

SECTION **V**

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**The Eastwood Years  
2005–12**

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• *Eastwood owner Bob Nazarian repeatedly promised the*  
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• *City and his tenants that the leaking roof of the Mall*  
•  
• *would be fixed, and he appeared to take steps to do so.*  
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• *Unfortunately, that appearance was not a reality. Although*  
•  
• *he hired – or announced he had hired – a number of*  
•  
• *consultants and contractors, he resiled from contracts to*  
•  
• *which he had agreed, fired the people he had hired, or*  
•  
• *failed to move forward after receiving partial advice.*  
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## 2005: Purchase of Mall and Nazarian Finances

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## Eastwood Mall Inc. and the Nazarian family

Eastwood Mall Inc. (Eastwood) was the owner of the Algo Centre on June 23, 2012, the day of the collapse. It bought the Mall in August 2005, and all who testified on the ownership reported that the corporation was wholly owned by Bob Nazarian.

### Bob Nazarian's background and business interests

Bob Nazarian was born in Iran on July 23, 1945. He worked there as a machinist and an industrial manufacturer and was involved in building water pumps and hydraulic digging machines. He came to Canada in 1971 and lived in Montreal for 15 years, working as a tool and die maker and a plastic mould maker. While in Montreal, he co-owned a hydraulic manufacturing company and, at some point, he sold his interest in that company to his brother. Bob Nazarian moved to Hamilton, Ontario, where he invested in several apartment buildings in different cities and began developing shopping centres. In the beginning, he purchased shopping centres outside city centres and renovated them. He testified that he would bring in new tenants, increase the shopping centre's income, and then sell it and buy another. At the same time, he was also involved with some land development and construction work.<sup>1</sup>

### Members of the Nazarian family

Bob Nazarian is married to Irene Nazarian, and they have two children, Levon and Armen. (Armen, the younger son, was a student throughout the time that Eastwood owned the Algo Centre.) Levon Nazarian was born in 1983. He graduated from York University, Toronto, in 2007 with a bachelor of arts in public policy and business management. He was licensed as a real estate agent in 2009 and as a real estate broker in 2012. Since June 27, 2012, he has run his own brokerage firm in Richmond Hill, Ontario, Re/Max Infinite Inc. He testified that he is not an officer of Eastwood and does not work for that corporation directly but has worked for it indirectly as a real estate broker and leasing manager. As is described later in this Report, he also attempted to obtain financing for it and managed the project to develop a new parking lot. He was heavily involved in the attempts to sell the Algo Centre.<sup>2</sup>

### Bob and Levon Nazarian as witnesses and documents produced by and for them are not credible

Neither Bob Nazarian nor his son Levon was a credible witness. They both testified for an extensive period of time – Bob Nazarian over seven days, and Levon over four days. Faced with challenging questions, they frequently gave evasive answers, professing not to recall events or facts in circumstances where they ought to have been able to. They each gave evidence that contradicted their own earlier evidence. Bob Nazarian often refused to give a responsive answer to questions, stating either “no comment” or “it is possible” to questions requiring either a “yes” or “no” answer. Their evidence frequently was in conflict with contemporaneous documentary evidence produced by others. Bob Nazarian, in particular, was sometimes defiant and truculent in the witness box. Documents produced by or at the direction of both men were themselves contradictory. Frequently, information on the same subject differed between documents, leading any fair-minded observer to justifiably suspect a self-serving purpose.

In addition, throughout the period of their involvement with the Mall, the Nazarians engaged in conduct that was often, in my opinion, deliberately deceptive and unscrupulous. Numerous instances of such behaviour will be described later in this section. That aspect of their character reinforces my generally dismal view of their trustworthiness as witnesses. Without reliable corroboration, I find it difficult to rely on their evidence, unless it amounts to an admission against their own interests or for other good and articulable reason. Where their evidence is in conflict with evidence of another apparently credible witness, I have, unless stated otherwise, preferred the evidence of the other witness. In my view, it would be unsafe to do otherwise.

### **Eastwood Mall Inc., its shareholders, and related corporations**

Eastwood Mall Inc. is the company that owns the Algo Centre. Both Bob Nazarian and Levon Nazarian testified that Bob Nazarian is and has always been the sole shareholder of that company. He is also its president.<sup>3</sup>

Both Bob Nazarian and Levon Nazarian testified that Yorkdale Group Inc. and Yorkdale Centre Inc. are corporations owned by four equal shareholders: Bob Nazarian, Irene Nazarian, Levon Nazarian, and Armen Nazarian.<sup>4</sup> The 2009 income tax return for Yorkdale Group Inc., however, showed Bob Nazarian as the sole shareholder.<sup>5</sup> When confronted with this discrepancy, Bob Nazarian stated that he was at that time the only shareholder in that company and in Yorkdale Centre Inc. and that, sometime after, he gave one quarter of the shares in each company to each family member. He stated his earlier testimony had been a mistake.<sup>6</sup> He also testified that his son Levon was “virtually C.E.O. of those companies” reporting to him.<sup>7</sup>

Both Bob and Levon Nazarian testified that another corporation, Westgate Inc., at some point amalgamated into Yorkdale Centre Inc. Levon Nazarian could not recall whether Westgate Inc. had the same four shareholders as Yorkdale Centre Inc. Bob Nazarian testified that Westgate Inc. was owned by him, his wife, and his two sons in equal shares.<sup>8</sup>

I am not able to reach a conclusion about the precise ownership interest in each of these corporations at any point in time. However, as I set out below, Bob Nazarian treated all of these corporations as affiliated. The money in each, and his personal assets, were available to any of them.

### **2005: NorDev / Retirement Living sold a “black hole” to Eastwood**

The evidence before me was overwhelming that the Mall leaked virtually from the day it opened. Although the leaks never completely stopped, the Mall’s appearance nevertheless improved somewhat with its second owner, Retirement Living, through its for-profit subsidiary NorDev. The same, unfortunately, could not be said of the Mall’s third and last owner, Eastwood. As I describe below, the Mall’s demise can certainly be partially attributable to Bob Nazarian. However, questions were raised during the Inquiry as to whether Mr. Nazarian was duped into buying the property without having been provided with the true facts about its physical condition. As I explain further below, while I face conflicting evidence on this difficult and somewhat tangled issue, I find that Mr. Nazarian’s version of events on this issue is the more plausible one.

## Retirement Living decides to sell to get its money out

Richard Kennealy, general manager of Retirement Living, testified that the decision to put the Mall on the market was made following internal discussions in the fall of 2004 and not as result of expressions of interest. Retirement Living was involved in a lot of projects in the community, including the golf course, the lakefront/waterfront development project, and a nursing home. Management of the Hotel required significant resources and manpower, including attracting events to the community.<sup>9</sup> The Retirement Living managers were all very busy. Mr. Kennealy testified:

We were trying to move on to other things. It sort of wasn't our goal to be in the retail mall business forever. Many things that we have gotten involved with the community over the ... 20 years that I have been here, we would get involved in something, try and ... fix it, try and get it back on track, try to get it moving in a positive direction, and then if things are going well, then move on.

And the Mall was very much that type of a situation. And so it was resource consumption in terms of human resources. We felt it an appropriate time to recapture some of the financial resources.<sup>10</sup>

Al Collett, then a representative of the Chamber of Commerce on the board of directors of Retirement Living, and Richard Hamilton, who was a councillor at the time and the City representative on the board, both testified that Retirement Living wanted to see the Mall return to a private sector owner because there was some concern among members of the board that this not-for-profit corporation was competing with local businesses. The board members wanted Retirement Living to focus on its core activities.<sup>11</sup>

Retirement Living believed it had fixed the problem it had identified with the Mall – which Mr. Kennealy identified not as the leaks but as the “retail mix.” He testified that Retirement Living had brought in better department stores, such as Zellers and A Buck or Two, and had ensured that the majority of the leases extended over a five-year period and beyond. Retirement Living felt that the market was such that it was a good time to sell the Mall.<sup>12</sup>

**Retirement Living believed it had fixed the problem it had identified with the Mall – which Mr. Kennealy identified not as the leaks but as the “retail mix.”**

On March 3, 2005, at the annual meeting of NorDev, Mr. Kennealy described the good financial performance of the Mall and the “exceptional” performance of the Algo Inn. He presented to the board the 2005 business plan in which he advised that one of the 2005 objectives was to “explore the opportunities for the sale of NorDev’s retail mall holdings.”<sup>13</sup> He further informed the board:

As the board knows, we are exploring opportunities for the sale of the mall not including the hotel. We have had one strong expression of interest and we anticipate a formal offer to be made in the near future. As with any sale, this offer may not result in an outcome satisfactory to both parties. We therefore will be going to market aggressively in Mid-March. For your review, I have included a copy of the package we will use.<sup>14</sup>

Mayor George Farkouh, who as one of City Council’s appointees to the board was present at the meeting, testified that he thought the potential sale was a positive move because it would bring new investors into the community and allow Retirement Living to free up its financial and human resources for other projects. He thought Retirement Living had increased the value of the Mall during its time by bringing in Zellers, signing long-term leases with other major tenants, and improving the looks of the Mall. As the mayor and as a member of the board, he agreed with those expenditures.<sup>15</sup>

## April 2005: Bob Nazarian made an offer to purchase the Mall without much consideration

On March 31, 2005, Bob Nazarian signed a non-disclosure covenant in which he agreed not to disclose any of the confidential information provided to him by Retirement Living and NorDev about the Algo Mall. Mr. Nazarian testified that he learned about the possibility of buying the Algo Mall from his friend, Michael Sobhi, a real estate agent. Mr. Sobhi informed him that the income of the Algo Mall was appealing, as were the anchor tenants, such as Zellers, Sobeys, the Elliot Lake Public Library, and Dollarama.<sup>16</sup> Mr. Nazarian further testified that, on April 1, 2005, he visited the Mall and did not see any evidence of leakage inside the Mall: he saw no leaks, no water buckets, and no tarps.<sup>17</sup> Ken Snow (the Mall's maintenance supervisor during the Algocen and Retirement Living ownership periods) testified that, at the time of sale of the Mall to Eastwood, the leak situation was "generally okay."<sup>18</sup>

Bob Nazarian testified that, on the same day, he met with Mr. Kennealy, Rhona Guertin (Retirement Living's finance and business development manager), and Mr. Sobhi (who was acting as Mr. Nazarian's agent) at the Retirement Living offices in the Mall. He was given a sales brochure which described, among other things, the lease profile of the Mall and the capital improvements made to it. The brochure made no reference to the roof of the Mall or the leaks.<sup>19</sup> He testified that Mr. Kennealy and Ms. Guertin did not mention any issues with the Mall and were very positive about the Mall's future growth. His evidence was that he asked if there were any problems with the Mall:

I told them if there is any kind of documents, any kind of information you can give me or any defect in the mall, I would like to know now rather than later. They said that the mall is in sound situation, there is nothing wrong with that.<sup>20</sup>

According to Bob Nazarian, no one told him prior to entering into the agreement of purchase and sale with Retirement Living that the building had leaked from the date it was built. When he entered into that agreement, he had no information to suggest that work would be necessary on the parking roof deck of the Mall.<sup>21</sup> He testified that he asked Mr. Kennealy and Ms. Guertin at the April 1, 2005, meeting whether they had any engineering reports, including any structural reports, detailing any kind of defect with the Mall, and that he was not provided with any reports.<sup>22</sup> In response to questions from his own counsel, Mr. Nazarian testified that when he examined the Mall, he saw "improvements" that he wanted to make to the property, such as painting it. He also wanted to adjust the slope of the ground level parking lot by Ontario Street and renovate and improve the parking conditions.<sup>23</sup>

On April 1, 2005, after his meeting with Mr. Kennealy and Ms. Guertin, Bob Nazarian signed an offer to purchase the Mall for \$8.2 million. The offer was made conditional on several things, including:

- the purchaser's approval of inspection results of the property by a qualified inspector (clause 3(c));
- "All municipal and other governmental requirements and the requirements of the insurers of the premises being complied with as of closing and there being no outstanding work orders or requirements issued by the building, fire, health or labour departments or any other authority having jurisdiction requiring any repairs, work, changes or additions to be made" (clause 3(e));
- the purchaser being able to arrange financing (clause 3(g));
- "The Vendor represent[ing] that all heating, plumbing, sprinkler and electrical systems and elevators will be in good repair and working order as of closing, and as of closing, the premises will comply with all municipal and other governmental requirements and the requirements of the insurers of the premises. The Vendor further represent[ing] that it is not aware of any major defect in the structure of the building or of any major defect in the fixtures, chattels and equipment that form part of this Agreement" (clause 6); and

- the seller representing and warranting that “as at the date of closing there will be no work orders outstanding with any municipal or government authority with respect to the subject property and the Seller shall not have received written notice of any work orders or deficiency notices or letters capable of becoming work orders or deficiency notices from any municipal or governmental authority and that the current use of the subject property does not breach any municipal, provincial or federal environmental legislation, by-law or regulations” (clause 10(f)).<sup>24</sup>

Bob Nazarian testified that he included clause 6 – the representation by NorDev that it was not aware of any major defect in the structure of the building – to make sure that, if there were any defect, he would know about it.<sup>25</sup> However, as discussed below, he later chose to waive this condition.

### April 2005: Retirement Living’s counter-offer

On April 5, 2005, a special meeting of the NorDev / Retirement Living board of directors was called to review the offer by Bob Nazarian to purchase the Mall. The board was advised that

- the motivation to sell the property by NorDev was to recapture human resources currently invested in managing the property and focus on future developments, recapture funds invested in the property, and realize value appreciation;
- as part of the key characteristics of a sale, the “[p]urchaser should be experienced in the industry” and the “[p]urchasers [sic] motivation should be to grow the business”; and
- the timing is right for the sale as, among other things, the “[p]roperty is in a good physical state.”<sup>26</sup>

Ms. Guertin testified that she believed it was important that the person who bought the Mall had experience in the industry and showed interest in running it as a business. She thought that Mr. Kennealy was aware of Bob Nazarian’s other business involvements. She had no idea of the condition of his other ventures, but she was aware that he did own other shopping centres in Ontario.<sup>27</sup>

Although Retirement Living may, on grounds I cannot discern, have concluded that Mr. Nazarian was a purchaser with “experience in the industry” and “motivated to grow the business,” that conclusion does not accord with the facts. He certainly does not appear to have had any experience in the long-term management of the malls he previously owned. As I indicate below, Mr. Nazarian was eager to sell the Mall from the moment he bought it. That was what he had done in the past with the other shopping centres he had bought. He sold all of them for a good profit a short time after purchasing them. There was no reason to believe that he would do anything different with the Algo Mall.

During the special meeting, the board passed a resolution authorizing the general manager and the chair of the board to enter into a contract with Bob Nazarian (in trust) for the sale of the Algo Centre, with the reservation of a lease for the Hotel and the present Elliot Lake Retirement Living office, on terms satisfactory to them and to the corporate secretary, for the amount of \$8.2 million. The board also agreed that in the course of the due diligence procedure, if the purchaser identified a legitimate reason for discounting the purchase price agreed to, the general manager and the chair were authorized to agree to reductions not to exceed \$700,000.<sup>28</sup> Mayor Hamilton, who was present at the meeting, testified that there was no discussion of the leaks or of the physical condition of the Mall.<sup>29</sup>

On April 7, 2005, NorDev made a counter-offer to Bob Nazarian agreeing to his purchase price but proposing new covenants, including the following preamble:

The following provisions are incorporated into the contract at the request of the Vendor. These provisions represent a counteroffer and where there is a conflict between this Schedule and the Offer of April 1, 2005, this Schedule [Schedule C – see below] shall prevail.<sup>30</sup>

Bob Nazarian accepted the counter-offer on April 13, 2005. He testified that he read the above clause and understood its meaning.<sup>31</sup> In addition to the right by the purchaser to access the property to conduct inspections (clause 5), schedule C provided:

8. *The Purchased Assets will be purchased and assumed by the Purchaser “As Is” and on Closing, the Purchaser shall assume responsibility for the physical condition of the Purchased Assets and the Vendor shall have no obligations or responsibility to the Purchaser after Closing with respect to the Purchased Assets or the condition thereof.*<sup>32</sup> [Emphasis added.]

Mr. Kennealy testified that although he knew that this clause was a condition of the counter-offer, he did not know whether the condition was inserted at NorDev’s insistence and why it was included. He had no recollection of discussing it.<sup>33</sup> Bob Nazarian testified that he did not think he had read this clause at the time, but understood its meaning: “That means even if it is a lemon, I have accepted.”<sup>34</sup> The effect of this clause was that, once accepted, the representation by NorDev that it was not aware of any major defect in the structure of the building disappeared.

Nonetheless, Mr. Kennealy testified he thought that in 2005 it was true that Retirement Living was not aware of any major defect in the structure of the building.<sup>35</sup> When asked if he thought that water infiltration was a major defect in the building, he said:

I think it is something that you want to manage and control as much as possible. You work very hard to make sure it doesn’t get through.<sup>36</sup>

In effect, Mr. Kennealy did not answer the question, and the issue was not pursued.

