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2009: The leaks continue, Eastwood does nothing to stop them, and the City misses opportunities to force the owner to fix them

The year 2009 was one of contradictions for Elliot Lake. It would see the City, on the one hand, renew the Library lease with Eastwood against the wishes of the Library and force it to remain in its leak-plagued location. On the other hand, it issued an Order to Remedy against Eastwood over structural concerns and the ongoing leaks. The City issued the order in reaction to its discovery of the 2006 Notice of Violation. The reaction was short-lived. The City would conclude, based on a deficient report from engineer Robert Wood and without proof, that the roof had been fixed and the leaks stopped despite no new repair methods being undertaken at the Mall.

Although 2009 was a less eventful year for Bob Nazarian, he would nonetheless continue to mislead the City, the Royal Bank, and Mall tenants by saying that the leaks were fixed. Scotiabank, one of the Mall's anchor tenants, would be the only one to take a stand against Eastwood by withholding its rent as a result of the damage caused by the leaks.

January–March: The City Council responds to the land purchase request, and the Library lease saga continues

January–February: Land purchase – the City is told Eastwood wants to purchase land to stop the leaks, but makes no decision on the request

On January 13, 2009, Lesley Sprague, the City clerk, responded to Antoine-René Fabris's letter of December 2, 2008, advising him that Eastwood's request to purchase City land would be on the agenda for the next scheduled meeting of the By-law and Planning Committee, on February 2, 2009. This committee was responsible for reviewing requests to purchase land from the City.¹

Bob Nazarian and Mr. Fabris attended the February 2, 2009, meeting on behalf of Eastwood. The minutes of the meeting record the following:

Mr. Fabris and Mr. Nazarian from the Eastwood Mall spoke to the committee about a proposal to purchase the property behind the Fire Hall and Ambulance centre for the purposes of creating additional parking. Items discussed included drainage issues and reduction of green space. Further discussion to take place after report prepared for next regular meeting.²

Bob Nazarian testified that he told the committee he wanted to buy this land because he had concluded that he needed it to "make additional parking and eventually reduce the leak." He claimed he informed the committee he had decided that, if he did not do so, he could not fix the leaks. Mr. Nazarian was adamant that he had told the committee he wanted to reduce or eliminate the parking on top of the roof and substitute parking in the back of the Mall.³

However, Councillor Al Collett, who was at the meeting, testified that Mr. Fabris and Bob Nazarian reported to the committee that they had some concerns about the rooftop of the Mall at the time: there were some drainage problems, and Eastwood wanted to purchase land close to the Mall for parking to alleviate some of the weight from the parking on the roof.⁴ Councillor Collett testified that Mr. Fabris and Mr. Nazarian did mention that one

of the reasons to alleviate the weight on the roof was to stop the leaks in the Mall. He stated that they did not specifically talk about structural measures of any kind. It was his evidence that, given the concern about the additional weight on the roof, he raised the possibility of Eastwood using the parking space at the far end of the parking lot which was used at that time for dumping snow. Councillor Collett testified that in his opinion, if the City was to sell the land behind the fire hall to Eastwood, it would be a considerable distance from that parking lot to the Mall entrance, and it would be easier to open up the parking lot at the far end of the Mall because it was not currently used.⁵

Ms. Sprague, who was also at the meeting, testified that she believed Bob Nazarian and Mr. Fabris advised the committee that the proposed purchase was intended to stop the leaks. She confirmed that the committee did not make a decision and there was no resulting resolution. The committee requested a report from staff before making a decision.⁶

As I described above, when council was informed in 2008 of Eastwood's request to purchase the land, it became aware that the leaking was of such significance that Bob Nazarian thought it was important to put an end to parking on the roof. Despite its importance to the safety of the Mall, this request for purchase of municipal land by Eastwood would follow a long and slow process of more than two years. Eastwood never did purchase the land.

January: Scotiabank seeks to recover from Eastwood the costs it incurred as a result of the leaks

On December 28, 2008, approximately 20 ceiling tiles were damaged throughout Scotiabank as a result of water infiltration. The initial cleanup was performed by the branch's manager and her spouse. The following day, the Mall maintenance personnel replaced the wet ceiling tiles, but the wet flooring and drywall remained. The bank manager noted a musty odour in the bank.⁷

A few days later, on January 6, 2009, Scotiabank requested, through Henrieth Laroue, the Mall manager, that Eastwood "rectify right away so that mold doesn't start. Please be advised that if this isn't rectified by Monday January 12th, 2009, than [sic] we will have to contact ServiceMaster to complete the work at your expenses since this issue is caused by your ongoing roof leaks."⁸

The situation was never rectified. A week later, on January 14, 2009, Scotiabank wrote another email to Ms. Laroue and Bob Nazarian:

Per the email below, we still have not heard from your office nor has your staff been to the branch to remove the wet material [the wet ceiling tiles, the wet drywall and wet carpeting⁹] that is present in our Branch due to the roof leaks.

In order to keep mould from growing within our branch it is imperative that wet material doesn't remain for any period of time. As per the email below, your staff hasn't completed the removal of the wet material, therefore we will proceed with hiring Service Master to complete this work. We will then invoice your firm for reimbursement for the costs to remove the wet material provided by Service Master.¹⁰

On February 6, 2009, Scotiabank sent a letter to Bob Nazarian seeking to recover from Eastwood the costs and expenses of \$113,889.72 as a result of the "continual roof leaks" at the Mall. These charges included environmental testing (\$21,201), mould remediation (\$64,981), and several emergency cleanups.¹¹

Bob Nazarian admitted having negotiated a lease condition three years earlier which specifically provided that the landlord would pay for all reasonable costs resulting from the leaks and that, if the landlord did not pay, the tenant could deduct the amount from its rent. He testified, however, that Scotiabank should not have deducted the costs from the rent and should have looked to its own insurer for compensation:

They had the insurance in their lease, specifying that every tenant has to have their own insurance, and in this case, that tenant could have gone to their insurance and say, "We have damaged so much due to the water leak", and collect from the insurance, but no, they exercised to collect from the landlord, which is me, and therefore, I didn't have this much money to pay them out of nowhere. They were not paying rent anyway.¹²

Bob Nazarian eventually agreed with Commission counsel that he was obligated to pay these costs under the lease agreement with Scotiabank but that they could have been submitted to its insurer instead. Despite being told that the evidence was to the contrary, Mr. Nazarian insisted that, as of February 2009, Scotiabank had already been withholding rent "for so many months."¹³ That was not so. As I describe below, the bank stopped rent payments almost six months later, on July 28, 2009.

Judy McCulloch, the branch's customer service manager, testified that the Mall maintenance personnel did not remove the wet material and, consequently, Scotiabank called in ServiceMaster.¹⁴ ServiceMaster took down several ceiling tiles and pulled up some carpet. Part of the wall was torn out and fans installed.¹⁵ On February 17, 2009, Scotiabank advised Bob Nazarian and Ms. Laroue of the steps it had taken and the action required to prevent mould:

With leaks, it is very important to dry the wet materials or remove them within 48 hours as mould can set in, which then will cost more as Environmental tests would then be required to ensure Staff health. We have proceeded to remove these materials and dry other materials to minimize your costs. We will forward these costs for your attention once received.

Please advise as soon as possible a schedule as to when we can expect all leaks to be completed and when you will be reinstating our branch?¹⁶

On February 23, 2009, Mr. Fabris replied to the email on behalf of Eastwood, stating:

We have been following the roof situation closely, and note that in the past the branch has been excessive in the removal of materials. If you are to remove any materials, please claim from your insurance.

As far as we are aware the leaks have been dealt with. Please advise if more leaks develop as this is a continuing repair process. I note no mold has been detected as per previous fear.¹⁷

Ms. McCulloch disagreed that the removal of damaged material was "excessive." It was her evidence that the amount of mould found required the material's removal. She testified that she did not believe that Mr. Fabris or Bob Nazarian ever visited the bank following the work performed in August 2008.¹⁸ I question how they could come to the conclusion that the material removed from the premises was excessive. Ms. McCulloch also testified that, contrary to the allegations of Mr. Fabris, the leaks had not been dealt with.¹⁹ The other evidence before me, from other tenants who were also suffering from leaks at the same time, supports her evidence, which I accept. Indeed, on February 12, 2009, Zellers reported that it had 59 tiles with water leaking on them.²⁰

Bob Nazarian never paid Scotiabank's costs, despite having contracted to do so in 2006. Scotiabank consequently withheld its rent. The leaks persisted, and the bank eventually moved out.

March: Library lease – Eastwood misleads the City into thinking that the Retirement Living space is available

Mr. Fabris was involved, on behalf of Eastwood, with the negotiations with the City for the Library's lease renewal. He testified that, because his instructions were to start the negotiations early – so as not to be stuck at the last minute trying to execute a lease with this major tenant – he approached the City almost a year before the lease was due to expire. It was his evidence that Eastwood did not initially know whether council wanted the Library to stay in the Mall, but he learned from Fred Bauthus, the chief administrative officer, that the City was thinking of building a multiplex (with a pool, arena, and the Library) for which it was hoping to receive federal funding. Mr. Fabris testified that as a result of this possibility, the negotiations for the renewal of the Library lease went into a "holding pattern."²¹

On March 5, 2009, Mr. Bauthus, Mr. Fabris, Ms. Morin, and Ms. Laroue met to discuss the issue. Mr. Bauthus's notes of the meeting show that there was discussion about a possible five-year lease with a five-year option. Mr. Bauthus testified that the note "deferral of April 1/09" referred to the lease requirement to provide notice six months in advance of the expiration of the lease if the Library wanted to renew. He further testified that Mr. Fabris had advised him that he would not hold the Library to this requirement. Mr. Bauthus confirmed that they discussed moving the Library to the old Retirement Living offices, which were leak-free because they were on the ground floor. Mr. Bauthus testified that, although there had been no formal confirmation that this space was available for the Library, the City was left to believe that it was.²²

On March 9, 2009, Mr. Bauthus wrote to Bob Nazarian, copying Suzanne Morin (chief librarian), Katherine Croxson (chair of the Library board), Ms. Laroue, and Mayor Hamilton. He explained that the City was considering continuing a lease arrangement with Eastwood for space to accommodate the Library and would appreciate receiving a proposal for space as follows:

- Term of 5 years with 5 year option
- Approximately 9,000 square feet
- Space to include the space currently occupied by Retirement Living
- Cost and description of fitting out the proposed space²³

Mayor Hamilton agreed that this communication was the sort of formal letter that would start the negotiation process. According to him, council was still operating on the same premise that Mr. Bauthus had expressed to Ms. Croxson in April 2008 – that council would not decide on whether the Library would remain in the Mall until it knew if the leaks had been fixed. He admitted that Mr. Bauthus's letter was inconsistent with that position because it was proposing lease terms before the City knew if the leaks had been fixed.²⁴

On March 12, 2009, Mr. Fabris wrote Bob Nazarian, stating:

I met with Henri McCleary [*sic*] and Fred Bauthus on March 5th, 2009, in regards to the library. The library board expressed their intentions to renew their lease for a 5 year period, with option to renew for 5 more.

I believe that the infrastructure money has not yet been received from the Multi-Plex project in Elliot Lake; however they are adamant that they wish to move out of the spot that they are in.

We did not disclose to them that the Retirement Living space had been tentatively leased to Public Works Canada. I believe that a further meeting would be required.²⁵ [Emphasis added.]

Bob Nazarian would continue to mislead the City, both on the issue of the leaks and the availability of the Retirement Living space. He negotiated in what can be described only as bad faith in an attempt to keep the Library as a tenant.

Mr. Bauthus testified that Mr. Fabris's letter accurately reflected the fact that the Library was seeking an alternative location and wanted to move out of the existing space because of the leaks.²⁶ Mr. Bauthus agreed that Ms. Morin was the promoter of this idea and that, as far as the Library was concerned, it wanted nothing to do with staying where it was.²⁷

Bob Nazarian would continue to mislead the City, both on the issue of the leaks and the availability of the Retirement Living space. He negotiated in what can be described only as bad faith in an attempt to keep the Library as a tenant. The efforts of Ms. Morin would prove to be fruitless, faced with a City Council willing to ignore the pleas of the Library about the deplorable conditions and the potential structural problems.

March: Land purchase – City Council is advised again that Eastwood wants to purchase City land to stop the leaks

Mr. Bauthus testified that, following the February 2009 meeting of the By-law and Planning Committee, the sale of the land was "in limbo." A meeting of the committee should have taken place in early March but, as Mr. Bauthus testified, no report was prepared for that meeting, contrary to the request noted in the minutes of the February 2 meeting. Mr. Bauthus testified that, after the February meeting, he had asked Bob Nazarian to provide him with some engineering information about the land's grade separation and drainage onto City property, but nothing was ever provided.²⁸ Mr. Bauthus testified that he also had concerns about whether Bob Nazarian would actually follow through on the project.²⁹

On March 18, 2009, Ms. Laroue, then general manager of Eastwood, sent a letter to Mr. Bauthus with respect to the proposed parking for the Mall. She indicated that Eastwood wished to proceed with the additional parking and inquired about the status of the request. She asked to be advised as soon as possible so that Eastwood could start taking the necessary steps.³⁰

Six days later, on March 24, 2009, Mr. Bauthus prepared a report "provid[ing] Council with information respecting a request by Eastwood Mall to purchase land adjacent to the mall to provide additional parking capacity."³¹ In his report, Mr. Bauthus wrote that "[t]here may be some merit to acquiring the additional land in order to create additional parking which in turn would reduce some of the pressure created by the parking on the rooftop area."³² He explained that this statement meant that the additional parking would remove pressure caused by the vehicles on the roof and decrease the wear and tear.³³ He could not explain why he omitted from the report Mr. Fabris's explanation (in his letter of December 2, 2008³⁴) that one-third of the weight on the roof would be reduced and that this reduction would help with the leaks.³⁵ He testified:

Q. Sir, can you tell me, why did you not say anything in this report about the leaks?

A. I can't relate to that outside of looking at the benefit to the municipality in terms of looking at the improvement that I had indicated. And I guess I would have left that the ... would meet the needs of the mall owner.

Q. But the mall owner told you, he gave you ... five reasons. The first reason you'd already discounted and that was that a lot of people used the mall parking lot to park when they're going to the other stores on Ontario Street. And then the very next reason was to help with the leaks. So that was what the mall owner had told you and you knew that the leaks were a serious problem, right?

A. Yes, sir.

Q. In fact. The leaks were so serious the library wanted out?

A. Yes, sir.

Q. So I'm just trying to understand why, when you were writing this letter to the Council about this proposal to purchase the land, which had as ... one of its major purposes dealing with the leaks, you didn't tell them.

A. I can't answer that right at this time.³⁶

In light of the events of the summer of 2008 leading up to the tenants' meeting in September 2008, it would seem to me that the City should have been eager for the Mall owner to find a solution to the leaks that had been plaguing the Mall for almost 30 years. The inclusion of this information in the report would have been highly relevant. In any event, it appears that members of council were aware of the relationship between Mr. Nazarian's attempt to stop the leaks and his request to purchase the land.

Mr. Collett testified that everyone assumed that the reference in Mr. Bauthus's report to the reduction of the pressure on the rooftop was related to the leaks. It was his evidence that, when he received the report, he thought that it was a step in the right direction for Bob Nazarian: "finally ... he was actually doing something to alleviate the problem." He was in favour of the City selling the land to Mr. Nazarian.³⁷

Mayor Hamilton testified that when he read Mr. Bauthus's report, he understood that the reference to reducing some of the pressure created by the parking on the rooftop area related to the weight of the cars or the number of cars driving back and forth. He understood there was a relationship between that traffic and the weight of the cars and the leaks. He admitted knowing by then, if not earlier, that the Mall owner's desire to purchase the land was an attempt to reduce the leaks by reducing the number of cars on the roof.³⁸

Ms. Sprague testified that her only involvement with this report was to assist Mr. Bauthus with the wording of the recommendation to council. She said this issue was not within her area of responsibility despite the fact that land matters, land sale, and acquisition were normally part of it. It was her evidence that it was a fairly important issue in which the chief administrative officer was directly involved. City Council viewed it as important because the Mall was its major retailer.³⁹ I find it odd that, during her testimony, Ms. Sprague was quick to transfer responsibility for this matter to the chief administrative officer. As I describe below, it would become quite apparent later on that Ms. Sprague, who would go on to write several reports on this matter, was the City staff person responsible for this issue.

