 2880–1.
- ²² Exhibit 2146.
- ²³ Guertin testimony, April 19, 2013, pp. 5822–3.
- ²⁴ Quinn testimony, April 4, 2013, pp. 4809–10.
- ²⁵ Bauthus testimony, March 25, 2013, pp. 2883–4.
- ²⁶ Bauthus testimony, March 25, 2013, p. 2884.
- ²⁷ Kennealy testimony, April 16, 2013, pp. 5189–92.
- ²⁸ Farkouh testimony, May 2, 2013, pp. 7968–70.
- ²⁹ Exhibit 2146.
- ³⁰ Exhibit 2146.
- ³¹ Kennealy testimony, April 16, 2013, pp. 5191–2.
- ³² Kennealy testimony, April 16, 2013, p. 5191.
- ³³ Farkouh testimony, May 2, 2013, pp. 7976–7.
- ³⁴ Farkouh testimony, May 2, 2013, pp. 7981–2.
- ³⁵ Hamilton testimony, July 8, 2013, pp. 14968–70.
- ³⁶ Hamilton testimony, July 8, 2013, pp. 14957–8.
- ³⁷ Hamilton testimony, July 8, 2013, pp. 14957–9; Exhibit 4213.
- ³⁸ Exhibit 4213.
- ³⁹ Denley testimony, June 4, 2013, pp. 12846–50.
- ⁴⁰ Denley testimony, June 4, 2013, pp. 12846–7.
- ⁴¹ Collett testimony, May 23, 2013, pp. 11090–1.
- ⁴² Exhibit 3651; Collett testimony, May 23, 2013, pp. 11271–3.
- ⁴³ See supplementary submissions of the City of Elliot Lake, May 29, 2014, pp. 3–4.
- ⁴⁴ Exhibit 4215.
- ⁴⁵ Farkouh testimony, May 2, 2013, p. 7977.
- ⁴⁶ Farkouh testimony, May 2, 2013, pp. 8126–7.
- ⁴⁷ Kennealy testimony, April 16, 2013, pp. 5214–15.
- ⁴⁸ Kennealy testimony, April 16, 2013, p. 5221.
- ⁴⁹ Farkouh testimony, May 2, 2013, pp. 8127–8.
- ⁵⁰ Kennealy testimony, April 16, 2013, pp. 5214–17.
- ⁵¹ Kennealy testimony, April 16, 2013, pp. 5222–3.
- ⁵² Exhibit 2148; Kennealy testimony April 16, 2013, pp. 5231–2.
- ⁵³ Bauthus testimony, March 26, 2013, pp. 2981–2.
- ⁵⁴ Farkouh testimony, May 2, 2013, pp. 8129–31.
- ⁵⁵ Exhibit 3224.
- ⁵⁶ Farkouh testimony, May 2, 2013, pp. 8129–31.
- ⁵⁷ Kennealy testimony, April 16, 2013, pp. 5239–41.
- ⁵⁸ Farkouh testimony, May 2, 2013, p. 8131.
- ⁵⁹ Bauthus testimony, March 26, 2013, p. 2983.
- ⁶⁰ Kennealy testimony, April 16, 2013, p. 5239.
- ⁶¹ Bauthus testimony, March 26, 2013, p. 2984.
- ⁶² Exhibit 2098.
- ⁶³ Bauthus testimony, March 26, 2013, p. 2990.
- ⁶⁴ Kennealy testimony, April 16, 2013, pp. 5245–6.
- ⁶⁵ Kennealy testimony, April 16, 2013, pp. 5253–8.
- ⁶⁶ Leistner testimony, March 27, 2013, pp. 3450–1.
- ⁶⁷ Bauthus testimony, March 26, 2013, pp. 2990–2.
- ⁶⁸ Bauthus testimony, March 26, 2013, pp. 2992–3.
- ⁶⁹ Bauthus testimony, March 26, 2013, p. 2994; Farkouh testimony May 2, 2013, p. 8135.
- ⁷⁰ Bauthus testimony, March 26, 2013, pp. 3121–2.
- ⁷¹ Exhibit 3226.
- ⁷² Exhibit 3226.
- ⁷³ Exhibit 3226.
- ⁷⁴ Exhibit 3270.
- ⁷⁵ Exhibits 2150, 2151.
- ⁷⁶ Exhibit 390.
- ⁷⁷ Exhibit 390.