## **Retirement Living did not provide Bob Nazarian with the engineering reports it had about the Mall**

As I noted above, Algocen did not provide any engineering reports to Retirement Living when it purchased the Mall, although Retirement Living indicated that it had asked for them. This matter of engineering reports was also a live issue with respect to the sale of the Mall to Eastwood, with contradictory evidence from the vendor and the purchaser.

Bob Nazarian testified that, after the agreement of purchase and sale was signed and he agreed to the counter-offer, he requested engineering reports from Retirement Living several times. He indicated that he specifically requested engineering, electrical, and mechanical reports and any other information that would be useful to him. He received nothing.<sup>37</sup> Mr. Nazarian explained that, a week after the agreement was signed, he received, at a meeting held at his home with Mr. Kennealy, Ms. Guertin, and Marielle Brown (Retirement Living’s director of marketing), a banker’s box full of tenants’ leases but no reports. He testified that he was told several times by Mr. Kennealy and Ms. Guertin that they did not have any engineering reports.<sup>38</sup>

Bob Nazarian's evidence was that he did not see the 1991 Trow report,<sup>39</sup> the 1994 Trow report,<sup>40</sup> the 1995 letter report from Trow,<sup>41</sup> the Paul Meyer report,<sup>42</sup> the 1998 Nicholls Yallowega Bélanger report,<sup>43</sup> the 1998 Halsall report,<sup>44</sup> or the 1999 Halsall report<sup>45</sup> before the Mall's collapse. He testified that if he had seen the two options proposed by Halsall in its 1999 report, it would have affected the negotiations. He said that he would not have bought the Mall if he had been told that these two options had been recommended, but neither one carried out. He also testified that he would not have bought the Mall had he known that the leaks had been continuing for so long.<sup>46</sup>

Mr. Kennealy's evidence was different. When asked whether he told Bob Nazarian about the leaks, he testified:

Yes, yeah, we talked – during the course of those four or whatever number of months it was until completion, we had a number of discussions. We talked ... quite openly about the fact that there were leaks in the parking deck. We talked about the maintenance program that we had implemented. In fact, I recall speaking with him in terms of when we bought the mall, we had someone come in and do an assessment and they gave us two options and we selected one of those patterns to move forward with the maintenance of the mall, the parking deck.

We talked about a variety of things in relation to the different things that we did in terms of ... using sand and using the light snow trucks or trucks for plowing ... we talked about a lot of things. We talked about the fact that it had been sort of a continual problem since construction or design, whatever you want to call it.

... I remember speaking about [how] our guys would use the traffic flow things, which was a habit ACP [Algoma Central Properties] used to try and make sure traffic was travelling over the concourse in a distributed manner.

What else did we talk about? ... I can remember having a specific conversation about saying it is a lot of work, that you have to ... be very focussed on it. It is quite labour-intensive in the sense that ... you really have to focus on that part. ... I did speak about our employees, that our employees were important and that they knew what had to be done on the deck and that it was important to hang on to those folks, that they were an important component of what you were trying to do.

So it was a fairly open dialogue in terms of the fact that there were leaks there.<sup>47</sup>

Mr. Kennealy admits effectively telling Mr. Nazarian that the leaks could be controlled by proper maintenance. In fact, this was not so, and Mr. Kennealy knew it because of the 1999 Halsall report and because the leaks continued to be a significant problem right up until the date the property was transferred to Eastwood. As just one example, I cite the meeting of June 15, 2005, described below. Even if Mr. Kennealy's evidence is accurate, he misled Mr. Nazarian. As I will explain, similar misleading information was provided to the firm Construction Control when it conducted its inspection of the Mall on behalf of the Royal Bank of Canada (RBC), Mr. Nazarian's lender.<sup>48</sup>

Mr. Kennealy did testify that Retirement Living did not provide the Halsall or Nicholls Yallowega Bélanger reports to Bob Nazarian, but he said that Mr. Nazarian never asked for them. He explained that Ms. Guertin, in the course of dealing with the Royal Bank, advised it that they had those reports, but the bank told her it wanted to do its own assessment. Ms. Guertin's evidence supported this version of events.<sup>49</sup> Mr. Kennealy claimed that he had advised Ms. Guertin to move things along and to give Mr. Nazarian and the Royal Bank whatever they wanted.<sup>50</sup> Ms. Guertin testified that she supplied the bank with an environmental assessment that a tenant had done because it was recent, but otherwise the bank ordered its own assessments.<sup>51</sup>

Mr. Kennealy admitted, however, that he did not advise Bob Nazarian of the estimates of \$433,000 and \$700,000 for concrete restoration and waterproofing repairs to the roof; he did tell him that they had a maintenance program and that they had “folks” come look at the roof when they purchased it.<sup>52</sup>

Mr. Kennealy testified:

Q. Did you tell him that you had engineers who had looked at it before?

A. I believe we told him we did have folks come in and look at it, yes.

Q. Did you tell him that your engineers made two recommendations but you didn’t perform the work in accordance with those recommendations?

A. We told him that we had the folks come in and look at what sort of the general options were and that we had elected to go with the maintenance option. That is what we would have told him.<sup>53</sup>

Ms. Guertin also claimed that Bob Nazarian was aware of the leaking problem:

It was something that came up in discussion probably several times.

I know Mr. Kennealy talked to him. I was there during some discussions. I recall it being explained to him how key it was to have the employees still work for Mr. Nazarian because they had been working on the deck for years and they understood it and they know how to use the ... material.<sup>54</sup>

Ms. Guertin thought the roof was in “fairly good condition” at the time of the sale, with the exception of the Library. She did not know whether Bob Nazarian visited the Library during his several trips to Elliot Lake, but assumed he did. She testified, however, that Mr. Nazarian never raised the issue of the Library.<sup>55</sup> When asked whether there were any discussions with Mr. Nazarian about what was recommended in the Halsall report, Ms. Guertin testified that she recalled Mr. Kennealy talking to Mr. Nazarian about joint profiles, routing, and sealing, and explaining to him how it worked.<sup>56</sup> The evidence of Bob Nazarian’s future lawyer, Antoine-René Fabris, a local of Elliot Lake, also differed slightly. Indeed, Mr. Fabris testified that Mr. Nazarian told him he had not been made aware of the “extent” of the leaks when he bought the Mall; he knew there were some minor leaks, but not the extent to which the roof was actually leaking.<sup>57</sup> Although the issue of whether Bob Nazarian was aware of the leaks when he bought the Mall may be up for debate, one thing is certain: Retirement Living did not provide him with the engineering reports it had in its possession.

## **Bob Nazarian did not hire his own engineer and relied on the assessment by the Royal Bank’s engineer**

Bob Nazarian did not hire his own independent inspector to inspect the Mall, as was his right under the agreement of purchase and sale. Instead, he relied on the inspection by the engineer hired by the Royal Bank before it agreed to lend the purchase money. He did not see the report from the bank’s inspectors before the transaction closed because, as he testified, he did not need it. In his view, if RBC accepted the mortgage after having done an inspection, it indicated that everything was to the bank’s satisfaction, which was sufficient for him.<sup>58</sup> In any event, Mr. Nazarian was happy with the deal: “It was a steal.”<sup>59</sup> The brochure given to him by NorDev showed a net income of \$825,000. His offer of \$8,200,000 represented a 10 percent return on investment, which was, according to Mr. Nazarian, a very good deal.<sup>60</sup> Having come to that conclusion, Mr. Nazarian decided that he did not need to have the property inspected. Not hiring his own inspector had been his practice with previous purchases, and he testified that was the way he always proceeded.<sup>61</sup> He would surely come to rue the day he continued to adhere to that practice.

## April–August 2005: During the due diligence period, the Library continued to leak, but the City provided no assistance

While Retirement Living was inching closer to a deal with Bob Nazarian for the sale of the Mall, some tenants continued to suffer from leaks, including the Library and Scotiabank. In the spring of 2005, the conditions at the Library became unbearable for the staff. On Thursday morning, April 21, 2005, Barbara Fazekas, chief librarian, sent an email to Judy Menzies, who was then chair of the Library board, describing the water damage that the Library was experiencing:

Even though it rained only slightly on Tuesday night/early Wednesday morning, there was water leaking in the Library yesterday morning in the bathroom, tech office and storage room. Some of the ceiling gunk fell on the plastic covering which we placed over the bookshelves when we came in. As one row had three buckets in it, I cordoned the row off from patron access. Barbara [a librarian] and I ended up cleaning the bathroom floor at 11 a.m. (after my meeting with Dan [Gagnon]) as NORDEV had still not sent anyone to clean it up and I was worried about staff safety even though Barbara had requested assistance in person in front of both a maintenance staff member and Rhona [Guertin] who merely rolled her eyes as though we were infringing on her day!

Troy [Speck] is suggesting that we write a letter with our concerns as stated on your list. Dan [Gagnon] will let me know whom to send it to: CAO or Mayor, but they don't want NORDEV involved at this point in time. When I hear back from him, I will contact you with the details. If you want help with the letter, I am quite willing.

In the meantime, I am to contact Ralph Reagan from the Ministry of Labour to have the air quality tested again. The information gathered would be a supporting argument for the City to use in negotiation. Sue's [Morin] doctor told her this week that her present respiratory ailment may be due to mould and she says that she doesn't have any in her house. Pat [McGurk] has been experiencing burning in her eyes recently to the extent that she is wearing glasses instead of her contacts.

...

Sorry about all this bad news; however, I want you to know how things are developing. On May 2nd, the Mayor and Council had scheduled a caucus meeting in the Committee Room when we wanted to meet so I suggested that we might appear as a delegation to that meeting.<sup>62</sup>

Although she did not deal with Ms. Guertin often, Ms. Fazekas testified that, during this incident, Ms. Guertin was not receptive to her concerns.<sup>63</sup> Ms. Fazekas indicated that she did not know why Mr. Speck, Elliot Lake's chief administrative officer, did not want NorDev involved at that time.<sup>64</sup> She expected Mr. Speck and Mr. Gagnon, the City's director of project tourism and leisure, to work with the landlord to fix the roof situation and stop the leaks.<sup>65</sup> Ms. Fazekas did contact Ralph Regan of the Ministry of Labour, and he went to the Library on May 3, 2005.<sup>66</sup>

Mr. Speck testified that he remembered this leaking incident,<sup>67</sup> but he did not recall telling Library staff not to involve NorDev. He testified that he had spoken with Ms. Fazekas after the incident and told her to gather all the documents regarding leaks, have the Ministry of Labour perform air-quality testing to assess for mould, and establish the cost to repair the damage. He stated that the intent behind his advice to Ms. Fazekas to compile information on the leaks and air quality was to have the information to hand over to the landlord and to ensure that it would not ignore their request.<sup>68</sup>

Mr. Speck agreed that Ms. Fazekas held the position of chief executive officer of the Library and that, although she asked Mr. Speck to help her with the situation, he had no authority over the Library or its operation.<sup>69</sup> Mr. Speck testified at first that he was not sure why Ms. Fazekas approached him regarding the issue at the Library,<sup>70</sup> but later agreed that Ms. Fazekas sought the City's help to solve the problem and that it was within the City's power, not the Library board's, to arrange for a new lease in another facility.<sup>71</sup>

On the morning of April 27, 2005, Ms. Fazekas sent an email to the Library board members describing the staff's frustration and listing the issues confronting the Library. The public was also urged to send complaints to the Library board, the landlord, and their City councillor.<sup>72</sup> At the same time, Suzanne Morin, a librarian, sent an email to Andrea Leddy, the City's human resources manager, copied to Ms. Fazekas, in which she asked how to file a health and safety complaint concerning the condition of the Library. In her email, Ms. Morin stated:

Just this morning we have closed off half of the fiction area to the public and staff because of the water leaks from the roof. We had so many buckets in the aisles that we felt it was an accident waiting to happen. Many ceiling tiles were either removed or got so wet from the leaks that they have collapsed. Water pools into the light fixtures. Our staff office is also affected with leaks and some ceiling tiles have also been removed. Our staff washroom is also affected, tiles have been removed and twice in two weeks the bathroom floor was flooded with water. I was off work sick two days last week because of respiratory problems due to possible mold or mildew in the ceiling. I have noticed in the three years that I have been working here that I am always plagued with either headaches, respiratory problems, coughs, itchy eyes and throat, etc.<sup>73</sup>

Later that morning, Ms. Fazekas forwarded Ms. Morin's email to the members of the Library board.

At 10:50 a.m., Ms. Morin sent another email to members of City Council, including Mr. Hamilton, a councillor at the time, entitled "Health and safety concerns re. Library," in which she expressed the same concerns – this time not only as an employee of the Library but also as a taxpayer.<sup>74</sup> Ms. Morin also invited the recipients of

the email to view the deplorable conditions (see fig. 1.7.1). Chris Clouthier, building inspector and property standards officer, and Syl Allard, chief building official, testified that they did not see this email at the time. Mr. Allard testified that, if this email had been directed or copied to the City's Building Department, as it should have been,<sup>75</sup> he would have considered it a complaint and acted on it. Mr. Allard agreed that, if what Ms. Morin was saying was true, it would clearly be a breach of the watertightness provisions of the Property Standards By-law.<sup>76</sup>

Mr. Farkouh, who was the mayor at the time, testified that he could not recall receiving Ms. Morin's email.<sup>77</sup> Mr. Hamilton testified that he did not accept Ms. Morin's invitation to view the conditions at the Library because he believed the matter was being taken care of by the Library board as well as City staff. He admitted that he did not take any steps to deal with the issue of leaks at the Library even though the working conditions described were not acceptable, particularly in a building to which the public had access.<sup>78</sup>

I must admit being mystified when Mr. Hamilton initially testified that the email was not a complaint of a building not being watertight, contrary to the Property Standards By-law, because it was, according to him, a health and safety complaint. He held this view even though he agreed that (1) Ms. Morin was writing as both an employee of the Library and a taxpayer; and (2) it is council's role to deal with



**Figure 1.7.1 Conditions in the Library, April 2005**

Source Exhibit 2041

property standards issues in the municipality. When the question was put to him again, however, Mr. Hamilton agreed that, in hindsight, it was a complaint under the by-law. He ultimately agreed that it could not have been seen as anything else.<sup>79</sup> He did nothing, however, to see that it was dealt with as a complaint under the Property Standards By-law.<sup>80</sup>

Don Denley, another councillor, also received Ms. Morin's email. Mr. Denley witnessed the situation in the Library and spoke to Ms. Morin about her health issues.<sup>81</sup> However, no member of council, or council as a whole, ever reported the leaks to a property standards officer or to the Building Department.<sup>82</sup>

Later, that same day, Councillor Cathy McTaggart forwarded Ms. Fazekas's email (which attached Ms. Morin's first email) to City Council as well as to Lesley Sprague, the City clerk, and to Mr. Speck. In her email, Ms. McTaggart advised that she felt this issue was something that must be dealt with at their next caucus meeting.<sup>83</sup>

Mr. Allard testified that he did not receive this email and that Ms. Sprague, his immediate superior, did not speak to him about the situation. Mr. Allard did not recall any discussion with Ms. Sprague about the leaks at the Mall.<sup>84</sup> Ms. Sprague, for her part, testified that she did not inform the Building Department about the situation at the Library or do anything as a result of the receipt of this email. She claimed that it was not her responsibility to do anything because the people who were advised, the human resources manager and chief administrative officer, were those who needed to know.<sup>85</sup>

In response to Councillor McTaggart's email, Mr. Speck responded that he was "not sure why it now seems to have become an issue requiring Council involvement" and advised that Mr. Gagnon had met with the Library board the previous week and had discussed the issues about the leaks.<sup>86</sup>

Having received no support since moving into the Mall, it is evident that the chief librarian felt that she had no choice but to reach out to various individuals in the hope that someone, anyone, would help. Unfortunately, as I describe below, this help never materialized until the arrival of Tom Derreck as chief administrative officer in the fall of 2006.