In addition to his duties as chief building official, Bruce Ewald was secretary of the By-law and Planning Committee.⁴⁰ He read Mr. Bauthus's report⁴¹ and testified that Mr. Bauthus's reference in it to reducing some of the pressure created by the parking on the rooftop area did not raise questions in his mind about whether there was a problem in terms of the weight on the roof. Unlike Mayor Hamilton and Mr. Collett, Mr. Ewald testified that he interpreted "pressure" as referring to the constant movement of vehicles driving on the roof – the traffic, and not the weight.⁴² He testified that it "was obvious to me from the day I came up for my very first interview" why they wanted to reduce the pressure from the roof. He testified that it "was the most stupidest design for a parking lot I had ever seen" because "[y]ou don't put parking on a roof" and because "[v]ehicles driving overtop of a roof top are just going to cause problems. That is just based on common sense, in my opinion." He explained that it was obvious to him that the constant movement of cars would prevent the seal from staying intact and would cause leaking: "It was a problem design ... And it would be prone to leaks."⁴³ He admitted knowing that where there are leaks in a steel-supported building, there is a potential for rust. Nevertheless, he took no steps to

It "was the most stupidest design for a parking lot I had ever seen."

– Bruce Ewald

determine whether leakage, which he considered to be an obvious consequence of the parking deck, had actually occurred:

Q. And you also knew that if there were leaks in a steel supported building, there was a potential for rust, particularly when the leaks were from drips from cars with salt?

A. Most definitely. But again, the information I had only suggested that that roof had been leaking since 2006.

Q. But you knew, sir, from what you have just told us, that as you put it, it was a stupid design and the building was 30 years old?

A. Yes.

Q. So you knew that at least there was a serious risk that it had salt-rich water dripping through it for 30 years?

A. No, I didn't know that.

Q. But you knew it was a potential because it was –

A. Oh, definitely.

Q. – because it was, in your view, a stupid idea, right?

A. Yeah, it was a dumb idea, but I mean, like anything else, with proper maintenance ... they could have alleviated that, and as I say, the only information I had suggested that that building had only been leaking since 2006.

Q. But you took no steps to determine whether what you say was obvious to you from the get-go had in fact occurred, whether or not there had been leaks for 30 years with the resulting damage?

A. No.⁴⁴

During his testimony, I probed Mr. Ewald on his claim that he was aware that the Mall had been leaking only since 2006. Mr. Ewald agreed with my suggestion that he actually did not have any information on when the leaks started, but simply assumed that it had been leaking since 2006 because there was nothing in the Building Department file prior to the 2006 Notice of Violation, despite the bad design.⁴⁵ Surprisingly, as I discuss below, Mr. Ewald claimed that he became aware of the 2006 Notice of Violation only in September 2009. His claim that, when he read the Bauthus report, he thought the leaks had started in 2006 can be described only as nonsense.

On March 26, 2009, Mr. Bauthus provided Mr. Fabris with a copy of his March 24 report and advised him that the request from Eastwood to purchase City land would be dealt with by the By-law and Planning Committee on April 6, 2009. Mr. Fabris was informed that the meeting was public and that he could attend to speak to the matter should he wish to do so.⁴⁶

March: Eastwood informs the City that, contrary to earlier indications, the Library cannot use the Retirement Living space

On March 25, 2009, following the meeting of March 5 and Mr. Bauthus's letter of March 19, Mr. Fabris sent a letter to Mr. Bauthus informing him that the space formerly occupied by Retirement Living had been leased out to a government agency at almost double the rate currently being paid by the Library. He went on to say that the only available space for the Library was the area it was currently occupying, as well as a portion of the old Reitmans store.⁴⁷ Mr. Bauthus testified that he was not pleased with this correspondence, given that Mr. Fabris had not indicated until then that the space the Library was interested in, and had specifically asked about, had been rented out. Mr. Bauthus thought Mr. Fabris was not negotiating in good faith.⁴⁸ This lack of trust affected the City's confidence in Eastwood, particularly because, as Mr. Bauthus saw it, the City had always been forthright

with Bob Nazarian, even mentioning its plan for the multiplex and the funding it was expecting. Mr. Bauthus also agreed that he did not trust Mr. Nazarian because of Eastwood's misleading statement in the fall of 2008 that the leaks had been fixed.⁴⁹

On March 27, 2009, Mr. Bauthus sent a memo to the mayor and City Council, providing them with an update. He wrote that Mr. Fabris had advised him that the space then occupied by Retirement Living had been leased to a government agency and, accordingly, would not be available for use by the Library. He further stated that this information did not come as a surprise and that it offered a very real example of how Bob Nazarian chose to do business with a premier tenant of his Mall. In his memo, Mr. Bauthus also outlined a chronology of events leading up to the letter, including meetings that were held between him and Mr. Fabris and/or Ms. Laroue in March, October, and November 2008 and in March 2009. In anticipation that his dealings with Mr. Nazarian would not run smoothly to a desired mutual agreement, he had asked staff to look at alternative arrangements. They had reviewed the possibility of using the Collins Hall (a municipally owned property) and determined that the Library could be located in that space with no floor-load issues. Mr. Bauthus identified the next step as determining feasibility.⁵⁰ In sum, Mr. Bauthus informed council that he believed Mr. Nazarian could not be trusted and that the Retirement Living space was unavailable, but that the Collins Hall and the multiplex were possibilities.⁵¹

Councillor Collett testified that when he received Mr. Bauthus's memo, he was not surprised to learn that Bob Nazarian had apparently leased the property to another occupant. He did not think that Mr. Nazarian ever had any intention of offering the space to the Library – it was just another game that Mr. Nazarian played. Councillor Collett was opposed to the use of the Collins Hall for a number of reasons involving its history and vocation. Rather, he was in favour of the Library being located in the multiplex.⁵² The fact remains that a safe, leak-free environment existed at Collins Hall.

April–August: Eastwood and the City respond to the land appraisal, inadequate inspections, and manipulations of the Library lease

April: City supports Eastwood's plan to purchase the land

By-Law and Planning Committee recommends to Council that the land be declared surplus and an appraisal be obtained

On April 6, 2009, a meeting of the By-law and Planning Committee was held. Mr. Fabris and a delegation from Eastwood addressed the committee about its wish to purchase the adjoining land. The committee received Mr. Bauthus's report of March 24, 2009, and adopted a resolution (seconded by Mayor Hamilton) recommending that (1) the land sought to be purchased by Eastwood be declared surplus to the need of the municipality; (2) an appraisal of the value of the land be obtained; and (3) an agreement be negotiated with Eastwood to set the condition for the proposed sale of the land.⁵³

Although present at the meeting, neither Ms. Sprague nor Mr. Bauthus recalled much about it.⁵⁴ Mr. Bauthus explained that the committee's endorsement of the land sale still had to be approved by council.⁵⁵ He testified that he would have spoken to the mayor about this requirement before the proposed purchase was discussed at the meeting. He would have discussed the matter with the mayor in broad terms and told him that selling this land would address some of the Mall's issues and that the sale was something for council to consider. Mr. Bauthus could not say whether he would have mentioned to the mayor the issue of the leaks or the reduction in weight. He did not advise the mayor whether it was a good or bad idea and simply left it to him to make the decision.⁵⁶

City Council passes resolutions declaring the land surplus and requesting an appraisal

On April 14, 2009, during a closed session, City Council discussed Eastwood's request for the purchase of City property.⁵⁷ The minutes noted: "Discussion on Eastwood mall owner as he wants to purchase City property for parking lot. This will solve a drainage problem. Staff are directed to declare land as surplus and get appraisal."⁵⁸ Council adopted the recommendations of the By-law and Planning Committee that the land be declared surplus and an appraisal be obtained. An appraisal was required by a City by-law in order to sell City land.⁵⁹

Mr. Bauthus agreed that the drainage problem caused by water occasionally running from the access road from Hillside Drive down to the land behind the fire hall had existed since the Mall was built in 1979.⁶⁰ The minutes of the closed session did not reflect the fact that the purchase was to help deal with the leaks or reduce the weight on the roof. Mr. Bauthus testified that he would have told members of council during the closed session that Bob Nazarian was interested in purchasing the land in order to assist with fixing the leaks, but that he did not tell them that the reasons also included Eastwood's desire to reduce the weight on the roof.⁶¹

Ms. Sprague testified she did not believe there was any discussion about the fact that the land was being bought to reduce and alleviate the leaks, since no such discussion was reflected in the minutes.⁶² Councillor Collett, however, testified that Mr. Bauthus would have reiterated the information he provided to the By-law and Planning Committee about why Eastwood wanted to purchase the land: (1) that Eastwood wanted additional parking; and (2) it wanted to reduce the weight on the roof to alleviate the leaks.⁶³ In addition, Mayor Hamilton testified that, although he could not advise whether it was known to other members that the leaks were the reason for the purchase of the land, some councillors (whom he could not identify) knew that the purchase was an attempt to deal with the leaks.⁶⁴

Both Councillor Collett and Mayor Hamilton testified that council was in favour of selling the land to Eastwood provided that an agreement could be reached and subsequently approved by council following the appraisal. Councillor Collett testified that the unanimous view of council was to adopt the recommendation of the committee. Mayor Hamilton agreed that "City Council was not standing in Mr. Nazarian's way of buying the land."⁶⁵

The City declares the land surplus and retains an appraiser

On April 16, 2009, the City posted a notice declaring the land sought to be purchased by Eastwood surplus to the needs of the municipality.⁶⁶ The same day, Ms. Sprague sent a letter to Mr. Fabris, with a copy to Ms. Laroue and Bob Nazarian, advising that City Council had declared the land surplus and required an appraisal of its value.⁶⁷ Ms. Sprague testified that she was responsible for preparing the notice and advising Mr. Fabris of the resolution of council.⁶⁸ It is clear that, contrary to what Ms. Sprague claimed before the Commission, she was heavily involved in this matter.

The following day, on April 17, 2009, Ms. Sprague retained John Shames, a professional appraiser in Elliot Lake, requesting his opinion on the land's value.⁶⁹

April: Bob Nazarian misleads the Royal Bank in an effort to obtain more funds

While City Council was considering the request by Eastwood to purchase the land behind the fire hall, Bob Nazarian was trying to keep his mortgagee happy in an effort to obtain additional funds from the bank for the purchase of the land.

Bob Nazarian alters his rent rolls to suit his financial needs

On April 6, 2009, the Canadian Mortgage Rating Service Ltd. advised Bob Nazarian that it had been retained by the Royal Bank to conduct a physical inspection of the Mall on April 16, 2009. A request was also made for the current rent roll. Mr. Nazarian forwarded the email to Ms. Laroue as a “reminder only.”⁷⁰

Ms. Laroue testified that the inspections conducted for the Royal Bank took place annually.⁷¹ She explained that the “bank inspections were always of utmost importance” for Bob Nazarian.⁷² She would accompany the inspectors around the Mall and be friendly with them.⁷³ Ms. Laroue also testified that Bob Nazarian would instruct the Mall staff to make the Mall look as good as possible in advance of an inspection (either by the bank for mortgage purposes or by the City inspectors). This cleanup would include changing ceiling tiles that had watermarks or stains on them to camouflage the fact that there had been leaks in that area and moving the tarps and hoses that were used to collect water from the leaking ceiling above the ceiling tiles so they were no longer visible to the naked eye.⁷⁴

Ms. Laroue also testified that before the bank inspection, Bob Nazarian would have her “re-create the rent roll” to make the Mall’s financial condition appear more favourable. Ms. Laroue explained that she would “[t]ake out ones [tenants] that hadn’t paid and show that they had paid and not have it look so dismal. It became a separate entity on the computer.”⁷⁵ Ms. Laroue continued her testimony as follows:

Q. Well, just wait a second. Did you in fact do that?

A. Yes.

Q. Did you ...a raise any objection with Mr. Nazarian about that request?

A. Yes, I believe I told him it was illegal.

Q. But notwithstanding that, you went ahead and did it?

A. Yeah, he told me it was none of their business the different things that we had on there, because the original rent roll that we sent – that we kept track of every day listed every single little thing, and ... he wanted ... the bottom number to reflect more favourably. And that I kept as a side note always ... “Bob’s rent roll” is what I called it on the computer.

So we kept our regular track, you know, what I mean? Like say for March’s rent roll, we kept a regular track, but that was a separate one that I e-mailed to Bob. He did whatever he did with it and it was never used on my end.⁷⁶

Ms. Laroue testified that she was asked to “fix up” the rent rolls a couple of times a year. She explained that this modification would affect two things: (1) the income that was shown for the Mall; and/or (2) the vacancy rate of the Mall. When Ms. Laroue “fixed up” the rent rolls, it was often to reflect the fact that a tenant who had “in reality” left the Mall was still a tenant and paying rent. In other circumstances, Bob Nazarian would ask that a tenant not be shown on the rent roll. For example, when Mr. Nazarian applied for a rebate from the City, he wanted to show a higher vacancy rate.⁷⁷ Ms. Laroue testified that the “fixed-up” rent roll would often reflect a

difference from reality of \$20,000 to \$50,000 per month. On a yearly basis, the difference could be \$250,000 to \$500,000. Ms. Laroue testified that she sent the “fixed” rent rolls only to Bob and Irene Nazarian, Levon Nazarian, or Alexander Sennett, the Mall’s security consultant.⁷⁸

Ms. Laroue testified that the rent roll found at Exhibits 4506 and 4506A are examples of two different versions of the rent roll for the same period – with Exhibit 4506 having been altered and 4506A showing the actual financial condition of the Mall. Ms. Laroue testified that, on Exhibit 4506, the line item showing the Algo Inn paying rent of \$25,804.71 to the Mall was not accurate. At that time the Hotel was not paying rent because Eastwood also owned it. As a result, the figure showing a total rental income of \$178,569.19 would, according to Ms. Laroue, reflect a “fixed-up” version of the rent roll.⁷⁹

A similar deceptive financial manoeuvre (with the Algo Inn shown as providing income to Eastwood) is also reflected in the rent rolls at Exhibits 2356 and 2356A for May 2010, with Exhibit 2356 showing the true rent and Exhibit 2356A having been altered.⁸⁰

Ms. Laroue testified that Bob Nazarian asked her to send to him the “re-created” rent roll for the April 2009 inspection. She did not personally provide the documents to the bank and was therefore not able to confirm which version the bank actually received.⁸¹

It appears that the inspection did take place on April 16, 2009.⁸² Ms. Laroue testified that, when the inspector arrived on site, she did not shepherd him around in his inspection. He was free to look anywhere he chose.⁸³

Bob Nazarian presented a different version of events to me. He testified that he was simply asking Ms. Laroue to provide the necessary assistance to the inspector. He denied having asked Ms. Laroue to change the rent rolls in any way in preparation for the inspection. He stated that Ms. Laroue’s testimony was not true and that he “would never do that.”⁸⁴

Documents speak louder than words. I cannot accept Mr. Nazarian’s evidence, particularly in light of my earlier findings with respect to the significant unexplained discrepancies in his financial statements.

Bob Nazarian seeks to obtain the release of the reserve funds

One of the terms of the mortgage obtained by Eastwood provided for the payment of monies by Eastwood into reserve funds held by the bank. The reserve funds consisted of realty tax (monthly) \$33,500; lease reserve (immediate) \$150,000; and lease reserve (monthly) \$5,000 (over 30 months).⁸⁵ Bob Nazarian testified that, by 2009, \$300,000 had been accumulated in these funds in addition to interest.⁸⁶ The terms of the lease reserve provided the conditions under which disbursement of the funds could occur, including that the lease reserve was to be used for reasonable costs associated with the leasing of vacant space and could not be disbursed if Eastwood was in monetary default.⁸⁷

At the same time as the City was considering Eastwood’s request for the purchase of City land, Bob Nazarian testified he was seeking the release of all or part of the lease reserve in order to purchase the City land and create the new parking space. Mr. Nazarian tried to submit the necessary information to obtain the release of the funds. At that time, he had no firm quotations or estimates for what it would cost to construct a parking lot on the City land. According to him, he needed the land before he could hire the contractors.⁸⁸

Bob Nazarian would never obtain the release of the reserve fund. As I have indicated, however, he did not need this money to purchase the land. He had the financial means to do so.

May: The relationship between the City and Eastwood becomes strained

Eastwood seeks to buy the City land for a low price

On May 8, 2009, Mr. Fabris sent a letter to Bob Nazarian advising him that he had met the previous day with Mr. Bauthus and Ms. Sprague and had discussed with them the Library lease and the purchase of the City land. Mr. Fabris advised:

With respect to the property I have enclosed a draft agreement of purchase and sale. I liked your comments on the agreement. There is to be 180 day due diligence period on this matter. The appraisal is not yet ready; the final agreement will be prepared once the appraisal is set. I doubt the appraisal will be much more than a few thousand dollars.