- ⁷⁸ Exhibits 3280, 3281, 3282.
- ⁷⁹ Exhibit 2089.
- ⁸⁰ Leistner testimony, March 27, 2013, pp. 3454–5.
- ⁸¹ Exhibit 874.
- ⁸² Guertin testimony, April 19, 2013, pp. 5847–8.
- ⁸³ Guertin testimony, April 19, 2013, pp. 5843–6.
- ⁸⁴ Exhibit 874.
- ⁸⁵ Guertin testimony, April 19, 2013, pp. 5859–60.
- ⁸⁶ Exhibit 874.
- ⁸⁷ Nicholls testimony, April 30, 2013, pp. 7267–68.
- ⁸⁸ Guertin testimony, April 19, 2013, pp. 5862–3.
- ⁸⁹ Kennealy testimony, April 17, 2013, pp. 5311–12.
- ⁹⁰ Exhibit 3227.
- ⁹¹ Exhibit 3227.
- ⁹² Exhibit 3227.
- ⁹³ Exhibit 3227.
- ⁹⁴ Kennealy testimony, April 17, 2013, p. 5330.
- ⁹⁵ Bauthus testimony, March 26, 2013, pp. 2993–4, 3015.
- ⁹⁶ Exhibit 249.
- ⁹⁷ Exhibit 249.
- ⁹⁸ Bauthus testimony, March 26, 2013, pp. 3027–8.
- ⁹⁹ Burling testimony, April 2, 2013, pp. 3852–3.
- ¹⁰⁰ Burling testimony, April 2, 2013, pp. 3858–9.
- ¹⁰¹ Exhibit 3233.
- ¹⁰² Exhibit 3233.
- ¹⁰³ Bauthus testimony, March 26, 2013, p. 3032.
- ¹⁰⁴ Kennealy testimony, April 17, 2013, pp. 5342–3.
- ¹⁰⁵ Farkouh testimony, May 2, 2013, pp. 8158–60.
- ¹⁰⁶ Bauthus testimony, March 26, 2013, pp. 3038–40.
- ¹⁰⁷ Kennealy testimony, April 17, 2013, pp. 5286–9.
- ¹⁰⁸ Guertin testimony, April 19, 2013, pp. 5879–80.
- ¹⁰⁹ Farkouh testimony, May 2, 2013, p. 8164.
- ¹¹⁰ Kennealy testimony, April 17, 2013, pp. 5286–90.
- ¹¹¹ Exhibit 3234.
- ¹¹² Farkouh testimony, May 2, 2013, pp. 8161–2.
- ¹¹³ Bauthus testimony, March 26, 2013, p. 3036.
- ¹¹⁴ Speck testimony, April 24, 2013, pp. 6702–5.

- ¹¹⁵ See supplementary submissions of the City of Elliot Lake, May 29, 2014, pp. 8–9.
- ¹¹⁶ Exhibit 2153.
- ¹¹⁷ Guertin testimony, April 19, 2013, pp. 5881–3.
- ¹¹⁸ Guertin testimony, April 19, 2013, pp. 5828–9.
- ¹¹⁹ Nicholls testimony, April 30, 2013, pp. 7274–5.
- ¹²⁰ Exhibit 874.
- ¹²¹ Nicholls testimony, April 30, 2013, pp. 7276–7.
- ¹²² Exhibit 69.
- ¹²³ Nicholls testimony, April 30, 1998, p. 7285.
- ¹²⁴ Nicholls testimony, April 30, 1998, p. 7297.
- ¹²⁵ Guertin testimony, April 19, 2013, p. 5892.
- ¹²⁶ Nicholls testimony, April 30, 1998, pp. 7286–7.
- ¹²⁷ Exhibit 874.
- ¹²⁸ Guertin testimony, April 19, 2013, pp. 5897–9.
- ¹²⁹ Exhibit 69.
- ¹³⁰ Exhibit 874.
- ¹³¹ Luciw testimony, April 10, 2013, pp. 4741–2.
- ¹³² Luciw testimony, April 10, 2013, pp. 4747–8.
- ¹³³ Luciw testimony, April 10, 2013, pp. 4747–9.
- ¹³⁴ Leistner testimony, March 27, 2013, pp. 3476–9.
- ¹³⁵ Kennealy testimony, April 17, 2013, pp. 5868–9.
- ¹³⁶ Luciw testimony, April 10, 2013, pp. 4726–7.
- ¹³⁷ Exhibit 394.