On April 28, 2005, Ms. Fazekas wrote to Mr. Speck in response to his email of the previous day and asked him whether she should write the letter to him or to council. Mr. Speck responded to Ms. Fazekas as follows:

You are the manager of that facility. I am the manager of the City, surely [*sic*] to God we can deal with this, or we shouldn't have our jobs. Why would you send it to Council? Please get me the letter ASAP.<sup>87</sup>

Ms. Fazekas felt that Mr. Speck's reaction was "pretty adversarial." She testified that she believed it was her duty to keep the City aware of the situation at the Library, because it was the funder. She explained that the Library "had limited options to do more than make the landlord and the City aware of the conditions that we were working in." She expected that the City would assist the Library in working with the landlord to improve the roof and the leak problems.<sup>88</sup> Mr. Speck testified that he was still "frustrated" when he sent that email, because he felt that instead of getting answers to the questions he had asked of Ms. Fazekas, he was getting further complaints.<sup>89</sup>

When asked about these communications, Mr. Farkouh agreed it was inappropriate for Mr. Speck to have told Ms. Fazekas what she could and could not take to council. He claimed that, to his knowledge, no explicit or implicit direction had been given to Mr. Speck to keep issues relating to the Library away from council.<sup>90</sup>

Mr. Allard testified that he did not receive any of these emails at any time in 2005 and that no one made him aware of the content of them. Mr. Allard agreed that these emails appeared to have been sent to the highest levels of the municipal organization, but he could not provide any explanation why nobody had ever discussed the emails with him, the chief building official.<sup>91</sup>

On April 28, 2005, Ms. Menzies sent a letter to Mr. Speck (as he had requested) describing the history of the problems at the Library as a result of the roof leaks. She described how buckets were placed under the leaks – often with several large garbage pails sitting on the floor collecting water, and plastic covering the books. She also described the poor staff working conditions. She concluded her letter by saying that she believed they needed to start making plans for a new location.<sup>92</sup> The Library wanted to move out of the Mall and was seeking the help of the City.<sup>93</sup>

... Ms. Menzies ... described how buckets were placed under the leaks – often with several large garbage pails sitting on the floor collecting water, and plastic covering the books. She also described the poor staff working conditions. She concluded her letter by saying that she believed they needed to start making plans for a new location. The Library wanted to move out of the Mall and was seeking the help of the City.

Both Mr. Allard and Mr. Clouthier testified that they did not see this letter and that, had the letter been sent to them, they would have acted on it.<sup>94</sup> When asked about the letter, Mr. Hamilton testified that he was not aware of the extent of the leak-related issues the Library had suffered for several years, but agreed that he knew that the leaks had persisted for a number of years (as he had been told in the email from Ms. Morin on April 27, 2005). When asked whether this letter constituted a complaint of a building not being watertight, Mr. Hamilton claimed that it was a health and safety issue, given the title of the letter. He explained that, if Mr. Speck had seen a need to do so, he would have expected him to refer the letter to the chief building official for investigation under the Property Standards By-law. Mr. Hamilton agreed that the policy was that, if a complaint came in about a building being in breach of the Property Standards By-law, the expectation was that it would be referred to the chief building official and that, once a complaint was referred to him, he was obliged to conduct some sort of investigation. Mr. Hamilton eventually admitted, after further questioning, that he would have expected Mr. Speck to refer the matter to the chief building official. Mr. Hamilton was not able to

explain why this letter would not, as a matter of course, have been sent to the chief building official by Mr. Speck. He agreed that there was no requirement that a complaint be in any particular form.<sup>95</sup>

On May 2, 2005, Mr. Speck emailed Ms. Fazekas to ask her for an update on the deficiencies – which she was to outline. Ms. Fazekas replied that Chemnorth (Quest Enterprises) had taken samples for testing<sup>96</sup> and that the Ministry of Labour was going to do the same. She also advised him that the landlord was aware of the work being conducted by Chemnorth's representative, Bob Stirling, and had told him to do "whatever it takes." She informed Mr. Speck that she would forward the findings to the Health and Safety Committee and to him.<sup>97</sup>

Mr. Speck replied: "I understand forwarding the information to the Health & Safety Committee, but I trust you are not expecting them to address the situation."<sup>98</sup> Mr. Speck testified that he was not insinuating that the committee could not address the issues. His intentions were to let Ms. Fazekas know that she, not the committee, had to deal with the contractors and the remediation.<sup>99</sup> Mr. Speck agreed that it is the committee's role to receive complaints and recommend fixes.<sup>100</sup>

It appears that no caucus or council meeting was held on May 2, 2005. Ms. Fazekas's request to Mr. Speck that the Library send a delegation to council to discuss the issues on that day, as described in her email of April 21, 2005, was unsuccessful.<sup>101</sup>

### May: The Ministry of Labour and Quest Enterprises find mould in the Library

On May 3, 2005, Ralph Regan and Tony Fontana from the Ministry of Labour inspected the Library. Air quality tests were conducted.<sup>102</sup> Mr. Fontana's report, issued on May 10, 2005, noted the presence of mould in the ceiling tiles, carpet, and drywall. Mr. Gagnon informed Mr. Speck of these test results.<sup>103</sup> Mr. Fontana made the following recommendation:

The most effective way to manage mould is to prevent the conditions that promote its growth in the first place. *Sources of water infiltration should ideally be identified and eliminated.* When water infiltration does occur, it should be removed in a timely manner.<sup>104</sup> [Emphasis added.]

Not only did Mr. Regan recognize that these results were not "good," but he also agreed that the 1995 report, previously discussed, and the 2005 report essentially had the same recommendation and therefore there was no basis on which he could have concluded that the situation had improved between 1995 and 2005.<sup>105</sup> Mr. Regan did not issue any orders as a result of this visit and the tests conducted, and he would retire from the Ministry of Labour shortly thereafter.<sup>106</sup>

### May 2005: Again the City did not act

On May 6, 2005, Mr. Speck responded to Ms. Menzies's letter of April 4<sup>107</sup> (copied to Mayor Farkouh and Councillor McTaggart), telling her that he shared her concerns and suggesting that they should be thinking about the future of the Library. Mr. Speck then set out options for future locations for the Library, including continuing to stay in the Mall. He concluded his letter by suggesting that a meeting could be set up between the Library board, the Library's council representative, the mayor, and himself to discuss some of these notions. This meeting never took place.<sup>108</sup>

Mr. Farkouh testified that Mr. Speck consulted him before sending this letter. Mr. Speck informed Mr. Farkouh that the situation in the Library was affecting the health and safety of the staff and members of the public and that he was now more engaged with it. Mr. Farkouh testified that he told Mr. Speck to keep him informed because he was "at this point concerned and wanting to see what could be done to rectify this problem."<sup>109</sup>

Despite recognizing the importance of the health and safety issues and the possible legal liability to the municipality resulting from the leaks,<sup>110</sup> Mr. Speck failed to help the Library. He agreed that it was within the City's power to look at new locations, exert influence over Retirement Living as the landlord to fix the leaks, or help the Library by asking the chief building official to inspect the Mall and issue an order if appropriate.<sup>111</sup> But the City took none of these actions. Once again, the Library's request for a more "aggressive campaign against the landlord rather than bandaid solutions"<sup>112</sup> fell on deaf ears. The City simply suggested to the Library that it remedy the damage resulting from the leaks by washing the walls, having air and dust samples tested, cleaning the carpets, and determining the cost to purchase a HEPA (air purifying) machine.<sup>113</sup> These actions, which were all taken,<sup>114</sup> did nothing to stop the real problem – the leaks.

**Once again, the Library's request for a more "aggressive campaign against the landlord rather than bandaid solutions" fell on deaf ears.**

### **May 2005: The City's Joint Health and Safety Committee recommended fixing the roof leakage problem – to no avail**

On May 12, 2005, the Joint Health and Safety Committee of the City of Elliot Lake discussed the Library situation, including the positive test results for mould in the carpet and drywall. The committee made several recommendations, including: "Ensure the landlord has the problem of roof leakage fixed to eliminate the hazardous conditions that occur when it rains"<sup>115</sup> – a result the Library had tried to achieve since 1989.<sup>116</sup>

Mr. Speck testified that, following this recommendation, he organized a meeting with the mayor, Mr. Kennealy, Ms. Fazekas, and members of the Library board so the Library could voice its concerns to the landlord.<sup>117</sup>

Mr. Farkouh testified that he was not specifically advised that the committee had made this recommendation. By this time, he knew that the Library had been and was continuing to ask the landlord to fix the leaks.<sup>118</sup> He agreed he was on the board of Retirement Living (the landlord), as the representative of the City, but he did not take any specific steps to get Retirement Living to fix the leaks.<sup>119</sup>

Almost a month later, on May 16, 2005, the Library was still experiencing leaks.<sup>120</sup> Once again, although those at the highest levels of the City were aware of this situation,<sup>121</sup> the Building Department was not officially informed.<sup>122</sup> The problem had become so severe that the Joint Health and Safety Committee<sup>123</sup> had recommended that the Library put in place a procedure to deal with the leaks, which it did. A 16-step procedure was instituted for the Library staff, including checking for leaks every morning and, if leaks were found, putting tarps over books and computers, calling maintenance, doing clean-up, and putting down buckets.<sup>124</sup> None of these steps were tasks that librarians would normally have to deal with. Nor should they have had to.

The Library also developed a binder to record when maintenance staff was notified, the maintenance staff's response time, and the action taken.<sup>125</sup> When asked whether anyone at the City offices was informed when leaks took place, Ms. Fazekas explained:

Well, it was so often, I mean, who would we report to? And based on past experience with the lack of action taken by the City, it just grew really frustrating ... – there wasn't any point in reporting every incident."<sup>126</sup>

It is understandable, though unfortunate, that this procedure did not involve notifying anyone from the City. The Library's complaints to the City had consistently fallen on deaf ears.

### **Conclusion about the City's attitude: the City did not want to cause trouble for the Mall**

It is clear to me that, contrary to Mr. Farkouh's evidence, there was at least an implicit understanding on the part of City staff and City Council that the Mall was not to be interfered with. As I explain below, even Mr. Allard recognized this political reality. The failure of anyone – the mayor, City councillors, Mr. Speck, Ms. Sprague – to forward these emails, letters, reports, and complaints to Mr. Allard is, at a minimum, circumstantial evidence that such an understanding existed.

Mr. Speck's behaviour throughout this exchange, however, went further than a failure to act because of an implicit understanding. He wrote to Ms. Fazekas and told her not to contact NorDev about the situation at the Library, wrote to Councillor McTaggart and Ms. Fazekas admonishing them both that it was not appropriate to go to council about the situation, and wrote to Ms. Fazekas telling her that she should not expect the Joint Health and Safety Committee to deal with the issue. These were explicit directions from the City's most senior staff person warning against taking action about the leaks.

### Retirement Living was concerned that the Library would become a problem

On May 26, 2005 – just over a month after the agreement of purchase and sale, but while Eastwood could still back out of the agreement because of conditions contained in it – Mr. Kennealy reported to the board of directors of Retirement Living and NorDev. He wrote, under the heading “Library Problem”:

Given the recent newspaper article and several discussions I have had with various individuals, I anticipate some difficulties with this tenant. I believe this problem will be solved and I will provide an update during our meeting.<sup>127</sup>

Mr. Kennealy testified that this reference related to the leaks suffered by the Library.<sup>128</sup> He claimed he would have discussed this matter with Richard Quinn, Retirement Living’s property manager, and Ms. Guertin.<sup>129</sup> Mr. Quinn, however, testified that he did not know what this issue was about.<sup>130</sup> Mr. Kennealy said that he wrote that the problem would soon be solved because he believed that NorDev “were going to do everything in our power to try and resolve the problem for them and see if we could do anything to get them in a position where they were content.”<sup>131</sup> Both Mr. Hamilton and Mr. Farkouh, the City representative on the board, were absent from the meeting. They both testified that they did not seek more information from Mr. Kennealy about this issue.<sup>132</sup>

In fact, Retirement Living, which was about to divest itself of the Mall, did nothing to fix the leaks. Quite the contrary, as I will explain, it advised the Library that it was not prepared to invest the necessary funds in fixing the roof.

### June 2005: M.R. Wright and Associates was aware that there was water infiltration in the Mall

As will be seen, the Sault Ste. Marie engineering firm of M.R. Wright and Associates played an important role in assessing the Mall’s condition in 2009 and 2012. Its involvement, however, began much earlier. As part of the remedial steps taken by the Library in the spring of 2005 to deal with the leaks, Mr. Stirling retained that firm to conduct an assessment. M.R. Wright concluded that the remediation activities undertaken by the Library had restored it to normal conditions (i.e., no more mould). Ms. Fazekas gave the report to Ms. Leddy, Mr. Gagnon, and Mr. Kennealy.<sup>133</sup> It noted that the incidents of water intrusion had been problematic since the establishment of the Library in the Mall 16 years before. Although no further action was required with respect to remediation, M.R. Wright concluded:

[H]owever, water damage and staining observed during the course of this assignment does suggest that water intrusion continues to be problematic. Therefore, events of roof leaks that periodically occur as a result of the existence of a problematic overhead exterior parking lot must be resolved in order to limit the potential for mould proliferation.<sup>134</sup>

### June: Retirement Living is not prepared to fix leaks since it was about to sell the Mall

On June 1, 2005, Mr. Speck sent a letter to Mr. Kennealy in which he outlined several ongoing problems that the Library had experienced as a result of the leaks.<sup>135</sup> He said:

As you know, the Elliot Lake Library has been experiencing ongoing problems with severe leaks from the roof *since it relocated to the Algo Mall in the early 1990s*. Until recently, the problem with the leaks was thought to be largely the damage to the books, the inability to use certain areas of library while the water was dried out and the staff time involved in the clean-up. While those inconveniences and difficulties continue and must be addressed, a larger issue has arisen that required our immediate attention as an employer and manager of the public facility.

A staff member at the library raised a concern that her health was impacted by the atmosphere in the library caused by the frequent flooding. An investigation was launched by our Health and Safety Committee. The investigation included various tests of the working environment. The drywall, carpet, ceiling tiles, some of the books and air quality were tested for mould and other contaminants. Those results that are available at this time are attached. One severe health hazard and some safety hazards were discovered.

Abundant mould growth was discovered in the drywall in the office where frequent flooding had occurred. Some mould was also discovered in the carpet, and very sparse mould on some of the books in the collection. Detailed air quality test results have yet to be received but, since our telephone conversation of May 30, 2005, the verbal report from the firm doing the tests has indicated that no mould spores were discovered in the air. Mould can cause respiratory problems, especially for those with compromised immune systems such as the elderly or those with allergies. The presence of mould poses a health risk to our employees and the general public.

Safety hazards occur whenever the floods are severe enough to cause the ceiling tiles to cave in and/or soak through and risk falling on the public or employees. Risk of falls occur when the floors and office equipment become wet from the flooding. Other potential risks exist and are being assessed, such as corrosion of electrical fixtures from the water damage, the state of the heating and ventilation systems and trip hazards caused by roping off the water damaged areas when the library opens.

In addition to the health and safety hazards, the library administration is severely impacted by the frequent floods, since significant staff time is spent cleaning books and shelves, closing the fiction section to the public during the clean-up and causing public concern and negative publicity for the library and the mall. Books are frequently damaged, some beyond repair and cannot be replaced.

Given the test results, the library has rented an air scrubber, a large HEPA filter that filters the air for mould or other contaminants like dust and particles of ceiling tiles. Quest Enterprises was contracted to clean the carpets, wash down walls and oversee the testing and drywall replacement. The carpets were cleaned and should be cleaned frequently in the future to ensure that future mould growth will not take hold. The drywall where the mould had grown was removed and replaced.

Richard, all these problems are clearly caused by the roof leaks and unless something can be done will only continue in the future. We would like to meet to discuss the problem and review the feasibility of resolving the roof leaks as soon as possible. Our main interests include: 1) Ensuring the library environment is safe for occupation and use by staff and members of the public; 2) Eliminating damage to municipal property; and 3) Avoiding restrictions on and interruptions to library services.<sup>136</sup> [Emphasis added.]

Mr. Clouthier and Mr. Allard were not advised of this letter. Mr. Clouthier testified that Mr. Speck never advised him during his tenure about leaks in the Library or asked him to inspect the Library. Mr. Clouthier confirmed that the leaks in the roof, as described by Mr. Speck in his letter, more specifically the reference to “severe” leaks that had been happening since the 1990s, was a violation of the watertightness provision of the Property Standards By-law.<sup>137</sup> Similarly, Mr. Allard testified that had he received this letter, combined with the April 27, 2005, complaint of the Library, he would have taken action under the Property Standards By-law.<sup>138</sup>

Five days later, on June 6, 2005, a council caucus meeting was held where the “Status of Library issue” was listed as an item for discussion.<sup>139</sup> Mr. Farkouh did not know what was specifically discussed but thought that it might have been the issues raised by Councillor McTaggart and Mr. Speck with respect to the leaks at the Library.<sup>140</sup> Since this was a secret caucus meeting, there was no record of what was said.<sup>141</sup> On June 10, 2005, Ms. Menzies responded to Mr. Speck’s letter of May 6, 2005, and requested that the Library board meet directly with City Council.<sup>142</sup> Ms. Fazekas testified that the board members felt they should deal directly with council because they were appointed by council, and they expected, understandably so, council to “[i]mprove the situation.”<sup>143</sup> No such meeting took place.