However, during the due diligence period there will be extensive engineering work to be done and a site plan will have to be prepared. I note also that the rezoning will have to be performed on the property.⁸⁹

Bob Nazarian testified that Mr. Fabris told him surplus lands were sold at approximately \$1,000 or \$2,000 per acre. Mr. Nazarian also understood that the items in the second paragraph would be additional steps he had to take in order to acquire the property.⁹⁰ Mr. Nazarian never took those steps. As I conclude below, he was not prepared to expend the funds to proceed with the project, let alone pay fair market value for the land.

“Bad feelings” between the City and Eastwood over the leaks

In his May 8, 2009, letter, Mr. Fabris also updated Bob Nazarian on the issue of the Library lease and the City’s reaction to the unavailability of the Retirement Living space:

In respect on [sic] the library, Mr. Bauthus expresses disappointment that the Nordev offices were not available. He indicated that there were tremendous bad feelings, with respect to the leaks. I responded that the leaks were a large part of responsibility in Retirement Living and their failure to maintain the roof.

As such we have indicated that we have taken an aggressive maintenance program, and that we would address the leaks accordingly. He indicated that we would have an answer prior to the end of June, as to the library’s intentions.⁹¹

Mr. Bauthus confirmed that he had negative feelings when he learned the Retirement Living offices were not available to the Library – especially as the Library continued to experience leaks. Mr. Bauthus also confirmed that during the meeting, Mr. Fabris had tried to lay the blame for the leaks on the previous owner, Retirement Living.⁹²

Mr. Fabris testified that about this time, he discussed with Bob Nazarian the need to stop the leaks.⁹³ He further explained that the “aggressive maintenance program”⁹⁴ was a reference to re-caulking of all the cracks in the roof, which, according to Mr. Fabris, continued into 2009. His understanding was that three-quarters of the roof had been repaired in 2008, and the maintenance went on until late fall. He also claimed that this work recommenced in 2009, along with repairs to damage that occurred during the 2008–9 winter.⁹⁵

If this work was done, it had no effect. In 2009, neither the leaks nor the complaints of numerous tenants, including the Library, Scotiabank, and Zellers, ever stopped.

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May: More mould found at Scotiabank, but Bob Nazarian still questions the veracity of the inspector's findings

In April 2009, the staff of Scotiabank raised further health concerns with respect to water leaking into the premises.⁹⁶ As a result, on May 11, 2009, Pinchin Environmental performed another mould and indoor air-quality assessment following up on the investigations conducted in 2008. Bank staff reported to Pinchin the following:

Water continues to leak through the ceiling of the teller area, waiting area, open office area and kitchen each time it rains. Buckets are placed in locations where some of the water leaks have repeatedly occurred. The affected lay-in ceiling tiles are replaced after every heavy rainfall.

...

A musty odour is noticed by branch staff and is most prominent in the morning.⁹⁷

In its interim report of May 14, 2009 (later confirmed in its final report dated June 16, 2009⁹⁸), Pinchin noted suspect mould growth in the photocopy area and adjoining corridor, office no. 4, the open office area, the teller area, and the storage room (see figure 1.10.1). Water staining was also noted in several locations. The recommendations made included repairing the source of leaks from the roof and removing and disposing of the wet material (in this case, the wet carpet).⁹⁹ Ms. McCulloch testified that this report was shared with Mall management and with Bob Nazarian.¹⁰⁰ She stated that Scotiabank undertook the recommended remediation work and that the carpet was removed throughout the bank (a fact corroborated by Pinchin in its final report).¹⁰¹ Eventually, tiles were installed.¹⁰²

Bob Nazarian admitted that he saw the May 14, 2009, Pinchin report. He claimed that he asked Robert Wood immediately to check the bank and the adjacent stores to make sure that there actually was mould and that it was not just “presumptions.” He agreed that Pinchin was a firm of environmental engineers but was concerned because Scotiabank had hired it. According to Mr. Nazarian, the person who hires the engineer can make a “big difference” with respect to results. He stated:

When an engineer is working for you is giving you the truth to you. When it's influenced by the bank workers, it could have a different result. So, to make sure, we have asked Mr. Bob Wood to come and check, not only Scotiabank, but adjacent, just for our own information to see if there is a mould or not or if there is, to what extent. And that's our right.¹⁰³



Figure 1.10.1 Conditions in the manager's office and behind the tellers at the Scotiabank branch, May 2009

Source Exhibits 5115 and 5119

Bob Nazarian testified that he did not believe Pinchin was providing accurate information to the bank because he was under the assumption that Scotiabank was “creating the expense, not to pay the rent.”¹⁰⁴

When asked what he did in 2009 to deal with the leaks, Bob Nazarian asserted that the leaks were much “better” in 2009, that Mr. Bauthus was very happy with the Library, and that the leaks had almost stopped in Scotiabank. He agreed, nonetheless, that in the summer of 2008 the bank had removed half the drywall, exposing the studs, and, because it did not want to enclose the walls until the leaks were dealt with, it had left it in that condition until it moved out in 2011. He claimed he was told the leakage situation was much better, although he acknowledged there was no permanent fix because that would have required eliminating the cars and putting a membrane on the roof.¹⁰⁵

Again, I find the evidence of Bob Nazarian totally unreliable considering that, only a few days before he received the Pinchin report, Mr. Fabris had advised him that there were bad feelings at the City toward the Mall because of the leaks. Furthermore, the evidence before me shows that the leaks in fact never stopped at Scotiabank. I am also perplexed by the fact that Mr. Nazarian actually questioned the accuracy of the Pinchin findings without any justification.

May: The land sought to be purchased by Eastwood is appraised at a value higher than what Bob Nazarian expected

On May 17, 2009, the City received Mr. Shames’s appraisal of the land. Mr. Shames concluded that the most likely estimate was \$55,000 to \$60,000.¹⁰⁶ The *Municipal Act* required a fair market value appraisal for the disposition of municipally owned property.¹⁰⁷ Ms. Sprague testified that she was not surprised by the estimated value of the land. She expected it to come within that range.¹⁰⁸

April–June: Robert Wood is hired by Eastwood and does not deem it important to his mandate to consider the 1998 Halsall report

On April 8, 2009, Robert Wood was retained by Eastwood to provide an as-built drawing and an engineering report outlining the structural condition of the tenant space that had previously been occupied by Retirement Living. The engineering report had been requested by Service Canada, which intended to lease the premises.¹⁰⁹ This assignment would be the first of many given to Mr. Wood by Eastwood, leading up to his inspection in May 2012, mere weeks before the collapse.

Mr. Wood’s training and experience

Mr. Wood obtained a bachelor of science in civil engineering from the University of London at King’s College in 1969. He immigrated to Canada in 1973 and was licensed as a professional engineer in Ontario in January 1974. He was hired by the Foundation Company of Canada in Toronto, where he worked on various projects, including some in Hamilton related to the steel industry. After four months, he was transferred to Sault Ste. Marie, where he assisted in the design of a blast furnace at the Algoma Steel Company building. In 1986, he started to work with M.R. Wright and Associates. He later became principal owner and remained at that firm until his retirement in 2012.¹¹⁰

Mr. Wood testified that he conducted condition assessments of large hotels and conference centres throughout Canada. He indicated that he travelled the country inspecting buildings for real estate investment trusts (REITs). He carried out condition assessments of the components of hotels, including the mechanical, electrical, and structural elements, in order to identify any problems with the buildings. Most of the buildings were similar in size to the Mall, or larger. Mr. Wood also inspected hockey arenas during his time with M.R. Wright; they

required routine inspections because damp and humid conditions caused corrosion problems to their structures. Mr. Wood testified that he had previously condemned an arena in the Town of Spanish, in the Algoma District, and he ordered that several others be reinforced so they could continue being used. He stated that he also had experience inspecting bridges, including bi-annual inspections of many bridges throughout townships in the Algoma District and beyond. Mr. Wood had acted as interim building official for the Townships of Wicksteed and Michipicoten and for the City of Sault Ste. Marie. He testified that he reviewed many collapsed structures, including the Station Mall, in his capacity as a building inspector for the City of Sault Ste. Marie.¹¹¹

In his testimony, Mr. Wood explained that most of his experience in relation to corrosion, before his work at the Mall, was with rust and corrosion in industrial settings. He did not have previous experience dealing with corrosion in a mall like the Algo Mall. He testified that he did not expect the supporting steel structure inside a mall to have been affected by rust and corrosion.¹¹²

Before working for Eastwood to prepare his October 2009 report, Mr. Wood had never worked on a rooftop parking deck with public space underneath. He testified that he worked on many parking decks and in many malls, but that, to his knowledge, there are no other malls in Northern Ontario, other than the City Centre in Sudbury, that have parking over occupied space.¹¹³

Mr. Wood is advised of leaks under the roof deck

On June 3, 2009, Mr. Wood provided a report to Eastwood about the former Retirement Living space, which stated:

The structure within the tenant space was observed to be sound and no visual deficiencies were observed ... Conversations with staff indicated that there had been no structural or water problems in this area. It is our understanding that some issues exist in the areas of the building that are located underneath the roof top parking area.¹¹⁴

Mr. Wood agreed that at the time of preparing his June 2009 report he had been told about leaks in the areas underneath the parking deck by Ms. Laroue, but he said that he did not look at those areas.¹¹⁵ He testified that, because the building was 30 years old, he was not surprised there were leaks in certain areas of the Mall. He explained that most roofs have a life expectancy of less than 30 years. Mr. Wood explained that he was not told how many leaks there were, or where they were. He claimed he was not told how long the Mall had been leaking.¹¹⁶

Mr. Wood is provided with the 1998 Halsall report but does not read it closely or consider it

Mr. Wood testified that when he performed the structural review of the former Retirement Living space, he asked Eastwood if it had any drawings. He was shown the structural and architectural drawings, and he believed that, at that time, Ms. Laroue provided him with a four- or five-page 1998 Halsall report.¹¹⁷ He confirmed that the Halsall report he saw was the one prepared by Halsall in November 1998 as part of the Nicholls Yallowega Bélanger building condition assessment commissioned by Retirement Living.¹¹⁸

He confirmed that he probably read the parking structure section of the November 1998 Halsall report. With respect to the reference to the corrosion of the structural steel beams and columns, Mr. Wood testified:

- Q. All right. And you'll see that in the first part of this discussion and the third paragraph, it refers to the corrosion of structural steel beams and columns indicating past leaking of the deck. See that there?
- A. I can read that, yes.

- Q. And that's 10 years before or, actually, more than 10 years before your visit in 2009.
- A. Correct.
- Q. And so when you read that, you realized that this was a long-standing issue?
- A. I didn't realize that. I took this as information. I was looking at the space that was occupied by Retirement Living and I took this for information and filed it more than look at [it] – I wasn't being asked to look at that area of the mall at that time.¹¹⁹

He also testified that he did not specifically recall reading the recommendation in the 1998 Halsall report that the condition of the beam and bracing connections should be inspected. At the time he was not looking at the parking deck but only at the Retirement Living space.¹²⁰

Even though the issue considered by Halsall in 1998 was similar to what Mr. Wood was mandated to consider in the fall of 2009 and again in 2012, he did not deem it necessary to review his files and consider the information he had in his possession, including the 1998 Halsall report.

May–June: Pinchin conducts a visual inspection and concludes that the Mall is in “satisfactory condition”

Pinchin is hired by the Royal Bank and Midland Loan Services to conduct a Building Condition Assessment of the Mall

In May / June 2009,¹²¹ Pinchin was retained by the Royal Bank, the administrator of Eastwood's mortgage on the Mall, and Midland Loan Services, a provider of loan servicing, to carry out a Building Condition Assessment. The assessment, carried out in accordance with an approved work plan, consisted of an inspection by Majid Milani-Nia, an engineer,¹²² and a report¹²³ written by Mr. Milani-Nia and Jaime Hass, a certified engineering technologist. It was completed in accordance with the American Society for Testing and Materials (ASTM) Designation: E 2018-01 Standard Guide for Property Condition Assessments: Baseline Property Assessment Process.¹²⁴

Mr. Hass is employed by Pinchin in the Due Diligence and Building Condition Assessment Group. He received his diploma in construction engineering technology from Algonquin College in 1988. Following graduation, he worked for the consulting firm CSA Building Sciences and then for Agra Earth and Environmental. While at Agra, he developed and established a Due Diligence Assessments Department, relating to building condition assessments. He was retained by clients to look at properties in conjunction with Environmental Phase I assessments, generally for the purposes of refinancing, a new mortgage, or a pre-purchase inspection. Mr. Hass began working for Pinchin in 2004. He testified that Pinchin is a consulting engineering firm that offers services in environmental due diligence, hazardous materials, occupational health and safety, training, and laboratory services pertaining to mould and asbestos. He created the Building Condition Assessment Department at Pinchin. Mr. Hass testified that during the course of his career he had been involved, in various ways, in more than two thousand building inspections.¹²⁵ Although he did not conduct the actual inspection, Mr. Hass was forthright and accepted the limitations and weaknesses of the work conducted by Pinchin where necessary. I accept his evidence.

Mr. Hass testified that he could not be sure why the Royal Bank and Midland Loan Services had requested the Building Condition Assessment, but he assumed it was for a refinancing. Nevertheless, he explained that the purpose for which the assessment was requested would have had no impact on the manner in which the assessment was conducted. He explained that all Building Condition Assessments done by Pinchin are performed in accordance with the ASTM standard.¹²⁶

Mr. Hass testified that the ASTM designation is a US standard that has been adopted by many of Pinchin's clients (lenders, large property owners, etc.) and one that Pinchin's clients demand be followed when carrying out the Building Condition Assessment work. He explained that the ASTM standard is typically a visual assessment of the major components, which also includes the identification of potential liabilities and associated estimates to rectify the liabilities.¹²⁷

In his testimony, Mr. Hass explained that there is no equivalent Canadian standard for Building Condition Assessments. He explained that a previous protocol, dating back to 1993, had been issued by the National Research Council, but it was his understanding that that protocol had been archived and was no longer being updated. Mr. Hass acknowledged that the National Research Council protocol was a more rigorous and exhaustive examination that included testing throughout the building. He noted that, in his 24 years of conducting building condition assessments, he had never seen one performed using the National Research Council protocol.¹²⁸

Pinchin's work plan also included the following terms and conditions, limiting the scope of its assessment:

5. The CLIENT acknowledges that subsurface and concealed conditions may vary from those encountered or inspected. PINCHIN can only comment on the environmental and building conditions observed on the date(s) the assessment is performed.
6. The work will be limited to those locations and/or areas of concern identified by the client or scope of work as outlined in our proposal.¹²⁹

Pinchin is aware of the leaks but fails to consider its own environmental assessment reports or obtain previous engineering reports

In the work plan, Pinchin also acknowledged the history of the leaks at the Mall. Indeed, it was noted:

Based upon conversations with Mr. John Harding of Woodbourne-USA and a review of documentation provided by RBC Financial Group, it is Pinchin's understanding that *there has been considerable historical moisture infiltration and major deficiencies associated with the podium parking deck and roof system*. As such, Pinchin's proposal includes a Senior Building Science professional who will be able to not only assess the roof condition but be in a position to offer direction on the next steps required for further investigation and mitigative measures.¹³⁰ [Emphasis added.]

Mr. Hass explained in his evidence that he understood the "considerable historical moisture infiltration" to mean that, in the past, there had been moisture-penetration problems with the parking deck, and that the "major deficiencies" related to the watertightness of the parking deck.¹³¹

Mr. Hass testified that when he was retained to conduct the building condition assessment of the Mall in 2009, he was not aware of Pinchin's previous involvement with the Mall, and that neither he nor Mr. Milani-Nia had seen the previous Pinchin mould reports. Mr. Hass acknowledged that although he had searched to determine whether Pinchin had conducted a prior building condition assessment of the Mall, he did not search to ascertain whether any environmental assessments had been conducted, despite acknowledging that the reports were available to him. Mr. Hass explained that he did not conduct this search because at that time he was just trying to identify whether Pinchin had previous information on the building. He noted that even if he had looked for previous environmental assessments, they might not have come up in his search because they had been done for Scotiabank and not for the Mall. Mr. Hass confirmed that, under the procedures currently used by Pinchin, the reports prepared for Scotiabank would probably have been captured.¹³²

The previous Pinchin files and reports would have shed light on the severe water-infiltration issues that the Mall had been facing for years. The failure by Pinchin to locate and review these materials was unfortunate.

This failure, together with the fact that only a visual inspection was conducted, led to a less than ideal Building Condition Assessment.