- ¹³⁸ Leistner testimony, March 27, 2013, pp. 3485–6.
- ¹³⁹ Exhibit 3274.
- ¹⁴⁰ Exhibit 721.
- ¹⁴¹ Kennealy testimony, April 17, 2013, pp. 5401–4.
- ¹⁴² Exhibit 2157.
- ¹⁴³ Kennealy testimony, April 17, 2013, pp. 5404–5.
- ¹⁴⁴ Farkouh testimony, May 2, 2013, pp. 8166–7.
- ¹⁴⁵ Exhibit 2090.
- ¹⁴⁶ Exhibit 2091.
- ¹⁴⁷ Exhibit 2090.
- ¹⁴⁸ Exhibit 2158.
- ¹⁴⁹ Kennealy testimony, April 17, 2013, pp. 5428–30.
- ¹⁵⁰ Guertin testimony, April 19, 2013, pp. 5915–17.
- ¹⁵¹ Guertin testimony, April 19, 2013, p. 5873.
- ¹⁵² Bauthus testimony, March 26, 2013, p. 3048.
- ¹⁵³ Guertin testimony, April 19, 2013, pp. 5916–18.
- ¹⁵⁴ Bauthus testimony, March 26, 2013, p. 3048.
- ¹⁵⁵ Exhibit 2324.
- ¹⁵⁶ Kennealy testimony, April 17, 2013, p. 5426.
- ¹⁵⁷ Kennealy testimony, April 17, 2013, p. 5433.
- ¹⁵⁸ Kennealy testimony, April 17, 2013, p. 5436.
- ¹⁵⁹ Kennealy testimony, April 17, 2013, pp. 5434–5.
- ¹⁶⁰ Guertin testimony, April 19, 2013, pp. 5919–20.
- ¹⁶¹ Exhibits 2159, 463.
- ¹⁶² Exhibit 3284.
- ¹⁶³ Exhibit 2092.
- ¹⁶⁴ Kennealy testimony, April 17, 2013, pp. 5413–14, 5419.
- ¹⁶⁵ Kennealy testimony, April 17, 2013, pp. 5436–7.
- ¹⁶⁶ Exhibit 66.
- ¹⁶⁷ Exhibit 66.
- ¹⁶⁸ Exhibit 66.
- ¹⁶⁹ Exhibit 66.
- ¹⁷⁰ Nicholls testimony, April 30, 2013, pp. 7328–9.
- ¹⁷¹ Kennealy testimony, April 17, 2013, pp. 5352–3.
- ¹⁷² Kennealy testimony, April 17, 2013, p. 5347.
- ¹⁷³ Guertin testimony, April 19, 2013, pp. 5952–3.
- ¹⁷⁴ Pigeau testimony, March 22, 2013, pp. 2625–6.
- ¹⁷⁵ Kennealy testimony, April 17, 2013, pp. 5446–8.
- ¹⁷⁶ Kennealy testimony, April 17, 2013, pp. 5451–5.
- ¹⁷⁷ Guertin testimony, April 19, 2013, pp. 5933–5.
- ¹⁷⁸ Farkouh testimony, May 2, 2013, p. 8186.
- ¹⁷⁹ Kennealy testimony, April 17, 2013, pp. 5462–4.
- ¹⁸⁰ Exhibit 3240.
- ¹⁸¹ Exhibit 2094.
- ¹⁸² Exhibit 3276.
- ¹⁸³ Exhibit 2093.
- ¹⁸⁴ Kennealy testimony, April 17, 2013, pp. 5459–60.
- ¹⁸⁵ Guertin testimony, April 19, 2013, pp. 5941–3.
- ¹⁸⁶ Guertin testimony, April 19, 2013, pp. 5952–3.
- ¹⁸⁷ Guertin testimony, April 19, 2013, pp. 5946–8.
- ¹⁸⁸ Kennealy testimony, April 17, 2013, pp. 5469–70.
- ¹⁸⁹ Guertin testimony, April 19, 2013, p. 5947.
- ¹⁹⁰ Exhibit 2168.
- ¹⁹¹ Guertin testimony, April 19, 2013, p. 5943.
- ¹⁹² Kennealy testimony, April 17, 2013, pp. 5474–5.
- ¹⁹³ Exhibit 2168.
- ¹⁹⁴ Guertin testimony, April 19, 2013, pp. 5944–5.
- ¹⁹⁵ Exhibit 2168.