### June: A suspicious Bob Nazarian reduces the purchase price to \$7.2 million

In early June 2005, in a letter sent by his real estate agent, Mr. Sobhi, Bob Nazarian asked that the purchase price for the Mall be reduced to \$7.2 million in exchange for the removal of all the conditions except the financing condition. Mr. Sobhi indicated in the letter that Mr. Nazarian intended “to improve the condition of the property and the parking lot in due time.”<sup>144</sup>

Bob Nazarian testified that the price reduction was done at his behest. He indicated that his action was a result of the “secretive” nature of the deal and the fact that it was being sold “[a]s is, where is [sic].” Although he had not noticed the “as is” clause before signing it, Mr. Nazarian testified he noticed it after receiving no documentation from NorDev. At that point, he thought there might be something they did not want him to know, so he went through the contract and noticed the clause. He agreed this clause was a bit of a “red flag,” but instead of getting out of the deal, as was his right, he lowered the price.<sup>145</sup> Mr. Nazarian testified that the improvements referred to in Mr. Sobhi’s letter referred to the ground level parking lot between the Mall and Ontario Street, not the rooftop parking.<sup>146</sup>

On June 10, 2005, NorDev accepted the proposal to reduce the price to \$7.2 million immediately, without asking any questions.<sup>147</sup> Mr. Kennealy testified that he felt it was appropriate given that Bob Nazarian wanted to do some improvements to the property.<sup>148</sup> Mr. Nazarian was surprised by NorDev’s quick acceptance of the price reduction. He testified that it made him think that NorDev was hiding something, but he did not ask any more questions because he had already asked Mr. Kennealy and Ms. Guertin several times if there was anything more he needed to know about the Mall.<sup>149</sup>

**Mr. Nazarian was surprised by NorDev’s quick acceptance of the price reduction. He testified that it made him think that NorDev was hiding something, but he did not ask any more questions because he had already asked Mr. Kennealy and Ms. Guertin several times if there was anything more he needed to know about the Mall.**

At the request of Mr. Kennealy, on June 10, 2005, Mayor Farkouh sent a letter to Bob Nazarian<sup>150</sup> advising him that the Mall was “a good investment.” Mr. Nazarian testified that he had met with Mayor Farkouh before purchasing the Mall to ask about it and whether there were any problems.<sup>151</sup> According to Mr. Farkouh, Mr. Nazarian wanted

some comfort, since he’s making a significant investment in Elliot Lake, that somehow, once he makes the purchase, something is not going to pop up and, in effect, cause harm to his investment in the form of some new mall ... that would be competing with it.”<sup>152</sup>

Mr. Farkouh was happy to provide the letter because he saw the sale as a good thing: this purchase would be the first major investment in Elliot Lake since the 1990 mine closures and the elimination of some 9,000 jobs. When he spoke to Mr. Kennealy about this letter, Mr. Farkouh testified that the subject of the Library leaks did not come up.<sup>153</sup>

Mr. Nazarian perceived the letter from Mayor Farkouh as a “blessing.” At the time, Mr. Nazarian did not know that NorDev and Retirement Living were companies organized with the assistance or support of the City of Elliot Lake. He did not know that Mr. Farkouh sat on the board of Retirement Living.<sup>154</sup>

## June: Retirement Living is not prepared to spend \$1.5 million to fix the roof

On June 15, 2005, two months after the Library's complaint, a meeting was held between Mr. Kennealy, Mr. Speck, Mayor Farkouh, Ms. Menzies, and Ms. Fazekas, as well as other members of the Library board. This meeting took place just two weeks after Mr. Speck's lengthy letter to Mr. Kennealy complaining of the serious problems with leaks at the Library and a few days after all the conditions of the sale to Eastwood, except financing, had been waived.<sup>155</sup> Ms. Fazekas's contemporaneous report of the meeting, which I accept as accurate, indicated the following:

Mr. Kennealy chaired the meeting.

Having distributed copies of the lease to the Board members the previous day, he stressed the importance of written communication with the landlord in the future, especially prior to any action being taken in the way of maintenance repairs. He also drew attention to Clause 6 on page 13 of the lease that protects the landlord against claims from the tenants regarding compensation for water damage to their property.

*He outlined the structural challenges faced by the flat roof of the mall and the attempts at ameliorating the problem over the past 5 years. The structure of the parking roof is two layers of cement slabs approximately 4 to 5 feet apart. Solutions proffered by the experts include the insertion of a rubber membrane between the two layers, involving the removal of the top cement layer or the construction of a structure over the roof that would necessitate increased structural support. This latter option would cost approximately \$1.5 million.*

The preferred option is to find a substance that seals the leaks. This has been done in the more passive areas; however, in the areas of higher traffic in the line between the two access ramps, the seals can not [sic] be kept intact what with the temperature changes, cars and snowplows, etc.

A solution which will be investigated this summer is the insertion of a trough wider than the I beam (along which the water flows to leak below, i.e. the seam where historically most of the leaks have occurred) to catch the water and drain it to an outside spot. A speed bump may be added over this trough to slow down the traffic over it.

The Board members inquired about an alternate location in the mall for the library, e.g. the bingo hall. The landlord was unsure of the area of those premises and could not predict what the vacancy situation may be in 5 years.

The Librarian inquired about different levels of maintenance service available from the Landlord; however, the same service is offered to all tenants.

The Landlord is to meet with the Librarian to discuss HVAC maintenance schedules, access to hot water in the storage area, replacement of existing light fixtures with sealed ones to prevent leaking inside the fixtures and the replacement of plastic covers over the fluorescent lights.<sup>156</sup> [Emphasis added.]

Mr. Speck's notes of the same meeting (which Mr. Kennealy did not contest<sup>157</sup>) included the following:

July-Aug – RK will get engineer in to determine if his solutions are do-able (eavestroughing)

will do:

repair

some work

- will not do large outlays of cash.<sup>158</sup>

Mr. Kennealy testified that he did not recall the meeting.<sup>159</sup> He could not recall saying the excerpt in italics set out above, but did not contest Ms. Fazekas's version.<sup>160</sup> When asked about the source of the \$1.5 million solution, Mr. Kennealy testified that he had no idea where the \$1.5 million figure came from:

I was trying to think through how would I come up with a number like that? I mean, could I pull something like that out of the air? I mean, not uncommon for me. I mean, you know, my entire background is in sales and dealing with that kind of situation. I don't – I honestly do not know where I would come up with the number, Mr. Doody. Like it must have been a collage of NY, of Nicholls Yallowega, of Halsall. I must have been just randomly picking stuff in my mind to come up with something like that.<sup>161</sup>

Mr. Kennealy claimed that, despite the fact that the Mall had for all intents and purposes been sold to Bob Nazarian, he continued running the Mall and dealing with the customers on a long-term basis, including attempting to find a solution that summer to the leaks.<sup>162</sup> I find it very difficult to place any faith in that assertion. Having only a few days prior to this meeting accepted a reduction of \$1 million in the sale price, quickly and without asking questions, it is evident to me that Retirement Living was anxious to sell the Mall as soon as possible. More importantly, there is no evidence that Retirement Living did anything to resolve the leaking problem of the Mall after it accepted Mr. Nazarian's offer in April, other than continuing to maintain it the way it had been maintained since the time it was built. NorDev was determined to sell the Mall and, as Mr. Kennealy is recorded as having said in the meeting, was not prepared to "do large outlays of cash."<sup>163</sup>

Mr. Farkouh agreed that by the end of the meeting no solution had been found to fix the leaks. When asked what he did at that time, Mr. Farkouh testified that he asked Mr. Speck to keep him informed and to ensure the landlord kept his commitment. He did not take any other steps.<sup>164</sup> When asked if he gave any consideration to asking the chief building official to conduct an inspection to determine whether to issue a property standards order, he again stated:

A. As I stated earlier, Mr. Doody, it never occurred to me or any members of Council that the Property Standards by-law would have been the vehicle to implement an order and address this issue.

And that is something that, had I known, had I – it would have been done.

... But at that – at that point in time, I speak for myself and probably the members of Council, that we didn't realize that the Property Standards Committee had that kind of authority and power in it, to effect this.

Q. And if you had known, you would have done something?

A. Yes, I would have.

Q. Even if ... doing something risked closing the mall?

A. Yes, sir.<sup>165</sup>

I note that it does not appear that either Mr. Kennealy or Mr. Farkouh disclosed the fact of the impending sale of the Mall.

Mr. Hamilton testified that he did not know in 2005 that the Library had been suffering long-standing leak problems since it had moved in the Mall. He indicated that

- Mr. Kennealy had never told him, as a member of the board or otherwise, about what he had described at the meeting with the Library in June 2005 as "the structural challenges faced by the flat roof of the Mall";
- Mr. Kennealy never told him, as a member of the board or otherwise, that the expert had suggested putting a membrane on the roof;

- Mr. Kennealy never told him, as a member of the board or otherwise, that the cost of fixing the leaks would be about \$1.5 million;
- Mr. Speck and Mr. Farkouh did not report to council about this June 2005 meeting; and<sup>166</sup>
- Mr. Kennealy never told him or the board that Retirement Living would not make large outlays of cash to fix the leaks.<sup>167</sup>

I am inclined to accept Mr. Hamilton's evidence on this issue. I agree with him that it is alarming this information was not provided to the board of Retirement Living or to members of City Council other than Mayor Farkouh and Mr. Speck.<sup>168</sup> At a minimum, Mr. Speck and Mayor Farkouh should have alerted Mr. Allard so that he could conduct an inspection and issue an appropriate order.

### **Conclusion on 2005 Library situation: the failure of Retirement Living and the City to help was inexcusable**

Ms. Fazekas said it best when she was asked at the end of her examination in chief by Commission counsel whether she had anything else to say:

So much. But basically they were deplorable conditions for anyone to work in, and all we were trying to do was provide a safe environment for the staff and the patrons and maintain the integrity of the collection.<sup>169</sup>

In 2005, aside from what is described above, none of the senior City officials, including Mr. Speck, Mr. Gagnon, and Mr. Allard, did anything to assist the Library.<sup>170</sup> And nor did Retirement Living.

### **June–July: Scotiabank was also suffering from leaks**

On June 21, 2005, Robert Juralietis, the Scotiabank branch manager at the time, complained to the head office about the situation at the branch:

In 2003, we replaced all the ceiling tile in the branch, and in the process discovered considerable mould and mildew resident in the ceiling. With the recurring dampness, we suspect the mould has returned. The smell is quite noticeable, to the point clients comment on it as they come in to the branch.<sup>171</sup>

As part of preparing the lease renewal documents, Mr. Juralietis requested that the ceiling be inspected and the air quality tested to determine if the mould had indeed returned, and, if so, if it presented a health risk to the staff.<sup>172</sup> Pinchin Environmental Limited was retained by Scotiabank to conduct the indoor air-quality and mould assessment.<sup>173</sup> This was the first of several mould and air quality tests performed for Scotiabank during its time at the Mall.<sup>174</sup> Pinchin became a regular visitor and would later also conduct two building condition assessments there.

Pinchin issued its report on July 28, 2005.<sup>175</sup> It reported an interview conducted with Judy McCulloch, manager of customer service at the branch: "There have been numerous roof leaks in the past years. The landlord changes the ceiling tiles whenever a noticeable stain or damage is present."<sup>176</sup> Pinchin concluded:

Mould growth was identified in the janitor's closet on the drywall wall where the sink is attached. Two bulk samples were collected, which confirm this growth. Drywall was dry, suggesting that there was not a current leak. However, plumbing should be checked and necessary repairs should be completed prior to installation of new finishes.

Ceiling tiles with minor water stains were identified in the branch. Staff indicated that ceiling tile water damage is frequent, which indicates that there may be water infiltration from the parking garage above the branch. No musty odours were detected by Pinchin and no mould growth was identified above the ceiling.<sup>177</sup>

As of June 2005, the Pinchin employees investigating the mould at the Scotiabank were aware of a concern about water leaks at the Mall.<sup>178</sup> On July 19, 2005, Scotiabank removed the mould found in the janitor's closet.<sup>179</sup> This step would be the first of many taken by the bank in an attempt to protect its staff and its patrons. Unfortunately, the situation would never improve, leading the bank to move out of the Mall.

## June: Construction Control did not see any evidence of leaks

Construction Control (now CCI Group) was retained by the Royal Bank to carry out a property condition survey of the Mall before the bank provided a mortgage to Bob Nazarian. The building survey was to include a replacement reserve analysis, setting out the future capital expenditures required, including an evaluation of the "Average Effective Useful Life, the Effective Age and the Remaining Useful life" of each building component, together with a cost estimate to remedy immediate deficiencies.<sup>180</sup>

Brian MacDonald, currently manager of the Building Assessment Department at Construction Control, conducted the survey. He holds a bachelor of technology from Ryerson Polytechnical Institute (as it then was) and has worked for Construction Control for 16 years, primarily in the building assessment group. Prior to his employment with Construction Control, he was employed by a division of SNC Lavalin, where he performed quality control inspections on construction projects. Mr. MacDonald has been in the construction industry for over 30 years. Throughout his testimony, he was not only forthright but visibly upset by the fact that the Mall collapsed and he had seen no sign that led him to conclude there was such a risk. I have no reason to doubt his evidence.

Mr. MacDonald explained that a property condition survey of the type requested by RBC included a visual inspection of the property to identify the major elements of the building. RBC also wanted some cash flow projections or projections for capital repair costs over a 13-year period.<sup>181</sup> He testified that the only difference between a property condition survey carried out at the request of a prospective lender and one done for a property owner is that, in the first, destructive testing cannot be required. Consequently, inspections of the type he carried out are limited to what can be seen without destruction. Mr. MacDonald testified, and his report confirmed, that this practice was normal for inspections of this type.<sup>182</sup>

On June 28, 2005,<sup>183</sup> Mr. MacDonald went to the Mall with Tony Noce, a Construction Control engineer with a mechanical background. Mr. Noce's primary responsibility was to inspect the equipment in the mechanical room. Mr. MacDonald inspected the physical condition of the structure of the Mall.<sup>184</sup> He confirmed that Construction Control was not asked to carry out a parking garage assessment, which is a more focused type of review. A parking garage assessment would be conducted by a structural engineer (who would look at the structural elements, including the steel and the connections), would be more detailed than a building condition survey, and would include destructive testing (such as sampling and coring of the concrete).<sup>185</sup>

Mr. MacDonald's contact person for the property condition survey was Ms. Guertin. He could not recall whether he asked Ms. Guertin for documents relating to the Mall; however, his usual practice was to request documents such as drawings and reports from the persons in control of the building, and he believed he would have asked Ms. Guertin to provide the relevant documents. He testified he did not receive any previous engineering reports

or copies of any structural and architectural drawings. Mr. Kennealy also testified that he had not provided the Royal Bank with the Halsall and Nichols Yallowega Bélanger reports.<sup>186</sup> Mr. MacDonald confirmed that a copy of the Trow and Halsall reports would have been helpful to his inspection because he would then have been aware of the history of leakage, and that would have changed his recommendations on how to address the leaking.<sup>187</sup> I conclude that Mr. MacDonald was not provided with any prior reports or drawings and that it is probable he asked Ms. Guertin for them.

He testified that he was never told that the Mall had been leaking for close to 25 years. When he arrived at the Mall, he was accompanied by a maintenance worker (whose name he could not recall) and was taken up to the parking deck, where he noted that repair work had been performed and was ongoing. He testified that the maintenance worker further advised him that the repair program involved sealing the cracks, sealing the control joints, and applying a sealer.<sup>188</sup> The maintenance worker also informed Mr. MacDonald “that the parking surface consists of a concrete topping that is installed over the precast concrete roof slabs and that a waterproofing membrane is not located below the topping.”<sup>189</sup>

Mr. MacDonald’s inspection of the Mall was done in one day over approximately five to seven hours, which was typical for the type of inspection the company had been retained to perform.<sup>190</sup> All the observations on the condition of the building were made from the ground or floor level. No ladder was used during the inspection.<sup>191</sup> He testified that during the course of his inspection he did not recall speaking with any of the tenants in the Mall. He felt that the retainer with RBC, which included a confidentiality clause,<sup>192</sup> restricted him from questioning the tenants about conditions in the Mall.<sup>193</sup> If that is so, it was an unfortunate restriction on Mr. MacDonald’s work, particularly in light of the fact that there were no signs of continuing leaking when he inspected the Mall that dry summer day.