Mr. Hass confirmed that before conducting the assessment, Mr. Milani-Nia located an article on the Internet entitled “Mall roof leaks now stopped, says owner.” He acknowledged that he was aware that this article reported that the Mall had been “plagued” by roof leaks for years.¹³³

As a result of reviewing this article, Pinchin advised Midland that there should be extensive investigation reports and information on the repairs conducted at the Mall. It asked that this information be provided.¹³⁴ In addition to this request, Pinchin made others in telephone calls and via the on-site representative when Pinchin was actually doing the assessment. Mr. Hass testified that Pinchin did not receive any of the historical information that came to light during the course of this Inquiry. Mr. Hass further confirmed that he had never seen any of the previous reports commissioned by any of the owners of the Mall.¹³⁵ In fact, the Royal Bank informed Pinchin when it confirmed its mandate:

To date, the Borrower has not provided any information with respect to the inspections he had carried out last year prior to starting work on the roof. It is unlikely the information will be forthcoming as the Borrower is somewhat annoyed with RBC at the moment. He still believes we should have given him the Lease reserve to repair the roof. Thank you.¹³⁶

Mr. Hass testified that the fact that the owner of the Mall was not co-operating by providing information did not necessarily raise a red flag for him: it was not unusual for an owner to resist sharing information.¹³⁷ This dearth of previous records had no impact on how Pinchin performed the assessment.¹³⁸

Subject to my earlier comments regarding Pinchin’s failure to locate its own existing reports about the Mall, it is clear that, as a result of circumstances beyond its control, Pinchin was never provided with the full picture of the situation at the Mall before conducting its assessment.

Pinchin observes evidence of “minor” leaks, but does not speak to tenants

The Building Condition Assessment was carried out on June 3, 2009,¹³⁹ by Mr. Milani-Nia. Mr. Hass testified that Mr. Milani-Nia is a civil engineer by training (not a structural engineer), but that he has spent most of his 24-year career reviewing existing buildings and dealing with building sciences issues. Mr. Hass described building sciences as focusing on a building’s envelope, including its roof, walls, windows, and mechanical systems, all of which make the building function and keep it watertight and airtight.¹⁴⁰

It appears that the site assessment conducted by Mr. Milani-Nia lasted a full day, from approximately 8:00 a.m. to 5:00 p.m.¹⁴¹ Derek Alrove, a maintenance worker at the Mall, accompanied Mr. Milani-Nia on the inspection.¹⁴²

It did not rain in Elliot Lake either the day of, or the day before, the inspection.¹⁴³

The examination of the Mall conducted by Pinchin consisted of only a visual inspection,¹⁴⁴ or what the ASTM describes as a “walk-through survey”:

walk-through survey, n – conducted during the field observer’s site visit of the subject property, that consists of nonintrusive visual observations, survey of readily accessible, easily visible components and systems of the subject property . . . Concealed physical deficiencies are excluded. It is the intent of this guide that such a survey should not be considered technically exhaustive. It excludes the operation of equipment by the field observer and is to be conducted without the aid of special protective clothing, exploratory probing, removal of materials, testing or the use of equipment, such as scaffolding, metering / testing equipment, or devices of any kind, etc. It is literally the field observer’s visual observations while walking through the subject property.¹⁴⁵

Mr. Hass testified that he believed Mr. Milani-Nia had observed approximately five or six locations of leaking during his walk-through of the interior of the Mall.¹⁴⁶ One of these was at Zellers, where ceiling tiles had been removed and buckets placed on the floor.¹⁴⁷ Mr. Milani-Nia did not note any tarps or water-diversion devices in the store.¹⁴⁸ Evidence of leaks was also noted at the Soul Mate and Dollarama stores.¹⁴⁹ There was no evidence of active leaks there during Mr. Milani-Nia's inspection, probably because it had not rained for two days.¹⁵⁰

Mr. Hass confirmed that Mr. Milani-Nia did not conduct a closer examination of the areas where the stained ceiling tiles had been noted because climbing a ladder to look above the ceiling tile is not typical of the protocol followed by Pinchin for a Building Condition Assessment.¹⁵¹ This restrictive practice seems somewhat incurious and perfunctory to me.

Mr. Milani-Nia also conducted a walk-through of the exterior walkways, both at grade level and on the second level. He observed evidence of minor corrosion of the steel beams.¹⁵² In addition, he noted deterioration or cracks in the control joints of the precast hollow core concrete in the walkways.¹⁵³ Mr. Hass described the corrosion observed by Mr. Milani-Nia as surface corrosion on the top flange of the steel beams in certain locations, as well as some minor corrosion on the columns of the walkways.¹⁵⁴

In addition, Mr. Milani-Nia performed an assessment of the rooftop parking deck. He noted that some work had been undertaken or was ongoing at the time of his inspection.¹⁵⁵ Pinchin was aware that the Algo Mall did not have a membrane installed on the rooftop parking deck and that the building was constructed with precast hollow core slabs.¹⁵⁶

Given the limited scope of the inspection, Mr. Hass agreed that in many cases the columns and beams in the Mall were concealed and not readily visually accessible. Mr. Milani-Nia observed the beam only in the Zellers store where the ceiling tile was removed, and he observed the columns that supported the walkway only on the exterior of the building.¹⁵⁷

Mr. Milani-Nia's notes reveal that he did not speak to any of the tenants during his inspection. Mr. Hass testified that, as part of their mandate, inspectors typically try to speak to the tenants in order to gain more information. In the case of the Mall, his "guess" was that there were no tenants for Mr. Milani-Nia to meet with who had any real knowledge.¹⁵⁸ In cross-examination, Mr. Hass admitted that the ASTM standard directed inspectors to speak with tenants.¹⁵⁹ He agreed that it was important to speak to tenants because they are actually on site and may have information about the severity, frequency, and duration of the leaks in a particular place.¹⁶⁰ He also agreed that a prudent inspector should have spoken to Mall tenants about repairs that might have been recently undertaken and could have been concealing areas of recent leaks.¹⁶¹ It is unfortunate that Mr. Milani-Nia did not adopt this practice. Had he spoken to only a few of the tenants (such as Zellers, Scotiabank, and Library employees), he would have gleaned important information about the history of the leaks.

Pinchin concludes that the Mall is in "satisfactory" condition

On June 19, 2009, Pinchin provided its Building Condition Assessment report to the Royal Bank.¹⁶² Although the actual report was entitled "Preliminary Building Condition Assessment," I was informed by Mr. Hass that Pinchin's protocol at that time was to identify all Building Condition Assessments as preliminary. No subsequent final report was anticipated or issued.¹⁶³

Mr. Hass confirmed that he and Mr. Milani-Nia were concerned about the effect of the water infiltration on the precast concrete. For that reason, they specified in the report that the precast concrete panels needed to be evaluated for concrete delamination.* He confirmed that their concern was based on the knowledge that the

.....

* See glossary.

water infiltration was an ongoing historical problem and that de-icing agents, including chlorides, likely would have infiltrated the building.¹⁶⁴

The Pinchin report noted that it had been previously determined (by others) that placing a membrane over the concrete topping was not a viable solution because of load capacity issues. As I have explained elsewhere in this Report, this conclusion was incorrect. Pinchin recommended the following two options to address the water-infiltration problem:

1. removing portions of the concrete topping, applying a waterproofing membrane, and reinstating the concrete topping in phases; or
2. monitoring the concrete topping for new cracks and any damage to the expansion joints and control joints, and carrying out repairs in a timely manner.¹⁶⁵

Mr. Hass acknowledged that the solutions put forward by Pinchin recognized that certain remedial work needed to be done.¹⁶⁶

Pinchin estimated the cost to carry out the proposed repairs for the roof deck parking at approximately \$2.68 million, which included the waterproofing and the repairs to the concrete.¹⁶⁷ Mr. Hass testified that the recommendations and costing for the repairs to the parking deck were spread over four years because the owner would not be able to shut down the entire parking area at once.¹⁶⁸

Pinchin noted that the condition of the precast concrete panels could not be determined because the scope of work did not include any destructive testing (removing material from the building).¹⁶⁹ It recommended that further investigation of the precast panels be conducted, given concerns over the historical water infiltration that had occurred at the building and the effects of the chlorides on the precast panels.¹⁷⁰

Pinchin noted in its report that there were no major or minor deficiencies in the structural elements of the Mall, and therefore no recommendations were made. The report went on to say:

Pinchin's review of the structural elements indicated that *no major deficiencies existed within the visibly accessible components* of the Site Building, which would compromise the integrity of the structures.¹⁷¹ [Emphasis added.]

Pinchin concluded:

Based on Pinchin's review of the property ... *the Site Building appears to be in satisfactory condition and in comparable standing with other similar retail/hospitality property.* The building generally appears to have been constructed in compliance with contemporary building codes and standard building practices in place at the times of construction. The assessment did not reveal any evidence of major structural failures, soil erosion or differential settlement.¹⁷² [Emphasis added.]

When asked on what basis it had reached this conclusion, Mr. Hass testified:

That determination is we have looked at the property as a whole and identified the components of the property, starting from the top down, so to speak, and identified that it is performing. You know, there was nothing there indicative of immediate red flags that would alarm us to ... make a statement, a more powerful statement.

And that statement, of course, has to be read in conjunction with the fact that we had recommended a significant amount of work pertaining to the parking deck as well.¹⁷³

When pressed further by Commission counsel on the meaning of “satisfactory,” Mr. Hass explained:

Keeping in mind that repairs had been ongoing for the parking deck specifically and reports that there were leaks [that] had been stopped, based on our observation, and keeping in mind it is not uncommon, although this was a bit of a unique building ... to walk a building and see roof leaks, whether it is a retail type of building, whether it is an industrial building, whether it is a residential building. We see leaks all the time as far as penetrating roofs or wall problems, et cetera. You know, they are performing. They are leaking and they have leaks and they have issues that have to be dealt with for certain, but they are still performing.¹⁷⁴

As I explain further below, I am troubled that Pinchin could in fact have concluded that the building’s condition was “satisfactory,” given its knowledge of the history of the leaks at the Mall.

That being said, Mr. Hass acknowledged during his testimony that

- he could not say that the building was “performing” with respect to the specific criteria of watertightness;¹⁷⁵
- the Pinchin report did not define the term “satisfactory” and did not provide a range of what “satisfactory” meant on a scale of “excellent” to “poor” condition;¹⁷⁶
- it was reasonable for a reader to interpret the phrase “the building is satisfactory” to mean that there were no major structural concerns with the building and that the building is structurally sound;¹⁷⁷
- there was no limiting comment in the Structural Elements section of the report (section 3.4) that advised the reader that only two areas of columns and beams had been inspected, neither was there a definition of the phrase “visibly accessible”;¹⁷⁸
- Pinchin did not recommend that the areas where stained ceiling tiles had been noted be inspected by a structural engineer or that those areas be looked at more closely;¹⁷⁹
- Pinchin did not identify the corrosion observed on the exterior walkways as being an issue and did not make a recommendation that a further investigation of the corrosion by a structural engineer be undertaken;¹⁸⁰
- no one at Pinchin reviewed the load capacity of the hollow core precast slabs because such a review, according to Mr. Hass, was beyond its mandate;¹⁸¹
- the connections inside the Mall were not inspected, but Mr. Milani-Nia would have seen some of the connections on the exterior walkways;¹⁸² and
- Pinchin did not recommend that a structural engineer be retained to further investigate the beams under the walkway.¹⁸³

Pinchin did not report the observations it made at the Mall to the City of Elliot Lake or to any other regulating body. Mr. Hass and Mr. Milani-Nia felt strongly that, apart from the recommendations for further investigation of the hollow core precast slabs and the need to perform waterproofing repairs, nothing was observed that raised a red flag or was noted as being life threatening.¹⁸⁴

Unfortunately, the visual inspection conducted by Pinchin did not reveal what was hidden above the Mall’s ceiling tiles. The previous engineering reports of the Mall and the Mall’s own previous inspection reports would have shed light on the rust that was creeping through the Mall. Pinchin never saw them.

In light of the fact that Pinchin was aware of the water infiltration and had concerns about its existence, I feel it is not unduly critical to suggest that Pinchin should have

- notified the Royal Bank and Midland Loan Services that the continued infiltration of the chloride-containing water would cause deterioration to the Mall’s structure, which could result in a potential failure of the various structural components;

- made clear in its report that the assessment of the structural elements was based solely on those structural elements that were visible and accessible without the removal of any finishes or ceiling tiles; and
- recommended that a structural engineer be retained to further investigate the degree of rust and corrosion observed and to determine if the structural integrity of the building had been compromised.

There was no evidence before me that the Pinchin report was provided to Eastwood directly or by Pinchin's clients.* Since Bob Nazarian repeatedly testified about his reliance on the October 2009 report from Mr. Wood, I conclude that he did not see the Pinchin report. If he had, he would have relied on it, chosen the least expensive option (if any at all), and continued existing practices.

June: Land purchase – despite his claim to the contrary, Bob Nazarian was not prepared to buy the land at market value

The City is prepared to sell the land for \$55,000

On June 19, 2009, Ms. Sprague sent a draft agreement of purchase and sale to Mr. Fabris for the municipal property sought to be purchased by Eastwood.¹⁸⁵ It set the purchase price at \$55,000, the lower end of the range established by the appraiser. Ms. Sprague agreed that this draft agreement was an attempt on her part to inform Mr. Fabris of the value of the land and to get the negotiations underway. The agreement required that construction of the parking facility be started no later than 24 months from the date of closing and completed within six months thereafter. Ms. Sprague explained that, to avoid the sale of land to speculators, any sale of City land required that the purchaser develop or build on the land in the way the City intended. The draft agreement allowed the City to repurchase the property if the purchaser did not meet this requirement.¹⁸⁶

Bob Nazarian testified he did not agree to the City's offer. The price was not a problem, according to Mr. Nazarian: "Not that \$55,000 was too much or too little. About the land for me, that was completely secondary."¹⁸⁷ He said there were other conditions that he did not like, particularly the requirement that the project be started within two years and finished in six months.

When asked whether that requirement was unreasonable, he testified he was not sure he would get the proper funding; nor was he sure how long it would take to finish. He "didn't want strings attached in another [*sic*] way." He wanted to purchase the land and look for proper funding for the construction. However, when questioned, he could not recall what had been done in 2009 to find proper funding and to contact engineers and construction companies. He testified he personally spoke to Mr. Bauthus about this clause and told him that "if City's concerned about this, largest taxpayer in Elliot Lake should have taken the initiative to give us the piece of land with no charge and even help us to make it because of our concern." Mr. Nazarian could not recall when he told him that, nor could he give an approximate time period. He could not say what other provisions of the draft agreement he was unhappy about because he left the negotiating to Mr. Fabris. According to Mr. Nazarian, Mr. Fabris felt it was unfair that the City had sold land to the No Frills store at \$5,000 per acre but was asking for \$55,000 for a "wasteland." Mr. Nazarian testified that Mr. Fabris "felt that the City was taking advantage of the situation."¹⁸⁸

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* Mr. Hass testified that he did not know whether the Pinchin report was provided to the owner of the Mall: Hass testimony, June 14, 2013, p. 14617.

Eastwood is not prepared to pay \$55,000 for the land

On June 23, 2009, Mr. Fabris sent a letter to Ms. Sprague in which he stated that he and Bob Nazarian were surprised at the value of the land and requested a copy of the City's appraisal. He noted that surrounding properties had been sold at less than \$1,400 per acre and that his client was not prepared to pay \$55,000.¹⁸⁹

On June 24, 2009, Ms. Sprague replied, indicating that the appraisal the City obtained valued the land at \$1.49 per square foot, or \$45,000 per acre. She advised Mr. Fabris that she was not at liberty to provide a copy of the appraisal but that he could commission his own. Ms. Sprague then went on to indicate that the *Municipal Act* prohibited leasing or selling property below fair market value.¹⁹⁰ When asked why the City did not want to provide a copy of the appraisal report to Eastwood, she explained that the appraiser prohibited the sharing of the report with others.¹⁹¹

Mr. Bauthus testified that the City's policy was that it did not show appraisals to potential purchasers.¹⁹² Ms. Sprague agreed, however, that the report was the property of council and that council could have asked Mr. Shames to allow for the disclosure of the report to the potential purchaser.¹⁹³

I acknowledge that the appraiser had concerns about his report being shared. It appears to me, however, that in light of the reason why Bob Nazarian said he wanted to purchase the land (to stop the leaks) and the fact that he saw any refusal on the part of the City as simply the City "acting against him," it would have been reasonable for the City in this case to take steps to share the report with him, having sought the appraiser's permission. What was the harm?

June–July: Library lease – Eastwood plays a “cat and mouse game” with the City

June 30: Eastwood evicts the Library from the Mall

Six days later, on June 30, 2009, Mr. Fabris sent a letter to Mr. Bauthus in which he said:

I have been instructed by my client, Eastwood Mall, to contact you with respect to the space currently being occupied by the Elliot Lake Public Library.