- ¹⁹⁶ Exhibit 1525.
- ¹⁹⁷ Exhibit 710.
- ¹⁹⁸ Leistner testimony, March 27, 2013, pp. 3519–20.
- ¹⁹⁹ Kennealy testimony, April 17, 2013, pp. 5501–2.
- ²⁰⁰ Exhibit 710.
- ²⁰¹ Exhibit 00007-00002.
- ²⁰² Exhibit 00007-00002.
- ²⁰³ Kennealy testimony, April 17, 2013, pp. 5503–4.
- ²⁰⁴ Kennealy testimony, April 17, 2013, p. 5507.
- ²⁰⁵ Guertin testimony, April 19, 2013, pp. 5956–7.
- ²⁰⁶ Exhibit 2182.
- ²⁰⁷ Guertin testimony, April 19, 2013, pp. 5961–5.
- ²⁰⁸ Kennealy testimony, April 17, 2013, pp. 5513–14.
- ²⁰⁹ Guertin testimony, April 19, 2013, pp. 5964–5.
- ²¹⁰ Exhibit 711.
- ²¹¹ Kennealy testimony, April 17, 2013, pp. 5520–1.
- ²¹² Exhibit 2183.
- ²¹³ Exhibit 1466.
- ²¹⁴ Exhibit 70.
- ²¹⁵ Kennealy testimony, April 17, 2013, pp. 5532–3.
- ²¹⁶ Exhibit 70.
- ²¹⁷ Kennealy testimony, April 17, 2013, pp. 5527–30.
- ²¹⁸ Exhibit 70.
- ²¹⁹ Kennealy testimony, April 18, 2013, pp. 5555–7, 5564.
- ²²⁰ Kennealy testimony, April 18, 2013, pp. 5564–7.
- ²²¹ Speck testimony, April 24, 2013, pp. 6740–1, 6732.
- ²²² Speck testimony, April 24, 2013, p. 6738.
- ²²³ Exhibit 3252.
- ²²⁴ Exhibit 8-4.
- ²²⁵ Buckley testimony, April 8, 2013, p. 4417.
- ²²⁶ Truman testimony, April 9, 2013, p. 4513.
- ²²⁷ Exhibit 70.
- ²²⁸ Exhibit 70.
- ²²⁹ Exhibit 70.
- ²³⁰ Exhibit 70.
- ²³¹ Exhibit 70.

- 232 Exhibit 66, p. 56.
- 233 Truman testimony, April 9, 2013, pp. 4593–4.
- 234 Truman testimony, April 9, 2013, pp. 4593–4.
- 235 Exhibit 70.
- 236 Exhibit 70.
- 237 Exhibit 70.
- 238 Exhibit 70.
- 239 Exhibit 71.
- 240 Buckley testimony, April 8, 2013, pp. 4427–8.
- 241 Buckley testimony, April 8, 2013, p. 4434.
- 242 Buckley testimony, April 8, 2013, pp. 4429–30.
- 243 Buckley testimony, April 8, 2013, p. 4400; Truman testimony, April 9, 2013, p. 4600.
- 244 Truman testimony, April 9, 2013, pp. 4603–4.
- 245 Nicholls testimony, April 30, 2013, pp. 7330–1.
- 246 Nicholls testimony, April 30, 2013, pp. 7337–9.
- 247 Buckley testimony, April 8, 2013, pp. 4446–7.
- 248 Exhibit 70.
- 249 Exhibit 69.
- 250 Exhibit 70.
- 251 Truman testimony, April 9, 2013, p. 4601.
- 252 Truman testimony, April 9, 2013, pp. 4601–2.
- 253 NORR Panel testimony (Saffarini), May 29, 2013, pp. 12337–8; (Hughes) May 30, 2013, pp. 12600–1.
- 254 Truman testimony, April 9, 2013, p. 4618.
- 255 Exhibit 71.
- 256 Truman testimony, April 9, 2013, p. 4671.
- 257 Buckley testimony, April 8, 2013, pp. 4397–8.
- 258 Truman testimony, April 9, 2013, p. 4645.
- 259 Truman testimony, April 9, 2013, pp. 4617–18; Buckley testimony, April 8, 2013, pp. 4405–6.
- 260 NORR testimony, May 30, 2013, pp. 12589–90.
- 261 Quinn testimony, April 11, 2013, pp. 4876–8.