Somewhat surprisingly, Mr. MacDonald explained that lifting or removing acoustical ceiling tiles would be considered destructive testing, not permitted for this report, because in some cases the suspended ceiling is part of the fire separation, and the tiles are held in place by a clip. If Mr. MacDonald had pushed on the ceiling tile, it could break the clip, preventing him from putting the tile back in place and thereby compromising the fire protection of the structure. There could also be hazardous material above the ceiling.<sup>194</sup> The description of the construction of the building in his report was therefore based exclusively on the exposed areas of the Mall. In the basement below the Hotel, some of the ceiling tiles had been removed, enabling him to see the fireproofing, and it was intact. Of course, leakage was not to be expected below the Hotel. No other areas in the Mall had ceiling tiles removed during his inspection.<sup>195</sup>

On July 6, 2005, Mr. MacDonald provided a report to RBC on behalf of Construction Control, but a copy was not delivered to Eastwood.<sup>196</sup> In his report, he noted corrosion at the walkways and canopies at the exterior of the Mall. He testified that he did not have any concerns, safety or otherwise, in relation to the condition of the exterior steel given that the beam itself did not appear to be compromised.<sup>197</sup> He recommended repairs to the corroded areas of the steel framing at the soffit of the suspended walkways, to be done under the supervision of a professional engineer because these were structural repairs and not something that could be completed by maintenance staff.<sup>198</sup>

Mr. MacDonald confirmed in his report that no evidence of water leakage was seen on the interior of the Mall:

Evidence of water leakage at the interior of the building (in the form of water damaged ceiling finishes) was not observed during our site visit, although we understand that water leakage has occurred in the past. In the event of water leakage, repairs are carried out at the concrete topping covering the parking deck.<sup>199</sup>

Mr. MacDonald inspected the Library and did not see any evidence of water damage as depicted in some photographs taken there in 2005.<sup>200</sup> There was no plastic covering the books in the Library. Mr. MacDonald also entered Zellers and walked through the common areas of the Mall, such as the corridors, and entered the tenant areas. He did not see any damage similar to that depicted in the photographs he was shown during his testimony anywhere in the Mall or any buckets to catch the leaks.<sup>201</sup> Mr. MacDonald testified that, if he had seen evidence of water damage as depicted in the photographs, he would have recommended to the Royal Bank that additional investigative work be conducted, including looking at the conditions above the ceiling tiles.<sup>202</sup>

Mr. MacDonald testified that during his inspection he did not observe any areas which stood out as having been recently repaired or “spruced-up.”<sup>203</sup> In his report, he also noted:

- 11 In many locations it is apparent that repairs have been carried out at the joints between adjacent sections of concrete topping. It appears that the joints in the concrete topping correspond to the joints between adjacent precast concrete slabs. We understand that the concrete in these locations was deteriorated, due to raveling of the concrete topping adjacent to the joints.
- 12 Joints between adjacent sections of concrete topping have been routed/chipped out and filled with a pourable mastic material. At some locations, the sealant material is de-bonded from the adjacent concrete surfaces ...<sup>204</sup>

Mr. MacDonald explained that “raveling” constituted cracking of the concrete parallel to the joint, usually caused by traffic on the concrete.<sup>205</sup>

Mr. MacDonald concluded in his report that the “parking, paving and exterior stairs” were in fair condition. He explained that this reference did not include the hollow-core precast panels or the steel structure and was only a reference to the top surface of the parking which he could see. He explained that he noted the surface of the parking deck as fair because he saw that there was some deferred maintenance – and the problems in the surface of the parking deck were maintenance issues.<sup>206</sup>

Mr. MacDonald concluded that an allowance of \$30,000 should be provided at five-year intervals for repairs to the concrete topping and associated joints at the rooftop parking deck, commencing in year two.<sup>207</sup>

Mr. MacDonald testified that this amount would have been based on the percentage of what he thought it would cost to carry out the repairs to the whole deck – namely, routing and sealing the joints and fixing the debonded and cracked areas.<sup>208</sup>

Although he agreed it was critically important that there be a thorough structural inspection of the connections, because failure of connections is most likely to result in a catastrophic event, Mr. MacDonald explained that he did not inspect the connections because that was not part of his mandate. In addition, he did not recommend to the bank that such an inspection be carried out because he did not believe, based on what he observed at the Mall, that such an inspection was required.<sup>209</sup>

Mr. MacDonald admitted that, had he known Retirement Living had ignored the recommendations made by Nicholls Yallowega Bélanger and instead continued with a patchwork repair process as had been carried out by Algocen for years, using the same personnel, it would have changed his approach and he would have wanted to see above the ceiling and do further investigation work.<sup>210</sup> He also testified that the maintenance worker he spoke to told him that, although the parking deck had leaked in the past, it was at that point watertight.<sup>211</sup> It is clear from the evidence I have heard, including the extensive evidence about the ongoing leaks in the Library and the admissions made by Mr. Kennealy at the meeting with the Library board *just 13 days before* this inspection and in his evidence before me, that the parking deck was not watertight in June 2005. The maintenance worker, who must have been an employee of NorDev, may well have misled Mr. MacDonald. Whether this was intentional in an effort to ensure a favourable report is difficult to say.

Mr. MacDonald testified that, in light of the information he was provided – that the concrete topping on the parking deck had been routed and sealed and the roof was watertight – and the lack of evidence of water damage on the interior of the Mall, he had no reason to believe that the interior steel structure would be compromised.<sup>212</sup> The visual inspection sought by RBC unfortunately did not reveal what was hidden in the ceiling of the Mall that day. In light of the fact that he was told about past leaking on the interior of the Mall and his limited observations, I feel that it is not unduly critical to opine that his report might have commented more explicitly on the fact that there was no inspection of the internal structural members.

### **August: Bob Nazarian further reduces his purchase price to \$6.2 million**

On July 28, 2005, Mr. Nazarian's lawyer received estoppel certificates (formal statements intended to advise a purchaser of, among other things, disputes between tenants and the vendor) from Mall tenants, including one from Scotiabank which said: "There have been recurrent water leaks into the Premises, and wherever this is the case, the occurrence of mould is a concern." Bob Nazarian's evidence was that, although his lawyer received this estoppel certificate before closing the transaction, he saw it only after closing; his lawyer did not tell him about this estoppel certificate prior to the letter the lawyer sent lowering the price to \$6.2 million. Mr. Nazarian could not explain why he did not ask the lawyer before closing about the content of any estoppel certificates he had received. Mr. Nazarian's evidence was that, on reading the estoppel certificate after the transaction closed, he spoke to Mr. Kennealy and Ms. Guertin about the leaks at a meeting I describe below.<sup>213</sup>

On August 2, 2005 (two days before the scheduled closing), Mr. Nazarian's lawyer sent a letter to NorDev's lawyer offering to amend the agreement to waive all the conditions, reduce the purchase price from \$7.2 to \$6.2 million, and extend the closing date by a day to August 5. Mr. Nazarian testified that he was "testing" NorDev to see if it would agree to reduce the price by another million dollars. He did this because he was concerned about the "secrecy" and the fact that NorDev was not giving him the information he was requesting. He was prepared to walk away from the deal if NorDev did not agree. According to Mr. Nazarian, Mr. Kennealy never asked him why he was reducing the price yet again. He had no conversation with Mr. Kennealy or Ms. Guertin about the reason for the price reduction – and that surprised him.<sup>214</sup>

I heard a very different account of the events from Mr. Kennealy. He testified that he was surprised and caught off guard when he received this letter – it was last minute and quite a large drop in price.<sup>215</sup> Mr. Kennealy testified that he spoke to Mr. Nazarian:

And what he related to me was sort of in a general sense was he had gotten his financing all lined up. I think he told me what the rough amount of it was. He had more than enough of his own free capital to complete the deal, but he wanted to hang on to the cash because he wanted to do additional work on the property and fix a bunch of things up. He did mention specifically the parking deck.

And the other thing I didn't mention earlier, we ... talked a number of times over the time period and ... we talked about all kinds of different things in terms of ... what he might want to do or might not want to do with the property. But on this occasion, he specifically mentioned that he wanted to look at doing some things on the parking deck, and I would have taken that to the Board and asked them what they wanted to do.<sup>216</sup>

When this testimony of Mr. Kennealy was put to Bob Nazarian in cross-examination, he changed his evidence and indicated it was "possible" that he gave Mr. Kennealy an explanation for reducing the purchase price from \$7.2 million to \$6.2 million but doubted it was related to the parking deck, contrary to Mr. Kennealy's evidence. He testified that they did not discuss the parking deck before the purchase.<sup>217</sup>

The same day, August 2, the NorDev board of directors met<sup>218</sup> and accepted all the conditions set out in the letter, including the reduced price of \$6.2 million. Mr. Hamilton, who was present at the meeting, testified that, other than the waiver of the financing condition, he did not recall any discussion to justify the reduction in price – which he admitted was not an insignificant amount of money. It was a recommendation made by the staff which the board agreed to. No board member objected. Mr. Hamilton testified that the condition of the Mall or the leaks and the cost of repairs did not play a role in the decision to accept the reduction in price.<sup>219</sup> Mr. Farkouh, who was also present at the meeting, could offer no explanation for the price reduction either.<sup>220</sup>

On August 8, 2005, the transaction closed and Eastwood Mall Inc. became the owner of the Mall. Bob Nazarian obtained a mortgage for \$4.65 million to finance the purchase of the Mall. This mortgage was somewhat unusual in that it was a “commercial mortgage backed securitization,” intended to spread the risk of default on a mortgage among a number of investors. The Royal Bank of Canada, the “mortgage servicer,” which had to act on instructions from the investors, advanced the funds.<sup>221</sup> Mr. Nazarian paid the remainder of the price in cash.<sup>222</sup>

The mortgage had a prepayment penalty equal to the greater of three months’ interest or the present value of all future interest payments; its term was 10 years. The mortgage stipulated that if the owner sold the property or tried to put a second mortgage on it without the lender’s consent, Eastwood would immediately have to repay the first mortgage, including the prepayment penalty. These mortgage features were unusually severe and eventually posed a problem for Bob Nazarian when he tried to sell the Mall.<sup>223</sup>

### **August–November: Rhonda Guertin is hired to train Eastwood’s manager but keeps mum about leaks**

After Bob Nazarian took over the Mall, he hired Ms. Guertin to train the new Mall manager. Mr. Nazarian testified that he hoped, if there was something that NorDev had not revealed before the closing, he could get that information in the four months Ms. Guertin was employed by him. In those months, Mr. Nazarian testified, he did not speak with her personally but, nonetheless, did not find her helpful in training his manager. She did not reveal any prior engineering reports and gave him no information about the roof leaks.<sup>224</sup>

### **Retirement Living received over \$2.2 million from its ownership of the Mall**

Although I accept Mr. Kennealy’s evidence that he did not receive any bonus as a result of the sale of the Mall (his managers received something in the order of \$1,000),<sup>225</sup> there is no doubt that Retirement Living profited handsomely from the sale. NorDev had purchased the Mall for \$4 million. It sold it for \$6.2 million. When the Mall was sold, NorDev paid Retirement Living a dividend of \$1 million, along with a commission of \$186,000.<sup>226</sup> Retirement Living also earned interest of \$698,000 from NorDev on its loan of \$2 million over the six years NorDev owned the Mall and management fees of \$392,000. Those payments, a direct benefit to Retirement Living from NorDev’s purchase of the Mall, amounted to \$2.2 million.<sup>227</sup>

During the time Retirement Living owned the Mall, its revenue exceeded expenses (since it is a not-for-profit corporation, it does not describe this as a “profit”) by an average of \$1.1 million per year.<sup>228</sup>

## Conclusion: Bob Nazarian did not know the extent of the leaks before buying the Mall

The evidence about whether Bob Nazarian was informed that the Mall had suffered from leaks from the day it opened was contradictory in many respects, including at times his own evidence. However, I conclude that, at the very least, Retirement Living was not forthcoming about the extent of the leaks that the Mall had suffered over the years, thereby preventing Mr. Nazarian from making an informed decision when he purchased the Mall. I reach that conclusion for the following reasons:

- Retirement Living was not prepared to provide Mr. Nazarian with the guarantees he had sought about any major defect; it wanted to sell the Mall “as-is”;
- Retirement Living agreed to two reductions in price totalling \$2 million without being provided with any real justification;
- Retirement Living did not provide Bob Nazarian, the Royal Bank, or Construction Control with any of the engineering reports it had about the Mall even though Mr. MacDonald asked for them;
- Mr. Kennealy’s own evidence was that he told Mr. Nazarian that the leaks could be controlled by maintenance, even though he knew that it was not so;
- Mr. MacDonald did not observe any evidence of leaks in the interior of the Mall during his inspection, including his visit to the Library, although there had been recent extensive leaking with resulting significant damage, suggesting that efforts had been made to remove evidence of leaks;
- Mr. MacDonald was misinformed by a NorDev employee who told him that the Mall was watertight;
- the City, through Mayor Farkouh, did not reveal the existence of the leaks to Mr. Nazarian despite its extensive knowledge about the dire situation of the Library; and
- Mr. Nazarian advised Mr. Fabris that he was not aware of the extent of the leaks when he bought the Mall.

Retirement Living’s lawyer submitted forcefully that Mr. Nazarian must have known about the leaks from the parking deck because his agent’s letter of early June 2005 proposing a reduction in the purchase price stated that Eastwood “intended to improve the condition of the property and the parking lot in due time.”<sup>229</sup> As explained above, Mr. Nazarian’s explanation for this statement is that he always intended to reduce the slope of the ground level parking lot facing Ontario Street. He and his son Levon did take some steps to achieve that a few years after the purchase. Furthermore, none of the documents or the witnesses referred to the rooftop parking area as a parking “lot,” a word more commonly used for a ground level parking area. In my view, Bob Nazarian’s explanation is probably accurate.

Bob Nazarian testified that he had been successful in every business enterprise he had undertaken “beside this Algo Mall which was a black hole for me.”<sup>230</sup> In this respect, he may have been an author of his own misfortune. He was clearly not cautious and prudent in his acquisition. His reliance on RBC’s limited inspection without even reading the Construction Control report, his acceptance of the “as is” stipulation without further inquiry, his lack of interest in the estoppel certificates, as well as the extraordinarily restrictive conditions of the Royal Bank mortgage are clear indications to me that the lure of a good bargain blinded him to the perils of ownership.

## Eastwood could afford to pay for necessary repairs

### Income tax returns, financial statements and his own documents are not generally indicative of Bob Nazarian's financial affairs

The Commission obtained a large number of documents regarding the financial affairs of the corporations controlled by Bob Nazarian. Table 1.7.1 sets out some of the information contained in documents relating to Eastwood Mall Inc., the corporation that purchased the Algo Centre in 2005.<sup>231</sup> As can be seen, differing figures are often given for the same income for the same period of time.

**Table 1.7.1 Eastwood Mall Inc. Summary of Financial Reporting Documents**

Financial Year	Reported Operations Income	Reported Net Income After Interest and Amortization	Document Type	Author and Date
2006	1,002,128		Profit & Loss Statement	
2006	589,261	151,040	Financial Statement	Hurmizi & Co., June 6, 2007
2006	585,661	125,724	Financial Statement	Hurmizi & Co. June 6, 2007
2006	1,044,261	784,166 <sup>232</sup>	Financial Statement	Hurmizi & Co., July 23, 2008
2006	848,785		The Algo Centre: Financial Performance <sup>233</sup>	Levon Nazarian, to assist in sale of Algo Centre <sup>234</sup>
2006		123,641	Tax Return	
2007	430,776	(11,485)	Financial Statement	Hurmizi & Co., July 14, 2009
2007	1,477,505	1,233,699	Financial Statement	Hurmizi & Co., July 23, 2008
2007	857,845 <sup>235</sup>		Statement of Income	Hurmizi & Co., Nov. 5, 2009
2007	765,211 <sup>236</sup>		The Algo Centre: Financial Performance	Levon Nazarian, to assist in sale of Algo Centre
2007	107,539 <sup>237</sup>		Profit & Loss Statement	
2007		(11,485)	Tax Return	
2008	186,020	(241,511)	Financial Statement	Hurmizi & Co., July 14, 2009
2008	478,704	45,071	Financial Statement	Hurmizi & Co., Sept. 22, 2008
2008	94,890	(101,492)	Financial Statement	Hurmizi & Co., June 5, 2008
2008	1,042,061		Financial Statement	Hurmizi & Co., Nov. 5, 2009
2008	207,710	(213,427)	Financial Statement	Hurmizi & Co., June 29, 2010
2008	218,238	(208,019)	Financial Statement	Hurmizi & Co., June 29, 2010
2008	1,063,874		The Algo Centre: Financial Performance	Levon Nazarian, to assist in sale of Algo Centre
2008		(239,985)	Profit & loss statement	
2008		(193,402)	Profit & loss statement	
2008	991,722		Statement of income	
2008		(213,416)	Tax return	
2008	1,001,722		Statement of income	

Financial Year	Reported Operations Income	Reported Net Income After Interest and Amortization	Document Type	Author and Date
2009	575,060	162,735	Financial statement	Hurmizi & Co., June 29, 2010
2009	504,552	92,799	Financial statement	Hurmizi & Co., Oct. 29, 2010
2009	872,825	418,591	Financial statement	Hurmizi & Co., Oct. 29, 2010
2009	613,762	202,009	Financial statement	Hurmizi & Co., Oct. 29, 2010
2009	1,206,555		The Algo Centre: financial performance	Levon Nazarian, to assist in sale of Algo Centre
2009		171,761	Income Tax Return	
2010	838,308	367,887	Financial Statement	Hurmizi & Co., Feb. 23, 2011
2010	406,387	6,018	Financial Statement	Hurmizi & Co., Feb. 23, 2011
2010	391,263	20,512	Financial Statement	Hurmizi & Co., Oct. 13, 2011
2010		24,759	Tax Return	

Source Exhibit 6184

It is apparent that all these purported results cannot be correct. The operating income for 2006 is reported in a range from a high of \$1,044,261 to a low of \$585,661; for 2007, from a high of \$1,477,505 to a low of \$107,539; for 2008, from a high of \$1,063,874 to a low of \$94,890.