Eastwood Mall has advised me that the space will no longer be available to the library for lease, as there is a new tenant moving into the space.

We therefore give you notice that you are to vacate the library space as of October 31st, 2009.¹⁹⁴

Bob Nazarian testified he saw that letter. He explained:

I did not agree that 100 per cent with that. We had an LOI [Letter of intent] from a tenant that would like to occupy the space ... but under no circumstances we wanted to give away the library of Elliot Lake.

So, we had some discussion with Mr. Fabris and later on, we change our opinion that library should stay where it is and new tenant has to wait to find a different location.¹⁹⁵

He testified that he asked Mr. Fabris to send a letter to the City to see what was happening with the lease renewal and explained that the letter which was sent resulted from a misunderstanding. He did not know how that misunderstanding developed. He did not have a conversation with Mr. Fabris before the letter was sent and claimed it must have been an error made by Mr. Fabris's secretary. When asked if it was his evidence that Mr. Fabris, on his own, came up with the idea to move the Library out, Mr. Nazarian replied, "No comment, sir."¹⁹⁶

Mr. Fabris, on the other hand, testified that he was indeed acting on instructions from Bob Nazarian, who had advised him to evict the Library. He also testified that Mr. Nazarian had told him that the space would no longer

be available for lease to the Library. Mr. Fabris understood that there was a Letter of Intent from a major anchor tenant to move into that space.¹⁹⁷

Mr. Bauthus testified that he was in a state of disbelief when he received this letter. Nothing had been mentioned up to that point about a new major tenant coming to the Mall.¹⁹⁸ This announcement exacerbated his concern about Bob Nazarian's lack of good faith.¹⁹⁹ Mr. Bauthus testified that when he received this letter, he spoke to the mayor and asked for a council meeting to inform council of the state of the negotiations with Eastwood.²⁰⁰ The meeting took place on July 13, 2009.

Mr. Fabris confirmed that Mr. Bauthus spoke to him following the receipt of the letter and advised him that the Library would move out of the Mall and into the Collins Hall.²⁰¹

July 9: Bob Nazarian backtracks and claims it was a mistake – he does not want to evict the Library

On July 9, 2009, Mr. Bauthus spoke to Bob Nazarian. Mr. Bauthus outlined the content of this conversation in the first of two memos he provided the mayor and City Council on July 10, 2009. Mr. Bauthus wrote:

In response to a phone call from me on July 8, 2009, Bob Nazarian returned my call to discuss the letter dated June 30, 2009.

I indicated that we had received a letter dated June 30, 2009 from Antoine-René Fabris and based on the contents of the letter, and a subsequent phone call to Mr. Fabris, the City is making arrangements to vacate the mall.

Mr. Nazarian indicated that the letter was a mistake and that he had not directed Mr. Fabris in this regard. He further stated that he could not answer to a prospective tenant until the end of this month to give us an opportunity to discuss what the City is doing with the Library space. I indicated to Mr. Nazarian that the City was in the process of making application for grants and that depending on the outcome of those applications we would need two years if successful and a five and five if not successful at this time in securing funding. I indicated that I had relayed this to Mr. Fabris sometime ago.

Mr. Nazarian indicated that he would need a five year lease with us. I stated that in view of the current funding applications we could not commit to five years at this time.

Mr. Nazarian raised the issue of the request to purchase the land from us and did not agree with the price. He felt that it should be given to him because it was in the interest of the City and the mall to have a successful enterprise. I advised that this was a separate issue and did not comment further.

I indicated that we took the eviction notice very seriously and have started making alternate arrangements for the library. Mr. Nazarian reiterated that it was a mistake and that he did not direct Mr. Fabris to take this action. I indicated that as Mr. Fabris is his legal representative we have every reason to assume that the direction is that of the mall and acted accordingly. I also indicated that Council will be dealing with this on Monday, July 13 and at that time setting the course for the future library space requirements.

Mr. Nazarian indicated that this was all a mistake, that he did not direct Mr. Fabris to write the letter and that he had prepared an e-mail to Mr. Fabris asking him to write a letter to the City retracting the eviction notice of June 30, 2009. As of Friday morning I have not received a phone call or letter indicating anything of such nature.²⁰²

Mr. Bauthus testified that he was very upset with the turn of events.²⁰³ During his phone call with Bob Nazarian, Mr. Nazarian attempted to link the issues of the purchase of the municipal land with the renewal of the Library lease, suggesting that if the City sold him the land, he might be more amenable to the City's desires with respect to the Library lease.²⁰⁴

The same day, Mr. Bauthus informed Ms. Morin of his discussion with Bob Nazarian. She in turn told the members of the Library board that Mr. Nazarian claimed that Mr. Fabris's June 30 letter was a mistake and that Mr. Nazarian had offered the Library a five-year lease. In reaction to this email, Councillor Collett responded to some members of the Library board as follows: "What the hell kind of game is this guy trying to play with us???"²⁰⁵ Mr. Collett testified that he was very upset by what was going on. He explained, however, that it was typical of Bob Nazarian:

It was a cat-and-mouse game. [Bob Nazarian] went back and forth, back and forth, pushed you to the limit, and it was the same as how he handled contractors. As I said earlier, he would push you to the limit.²⁰⁶

Mr. Collett testified that when the City first received the Notice to Vacate, he did not actually believe that Bob Nazarian had a tenant waiting to occupy the space. Mr. Collett testified that he believed it was part of Mr. Nazarian's negotiation tactics with the City.²⁰⁷

Mr. Fabris testified that he never received an email from Bob Nazarian about a possible retraction letter, and he did not write a letter retracting the eviction notice. He testified that he confronted Mr. Nazarian during a conference call with Mr. Sennett and reminded him that he (Mr. Fabris) had indeed received these instructions from him in the presence of Mr. Sennett. Mr. Fabris advised Mr. Nazarian that he was not prepared to retract his letter and that Mr. Nazarian could retract it himself if he wished: "He wanted me to admit that it was my mistake and fall on my sword. No, I wasn't willing to do that." Mr. Fabris testified that although Mr. Nazarian initially denied that he had given those instructions, Mr. Sennett came forward and verified his account. Mr. Nazarian, in the face of Mr. Sennett's confirmation, advised Mr. Fabris that he was going to deal with the City himself, but he never acknowledged the fact that he had given those instructions.²⁰⁸ Mr. Fabris testified that Mr. Nazarian had a "tendency to fly off the handle," but that he certainly took some precautions: "If there was [*sic*] instructions given, there were witnesses present."²⁰⁹ According to Mr. Fabris, written instructions were very rare from Mr. Nazarian²¹⁰ This practice is not surprising given Bob Nazarian's own evidence that he did not like "to leave paper trace."²¹¹

As it turns out, Mr. Fabris did send a letter of retraction to the City on July 9 in which he admitted to having made a mistake.²¹²

I sympathize with the City's reaction to the eviction letter. It appears that, to the City, the letter was a deliberate action on the part of Bob Nazarian either to get rid of the Library because he thought he had a better offer from another potential tenant or to retaliate because he was upset that the City was not prepared to sell him the municipal land at a much lower price. I suspect that the latter is the most likely reason.

July 9: Eastwood claims it wants to keep the Library and offers a five-year lease; Mr. Bauthus recommends to council that it consider moving the Library to the Collins Hall

On July 10, 2009, Mr. Bauthus received two letters – one from Mr. Fabris and one from Ms. Laroue.*

Mr. Fabris wrote:

I apologize for any inconvenience this has caused, however I am advised by my client, Eastwood Mall, that through my own error, a lease has not be [*sic*] signed for the library premises, and no letter of intent has been signed.

As such, the library board has until the end of the month to decide.²¹³

.....

* Exhibits 11-35, p. 4802; Exhibit 11-36. Although these letters are dated July 10, it appears they were not delivered to Mr. Bauthus until later that day, after he had provided the mayor and council with his first memo of that day. His second memo of that day (Exhibit 11-190) refers to both letters.

Ms. Laroue wrote:

It has been brought to my attention that a misunderstanding appears to have happened regarding to [sic] the City of Elliot Lake Public Library lease and the Algo Centre Mall. We do not have a signed lease with a new tenant for the space B8-C4 which is currently rented to the City for the Public Library.

We apologize for any confusion or inconvenience that may have been caused due to a misunderstanding between Mr. Bob Nazarian and our Lawyer Rene Fabris.

We are quite willing to work with the City in signing a new 5 year lease. In fact, the City has until the end of July to let us know if they are willing to extend their lease.²¹⁴

Ms. Laroue testified that she was instructed by Bob Nazarian to write this letter. She testified that, to her knowledge, there was no other possible tenant interested in renting the space then occupied by the Library. Ms. Laroue testified that any suggestion to the contrary was a tactic on the part of Mr. Nazarian.²¹⁵ Mr. Bauthus testified that when he received the letter from Ms. Laroue, he was not happy and was not hopeful that the City could come to a final agreement on the lease since, given what had transpired to date, there was a general air of mistrust surrounding the negotiations. Although Ms. Laroue had indicated there was a misunderstanding, she did not advise that Eastwood was willing to sign a two-year lease, despite the fact that Mr. Bauthus had advised Bob Nazarian that the City was not in a position to sign a five-year lease owing to the plans for the multiplex.²¹⁶

Following the receipt of Ms. Laroue's letter, on July 10, 2009, Mr. Bauthus, in his second memo of the day, provided the mayor and the council with an update on the Library lease:

Further to my memo dated Friday, July 10, 2009, a letter from the General Manager of the Algo Centre Mall was delivered to my office stating that there was a misunderstanding in terms of the letter dated June 30, 2009 from Antoine-Rene Fabris, however, the letter does not specifically retract the demand to vacate by October 31, 2009. In fact the letter states that they're willing to sign a new five year lease and we have until the end of July to let the mall know if we wish to extend the lease. We also received a letter from Mr. Fabris that is very similar in context.

Based on these letters I would suggest that the notice advising of eviction by October 31, 2009 is still in effect particularly if we refuse to enter into a five year lease by July 31, 2009.²¹⁷

Mr. Bauthus testified that he indicated in the memo that the eviction notice was still in effect because Mr. Fabris's letter had been very specific and he believed the eviction would still be "hanging over" the City's head. He further confirmed that he was faced with having to look into alternatives for the Library because it seemed as though it might not be possible for the Library to stay in the Mall.²¹⁸ Mr. Bauthus went on to write:

Given that we are presently pursuing funding to construct the multi-use facility which includes the library and if successful we would be looking at 24 to 36 months to complete the facility and move the library into the new quarters. Accordingly, until this issue is finally settled we should not commit to any rental in excess of two years. If we are not successful then we would have to look at a longer-term of up to 10 years to allow time to develop the funds to construct the multiplex. It is anticipated that we would require 30 to 60 days to deal with our application to the Minister. During this period we would need to have the facility to house a library.

The challenge in finding appropriate space to house the library is the size and the floor load capability. We are presently using approximately 8500 ft.² for the library and its ancillary programs and we need a floor load capacity of 150 pounds per square foot which is significantly greater than what is normally required for regular use. Accordingly, any facility would have to have a slab on grade to accommodate the weight. There are limited facilities in the city that meet these criteria.

In addition there would have to be sufficient time to allow for leasehold improvements to accommodate the library which is estimated at between six months and 12 months. This creates an immediate problem with the eviction letter on file. The most prudent process would be to move to the Collins Hall and then review the options available to us. If we are unable to secure the funding to move ahead with the multiplex than [sic] the decision would be to either leave the library in the Collins Hall or select another site and retrofit that site to accommodate the library. This is assuming that the mall is no longer available.

Alternatively we can go to the mall and negotiate a new lease. In this respect I would suggest that if the minimum lease is five years then we have a 12 month exit in the event that there are alternative solutions or the water problem continues. This allows us to continue with the application for funding for the multiplex and if successful move when the facility is complete without a long-term commitment. The mall will have a minimal commitment in the way of leasehold during this period as well. Otherwise we should let it go on a month-to-month basis.²¹⁹

Mr. Collett testified that he agreed with Mr. Bauthus that the City should not commit to a lease in excess of two years. He explained that the City would certainly not entertain more than a three-year lease with a one-year option.²²⁰

Mr. Bauthus explained that if the City did not obtain what it wanted in terms of the lease, he proposed that the Library turn the lease into a month-to-month tenancy.²²¹ Mr. Bauthus went on to conclude in his memo:

The current lease is quiet on the wording for notice and renewal however it does state that in the event that there is not the execution and delivery of a lease and the tenant remains in possession of the premises the space shall be occupied on a month-to-month basis under the same terms and conditions as the existing lease.

Irrespective of a short term lease month to month or any other arrangements, we should be prepared to move to the Collins Hall on short notice. Until we have a long term lease or alternate arrangements for the library there will always be the issue of the mall requesting us to leave on short notice.

As an observation irrespective of the term of any potential lease with the mall, it would appear to be beneficial to the mall to have the library located in the mall for the next two to five years. With projects that we are undertaking, Spine Road Development, Cottage Lot Development, Highway 108 improvements and the CIP [Community Improvement Program], the economic fortunes in the City are improving which might in turn make the mall more viable and attractive for additional retail to locate in the mall, while still receiving rent for a major space.²²²

Regarding the mention in the report that it might be beneficial for the Mall if the Library were to stay, Mr. Bauthus testified he meant that the Mall would continue to receive rent for that space until the multiplex was established. He further confirmed that he thought the Library was important to the economic survival of the Mall and, in turn, the viability of the Mall was important to the economic survival of the City.²²³

With regard to the last sentence of his memo, Mr. Bauthus meant that if the Library could stay in the Mall for two to five more years and then leave, it would not harm the Mall. He had also determined that the Collins Hall was suitable for the Library in terms of load capacity and was a viable choice.²²⁴ Mr. Bauthus made this suggestion to council knowing that, at the time, the Mall had water problems and, despite his concerns (which dated back to September 12, 2008),²²⁵ there could be possible structural issues owing to rust and water. He admitted in his testimony that those concerns and issues had not been resolved between September 2008 and July 2009.²²⁶

Mr. Collett testified that he was in agreement with Mr. Bauthus's views that the Library should stay in the Mall – the City was not only trying to get the multiplex developed but had other expenditures as well. Mr. Collett testified that the City did not think it was viable to move the Library to another location for a short term and then into the new complex. He clarified his opinion by explaining that the Library was under the impression that

Bob Nazarian would fix the leaks and that there would be a guarantee that any future leak damage would be at the owner's cost. The Library held to this position throughout the negotiations.²²⁷

Mayor Hamilton testified that, although the Collins Hall was an option, he did not support it because the City was using this facility for other activities and it would have to accommodate them elsewhere. He agreed with Mr. Bauthus that it would be beneficial to the Mall to have the Library located there for the next two to five years.²²⁸

It is apparent to me that the City's decision was motivated more by its concern over the importance of the Library to the Mall, and the Mall's importance to the community, than by the safety of the Library staff and its patrons.

Despite the leaks not being fixed and against the Library's wishes, City Council directs City staff to negotiate a lease with Eastwood

On July 13, 2009, as a result of Mr. Fabris's letter of June 30 evicting the Library,²²⁹ a special public meeting of City Council was convened. Representatives of two media outlets were present. As the minutes show, Mr. Bauthus provided an overview of the events and Katherine Croxson, then chair of the Library board, addressed council concerning the board's position on the termination of the lease agreement.²³⁰

Mr. Bauthus's notes of the meetings indicated the following:

Katherine Croxson

- Needs have been articulated.
- Library Board will be signing leases.
- Moving library twice is not a question.
- If a lease then should be month to month.
- Not 5 years.
- Very disappointed.
- Lease to address water.²³¹

Mayor Hamilton, Mr. Collett, and Mr. Bauthus all testified that it was very clear that the Library did not want to stay at the Mall because of the leaks, which council had been aware of for a number of years.²³²

Mr. Collett testified that Ms. Croxson advised council that the Library board would agree to a short-term lease on the condition the leaks were fixed. If not, the damages would be at the expense of the owner, and the Library would be able to terminate the lease at no cost.²³³

As noted in the minutes, council gave direction to City staff "to negotiate a lease renewal or extension of the lease for the library facility with a shorter term lease and with a clause to withhold rent in compensation for damages due to leakage."²³⁴

Mr. Bauthus testified that there was discussion during this meeting of moving the Library into the Collins Hall, but it was not well received by the council or the public.²³⁵ Both parties felt that having the Library in the hall would have an impact on its use as a community centre.²³⁶ In terms of public objection, Mr. Bauthus indicated that a couple of long-time residents of Elliot Lake had come to his office to voice their complaints.²³⁷ (In fact, at least one letter against the move by a citizen was introduced into evidence.²³⁸) Mr. Bauthus testified that council gave directions to negotiate a lease, despite the Library's position, because it believed the Library was important to the Mall.²³⁹ Mr. Bauthus agreed that he, the council, and the mayor knew that the Library had been leaking for more than 30 years, but he testified that councillors thought that Bob Nazarian would continue to work on those leaks and, they hoped, attenuate them.²⁴⁰

Mayor Hamilton agreed that the council had now made a decision to negotiate a renewal – despite the leaks – contrary to what Mr. Bauthus had indicated to Ms. Croxson in April 2008. (He had told her then that, before making a decision about renewing the lease, the City would wait to learn that the leaks had been fixed.) Mayor Hamilton admitted that in fact the leaks had not been fixed. When asked why council reversed its position, he testified that at that particular time it was trying to minimize the impact of moving. Council was waiting for the result of the multiplex funding application and was concerned about moving more than once. The City was attempting to negotiate a shorter-term lease extension at the Mall with a provision to withhold rent in compensation for damages.²⁴¹

Mayor Hamilton admitted that the Library

- did not want to stay in the Mall;
- did not want an extension of the lease to be negotiated; and
- had been told by Mr. Bauthus, with Mayor Hamilton's blessing, that it would not have to stay in the Mall unless the leaks were fixed.²⁴²

Mayor Hamilton also admitted that the council had reversed its position and that he supported this decision because of the cost and inconvenience of a second move. Contrary to Mr. Bauthus, he denied that the decision had anything to do with maintaining the economic viability of the Mall, even though this consideration had been mentioned in a number of memos prepared by staff.²⁴³ I find it difficult to accept that cost and inconvenience were the mayor's sole motivators.