- 262 Quinn testimony, April 16, 2013, p. 5143.
- 263 Quinn testimony, April 16, 2013, pp. 5143–4.
- 264 Quinn testimony, April 11, 2013, p. 4889.
- 265 Quinn testimony, April 16, 2013, p. 5142.
- 266 Exhibit 70.
- 267 Kennealy testimony, April 17, 2013, pp. 5540–1.
- 268 Snow testimony, April 3, 2013, p. 3973.
- 269 Quinn testimony, April 11, 2013, pp. 4905–6.
- 270 Quinn testimony, April 16, 2013, pp. 4978–9.
- 271 Truman testimony, April 9, 2013, p. 4604.
- 272 Quinn testimony, April 11, 2013, pp. 4923–4.
- 273 Quinn testimony, April 11, 2013, pp. 4924–6; Exhibit 2181.
- 274 Quinn testimony, April 11, 2013, p. 4927.
- 275 Quinn testimony, April 11, 2013, pp. 4927–9.
- 276 Quinn testimony, April 11, 2013, p. 4951.
- 277 Quinn testimony, April 11, 2013, pp. 4937–8.
- 278 Cloughley testimony, March 26, 2013, p. 3197.
- 279 Cloughley testimony, March 26, 2013, p. 3198.
- 280 Quinn testimony, April 11, 2013, p. 4931.
- 281 Exhibit 11-13.
- 282 Fazekas testimony, March 12, 2013, p. 1208.
- 283 Kennealy testimony, April 18, 2013, pp. 5618–20.
- 284 Exhibit 2181, p. 335.
- 285 Quinn testimony, April 11, 2013, pp. 4941–2.
- 286 Exhibit 2181, p. 339.
- 287 Quinn testimony, April 11, 2013, pp. 4944–5.
- 288 Exhibit 2181, p. 345.
- 289 Quinn testimony, April 11, 2013, p. 4948.
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- 291 Exhibit 13-4, p. 004.
- 292 Exhibit 13-5.
- 293 Quinn testimony, April 11, 2013, p. 4950; Snow testimony, April 3, 2012, p. 3975.
- 294 Kennealy testimony, April 18, 2013, pp. 5616–17.
- 295 Kennealy testimony, April 18, 2013, p. 5618.
- 296 Quinn testimony, April 11, 2013, pp. 4880–1.
- 297 Kennealy testimony, April 18, 2013, pp. 5616–17.
- 298 Hamilton testimony, July 8, 2013, pp. 149867–9.
- 299 Quinn testimony, April 11, 2013, p. 4952.
- 300 Bruce Caughill testimony, May 10, 2013, pp. 9080–1.
- 301 Bruce Caughill testimony, May 10, 2013, p. 9070.
- 302 Bruce Caughill testimony, May 10, 2013, pp. 9070–2.
- 303 Bruce Caughill testimony, May 10, 2013, pp. 9077–8.
- 304 Bruce Caughill testimony, May 10, 2013, p. 9073.
- 305 Bruce Caughill testimony, May 10, 2013, p. 9269.
- 306 Exhibit 74.
- 307 Bruce Caughill testimony, May 10, 2013, pp. 9112–13.
- 308 Bruce Caughill testimony, May 10, 2013, pp. 9104–7.
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- 329 Regan testimony, June 5, 2013, p. 13013.
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- 332 Exhibit 6-6.
- 333 Exhibit 6-7.
- 334 Exhibits 6-6, 6-7.
- 335 Exhibits 6-6, 6-7.
- 336 Exhibits 6-6, 6-7.
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- 338 Exhibit 6-8.
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- 342 Exhibit 11-3.
- 343 Fazekas testimony, March 12, 2013, pp. 1175–7.
- 344 Bauthus testimony, March 26, 2013, pp. 2953–5.
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- 346 Exhibit 11-3.
- 347 Fazekas testimony, March 12, 2013, p. 1187.
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- 350 Bauthus testimony, March 26, 2013, p. 2959.
- 351 Bauthus testimony, March 26, 2013, p. 2971.
- 352 Speck testimony, April 24, 2013, p. 6654.
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- 355 Bauthus testimony, March 26, 2013, pp. 2963–4, 2971.
- 356 Pigeau testimony, March 22, 2013, pp. 2634–44.
- 357 Farkouh testimony, May 7, 2013, pp. 8234–5.
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- 359 Bauthus testimony, March 26, 2013, p. 2962.
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