Many of these documents are financial statements prepared by Sam Hurmizi, a chartered accountant. The financial statements prepared by him are accompanied by a "Notice to Reader":

On the basis of information provided by the company, I have compiled the Balance Sheet of Eastwood Mall Inc. as at December 31, [year] and the Statements of Income and Retained Earnings for the year then ended.

I have not performed an audit or a review engagement in respect of these financial statements and accordingly, I express no assurance thereon.

Readers are cautioned that these statements may not be appropriate for their purposes.<sup>238</sup>

That notice is provided to ensure that those who read the financial statements understand that the accountant who prepared them did not take any steps to ensure that the figures are accurate or reflect the financial state of the company at the time. As the statement says, the information in the statements was "provided by the company."

Levon Nazarian admitted that, on the basis of his experience and training, this type of financial statement was the lowest assurance of accuracy of three categories of financial statements issued by chartered accountants,<sup>239</sup> and that in this type of financial statement the accountant is merely passing on to the reader what he or she was told by management.<sup>240</sup> Bob Nazarian agreed that he understood that the financial statements were based on information provided to the accountant. He testified that he did not "get involved with the accounting" and that normally it was either his son or his wife who gathered the information and informed the accountant of the detail.<sup>241</sup> Levon Nazarian, however, testified that he was not involved with the financial statements and that the accountant took care of them.<sup>242</sup>

Some of the financial statements report information that is implausible on its face. On October 29, 2010, Mr. Hurmizi signed three different “Notice to Reader” Financial Statements for Eastwood Mall Inc. for the year ended December 31, 2009. Each of them was dated October 29, 2010, but stated different operating incomes – \$504,552,<sup>243</sup> \$613,762,<sup>244</sup> and \$872,825.<sup>245</sup> When asked about these discrepancies, Bob Nazarian suggested that each of these statements was prepared at a different time but given the same date because it was Mr. Hurmizi’s practice to issue all financial statements for the same period on the same indicated date even after new information necessitated an amendment. He would not explain, however, if that was so, why the accountant issued a fourth statement for the year ending December 31, 2009, with a different date – June 29, 2010.<sup>246</sup> Bob Nazarian could not explain the apparent inconsistency and admitted that he had simply presumed that the three documents dated October 29, 2010, were issued on different dates. He called Mr. Hurmizi’s work a “sloppy job” and testified that he had had trouble with Mr. Hurmizi and his office, and that is why he chose new accountants in 2011.<sup>247</sup> Levon Nazarian could not explain the discrepancies among the various versions either.<sup>248</sup>

Similarly, Bob Nazarian had no explanation for the variation in the reports of Eastwood Mall Inc.’s operations income in 2006 from a low of \$585,661 in one document to a high of \$1,044,261 in another. He could not explain why reported revenue in 2006 varied from \$2,235,238 in one document to exactly \$200,000 less in another. He had no explanation for why maintenance and repair figures varied between documents by exactly \$200,000 for the year ending December 31, 2006, or why salaries and benefits varied by exactly \$100,000. He testified, “I have no explanations. I just can say it’s a sloppy accounting job.” He had no explanation for similar discrepancies related to the years 2007, 2008, and 2009.<sup>249</sup>

Mr. Hurmizi issued two Eastwood Mall Inc. financial statements for 2010 on February 23, 2011. One showed net income, after interest and amortization, of \$367,887; the other showed net income of \$6,018. Levon Nazarian agreed that income of \$367,000 would have meant a good financial year. His evidence was that he could not recall if 2010 was a good year financially for the Algo Centre, and he could not assist in determining which statement was accurate.<sup>250</sup>

## The Nazarians manipulated financial statements depending on their purpose

It is apparent that the amounts shown in financial documents prepared by or on behalf of Bob Nazarian and his companies differed to accord with their intended purpose.

### Tax return

When asked to explain a financial statement produced by Mr. Hurmizi on July 23, 2008, for taxation year 2007 which showed net income of \$1,233,699, Bob Nazarian stated, “I do not agree with this at all . . .” He testified that he knew his financial position at the time regardless of what the statements said and pointed to a loss of \$11,485 reported to Revenue Canada for that taxation year. In other words, the financial statements prepared for 2007 reported a profit, except for Eastwood’s tax return and the financial statement prepared by Mr. Hurmizi on another date which supported that loss.<sup>251</sup>

In an application to borrow money for the purchase of the Algo Centre, Bob Nazarian reported his personal business income as \$200,000. He agreed that he had reported only \$25,000 on his personal income tax return in 2005 but could not explain the discrepancy.<sup>252</sup> The tax returns and financial statements for Eastwood Mall for 2005, the year it bought the Algo Centre, are illustrative. During that year, the corporation sold property it

had owned for a number of years. That sale, with proceeds of \$6.2 million, resulted in a reported capital gain of \$1.5 million, of which \$750,000 – one half – would have been subject to income tax if the company did not have countervailing losses.<sup>253</sup> But Eastwood Mall Inc. paid no tax that year. It reported a loss of \$757,000 from its active business, resulting in a net loss for tax purposes of \$7,012.<sup>254</sup> The “loss,” which is almost exactly the amount of the taxable capital gain from the sale of the property, was a result of the “expenses” of Eastwood Mall being reported to have increased from \$750,000 in 2004 to \$1,577,715 in 2005.<sup>255</sup> Bob Nazarian could not explain how the expenses of Eastwood grew by almost exactly the amount of the capital gain from the reported sale of a property called the Northtown Plaza, the effect of which was to make the reported capital gain tax-free.<sup>256</sup>

Of the expenses on Eastwood Mall’s 2005 tax return reported to have increased from the previous year, the largest single item was “management fees,” which went from \$80,000 in 2004 to \$490,000 in 2005.<sup>257</sup> Bob Nazarian testified that, in 2005, he was running the company. Although there was a manager in place in the Algo Mall after he bought it in August 2005, he agreed that he did not pay her \$490,000 a year. When asked whether, “in terms of management, in the company, it was you, right?” he replied, “Yes, possible.” When asked if he was paid in the neighbourhood of \$490,000 to manage the company in 2005, he replied only that it was “possible.”<sup>258</sup> Although it may have been “possible” that he was paid that amount to manage the company in 2005, I find it very unlikely. Bob Nazarian reported income of only \$25,000 on his personal income tax return in 2005.<sup>259</sup> Eastwood earned a capital gain of \$1.5 million in 2005. I conclude that the most plausible explanation for this set of income tax returns is that, to avoid paying tax on the capital gain, Bob Nazarian either filed a corporate tax return that conveniently increased operating expenses by an amount sufficient to barely exceed the amount of the corporate taxable gain or filed a personal income tax return that failed to declare his income from the corporation for management fees. The result of these filings appears to have been the avoidance of tax on at least \$750,000 of income.

### Higher income shown in sales document

A document prepared by Levon Nazarian to market the Algo Centre to potential buyers showed the “net income” of the Algo Centre varying from \$848,785 in 2006 (the first full year Eastwood owned the Mall) to \$1,206,555 in 2009.<sup>260</sup> In a subsequent version of the same document, those numbers were changed to vary from \$1,298,742 in 2006 to \$1,414,142 in 2009.<sup>261</sup> Those income levels, in a document designed to interest potential purchasers, were significantly higher than levels reported in many other documents purporting to deal with the same time periods (although not always the highest reported net income for each of those years in documents obtained by the Commission). Levon Nazarian was unable to explain the discrepancies other than to blame Mr. Hurmizi. He testified that he had obtained some of this information from Mr. Hurmizi over the telephone, but he did not know where he got the balance of the information.<sup>262</sup> Bob Nazarian testified that he had seen the sales document before it was released, calling it a “beautiful brochure made by Levon, and everyone loves it.” Nevertheless, he said he took no steps to verify if the numbers were right.<sup>263</sup>

### Financial statement adjusted for loan application

One of the three financial statements issued on October 29, 2010, purporting to reflect Eastwood’s financial affairs for the 2009 financial year, listed the company’s operations income as \$613,762 and its net income as \$202,009. Those figures were midway between what is found in the other two financial statements for the same period issued on the same day and showed net income only slightly higher than the taxable income of \$171,761 reported to the Canada Revenue Agency. Levon Nazarian provided that statement to the Canadian Imperial Bank of Commerce on December 12, 2010, to support a loan application by Eastwood.<sup>264</sup>

Levon Nazarian had received that financial statement from Mr. Hurmizi on October 29, 2010, attached to an email in which Mr. Hurmizi wrote:

Here is the f.s., please review it before you release. Because it is going to a bank I cant play too much. We have to show them what was filed with CRA its up to them to normalize them (take things out).<sup>265</sup>

Neither Bob Nazarian nor his son could provide a credible explanation for this message.<sup>266</sup> The closest thing to an explanation that either of them provided was by Bob Nazarian after the email was shown to him:

- Q. Tell me, again, is this a practice that Eastwood Mall would involve Mr. Hurmizi in, playing with the financial statements to portray different financial pictures?
- A. Actually I think just the opposite. This is simply telling us that the accountant is not bending to whatever we would like to do.
- Q. So you are trying to get him to play with the financial statements and he's refusing; is that what you take that to be?
- A. We would like to be as nice as possible, of course.<sup>267</sup>

I conclude that the Nazarians were knowingly providing a financial statement to the bank which showed a level of income that was respectable enough to get a loan, but not so high as to invite close scrutiny of the Canada Revenue Agency filings for comparison and verification. The pattern used is clear: create, directly or indirectly, documents that provide financial information tailored to suit a particular purpose.

### Financial statement adjusted to support property tax appeal

Another of the October 29, 2010, financial statements illustrates similar behaviour. In the fall of 2011, Eastwood was appealing its property tax assessment in order to have it lowered. The assessment was based, among other things, on a capitalization of the income of the property – the lower the income, the lower the Algo Centre's value. On September 9, 2011, Wing Yan, a bookkeeper who worked with Mr. Hurmizi, sent an email to Irene Nazarian in which she wrote:

For the property tax, you fax rene, you should not send eastwood 2009 for him, eastwood 2009 you have is for the mall buyer.

I will email him what rene need.

You need to explain to rene, do not use eastwood 2009 financial statement you faxed to him.<sup>268</sup>

Later the same day, Ms. Yan sent an email to Mr. Fabris (copying Bob Nazarian and Irene Nazarian) stating: "Please find attached financial statement for property tax appeal."<sup>269</sup> The attachment to that email was the 2009 Eastwood financial statement prepared by Mr. Hurmizi on October 29, 2010, that showed the lowest income.<sup>270</sup> Mr. Fabris testified that he received two financial statements, that the second showed a lower income for the Algo Centre, and that he used the second statement to pursue the appeal with the Municipal Property Assessment Corporation.<sup>271</sup>

Bob Nazarian was asked if he knew that, of the three financial statements issued on October 29, 2010, the one that showed the lowest income for the Algo Centre was the one sent to his lawyer for the property tax appeal. His answer, after much evasion of the question, was "Possible. I can't answer that. I'm sorry, I can't answer that."<sup>272</sup> He could not explain why the higher income statement was sent to the bank from which they were seeking a loan, and the lower income statement was used in the property tax appeal.<sup>273</sup>

The most likely explanation is the obvious one – that one or more of the Nazarians instructed Mr. Hurmizi to prepare different sets of financial statements to be used for different purposes, and intentionally misrepresented the income of the company to suit each purpose.

### Agreement of purchase and sale created to support property tax appeal

The willingness of the Nazarians to misrepresent the true state of their financial affairs to obtain an advantage is further illustrated by another step taken in the appeal of the property tax assessment in 2011. On May 6, 2011, Eastwood Mall Inc. entered into an agreement to sell the Algo Centre to “Tom Kovacevic in Trust” for \$5.5 million (the Kovacevic May 6 Agreement).<sup>274</sup> That agreement was subject to a number of conditions, including that the buyer conduct due diligence within 15 days. An amending agreement extended that due diligence period, so that it expired on May 31, 2011 (the Kovacevic May 20 Amending Agreement).<sup>275</sup> Bob Nazarian signed the agreement on May 6 and the amending agreement on May 20, 2011.

On May 12, 2011, however, while the Kovacevic May 6 Agreement was outstanding and binding on Eastwood, Bob Nazarian executed an agreement of purchase and sale with “Ali Heydarian in Trust” to sell the Algo Centre for \$3.9 million, \$1.6 million less than the price he was already committed to sell it at (the Heydarian May 12 Agreement). That agreement was subject to a condition that the buyer conduct due diligence within 15 days. It provided that the purchase would close on June 30, 2011.<sup>276</sup> Levon Nazarian testified that it was a legitimate agreement and that the purchase was intended to be completed by Mr. Heydarian’s uncle.<sup>277</sup> When confronted with the fact that Eastwood had entered into two agreements to sell the Algo Centre at the same time, Bob and Levon Nazarian gave different explanations. Levon Nazarian testified that the Kovacevic May 6 Agreement was accepted by Eastwood because Mr. Kovacevic “seemed very serious.” He agreed that it was a binding agreement.<sup>278</sup> Bob Nazarian, however, testified that he thought that Mr. Kovacevic’s offer was bogus.<sup>279</sup> It was his evidence that he knew from the time he signed the Kovacevic May 6 Agreement that it was not going to close, and, as a result, he felt free to sign the Heydarian May 12 Agreement. When asked why, if that was so, he signed the Kovacevic May 20 Amending Agreement, after he had signed the Heydarian May 12 Agreement, he had no answer. He testified:

Q. So first of all on May 6th you sign a deal to sell it for 5.5, on May 12th you sign a deal to sell it for 3.9, and on May 20th you agree to extend the due diligence period for the 5.5 deal –

A. It is simply –

Q. – keeping it alive.

A. Yes.

Q. Why would you do that?

A. It simply shows our desperation that we want to get rid of this mall under any circumstances whatsoever.

Q. But you would have been in a pretty pickle if Mr. Kovacevic had decided to try and close?

A. We knew a hundred per cent, not 99, but a hundred per cent that Mr. Kovacevic is the man of ... Mr. McCowan, and they are there to take our mall, not to buy.

Q. And did you know a hundred per cent that he was not going to close?

A. Yes.

Q. Well, if you knew a hundred per cent that he was not going to close, why did you sign the agreement to extend it?

A. Just ... for the sake of it.

Q. Just because you’ll sign anything?

A. No. At this point, just for the sake of saying that, yes, we are in the business.<sup>280</sup>

Levon Nazarian's evidence was different. He testified that he was not treating the Kovacevic May 6 Agreement as null and void, although he "could have used the excuse that there was no cheque deposited, so that could terminate it or void it at any time."<sup>281</sup> He then testified that the Heydarian May 12 Agreement was "dead" on May 15 (five days before the Kovacevic May 20 Amending Agreement), because on that date a mutual release was entered into between Mr. Heydarian and Eastwood which terminated the Heydarian May 12 Agreement and released both parties of any obligations in it.<sup>282</sup> The release obtained by the Commission, however, is executed only by Mr. Heydarian, and not executed by anyone on behalf of Eastwood.<sup>283</sup> When this detail was pointed out to Levon Nazarian, he testified that the mutual release was executed by him; he subsequently changed his evidence to say that it had been executed by his father (on a copy which was not produced) because he, Levon Nazarian, did not have authority to sign on behalf of Eastwood.<sup>284</sup>

The Nazarians did not, however, treat the Heydarian May 12 Agreement to sell the Algo Centre for \$3.9 million as "dead" after May 15. Instead, on June 6, 2011, Mr. Fabris provided a copy of it to the Municipal Property Assessment Corporation in support of Eastwood's appeal of the property tax assessment. He wrote:

Attached herewith ... is a copy of the most recent Agreement of Purchase and Sale valuing the mall at \$3,900,000.00. I can advise you that the purchasers are still proceeding with their due diligence and one of the conditions of the sale is the pursuance of this application.<sup>285</sup>

Mr. Fabris did not advise the Municipal Property Assessment Corporation about the \$5.5 million Kovacevic May 6 Agreement. He testified that he was not aware of it, that he had asked Bob Nazarian to provide him with any offers that they had, and the only one he was given was the Heydarian May 12 Agreement.<sup>286</sup> Bob Nazarian testified initially that he did not know why Mr. Fabris did not advise the Municipal Property Assessment Corporation about the Kovacevic May 6 Agreement; he subsequently testified that he (Bob Nazarian) "didn't see that [it] is necessary."<sup>287</sup> Levon Nazarian testified that he gave Mr. Fabris the Heydarian May 12 Agreement and that he did not give him the Kovacevic May 6 Agreement because he did not think that the Algo Centre was worth \$5.5 million. Both Levon and Bob Nazarian denied that the \$3.9 million Heydarian May 12 Agreement was bogus.<sup>288</sup>

Bob Nazarian is a very experienced businessman, and he would not knowingly enter into two agreements of purchase and sale for the same property at the same time, thereby exposing himself to a potential lawsuit. Having Mr. Heydarian sign the release on May 15, and leaving the document unsigned by Bob Nazarian, gave him the option of backing out of the agreement at any time by simply executing the release. As I will explain later in this Report, the Heydarian May 12 Agreement for \$3.9 million was, by a significant amount, the lowest offer ever accepted by Bob Nazarian for the Algo Centre. Although the Nazarians have testified that the Heydarian May 12 Agreement was a *bona fide* attempt to sell the property, their actions belie their words. I conclude that Eastwood likely entered into the \$3.9 million agreement with Mr. Heydarian solely to support the property tax assessment appeal, and there was no intention on the part of the Nazarians to sell it to Mr. Heydarian for that price.