The Library was not concerned with the inconvenience of moving. It was concerned with the inconvenience and possible harm that the leaks caused its patrons and staff.

This decision of council was made despite Bob Nazarian's machinations, the Library's opposition, knowledge of the effects of long-term leakage, and Mr. Bauthus's advice that

[t]he most prudent process would be to move to the Collins Hall and then review the options available to us. If we are unable to secure the funding to move ahead with the multiplex than [sic] the decision would be to either leave the library in the Collins Hall or select another site and retrofit that site to accommodate the library.²⁴⁴

July–August: Library lease – City Council pushes forward with its plan to keep the Library in the Mall

City Council ignores the Library's "bottom line" of no leaks

On July 15, 2009, Bob Nazarian sent Mr. Bauthus his proposed lease terms for the Library.²⁴⁵ The next day, Mr. Bauthus forwarded those terms to Ms. Morin. Later that day, Ms. Morin informed Mr. Bauthus by email, copied to members of the Library board, that she would discuss the terms with the Library board or with Ms. Croxson. She advised him that three leaks in the old "drip zone area" had resurfaced the day before because of the rain. Ms. Morin also raised several concerns about the proposed terms of the lease, including issues related to the leasable area, the heating, ventilation, and air conditioning (HVAC) system, the option to renew, and the monthly rent.²⁴⁶

Mr. Collett testified that the board continued to participate in the discussion about the terms of the lease, despite its opposition to remaining in the Mall. The board believed its negotiations amounted to a confrontation with Mr. Bauthus. It appears that it wanted to keep close tabs on him and ensure he was aware of the board's position.²⁴⁷

On July 16, 2009, Ms. Croxson sent an email to Ms. Morin in which she outlined the points that board members would agree on or wished to add to the lease. At item number 5, Ms. Croxson indicated:

[T]he Board will not agree to a 5 year lease. We would agree to a month-to-month lease but, failing that, a 2–3 year lease, renewable in each of the years would be acceptable. However, the terms of the lease would be conditional upon no leakage at all. Any leakage would nullify the lease and repairs would have to be done immediately with the Landlord responsible for any damage to Library materials as well as the repairs required.²⁴⁸

There is no doubt that both Mayor Hamilton and Mr. Bauthus were aware of the Library's position.²⁴⁹ The Mayor testified that the City was striving to obtain terms satisfactory to the board and that nothing was a deal-breaker – he wanted to see where the City was able to go in the negotiations. He further testified that he did not tell Ms. Croxson or anybody else from the Library, and did not direct anyone to tell them, that the City was not going along with the conditions, particularly the condition involving no leakage at all. When he was asked why not, Mayor Hamilton provided the following less than satisfactory answer:

I have never seen this memo before, so this is the first time I see this. But with respect to negotiations, we need to understand what we can and can't do. So in regards to this, we were negotiating a lease and that lease progressed to a point where we ended up with a lease, sir.²⁵⁰

The City was not going along with the Library's bottom line. The mayor did not advise the Library accordingly because he believed Mr. Bauthus would have had discussions with the Library on the subject.²⁵¹

On July 17, 2009, Mr. Bauthus met with Bob Nazarian, Mr. Sennett, Mr. Fabris, and another individual who accompanied Mr. Nazarian to negotiate the Library's lease. In his typed notes of the meeting, Mr. Bauthus wrote:

Term of the lease

Because of multiplex application cannot sign a 5 year lease. Consider two year notice if BCF funding available.

Rental rate

\$13.00 per foot too high – there are no leaseholds. If enter into a lease what are the leaseholds that will be done? Paint, carpet entrance?

Represents a 47% increase over current rent

Taxes to be reviewed

...

Water infiltration

Need wording to deal with the water – needs to [sic] some recognition that the water problem is not totally solvable but reasonable efforts made to ensure leakage is not extreme and ruinous to the collection nor does it create mold problems.²⁵²

With regard to the notation under the heading "Water infiltration," Mr. Bauthus testified that it reflected the discussion he had with Bob Nazarian.²⁵³ Mr. Bauthus did not agree that the lease should contain language to recognize that the water problems were "not totally solvable," but he wanted the lease to contain language recognizing that Eastwood would be responsible for the leaks and have to do something about them.²⁵⁴ Mr. Bauthus knew the Library's position about terminating the lease if there were leaks, but he did not advocate it. He also knew that the Property Standards By-law required that the building be watertight and leak-free.²⁵⁵ He testified that, according to his position, the City wanted to include something in the lease whereby Eastwood would have to address the leaks – that the Library could vacate "if they continued to some degree."²⁵⁶ He explained that the position he held was a midpoint between the Library's position and Mr. Fabris's initial position

that the lease should not address anything related to leaking problems.²⁵⁷ Nonetheless, Mr. Bauthus stated that, at this point, he knew Eastwood would never agree to a term in the lease that allowed the Library to terminate it if there were any leaks. He continued to negotiate because he was given direction by council to do so.²⁵⁸

Mr. Bauthus testified that he was also told by Bob Nazarian that a prospective tenant was ready to sign a lease for the Library space, was going to do its own tenant fit-ups, and would pay more in rent, so the City would need to hurry and sign the lease.²⁵⁹ This testimony was consistent with Mr. Fabris's letter of June 30 and Ms. Laroue's letter of July 9, which stated that the Library had until the end of July to sign the new lease.²⁶⁰

Mayor Hamilton agreed that the approach adopted by Mr. Bauthus during this meeting was inconsistent with what the Library wanted, but consistent with the resolution of council. He admitted that the positions of the Library and the council were a long way apart. Mayor Hamilton testified that he asked Mr. Bauthus to negotiate the best deal possible. When asked, he denied advising Mr. Bauthus not to worry about what the Library wanted. Mayor Hamilton said he always worried about what it wanted. He disagreed with the suggestion that council did not try to get the best possible deal but agreed that the City gave up on that issue from this point on.²⁶¹

City Council is told that the Mall will continue to leak and that the Collins Hall is a more economical alternative

On July 20, 2009, Mr. Bauthus provided City Council with a report entitled "Future Location of the Library," in which he provided options now that the lease at Eastwood was coming to an end. In his report, he referred to the July 17, 2009, meeting he had with Mr. Nazarian and other representatives of Eastwood, where they discussed their proposal for the renewal of the lease, and indicated the following:

Background

For the past year, we have been looking at various options, however, the current stimulus programs have created some challenges in coming to a conclusion.

It had been decided that the Library should be an integral part of the multiplex and Council had decided that the multiplex be one of the priorities of the City ...

...

The lease that we presently have does not provide for any period of notification, however, it does provide for an overhaul and the lease rate is the same as the last month of the current lease on a month-to-month basis until a new lease is negotiated or other arrangements made.

...

Analysis

The current conditions in the mall respecting water filtration and the HVAC problems make consideration of remaining in the mall problematic. The mall has undertaken work to remediate the water problem however, due to the construction of the mall and the parking roof it is unlikely that this can be completely fixed. There will probably be some instances, during periods of heavy rain, when there will be some infiltration ...

...

Presently, the City is paying \$8.79 per foot for 8544 [square ft.] of space plus taxes ... Under the proposal, the owner is requesting \$13 per square foot with an escalator of \$.50 per square foot per year which would bring the rate to \$15 in 2014 ...

The mall owner indicated at the meeting that there is presently a retail concern who is interested in the library space and is willing to pay not only more per square foot but also that [*sic*] the leaseholds necessary to accommodate the new venture. This apparently is one of the reasons why the mall is wanting the City's answer by July 31.

Alternative Space

In looking to accommodate the library over the short term until permanent quarters can be provided, we require space that can accommodate the floor loading requirements of a library which is significantly greater than other office usage ...

Given the size and requirements for the library, the possible sites in the community might be the former No-Frills building, former schools and the Collins Hall. In anticipation of using the Collins Hall as the library, we asked Cannon Design to do a cursory review of the facility in order to determine that the Hall is capable of the use and the magnitude of any improvements that would be required. The Collins Hall would work well with minimal upgrades ...

If we were to choose the Collins Hall as the alternate site for the library, there would be significant impact on the community because the Collins Hall presently is used for community functions and activities ...

...

Financial/Budget Impact

If we stay with the mall for the five-year period, we will have a significant increase of approximately 40% in the first year and an ongoing increase of 3% plus for each of the remaining four years. ...

*If the City decides to move to the Collins Hall, there will be the initial outlay of a \$180,000, however, there will be savings of approximately \$150,000 ... per year in that we will not be paying any lease payments for the library space ...*²⁶² [Emphasis added.]

Mr. Bauthus concluded:

The key issue here is whether or not to renew the lease for five years and take a chance that we will receive the funding for the multiplex that would have us then renting space in the mall for three years during which time the library will have vacated the mall space. If we do not receive funding, then we will have to find a home for the library for a minimum of five years and probably longer during which time we will be fundraising to construct the multiplex.

In moving the library to the Collins Hall, there will ultimately be significant savings during the period that the library is in the Collins Hall, however, there will also be significant upset in the provision of services that were traditionally offered through this venue.

At the time of preparing the report, we had not received the final draft of the lease nor the penalty clause. Therefore, the costs related to any penalty is not known as yet.²⁶³ [Emphasis added.]

Mr. Collett testified that, when he read the report, he thought Mr. Bauthus wanted to put a quick end to all these negotiations, say simply that the City's hands were tied, and have the Library accept the situation the way it was. He did not think that Bob Nazarian would implement a solution to fix the leaks. Mr. Collett thought at the time that one possible solution would be to close down the rooftop parking and sell Mr. Nazarian the extra land. He agreed with Mr. Bauthus that, if the City chose the Collins Hall site for the Library, it would have a significant impact on the community. Mr. Collett testified that the Collins Hall was being looked at only as a temporary alternative because the City wanted to make sure that the building would not be permanently altered.* Nevertheless, Mr. Collett agreed that that option would have saved money for the City and put an end to the Library's leak problem.²⁶⁴

.....

* At the time of the Commission hearings Foodland was occupying the Collins Hall. Mr. Collett testified that all the renovations could be removed and the building restored to its original condition.

Mayor Hamilton also agreed about the significant savings if the Library had been moved to the Collins Hall. He said that, at this stage in mid-July 2009, the council had been told that

- Eastwood would not agree to the price the City wanted;
- Eastwood would not agree to any language about the leaks which the City and the Library wanted;
- the leaks would continue; and
- there would be a five-year term for the lease (not the two-year term the City wanted), with a penalty for early departure.²⁶⁵

Mr. Bauthus admitted that he did not advise council in his report that the Library board would agree to a lease only on the condition that the Library would be allowed to get out of the Mall if there were any leaks. Mr. Bauthus had no explanation for that omission. He agreed that the only direction he was given by council was to ensure that the lease had a clause stating that Eastwood would be responsible for any damage caused by the leaks.²⁶⁶ Mr. Bauthus also agreed that he had established it was possible for the Library to move into the Collins Hall, where there would be no leaks and where the City would save money.²⁶⁷

Despite the leaks and although there are options, City Council chooses to keep the Library in the Mall

On July 20, 2009, during a closed session of council, Mr. Bauthus's July 20, 2009, report was discussed. The confidential minutes of this meeting reflect the fact that Mr. Bauthus provided a history of what had taken place with respect to the lease of the Library:

The CAO advised that we have a letter from the Mall indicating that the library must vacate as of October 31, 2009. The owner of the mall said that letter was a mistake, but actually the letter still stands.

The lease would have gone on a month to month basis; however we now have the termination letter.

We do not want a 5 year term lease.

...

A lease for space at the mall at \$150K per year for 2 or 3 years is too expensive.

They would look at an option where we would vacate prior to the 3 years, but there would be a penalty.

...

Mr. Fabris suggested that it would be difficult to prepare wording in the lease to address the leakage problem.

The reality is that you will never be able to attenuate the leaking problem when you have a flat roof with parking on it.

We cannot put up with the type of water leakage experienced in 2008.

Mr. Nazarian stated that he does have someone (retail) to enter into a long term lease at more than \$13 per square foot.

...

There is no trust in the landlord/tenant relationship.

...

Schools or Collins Hall may be able to accommodate.

...

Collins Hall is a major community centre ...²⁶⁸

Mr. Bauthus testified that his comment “you will never be able to attenuate the leaking problem when you have a flat roof with parking” probably related to what he had been told by Mr. Fabris. He did not speak to anyone from the Building Department about whether it was possible to fix the leaks on the roof.²⁶⁹ Mr. Bauthus agreed that the Library’s position, that it wanted to be able to leave the Mall if there were any leaks, was consistent throughout the negotiations.²⁷⁰

Mr. Collett disagreed with Mr. Bauthus that the owner would never be able to fix the leaking problem because of the flat roof with parking on it. However, he admitted he did not ask whether Mr. Bauthus had obtained the opinion of the chief building official on these matters and said that Mr. Bauthus did not inform council whether the Building Department had been consulted. Mr. Collett further testified that there was no discussion at that meeting about the City taking action to address the leaking or to force Mr. Nazarian to fix the roof under the Property Standards By-law.²⁷¹

Mr. Ewald testified that he was not aware that Mr. Bauthus had reached the conclusion that the leaks could not be completely fixed. He would have expected this conclusion to be brought to his, or his inspectors’, attention.²⁷²

The minutes record comments that were made by various councillors, among them:

Morrisette: we were in the Mall years ago just to support the mall. We should let Mr. Nazarian have the library space for the new tenant. Mr. Nazarian wants us to pay these exorbitant rates: lets not do it.

Reinhardt: the eviction notice gets you thinking of “where should we go”. He reacted to our reaction. He pulled back his “eviction notice”. He did not accidentally evict us. The price increase is not acceptable. A temporary home in the Collins Hall has always been a background idea. Flat roofs do leak. The Mall has more than normal problems with flat roofs. Cost to renovate Collins Hall is reasonable. Subsequent to the eviction, he gave us the July 31 deadline. A tight timeline is unacceptable. We should get out of his way re: his new rental tenant. Negatives about moving to Collins Hall and then move again to the new facility. Problems with customers with the move, should be manageable. Staying in the environment with Nazarian keeps us in the valley of indecision. Alternative venues are available. Impact on library users. Kiss the mall good-bye.

Rastin: what are our hydro costs? Hydro is included except for heat. In favour of getting out of the mall. Not in favour of pushing out the users of the Collins Hall. Are we going to spend \$180K fitting out Collins Hall. We should look for a long term solution for the library now.

Collett: agrees we should get out of the mall.

Patrie: at \$13 we should be running away from the mall. Nazarian’s proposal and the proposed lease are not consistent at all. There is nothing in the lease to protect us from water damage. Nazarian did not change his proposal after negotiating with the CAO.²⁷³

It is apparent that at the time, as was recognized by Mayor Hamilton and Mr. Bauthus in their testimony, five of the six councillors (Councillors Morrisette, Reinhardt, Rastin, Collett, and Patrie) were opposed to the Library staying in the Mall.²⁷⁴ However, several councillors also indicated they were not in favour of using the Collins Hall as a long-term solution.

Mr. Collett testified that he was of the view that “enough is enough” and “it is about time we get out of that environment” where the problems included not only the leakage but also the resulting personnel issues and health and safety concerns.²⁷⁵

Mayor Hamilton was recorded in the minutes as saying:

Nazarian is risking a lot – we should say “here’s a two year lease” at the current rate. We have not taken a last stand as yet. We should notify Nazarian that we want it our way or the hiway. We have made big commitments to the library. We have included it in our Multi-plex facility. We need 60–90 days (funding answers needed). We do have an alternative. We are sick and tired of dealing with his antics.²⁷⁶

In Mr. Bauthus's handwritten notes of the meeting, he recorded the mayor as saying:

- same agreement.
- take it or leave it.
- two year lease.
- check taxes per square foot²⁷⁷

Mayor Hamilton testified that, by "take it or leave it," the City was going to take a stand on the agreement that it was proposing to Bob Nazarian and ensure that the agreement contained a provision "to deal with the water." He testified that he wanted to see something in the lease that would minimize the impact of the leaks on the Library because such a clause was not included in the previous lease. It was his evidence, however, that he did not support the Library's position that it should be able to get out of the Mall if there were any leaks. He wanted to see what else the City could find to address the problem. When pressed on what exactly he wanted, Mayor Hamilton clarified his position that he wanted the lease to include a clause requiring the landlord to make reasonable efforts to address the water in the hope that the Library would soon be out of the Mall and in the new multiplex. He agreed that there were all sorts of pitfalls in trying to enforce "reasonable efforts" clauses.²⁷⁸

The minutes then went on to record:

We are now going to give a lease back to Nazarian with our terms, and if it is not accepted by Friday, we will be spending from reserves to move to Collins Hall. That will be on the July 27 agenda.

If he does not sign it on Friday, we will still have legal tenancy. Our current rate is \$8.79 per sq. ft. ...

Mayor advised Chair of the Library Board that this discussion should remain within Council Chambers and not be shared with the library board until negotiations have been completed.²⁷⁹

When asked what instructions were given to Mr. Bauthus after this meeting, Mayor Hamilton testified that the minutes did not state the instructions, and he found that odd.²⁸⁰

Mr. Bauthus testified that his understanding following this meeting was that he should negotiate a lease with Mr. Nazarian which would include the discussed terms. He explained these terms as follows: the rate per square foot should be lower, the lease should be for a shorter term, and a provision on the water issues should be included. He confirmed that there was no vote on the direction given to him (to have the Library move out or otherwise). But he understood from the discussion at the meeting and from further discussions with the mayor that the Collins Hall was not a reasonable option and that he should negotiate a new lease. Mr. Bauthus explained that his understanding of the condition regarding leakage was that he should seek a clause whereby the Library would be allowed to vacate the Mall if the water problems persisted.²⁸¹

Mr. Collett testified that he did not believe any direction was given to Mr. Bauthus other than to continue pursuing other locations. Mr. Collett agreed with the evidence of Mr. Bauthus that, in addition to trying to pursue other locations, he was directed to continue negotiating with Bob Nazarian because the City had no other option at that time. When asked why council did not consider temporarily moving the Library to another location such as the Collins Hall, Mr. Collett testified that, in addition to the cost factor, there were concerns over renovating a historic building as well as monopolizing a hall that the community used for various events.²⁸²

On July 22, 2009, Mr. Bauthus sent an email to Bob Nazarian and Mr. Fabris, copying Mayor Hamilton, Ms. Morin, and Virginia MacLean (the City solicitor) and attaching the Library lease that had been revised according to instructions from council.²⁸³ These revisions included:

- rent at the same rate as then in effect at \$8.80 per square foot;
- a term of two years;

- property taxes at \$2.31 per square foot to reflect the current level of taxes on the Mall;
- a clause to deal with the potential water infiltration; and
- updated language to reflect the handling of the hydro and heating costs.

Mr. Bauthus ended the email by stating that he needed the lease to be signed by noon on July 24, 2009, in order to include it at council's next meeting. If it was not signed, council would invoke a provision from the 1989 lease agreement whereby the Library can "occupy the space at current rates in effect until other arrangements are made."²⁸⁴

On review of this email, Mayor Hamilton was pressed again about the nature of the instructions provided by council to Mr. Bauthus, particularly in light of the fact that, at the July 20 council meeting, five of the six councillors had expressed a desire for the Library to leave the Mall. Mayor Hamilton then changed his testimony and claimed that the instructions were not properly recorded in the confidential minutes. He testified that the final outcome of the discussions during the closed meeting and the instructions of council were as outlined by Mr. Bauthus in his July 22 email to Bob Nazarian. Mayor Hamilton had no explanation for why these instructions were given despite the views of the councillors as documented in the minutes.²⁸⁵

The revised lease proposed by Mr. Bauthus to Bob Nazarian contained a provision whereby the Library could vacate on 60 days' notice if water infiltration had "impacted" the Library's use:

26. Maintenance of the roof

(1) The Landlord will be responsible for the continuing maintenance of the roof so as to attenuate the infiltration of water caused by the elements and should the infiltration continue to the point that it impacts on the Tenants use of the facilities the Tenant has a right to terminate the lease on sixty (60) days written notice to the Landlord. Notwithstanding Paragraph 25 it shall be the responsibility of the Landlord to undertake repairs to the premises caused by the infiltration of water at the Landlord's expense.²⁸⁶

As recognized by Mayor Hamilton and Mr. Bauthus, although this clause was not as strong as what the Library was seeking (it wanted to be able to terminate the lease if there was any infiltration of water), it somewhat addressed the concerns of the Library board.²⁸⁷

Eastwood does not back down; Mr. Bauthus recognizes that if another tenant is available, the Library does not need to stay in the Mall

On July 23, 2009, Mr. Fabris sent a letter to Mr. Bauthus concerning the proposed Library lease. In his letter, he indicated that

- the proposal was firm with respect to the \$13 per square foot, as there was a prospective tenant willing to pay more;
- the term of five years was non-negotiable;
- his client was "prepared to provide his best efforts to deal with water infiltration, and would be willing to have this as a clause in the lease; however, he would not agree to any compensation or early cessation of the Lease due to water infiltration";
- the Library could continue to occupy its premises after the end of the lease only with the approval of the landlord; if the lease was not signed, Eastwood would require the Library to leave at the end of its lease period; and
- Eastwood had been waiting for an answer from the City since the previous November; should the parties not be able to come to a mutually agreeable lease, Eastwood Mall would "approve the Tenant waiting in the wings."²⁸⁸

On July 23, 2009, Mr. Bauthus forwarded the revised lease to the council. He also advised council of the response he had received from Mr. Fabris, including the statement that, if nothing could be arranged, the Library was to move out of the Mall by the end of the lease on September 30, 2009. Mr. Bauthus also stated:

I indicated to Rene that once the decision to move is made there would be no backtracking irrespective of the issues. *I also indicated that if there is a tenant ready to move in then the reason for the library to be in the mall is no longer relevant.* The prospective tenant would prefer the space occupied by the library however there is other space available but more expensive to fit out. I suggested to Rene that 8.80 per foot for two years is better than nothing.²⁸⁹ [Emphasis added.]

When asked about the statement in italic above, Mr. Bauthus said:

Well, I was looking at it from the perspective that the Mall – the library is in the Mall to provide a tenant occupying a major space, and if they have somebody in the wings that would be able to fill that space and pay rent, then the economic need for the library to be there is diminished significantly.²⁹⁰

With respect to the allegation that Bob Nazarian had a prospective tenant in the wings, Mr. Collett stating: “Hogwash. I didn’t believe it whatsoever.”²⁹¹ Mr. Bauthus shared this sentiment.²⁹² Mr. Collett also agreed with Mr. Bauthus that there would be no reason for the Library to be in the Mall if there were another tenant, but clarified that he thought Mr. Bauthus was simply calling Mr. Nazarian’s bluff.²⁹³

Mayor Hamilton testified that he was not surprised by Bob Nazarian’s response: the landlord was playing hardball.²⁹⁴ Mr. Nazarian was not giving an inch and was being completely intransigent on the issue of the water infiltration.²⁹⁵

Mr. Bauthus’s correspondence to council makes it clear that the location of the Library was considered to be of vital importance to the Mall’s economic well-being.

City Council directs staff to continue to negotiate and foregoes the option of moving the Library to the Collins Hall

On July 27, 2009, as a follow-up to the conversation he had on July 23, Mr. Bauthus received a letter from Mr. Fabris. The lawyer advised him that he had communicated with Bob Nazarian and that the owner was prepared to agree to a five-year term as long as the first three years of the term were fixed, with the last two years terminable on notice. Mr. Fabris noted that if the Library board wished to terminate the lease after three years, it had to buy out the balance of the remaining two years by paying 30 percent of the gross rent per year. That would have meant a penalty of about \$50,000 each year if the City vacated after three years. Mr. Fabris then advised that Mr. Nazarian was firm at \$13 per square foot for the rent unless the Library wished to be responsible for the HVAC system. As Mayor Hamilton recognized, the City got a slight movement on the term from Mr. Nazarian, but was not able to convince him to budge on the rent and the issue of the water infiltration.²⁹⁶

On July 27, 2009, Mr. Bauthus sent a memo to the mayor and the council providing them with an update on the Library’s lease negotiations, including the recent communications he had had with Mr. Fabris. Mr. Bauthus concluded his report by saying:

In summary *the mall has moved very little in terms of the lease and reiterated that the mall has a prospective client in the wings. That would suggest that there is very little reason for us to remain in the mall.*

In looking at other possible locations, the Collins Hall is the most economical at \$180,000 to refit to accommodate the library and the timeframe allowable.

Presently one of the main issues is the term and that hinges on the application for funding for the multiplex. If we get the funding we require short-term space for two years until the multiplex is built, if we don't get the funding we will require a longer period probably up to 10 years which would allow for a five year lease with the five-year option.

...

In summary we have an eviction notice to September 30, 2009 if a lease is not entered into and we have an alternate space that will accommodate the library however it will create some public issues and it will cost \$180,000 and up to 60 days to undertake the changes.²⁹⁷ [Emphasis added.]

Mayor Hamilton agreed with Mr. Bauthus that, if the Mall had a prospective tenant in the wings, there was very little reason for the Library to remain in the Mall. He did not agree with locating the Library in the Collins Hall, but admitted that, of all possible locations, that one was the most economical.²⁹⁸

On July 27, 2009, council held a closed session to discuss the lease. Todd Stencil represented the Chamber of Commerce, and the Library board chair was invited to attend.²⁹⁹ Mr. Stencil expressed concern over the effect of the Library's departure on the Mall and the impact on Collins Hall's use as a community centre. According to Mr. Bauthus, the chamber merely wanted to bring these two concerns to council's attention;³⁰⁰ Mr. Collett, however, said that the chamber went further and advocated remaining in the Mall.³⁰¹

During the closed session, Mr. Bauthus provided background on the recent negotiations with the Mall.³⁰² The minutes recorded the following statements he made:

He still wants a five year lease but will give us a three year fixed and allow us to vacate with a fixed cost of \$50K

The issue driving the term is the funding proviso that we build within 2 years.

We requested of Mr. Fabris, given that is an issue, let us overhold until December. Fabris indicated he did not have authority to grant it.

Could we live with a \$100K penalty?

After significant storm on Friday, there was only one section where water came in.

The general perception is that the Mall needs us. The fact he has a tenant in the sidelines, seems unbelievable.

We don't feel that \$13 per sq foot is fair ...

The Collins hall can be ready in 30 to 60 days.³⁰³ [Emphasis added.]

Following certain remarks by councillors on the suggestion to move to the Collins Hall, Mayor Hamilton, as noted in the minutes, said:

Mayor – The Library Board has indicated they will not sign the lease. We control the purse strings. They control the lease. The Act states that the Board has the right, with the consent of the Council, to negotiate a lease. Council has only the financial control. Why are we negotiating the lease.

The buck does stop here. We either overhold the lease, or we move out the books, and lay off the library.³⁰⁴

Referring to the mayor's statement, "Why are we negotiating the lease," Mr. Collett testified that this issue was one of the few on which he agreed with the mayor. However, Mr. Collett agreed that it was the council that had directed Mr. Bauthus to go ahead with the negotiations, so Mayor Hamilton should have been aware of the approach Mr. Bauthus would take. Mayor Hamilton (disingenuously, in my opinion) explained that his statement was a rhetorical question. He surely knew that the council was doing the negotiating because of the Library board's long-held view that it did not want the Library to stay in the Mall.³⁰⁵

Mr. Bauthus confirmed that during the meeting of council, an issue was raised regarding what the City would do, or could do, if the Library board chose not to sign the lease ultimately negotiated.³⁰⁶ Mr. Bauthus was directed to contact the City solicitor, Ms. MacLean, to ask for an opinion on what the legal effect would be if the Library refused to sign the lease.³⁰⁷

Mr. Collett testified that it was ludicrous to suggest that the Library staff would be laid off: there was no way the City would shut down the Library and lay off the staff. He stated that the direction given to Mr. Bauthus was the same as before: to continue negotiating with Bob Nazarian and, at the same time, to look at alternative solutions.³⁰⁸

Although the City's position in April 2008 had been that it would not make a decision about the Library staying in the Mall until it saw whether the roof was fixed, Mayor Hamilton agreed that, by the summer of 2009, City Council had decided that the Library was not going to move and that the City would negotiate the lease to keep it in the Mall. When asked about the presence of leaks and health and safety concerns, Mayor Hamilton testified:

Q. Rather, what happened was Council decided that they were going to negotiate and keep the library in the mall, right?

A. Pending the multiplex, yes.

Q. Despite the leaks?

A. Yes.

Q. Despite the health and safety concerns that had been made apparent over the years?

A. No, I wouldn't say that, sir.

Q. Well, you knew about them?

A. Yes, we did.

Q. So you made the decision despite them?

A. No, I wouldn't say that. We made a conscious decision to negotiate a lease that would ameliorate the leaks, and hence improving [*sic*] the health and safety issues, not making them worse, yes. So certainly we would have that in mind.

Q. So it is your evidence that the lease that was entered into went a ways towards fixing the leaks?

A. Well, that was the whole goal, yes.

Q. That was the goal, but did you get to the goal?

A. I believe we did, but we'll have to go through –

Q. All right, well –

A. There is a number of reports that suggest that it did get much better thereafter, yes.³⁰⁹

I cannot accept Mayor Hamilton's evidence. It is clear from the abundant documentary and oral evidence that the leaks at the Library never stopped. More important, it is clear that the City's assertion to the Library that it would ensure that the leaks were fixed before deciding to stay in the Mall was nothing more than a hollow promise.

The minutes then go on to reflect the following statements made:

CAO suggested that we stay until Dec 31 2009. He wants to get \$300 to \$400K from us. Are we prepared to spend \$4 to \$5 M on a new library facility when it is part of the new proposed multiplex.

We need to negotiate a reasonable rate and terms.

Why pay escalating rent for years and years. If we get the funding we need two years. Everything else is fixed. We move to Collins Hall.

If we don't get the funding, it will be at least 10 years before we can deals [sic] with a new library facility. ...

*The reality of the mall has not changed.*³¹⁰ [Emphasis added.]

Mr. Bauthus testified that the last recorded statement was his. He explained:

A. I think the economic reality of the mall compared to the – I know I had mentioned it a couple of times to the Members of Council in terms of the need for the library in the mall.

Q. In other words, it was your view that it still needed the library?

A. Yeah, it was.

Q. And you told Council that.

A. And I told Council that on a couple of occasions.³¹¹

Mr. Bauthus may have believed that the Mall needed the Library. The mayor and the council were aware of his view. But Mayor Hamilton testified that the councillors who wanted to move out changed their view because they did not want the Library to move twice when the multiplex became a reality, and that he was of the same opinion.³¹² Yet Eastwood either had a prospective tenant (and, hence, no need for the Library) or was bluffing to get more advantageous lease terms. Ostensibly, it might appear as if the motivation caused by the desire not to move twice was so strong that the council was not prepared to risk calling Eastwood's transparent bluff and would, as we shall see, submit to disadvantageous lease terms despite the Library's well-known desire to move out. I strongly suspect, however, that the real motivation was a desire to keep the Library in the Mall at all costs for all the reasons that had previously been advanced and articulated. The Mall needed the Library, and the City needed the Mall. It would remain there despite the Library board's strong objections and the unappealing terms of the lease.

I find it bizarre that none of the members on council suggested the use of the Property Standards By-law to get the Mall owner to fix the leaks, despite the fact that many members were present in October 2006 when the City issued a Notice of Violation to Eastwood, ordering it to fix the leaks. "I think people just forgot that it was issued back in 2006" is the explanation that Mayor Hamilton provided.³¹³ Given the unprecedented nature of that notice, the fact that the problems at the Mall persisted, and the owner's crafty intransigence, this collective amnesia is difficult to fathom. Was it wilful blindness, incompetence, or something else? I cannot tell.