**I conclude that Eastwood likely entered into the \$3.9 million agreement with Mr. Heydarian solely to support the property tax assessment appeal, and there was no intention on the part of the Nazarians to sell it to Mr. Heydarian for that price.**

## **Bob Nazarian could afford to pay for necessary repairs, but he chose not to put any more money into the “black hole”**

### **Manipulation of documents shows there are significant assets to hide**

One may ask why, given my mandate, I heard evidence and have reached conclusions about the manipulation of tax returns, financial statements, and legal documents by the Nazarians and the corporations they controlled. I have been asked to determine the causes of the collapse. One of the issues before me is whether the collapse could have been averted by timely investment in repairs and maintenance. The financial ability of the owner to make such an investment is relevant to that issue.

In my ruling on Eastwood’s motion to keep confidential the financial information it had submitted dated January 8, 2013, I responded as follows:<sup>289</sup>

Further, I am unable to agree with the applicants’ contention that the financial information provided “could not possibly assist in determining how the collapse occurred on June 23, 2012.” (paragraph 19 of the original submissions). I am of the opposite view. Proper maintenance of commercial structures is an essential component of structural integrity. Proper maintenance costs money. While it is premature for the Commission to reach any conclusion on the cause of the mall collapse, it is only logical that a careful examination of maintenance procedures of the Algo Mall in the years prior to the collapse be carried out. The nature and extent of these procedures as well as their cost must be carefully investigated and analyzed. In that process, the Mall owners’ financial circumstances are directly relevant and of significant importance.

In addition, these manipulations support my opinion of the Nazarians’ credibility. The activities I have outlined, and the findings I have made, have led me to conclude that the financial documents purporting to show income or assets under the control of Bob Nazarian cannot be relied upon as accurate. That conclusion does not answer the question of whether he had sufficient funds to make any necessary repairs. It does allow me to conclude that he has not established that he could not afford to do it, despite his frequent protests from the witness box that he did not have any money. It is only common sense to observe, however, that people do not engage in such subterfuge, or conceal the truth about their income from the tax authorities, if there are no assets and income to conceal. I am comfortable in concluding that Bob Nazarian probably did have sufficient assets to pay for repairs.

### **Bob and Levon Nazarian admitted their companies had significant assets**

However, the evidence of Bob and Levon Nazarian that I find safe to accept allows me to reach this conclusion on other grounds as well. They effectively admitted to having significant assets at their disposal. As I have explained above, Bob Nazarian or his family were shareholders in a number of different companies. Bob Nazarian admitted that those companies would loan money to one another as needed (including to Eastwood) and that his personal money was available to be used to deal with the financial needs of his corporations.<sup>290</sup> I accept that evidence. It is consistent with the way in which he carried on his businesses. In addition, many of the financial statements for companies in which he had an interest had a reference to debts due to or from shareholders or associated companies.

Levon Nazarian prepared a document in 2010 or later listing the purchases and sales by one or more of the corporations affiliated with Eastwood since 1994.<sup>291</sup> Both men testified that the document was created to support a loan to one or more of the companies.<sup>292</sup> Both Levon and his father were examined at length about the nine transactions referred to in the document. They were able to recall specific transactions, the price paid and received for properties, the amount of mortgages placed on the various properties, the income earned by

the buildings in issue, and reasons why, in particular cases, the figures set out in the document were not quite accurate. I accept that the evidence given by them as to the profit made by each of the companies on these sales was generally accurate.

Levon Nazarian testified that, over the period covered by the document, the affiliated companies earned about \$10 million in profit, of which approximately \$3.3 million in cash was reinvested in properties. He agreed that, after the purchase of the Algo Centre, approximately \$6.7 million in capital was left. He did not know what had happened to that capital.<sup>293</sup>

Bob Nazarian testified that, over that period of time, the affiliated companies earned about \$11.05 million, of which approximately \$3.1 million was reinvested in properties. He testified that the difference of \$7.95 million was what he earned with those developments over that period.<sup>294</sup>

I cannot determine exactly how much money had in fact been earned by Bob Nazarian or one of his companies and was available capital from 1994 to at least 2010. There is a difference of \$1.25 million between the figures cited by him and his son – one claiming \$6.7 million, and the other \$7.95 million. I am satisfied that the correct figure is likely somewhere in the range between those two amounts.

### **Bob Nazarian admitted he could have invested more in the Algo Centre, but he chose not to**

When asked what happened to that money, Bob Nazarian replied:

- A. What happened to that money? That's a very interesting question. I build my house. I have a very, I would say, nice location, a 6,000 square foot house in a half acre of land. I have a good life. I'm successful virtually on every deal that I have done – besides Algo Mall. I don't know.<sup>295</sup>

Later, Bob Nazarian volunteered that, in August 2009, he had money available from the sale of other properties which he could have used to pay off the mortgage on the Algo Centre, but he had used it to purchase another property at a cost of \$2.65 million. When asked why he did not use that money to fix the roof, he replied:

- Q. Instead of putting the money down to pay – to buy that, you could have used that money to fix the roof, couldn't you?
- A. I wouldn't do that.
- Q. Why not?
- A. Because ...
- Q. Because why?
- A. The Algo Mall was a black hole that no matter how much money you put in, as Mr. Norr's report, sir, even before I purchase, that mall was doomed.
- Q. So you simply wouldn't put that money in?
- A. Simply I would not put my life in it, no. I worked 42 years to gather some fund for my family. I'm not going to put everything in this building and God forbid what happened, if it continues, everything goes down the drain.<sup>296</sup>

**“The Algo Mall was a black hole that no matter how much money you put in, as Mr. Norr's report, sir, even before I purchase, that mall was doomed.”**  
– Bob Nazarian

I conclude that Bob Nazarian had the money available, at all times, to carry out whatever repairs were required to fix the leaking. He chose not to invest the money because he decided that his assets were better placed elsewhere. Bob Nazarian had decided, early on, that his financial interests would be better served by selling the Algo Centre than by fixing it.

## Notes

- <sup>1</sup> Bob Nazarian testimony, July 23, 2013, pp. 17428–9.
- <sup>2</sup> Levon Nazarian testimony, July 15, 2013, pp. 16158, 16190; July 16, 2013, pp. 16460–1.
- <sup>3</sup> Bob Nazarian testimony, July 23, 2013, p. 17430; Levon Nazarian testimony, July 15, 2013, p. 16159.
- <sup>4</sup> Bob Nazarian testimony, July 23, 2013, p. 17430; Levon Nazarian testimony, July 15, 2013, pp. 16159–60.
- <sup>5</sup> Exhibit 1694, p. 014.
- <sup>6</sup> Bob Nazarian testimony, July 23, 2013, pp. 17487–8.
- <sup>7</sup> Bob Nazarian testimony, July 23, 2013, p. 17432.
- <sup>8</sup> Levon Nazarian testimony, July 15, 2013, p. 16165; Bob Nazarian testimony, July 23, 2013, p. 17431.
- <sup>9</sup> Kennealy testimony, April 18, 2013, pp. 5640–1.
- <sup>10</sup> Kennealy testimony, April 18, 2013, p. 5642.
- <sup>11</sup> Hamilton testimony, July 8, 2013, pp. 14973–4; Collett testimony, May 23, 2013, pp. 11096–9; May 24, 2013, pp. 11399–400.
- <sup>12</sup> Kennealy testimony, April 18, 2013, pp. 5643–4.
- <sup>13</sup> Exhibit 2286.
- <sup>14</sup> Exhibit 2286, p. 007; Exhibit 2285.
- <sup>15</sup> Farkouh testimony, May 7, 2013, pp. 8246–7.
- <sup>16</sup> Bob Nazarian testimony, July 23, 2013, pp. 17561–2.
- <sup>17</sup> Bob Nazarian testimony, July 23, 2013, p. 17565; July 26, 2013, pp. 18554–5.
- <sup>18</sup> Snow testimony, April 3, 2013, pp. 3985–6.
- <sup>19</sup> Bob Nazarian testimony, July 23, 2013, pp. 17562–6; Exhibit 9-126.
- <sup>20</sup> Bob Nazarian testimony, July 23, 2013, p. 17566.
- <sup>21</sup> Bob Nazarian testimony, July 26, 2013, pp. 18555–6.
- <sup>22</sup> Bob Nazarian testimony, July 23, 2013, pp. 17576–7.
- <sup>23</sup> Bob Nazarian testimony, July 26, 2013, pp. 18555–6.
- <sup>24</sup> Bob Nazarian testimony, July 23, 2013, pp. 17565–7; Exhibit 706.
- <sup>25</sup> Bob Nazarian testimony, July 23, 2013, pp. 17570–1.
- <sup>26</sup> Exhibit 2288.
- <sup>27</sup> Guertin testimony, April 19, 2013, pp. 5992–3.
- <sup>28</sup> Exhibit 2288; Kennealy testimony, April 18, 2013, p. 5645; Farkouh testimony, May 7, 2013, p. 8249.
- <sup>29</sup> Hamilton testimony, July 8, 2013, p. 14975.
- <sup>30</sup> Exhibit 706.
- <sup>31</sup> Bob Nazarian testimony, July 23, 2013, pp. 17571–3; Exhibit 706, p. 2325.
- <sup>32</sup> Exhibit 706, p. 338.
- <sup>33</sup> Kennealy testimony, April 18, 2013, pp. 5654–5.
- <sup>34</sup> Bob Nazarian testimony, July 23, 2013, p. 17573.
- <sup>35</sup> Kennealy testimony, April 18, 2013, p. 5765.
- <sup>36</sup> Kennealy testimony, April 18, 2013, p. 5765.
- <sup>37</sup> Bob Nazarian testimony, July 23, 2013, pp. 17577–80.
- <sup>38</sup> Bob Nazarian testimony, July 23, 2013, pp. 17578–80.
- <sup>39</sup> Exhibit 35; Bob Nazarian testimony, July 23, 2013, pp. 17607–8.
- <sup>40</sup> Exhibit 44; Bob Nazarian testimony, July 23, 2013, p. 17608.
- <sup>41</sup> Exhibit 51; Bob Nazarian testimony, July 23, 2013, pp. 17608–9.
- <sup>42</sup> Exhibit 65; Bob Nazarian testimony, July 23, 2013, p. 17609.
- <sup>43</sup> Exhibit 67; Bob Nazarian testimony, July 23, 2013, p. 17609.
- <sup>44</sup> Exhibit 67, p. 0034; Bob Nazarian testimony, July 23, 2013, pp. 17609–10.
- <sup>45</sup> Exhibit 70; Bob Nazarian testimony, July 23, 2013, p. 17610.
- <sup>46</sup> Bob Nazarian testimony, July 26, 2013, pp. 18558–64; Exhibit 5348, p. 1984.
- <sup>47</sup> Kennealy testimony, April 18, 2013, pp. 5648–9.
- <sup>48</sup> Kennealy testimony, April 18, 2013, p. 5650.
- <sup>49</sup> Guertin testimony, April 19, 2013, pp. 5994–5.
- <sup>50</sup> Kennealy testimony, April 18, 2013, pp. 56512–13.
- <sup>51</sup> Guertin testimony, April 19, 2013, pp. 5994–5.
- <sup>52</sup> Kennealy testimony, April 18, 2013, pp. 5766–7.
- <sup>53</sup> Kennealy testimony, April 18, 2013, p. 5767.
- <sup>54</sup> Guertin testimony, April 19, 2013, p. 5995.
- <sup>55</sup> Guertin testimony, April 19, 2013, pp. 5995–7.
- <sup>56</sup> Guertin testimony, April 19, 2013, p. 5997.
- <sup>57</sup> Fabris testimony, July 11, 2013, pp. 15597–8.
- <sup>58</sup> Bob Nazarian testimony, July 23, 2013, pp. 17574–6.
- <sup>59</sup> Bob Nazarian testimony, July 23, 2013, p. 17574.
- <sup>60</sup> Bob Nazarian testimony, July 23, 2013, pp. 17574–6.
- <sup>61</sup> Bob Nazarian testimony, July 23, 2013, pp. 17580–1.
- <sup>62</sup> Exhibits 11-81 and 2048.
- <sup>63</sup> Fazekas testimony, March 12, 2013, p. 1214.
- <sup>64</sup> Fazekas testimony, March 12, 2013, p. 1215.
- <sup>65</sup> Fazekas testimony, March 12, 2013, p. 1217.
- <sup>66</sup> Fazekas testimony, March 12, 2013, p. 1217.
- <sup>67</sup> Speck testimony, April 24, 2013, pp. 6755–7; Exhibit 11-81.
- <sup>68</sup> Speck testimony, April 24, 2013, p. 6758.
- <sup>69</sup> Speck testimony, April 25, 2013, pp. 6928–9.
- <sup>70</sup> Speck testimony, April 25, 2013, p. 6929.
- <sup>71</sup> Speck testimony, April 25, 2013, p. 6955.
- <sup>72</sup> Fazekas testimony, March 12, 2013, pp. 1224–5; Exhibit 11-83.
- <sup>73</sup> Exhibit 11-84.
- <sup>74</sup> Exhibit 11-82.
- <sup>75</sup> Clouthier testimony, April 23, 2013, pp. 6347–8; Allard testimony, April 29, 2013, pp. 7046–51.
- <sup>76</sup> Clouthier testimony, April 23, 2013, pp. 6347–8; Allard testimony, April 29, 2013, pp. 7046–51.
- <sup>77</sup> Farkouh testimony, May 7, 2013, p. 8252.
- <sup>78</sup> Hamilton testimony, July 8, 2013, pp. 15009–10; Exhibit 11-82.
- <sup>79</sup> Hamilton testimony, July 8, 2013, pp. 15010–13; Exhibit 11-82.
- <sup>80</sup> Hamilton testimony, July 8, 2013, pp. 15006–14; Exhibit 11-82.
- <sup>81</sup> Denley testimony, June 4, 2013, pp. 12844–5.
- <sup>82</sup> Denley testimony, June 4, 2013, pp. 12845–6.
- <sup>83</sup> Exhibit 11-84.
- <sup>84</sup> Allard testimony, April 29, 2013, pp. 7052–62; Exhibit 11-84.
- <sup>85</sup> Sprague testimony, July 12, 2013, pp. 16020–1; Exhibit 11-84.
- <sup>86</sup> Exhibit 11-84.
- <sup>87</sup> Exhibit 11-84, p. 4683.
- <sup>88</sup> Fazekas testimony, March 12, 2013, p. 1234.
- <sup>89</sup> Speck testimony, April 24, 2013, p. 6771.
- <sup>90</sup> Farkouh testimony, May 7, 2013, pp. 8264–5.
- <sup>91</sup> Allard testimony, April 29, 2013, pp. 7052–62; Exhibit 11-84.
- <sup>92</sup> Exhibit 11-84.
- <sup>93</sup> Fazekas testimony, March 12, 2013, p. 1250; Speck testimony, April 24, 2013, p. 6779.
- <sup>94</sup> Clouthier testimony, April 23, 2013, p. 6349; Allard testimony, April 29, 2013, pp. 7062–3.
- <sup>95</sup> Hamilton testimony, July 9, 2013, pp. 15020–4.
- <sup>96</sup> Exhibit 11-80.
- <sup>97</sup> Fazekas testimony, March 12, 2013, pp. 1243–7.
- <sup>98</sup> Speck testimony, April 25, 2013, pp. 6789–91; Exhibit 11-87.
- <sup>99</sup> Speck testimony, April 25, 2013, p. 6791.
- <sup>100</sup> Speck testimony, April 25, 2013, p. 6792.
- <sup>101</sup> Exhibit 11-85; Speck testimony, April 25, 2013, pp. 6787–9.
- <sup>102</sup> Exhibit 11-88.
- <sup>103</sup> Exhibit 11-93.
- <sup>104</sup> Exhibit 11-31; Dennis testimony, April 30, 2013, pp. 7526–7.

- <sup>105</sup> Regan testimony, June 5, 2013, pp. 13029–33.
- <sup>106</sup> Regan testimony, June 5, 2013, p. 13041; Exhibit 1436.
- <sup>107</sup> Exhibit 11-15.
- <sup>108</sup> Fazekas testimony, March 12, 2013, p. 1252.
- <sup>109</sup> Farkouh testimony, May 7, 2013, pp. 8271–2.
- <sup>110</sup> Exhibit 11-93; Speck testimony, April 25, 2013, p. 6834.
- <sup>111</sup> Speck testimony, April 25, 2013, pp. 6957–9.
- <sup>112</sup> Exhibit 3308.
- <sup>113</sup> Exhibit 11-94.
- <sup>114</sup> Fazekas testimony, March 12, 2013, p. 1252.
- <sup>115</sup> Exhibit 11-95.
- <sup>116</sup> Fazekas testimony, March 12, 2013, p. 1255.
- <sup>117</sup> Speck testimony, April 25, 2013, p. 6835.
- <sup>118</sup> Farkouh testimony, May 7, 2013, pp. 8274–5; Exhibit 11-95.
- <sup>119</sup> Farkouh testimony, May 7, 2013, p. 8275–6.
- <sup>120</sup> Exhibit 11-97.
- <sup>121</sup> Speck testimony, April 25, 2013, p. 6839; Exhibit 3311.
- <sup>122</sup> Clouthier testimony, April 23, 2013, p. 6347; Sprague testimony, July 12, 2013, p. 16022, and Exhibit 11-88.
- <sup>123</sup> Exhibit 11-95.
- <sup>124</sup> Exhibit 11-6.
- <sup>125</sup> Fazekas testimony, March 12, 2013, p. 1261.
- <sup>126</sup> Fazekas testimony, March 12, 2013, p. 1261.
- <sup>127</sup> Exhibit 2295, p. 016.
- <sup>128</sup> Kennealy testimony, April 18, 2013, p. 5661.
- <sup>129</sup> Kennealy testimony, April 18, 2013, pp. 5661–2.
- <sup>130</sup> Quinn testimony, April 16, 2013, p. 4986.
- <sup>131</sup> Kennealy testimony, April 18, 2013, p. 5662.
- <sup>132</sup> Hamilton testimony, July 8, 2013, pp. 14979–83; Farkouh testimony, May 7, 2013, pp. 8277–8.
- <sup>133</sup> Exhibit 11-105.
- <sup>134</sup> Exhibit 11-106.
- <sup>135</sup> Speck testimony, April 25, 2013, pp. 6841–3.
- <sup>136</sup> Exhibit 11-100.
- <sup>137</sup> Clouthier testimony, April 23, 2013, pp. 6352–3, 6355.
- <sup>138</sup> Allard testimony, April 29, 2013, pp. 7065–9.
- <sup>139</sup> Exhibit 2351, p. 019.
- <sup>140</sup> Farkouh testimony, May 2, 2013, p. 8074; Speck testimony, April 25, 2013, p. 6846.
- <sup>141</sup> Farkouh testimony, May 2, 2013, p. 8075.
- <sup>142</sup> Exhibit 11-101.
- <sup>143</sup> Fazekas testimony, March 12, 2013, p. 1266.
- <sup>144</sup> Exhibits 2296 and 706, p. 2348.
- <sup>145</sup> Bob Nazarian testimony, July 23, 2013, pp. 17581–4.
- <sup>146</sup> Bob Nazarian testimony, July 29, 2013, p. 18891; Exhibit 2296.
- <sup>147</sup> Kennealy testimony, April 18, 2013, pp. 5656–7; Exhibit 706, p. 2345.
- <sup>148</sup> Kennealy testimony, April 18, 2013, p. 5657.
- <sup>149</sup> Bob Nazarian testimony, July 23, 2013, pp. 17587–8; Exhibit 706, p. 2352.
- <sup>150</sup> Exhibit 1522.
- <sup>151</sup> Bob Nazarian testimony, July 26, 2013, pp. 18564–8.
- <sup>152</sup> Farkouh testimony, May 7, 2013, pp. 8282–3.
- <sup>153</sup> Farkouh testimony, May 7, 2013, pp. 8283–4.
- <sup>154</sup> Bob Nazarian testimony, July 26, 2013, pp. 18564–8.
- <sup>155</sup> Kennealy testimony, April 18, 2013, pp. 5665–6.
- <sup>156</sup> Exhibit 11-18, p. 003.
- <sup>157</sup> Kennealy testimony, April 18, 2013, pp. 5678–9.
- <sup>158</sup> Exhibit 11-103.
- <sup>159</sup> Kennealy testimony, April 18, 2013, pp. 5666–7.
- <sup>160</sup> Kennealy testimony, April 18, 2013, pp. 5668–9.
- <sup>161</sup> Kennealy testimony, April 18, 2013, pp. 5669–71.
- <sup>162</sup> Kennealy testimony, April 18, 2013, pp. 5674–6.
- <sup>163</sup> Exhibit 11-103.
- <sup>164</sup> Farkouh testimony, May 7, 2013, pp. 8296–7.
- <sup>165</sup> Farkouh testimony, May 7, 2013, pp. 8297–8.
- <sup>166</sup> Hamilton testimony, July 8, 2013, pp. 14983–6.
- <sup>167</sup> Hamilton testimony, July 8, 2013, pp. 14986–8.
- <sup>168</sup> Hamilton testimony, July 8, 2013, pp. 14983–6.
- <sup>169</sup> Fazekas testimony, March 12, 2013, p. 1282.
- <sup>170</sup> Fazekas testimony, March 12, 2013, pp. 1274–5.
- <sup>171</sup> Exhibit 13-4, p. 002; McCulloch testimony, June 13, 2013, pp. 14374–5.
- <sup>172</sup> McCulloch testimony, June 13, 2013, p. 14378.
- <sup>173</sup> Exhibit 750.
- <sup>174</sup> McCulloch testimony, June 13, 2013, pp. 14378–9.
- <sup>175</sup> Exhibit 750.
- <sup>176</sup> McCulloch testimony, June 13, 2013, p. 14379.
- <sup>177</sup> Exhibit 750; McCulloch testimony, June 13, 2013, pp. 14380–1.
- <sup>178</sup> Hass testimony, June 14, 2013, pp. 14527–8; Exhibit 13-6.
- <sup>179</sup> McCulloch testimony, June 13, 2013, p. 14381.
- <sup>180</sup> MacDonald testimony, April 24, 2013, pp. 6548–9; Exhibit 2349, pp. 001–004.
- <sup>181</sup> MacDonald testimony, April 24, 2013, pp. 6548–9.
- <sup>182</sup> MacDonald testimony, April 24, 2013, pp. 6551–2, 6554–5, 6568; Exhibit 844, p. 012.
- <sup>183</sup> Exhibit 844, p. 012; MacDonald testimony, April 24, 2013, pp. 6570–1.
- <sup>184</sup> MacDonald testimony, April 24, 2013, pp. 6552–4.
- <sup>185</sup> MacDonald testimony, April 24, 2013, pp. 6556–7.
- <sup>186</sup> Kennealy testimony, April 18, 2013, p. 5682.
- <sup>187</sup> MacDonald testimony, April 24, 2013, pp. 6558–61, 6606.
- <sup>188</sup> MacDonald testimony, April 24, 2013, pp. 6561–2.
- <sup>189</sup> MacDonald testimony, April 24, 2013, p. 6574; Exhibit 844, p. 013.
- <sup>190</sup> MacDonald testimony, April 24, 2013, p. 6563.
- <sup>191</sup> MacDonald testimony, April 24, 2013, pp. 6600–1.
- <sup>192</sup> Exhibit 2349, p. 005.
- <sup>193</sup> MacDonald testimony, April 24, 2013, p. 6618.
- <sup>194</sup> MacDonald testimony, April 24, 2013, p. 6569.
- <sup>195</sup> MacDonald testimony, April 24, 2013, pp. 6571–3; Exhibit 844, p. 013.
- <sup>196</sup> MacDonald testimony, April 24, 2013, p. 6565; Exhibit 844.
- <sup>197</sup> MacDonald testimony, April 24, 2013, pp. 6575–6; Exhibit 844, p. 018.
- <sup>198</sup> MacDonald testimony, April 24, 2013, pp. 6585–7; Exhibit 844, pp. 021 and 036.
- <sup>199</sup> Exhibit 844, p. 021.
- <sup>200</sup> Exhibits 2031, 2032, 2039, 2044.
- <sup>201</sup> MacDonald testimony, April 24, 2013, pp. 6577–83.
- <sup>202</sup> MacDonald testimony, April 24, 2013, pp. 6583–4; Exhibit 844, p. 021.
- <sup>203</sup> MacDonald testimony, April 24, 2013, p. 6584.
- <sup>204</sup> Exhibit 844.
- <sup>205</sup> MacDonald testimony, April 24, 2013, p. 6591.
- <sup>206</sup> MacDonald testimony, April 24, 2013, pp. 6590–6; Exhibit 844, pp. 010, 018–019, photos 11–12.
- <sup>207</sup> Exhibit 844, p. 021.
- <sup>208</sup> MacDonald testimony, April 24, 2013, pp. 6597–8; Exhibit 844, p. 021.
- <sup>209</sup> MacDonald testimony, April 24, 2013, pp. 6602–3.
- <sup>210</sup> MacDonald testimony, April 24, 2013, p. 6607–8.

- <sup>211</sup> MacDonald testimony, April 24, 2013, pp. 6561–2.
- <sup>212</sup> MacDonald testimony, April 24, 2013, pp. 6576–7.
- <sup>213</sup> Bob Nazarian testimony, July 23, 2013, pp. 17600–5; Exhibit 1490, pp. 029, 043–044.
- <sup>214</sup> Bob Nazarian testimony, July 23, 2013, pp. 17589–91; Exhibit 706, p. 2351.
- <sup>215</sup> Kennealy testimony, April 18, 2013, p. 5658.
- <sup>216</sup> Kennealy testimony, April 18, 2013, pp. 5659–60.
- <sup>217</sup> Bob Nazarian testimony, July 30, 2013, pp. 18919–24; Exhibit 706, p. 2351.
- <sup>218</sup> Exhibit 2305.
- <sup>219</sup> Hamilton testimony, July 8, 2013, pp. 14976–9; see also Kennealy testimony, April 18, 2013, p. 5660, and Bob Nazarian testimony, July 23, 2013, pp. 17590–1.
- <sup>220</sup> Farkouh testimony, May 7, 2013, pp. 10085–6.
- <sup>221</sup> Exhibit 8-16.
- <sup>222</sup> Levon Nazarian testimony, July 16, 2013, pp. 16464–6; Exhibit 5362, p. 0285.
- <sup>223</sup> Levon Nazarian testimony, July 16, 2013, pp. 16466–74; Exhibit 5362, pp. 0291–2.
- <sup>224</sup> Bob Nazarian testimony, July 26, 2013, pp. 18558–62; Exhibit 5348.
- <sup>225</sup> Kennealy testimony, April 18, 2013, p. 5725.
- <sup>226</sup> Kennealy testimony, April 18, 2013, p. 5686.
- <sup>227</sup> Kennealy testimony, April 18, 2013, pp. 5686–7.
- <sup>228</sup> Kennealy testimony, April 18, 2013, pp. 5686–7.
- <sup>229</sup> Exhibits 2296 and 706, p. 2348.
- <sup>230</sup> Bob Nazarian testimony, July 29, 2013, p. 18827.
- <sup>231</sup> Exhibit 6184.
- <sup>232</sup> After interest, but before amortization.
- <sup>233</sup> Purports to reflect the financial performance of the Algo Centre Mall, not Eastwood Mall Inc.
- <sup>234</sup> Levon Nazarian testimony, July 15, 2013, pp. 16200–03.
- <sup>235</sup> Purports to reflect the financial performance of the Algo Centre Mall, not Eastwood Mall Inc.
- <sup>236</sup> Purports to reflect the financial performance of the Algo Centre Mall, not Eastwood Mall Inc.
- <sup>237</sup> Purports to reflect the financial performance of Algo Centre Mall, not Eastwood Mall Inc.
- <sup>238</sup> As an example, Exhibit 5955, p. 3.
- <sup>239</sup> Levon Nazarian testimony, July 15, 2013, p. 16179.
- <sup>240</sup> Levon Nazarian testimony, July 15, 2013, pp. 16197–8.
- <sup>241</sup> Bob Nazarian testimony, July 23, 2013, p. 17452.
- <sup>242</sup> Levon Nazarian testimony, July 15, 2013, p. 16185.
- <sup>243</sup> Exhibit 1250.
- <sup>244</sup> Exhibit 5956.
- <sup>245</sup> Exhibit 5955.
- <sup>246</sup> Exhibit 5952.
- <sup>247</sup> Bob Nazarian testimony, July 23, 2013, pp. 17521–8.
- <sup>248</sup> Levon Nazarian testimony, July 15, 2013, pp. 16205–8.
- <sup>249</sup> Bob Nazarian testimony, July 23, 2013, pp. 17528–33; Exhibit 6185. Bob Nazarian also could not explain the change in Yorkdale Group Inc.'s income tax return for the year ending January 31, 2009, which indicated a net income of \$1,748 for that year and \$6,106,120 for the previous year: Bob Nazarian testimony, July 23, 2013, pp. 17485–8; Exhibit 1694, p. 0016.
- <sup>250</sup> Levon Nazarian testimony, July 15, pp. 16195–98; Exhibit 6184.
- <sup>251</sup> Bob Nazarian testimony, July 25, 2013, pp. 18100–2; Exhibit 6184.
- <sup>252</sup> Bob Nazarian testimony, July 23, 2013, pp. 17468–72; Exhibits 5359, 6069.
- <sup>253</sup> Exhibit 1683, pp. 0015–16; Bob Nazarian testimony, July 23, 2013, pp. 17462–3.
- <sup>254</sup> Exhibit 1683, p. 0019; Bob Nazarian testimony, July 23, 2013, pp. 17463–4.
- <sup>255</sup> Exhibit 1683, p. 0024.
- <sup>256</sup> Bob Nazarian testimony, July 23, 2013, pp. 17460–7.
- <sup>257</sup> Exhibit 1683, p. 0024.
- <sup>258</sup> Bob Nazarian testimony, July 23, 2014, pp. 17464–7.
- <sup>259</sup> Exhibit 6069.
- <sup>260</sup> Exhibit 5957.
- <sup>261</sup> Exhibit 3801.
- <sup>262</sup> Levon Nazarian testimony, July 15, 2013, pp. 16355–7.
- <sup>263</sup> Bob Nazarian testimony, July 25, 2013, pp. 18253–5.
- <sup>264</sup> Exhibit 5584; Exhibit 5956.
- <sup>265</sup> Exhibit 5571.
- <sup>266</sup> Bob Nazarian testimony, July 26, 2013, pp. 18346–7; Levon Nazarian testimony, July 16, 2013, pp. 16518–30.
- <sup>267</sup> Bob Nazarian testimony, July 30, 2013, pp. 18968–70.
- <sup>268</sup> Exhibit 5692.
- <sup>269</sup> Exhibits 4844 and 6183 (two copies of the same email).
- <sup>270</sup> Exhibit 1250.
- <sup>271</sup> Fabris testimony, July 11, 2013, pp. 15724–5.
- <sup>272</sup> Bob Nazarian testimony, July 23, 2013, p. 17538.
- <sup>273</sup> Bob Nazarian testimony, July 23, 2013, p. 17540.
- <sup>274</sup> Exhibit 5638.
- <sup>275</sup> Exhibit 1497.
- <sup>276</sup> Exhibit 5643.
- <sup>277</sup> Levon Nazarian testimony, July 16, 2013, pp. 16683.
- <sup>278</sup> Levon Nazarian testimony, July 16, 2013, pp. 16680–2.
- <sup>279</sup> Bob Nazarian testimony, July 26, 2013, p. 18463.
- <sup>280</sup> Bob Nazarian testimony, July 26, 2013, pp. 18464–6.
- <sup>281</sup> Levon Nazarian testimony, July 16, 2013, pp. 16687–8.
- <sup>282</sup> Levon Nazarian testimony, July 16, 2013, pp. 16888–90.
- <sup>283</sup> Exhibit 5643, p. 06.
- <sup>284</sup> Levon Nazarian testimony, July 16, 2013, pp. 16889–90.
- <sup>285</sup> Exhibit 5653.
- <sup>286</sup> Fabris testimony, July 11, 2013, pp. 15709–10.
- <sup>287</sup> Bob Nazarian testimony, July 26, 2013, pp. 18470–4.
- <sup>288</sup> Levon Nazarian testimony, July 16, 2013, p. 16702; Bob Nazarian testimony, July 26, 2013, p. 18471.
- <sup>289</sup> Ruling on Confidentiality, January 8, 2013, Part Two, Appendix M.2.
- <sup>290</sup> Bob Nazarian testimony, July 23, 2013, pp. 17431, 17502.
- <sup>291</sup> Exhibit 6067.
- <sup>292</sup> Levon Nazarian testimony, July 15, 2013, p. 16161; Bob Nazarian testimony, July 23, 2013, p. 17433.
- <sup>293</sup> Levon Nazarian testimony, July 15, 2013, pp. 16173–4.
- <sup>294</sup> Bob Nazarian testimony, July 23, 2013, pp. 17447–8.
- <sup>295</sup> Bob Nazarian testimony, July 23, 2013, p. 17448.
- <sup>296</sup> Bob Nazarian testimony, July 25, 2013, p. 18265.