Following this council meeting, Mr. Bauthus was instructed to continue negotiating with Eastwood as best he could. He testified that, given that Bob Nazarian had agreed on decreasing the duration of the lease, council was (blithely) hoping that Mr. Nazarian might give in again.³¹⁴

Council is advised it should not be negotiating the Library lease or signing it on behalf of Library

On July 29, 2009, the City received an opinion from Ms. MacLean on "what would happen if the council struck a deal with the mall to renew the lease and the Library Board refused to execute the new lease? Could the City execute the lease and insist that the Library occupy the space at the mall?" Ms. MacLean advised the City that

- the lease was between the board and the landlord, but the Library board could not lease land for the purpose of the Library without the consent of the council;
- the Library board should have been negotiating the lease;

- if the Library board authorized the negotiations on its behalf, the position should have been reported first to the board and then to the council, not the other way around. Council had the final decision, and the lease should have stated that the execution by the board was subject to the consent of the council so that there was no misunderstanding by the landlord;
- the council could not sign the lease for the Library board because the approval process was the other way around; and
- the Library board should have made a decision on the lease and sought the council's approval immediately.³¹⁵

Mr. Bauthus testified that he understood Ms. MacLean's opinion to be that the City could not sign the lease on behalf of the Library or force the Library to occupy the space if it refused to sign the lease. At this time, the Library was threatening not to sign the new lease because of the leaks.³¹⁶ However, the City Council ignored this legal advice and not only signed the lease with Eastwood but forced the Library to occupy the space, despite the relentless leaks and the ongoing health and safety concerns.

City Council's decision leads to the resignation of the chief librarian

On August 7, 2009, Ms. Morin, chief librarian, submitted her resignation to the Library board, effective August 28, 2009.³¹⁷ The evidence before me is uncontroverted that Ms. Morin resigned because of the council's refusal to relocate the Library despite the continuous leaks.³¹⁸

I find it disturbing that the resignation of the Library's chief administrative officer did not motivate the City to reconsider its position.

Conclusion: The City's decision to renew the lease was always motivated by its determination to keep the Library in the Mall

The City's actions ran counter to legal advice and the strongly and justifiably held view of the Library board. The owner had a prospective tenant. If that was not true, then the City had the upper hand in its negotiations with the owner, made even stronger by the fact that it had a powerful tool in its Property Standards By-law. Councillors had previously expressed their view – clearly – that the Library should move out. They had been told that the owner was likely playing a game with them. The health of the public and Library staff was an issue; the condition of the Library inventory was in jeopardy. Another location was available, at least on a short-term basis, until the multiplex situation was determined. However, these valid considerations could not sway the mayor and council in their determination to keep the Library in the Mall.

July–August: Scotiabank stops paying rent as a result of the unpaid expenses incurred because of the leaks

Following its letter of February 6, 2009, Scotiabank sent Bob Nazarian and Mr. Fabris several letters for the reimbursement of the expenses incurred for repairs caused by the water infiltration. Some of these letters were answered and others were not.

On June 26, 2009, Scotiabank reiterated its request for reimbursement of \$113,889.72 for these expenses. Bob Nazarian was also informed that, since February, additional costs had been incurred in relation to repairs.³¹⁹

On July 2, 2009, Scotiabank sent a letter to Bob Nazarian enclosing the list of costs and expenses, together with supporting invoices and quotations, for repair work and remediation required by the leaks. Mr. Nazarian was also informed that further remediation for an incident that took place in May would total approximately \$44,000 and that reimbursement would be sought. Scotiabank provided Mr. Nazarian with another copy of Bruce Caughill's September 2008 report (initially shared with him on September 29, 2008) and asked that he address the issues laid out in section 6 of that report because the bank remained concerned by the statements there.³²⁰ (Mr. Caughill had noted that the leaks were persisting, the repairs were deficient, and water had caused corrosion damage to steel which should be investigated to verify the integrity of the structure.³²¹)

On July 23, 2009, Scotiabank sent another letter to Bob Nazarian, requesting that \$155,726 be paid, based on the final invoices that it had up to that point.³²²

On July 27, 2009, Mr. Fabris responded to Scotiabank's July 2 letter, advising that

in our investigation there was no mold that was found.

I find that the work proposal is excessive; also my clients are prepared to do the work themselves with the local contractor at a much lower cost.³²³ [Emphasis added.]

Indeed, when asked about the investigation referred to in his letter, Mr. Fabris testified:

Q. And your response to that is that your investigation, which is the M.R. Wright; correct?

A. The M.R. Wright and the staff from the mall had gone in to see if there was any mould.

Q. Well, the staff in the mall are not environmental scientists; correct?

A. No, but they can see mould growing on a wall.

Q. Well, you had these Environmental Assessments done by Pinchin to find out the air quality, that is what they are looking at, correct?

A. The staff at the bank was seeing mould in areas, what they qualified as mould, and on certain occasions that proved not to be mould.

Q. In any event, you'll confirm for me that the M.R. Wright report was dealing with Zellers; it wasn't dealing with the Bank of Nova Scotia?

A. No, but the staff did go in and see where areas of concern were.³²⁴

Mr. Fabris's letter is puzzling. The M.R. Wright mould investigation and assessment was conducted at Zellers and not at Scotiabank. It was conducted in August 2008 and not in 2009.³²⁵ Eastwood did not request an investigation of Scotiabank until November 2009.³²⁶ In any event, the mould investigation by maintenance and M.R. Wright staff could not be an adequate substitute for the expertise of trained professionals in mould detection.

On July 28, 2009, Scotiabank gave notice to Bob Nazarian that, since it had not been reimbursed for the claims relating to the water damage, it would immediately commence deducting the amount owed from its rent in accordance with the lease addendum of July 24, 2006.³²⁷ This letter did nothing to change Mr. Nazarian's conduct with respect to the leaks.

On August 4, 2009, in response to Scotiabank's letter of July 23, Mr. Fabris sent a letter to Scotiabank advising that it should claim the amount from its insurer and that Eastwood would not be paying the amount.³²⁸ The next day, in response to Mr. Fabris's letter, Scotiabank sent a letter to Bob Nazarian and Mr. Fabris stating that its position was that it was up to the landlord, and not Scotiabank's insurer, to cover these costs pursuant to section 7 of the lease.³²⁹ Scotiabank continued to offset from its rent the amount it was owed.³³⁰

July–August: Bob Nazarian continues to try to get money from the Royal Bank, but not to fix the leaks

On July 29, 2009, Jim Davison from the Royal Bank, the administrator of Eastwood's mortgage, emailed Bob Nazarian, asking him about financial variances and a written plan or capital budget for the repairs to be made to the Mall. Mr. Nazarian did not recall getting this email but agreed it was apparent that the "bank was still on [his] case."³³¹

On August 6, 2009, Bob Nazarian sent Mr. Davison a report entitled "Algo Mall and Hotel Improvements Project – Infrastructure and Hydro HVAC Project." The report explained the Mall's "future improvement and requirements," which he sought to finance by the release of the reserve fund he had been required to pay into since buying the Mall. Mr. Nazarian stated it was "[v]ery much possible" that this report was in response to Mr. Davison's July 29 request.³³²

Mr. Nazarian indicated in his letter that Eastwood had significant problems with the roof in 2008. By September 2008, however, as I have described, Bob Nazarian had stopped trying to fix it. He simply maintained it by attempting to remove and restore caulking that had failed and applying new caulking in new cracks and leaks.

Bob Nazarian advised Mr. Davison that he was in the process of improving the Mall and recruiting new tenants. He listed the following improvements, none of which included fixing the leaks: HVAC system replacement; reconstruction of provincial government offices; preparation of new offices for the federal government; painting of Mall and Hotel; installation of a new hotel sign; and renovation of the interior of the Mall.³³³

Mr. Nazarian testified that he did not include the roof in the list of improvements because fixing it needed "much more money" than what was in the reserve fund. He had asked previously for money to fix the roof and been rejected. He was no longer trying to get financing to fix the roof in 2009. According to him, the leaks were in a "much better situation" in 2009. He stated the leaks "were 90 per cent clogged," regardless of what Scotiabank said. He nevertheless admitted that this view was not shared by the City in September 2009.³³⁴

On August 20, 2009, Mr. Davison emailed Bob Nazarian, advising him that the master servicer (who acted on instructions of the investors) had agreed to accept an early payout of the mortgage without a penalty.³³⁵ Mr. Nazarian saw that development as very good news.³³⁶

July: Levon Nazarian misleads lenders and potential tenants into thinking that the roof has been resealed

Despite Bob Nazarian's decision in September 2008 not to make a major expenditure on fixing the roof, Eastwood continued to advise lenders and potential tenants in July 2009 that it had invested money to do so.

In July 2009, Levon Nazarian prepared for lenders – or anyone else who wanted information on the Mall, including potential tenants – a sales brochure similar to the one he had prepared for potential purchasers, but without the financial information. Under "capital improvements," he wrote: "Several major capital investments were made, including ... Upgrading and resealing of the entire roof of the mall." By this description, Levon Nazarian testified, he meant "changing all the expansion joints ... and all the sealing that was done on the roof." He claimed that he was referring to the work his father and the Mall's forces did in 2008 and 2009. He testified that he did not know the difference between caulking where there were leaks and putting a sealer or sealant on the entire roof. He prepared the wording in the brochure himself, without consulting anyone. When pressed, he admitted there was a difference between fixing the cracks and covering the entire surface of the roof with a sealant. He testified that he wanted readers to think that "we've upgraded the roof, that we've done work to the

roof, that we enhanced the roof." He disagreed that one might conclude by reading his brochure that he wanted readers to think that the entire roof had been resealed, instead of just the leaks being re-caulked or resealed.³³⁷

I do not accept Levon Nazarian's evidence. It is clear to me that both Bob and Levon Nazarian wanted to convince everyone reading these brochures that they had spent money fixing the entire roof, leading them to believe that water infiltration was an event of the past.

August: Library lease – City Council approves a lease that does not protect the Library's interest

The City continues to negotiate for a lease with Eastwood

A public meeting of City Council was held on August 10, 2009. Mayor Hamilton is reported as saying, "[W]e are still negotiating with the mall about the library lease and as such cannot disclose details until this process is complete. Our staff is working feverishly to attempt to secure a lease with the mall."³³⁸

Mr. Collett testified that he expected Mr. Bauthus to be negotiating a short-term lease with the guarantees that the Library board had requested.³³⁹ Indeed, Mr. Bauthus testified that he communicated mostly with Mr. Fabris in this effort.³⁴⁰ Mayor Hamilton testified that the Library board was not involved in the immediate discussions.³⁴¹

The City concedes on all terms, including the water-infiltration provision

On August 12, 2009, Mr. Bauthus sent an email to Mr. Sennett, who was apparently acting on behalf of Bob Nazarian, copied to Ms. MacLean and Mayor Hamilton. He attached an updated Library lease that provided

- a rent of \$12.50 per square foot, almost as high as the \$13 that Eastwood had been seeking;
- a term of five years with an exit after three years with a penalty (approximately \$50,000 per year), which is what Mr. Fabris had suggested, instead of a two-year lease with an option to renew for two years, which had been the City's prior position; and
- a 12-month notice, instead of a 60-day notice as originally sought, if any water leakage interfered with the Library operation.³⁴²

Mr. Bauthus testified that council had not approved these revised terms but that he had discussed them with the mayor. The weaker position was a reflection of these discussions.³⁴³

Mayor Hamilton's evidence was different. He testified that he did not know who told Mr. Bauthus that these terms were acceptable and that he certainly did not give him the instructions. Ultimately, the deal had to be approved by council. However, when he was asked why these concessions were made regarding the rent, the term, and the water, Mayor Hamilton testified that it was so the Library could remain in the Mall until it would move into the multiplex. When the evidence of Mr. Bauthus was put to him (that Mr. Bauthus had discussed these terms with him), Mayor Hamilton testified it was possible but that the lease had to be ratified by council in any event. When asked again whether he was also trying to keep the Library in the Mall to keep the Mall economically viable, he testified that it was part of the reason, but that his goal was to make sure the Library did not move more than once.³⁴⁴

It is apparent that Mayor Hamilton was intimately involved in this matter, and I have no reason to question Mr. Bauthus's evidence on it. He was forthright throughout his testimony on this issue, admitting that indeed the City did not advocate the Library's position but simply wanted to negotiate a lease to allow the Library to stay in the Mall.

Eastwood pushes back on water-infiltration provision

On August 21, 2009, Mr. Fabris sent a letter to Mr. Bauthus in which he advised him that the parties were in agreement with all the items in the lease except the clause dealing with the maintenance of the roof. Mr. Fabris proposed the following language:

The landlord will be responsible for the continuing maintenance of the roof so as to attenuate the infiltration of the water caused by the elements and should the infiltration be as severe as that experienced during the 2008 calendar year, or continues to the point that it substantially impacts on the tenants use of the facilities, the tenant has the right to terminate the lease on twelve months written notice to the landlord.³⁴⁵

As recognized by Mr. Bauthus, this wording was a further weakening of the water-infiltration clause, particularly since 2008 was the worst year the Library had experienced in terms of leaks. This clause would ultimately be agreed to by council and be part of the executed lease.³⁴⁶

City Council approves “weak” lease and asks the Library board for approval

On August 24, 2009, Mr. Bauthus provided a report to council recommending the execution of the five-year lease with Eastwood, “which will allow the library to remain in the existing premises for a further five-year period.”

In his report, under the heading “Responsibility for water infiltration,” Mr. Bauthus wrote:

With the design of the parking area there are issues of water leaking into the library and in 2008 the water leakage was significant and very interrupting to the operation of the library. The landlord has undertaken to remediate this by upgrading the maintenance of the roof. In view of this a section was introduced into the lease to recognize that the landlord will fix and/or replace structure, walls, ceiling tiles etc. as a result of leaks and should these leaks become of the magnitude of those in 2008 the library then has the right to give 12 months notice to terminate the lease because of water infiltration.

This will allow the library to address an escalating issue of water infiltration and allow time to work with the City to search out alternate premises to house the library.³⁴⁷

Mayor Hamilton admitted that this clause was a significant concession by the City on behalf of the Library board from what the Library board had sought from the outset of negotiations. The Library could get out of the lease on 12 months’ notice only if the leaks were as bad as those in 2008 or if they significantly affected their operations. That was not what the Library wanted. Mayor Hamilton said that the City was effectively agreeing to have the Library stay in premises where there had been very bad water damage for the previous 30 years. He testified that this clause was a “stopgap measure”: the Mall owner was implementing a maintenance program to address those issues, and the City was looking at alternative premises in the multiplex.³⁴⁸

However, as admitted by Mr. Bauthus, the lease did not include a clause covering maintenance of the roof. Bob Nazarian and Mr. Fabris had made repeated oral promises to Mr. Bauthus since his return to the City in 2007, none of which were ever honoured.³⁴⁹

I also note that Mr. Bauthus did not report the Library’s position to council, which was that it wanted to be able to leave the Mall if there was any leakage. Indeed, the clause in the lease was significantly different and less beneficial for the Library.³⁵⁰

Mr. Bauthus concluded his report by saying:

While the rate at \$12.50 per square foot is higher than the current rate in effect it is reasonable *when considering the location and the impact on the community*. The key issues related to the HVAC and water infiltration have been addressed in the new lease to ensure that the landlord is aware of its responsibilities and to provide flexibility in the event that water infiltration continues to the extent that it impacts on the operation of the library.

The library will continue its operations in the mall location which is a win-win for both the mall and the City and when we are able to undertake the construction of the multiplex which is to include the library we will have the time to negotiate an appropriate exit time frame and cost when the library is ready to move. In the meantime the mall remains a very convenient location for the library to serve the community of Elliot Lake.³⁵¹ [Emphasis added.]

Mr. Bauthus explained that it was a “win” for the Mall because it retained a major tenant and would have no vacancy; and that it was a “win” for the City because the Library would continue to operate without interruption, additional cost, and the need to move until the multiplex was constructed.³⁵² Mayor Hamilton also agreed it was a “win-win” situation.³⁵³

I disagree for the following reasons:

- The City was committed to stay in the Mall for a minimum of three years, following which it could leave only with a penalty of approximately \$50,000 per year.
- The rent agreed to was not only higher than the current rate but also more than 40 percent higher.
- Had the Library moved to the Collins Hall, the City would have saved money.³⁵⁴
- The City had no indication from the federal government that it would get the grants for the multiplex; ultimately, it did not get them.
- It was a “win” for the Mall and the City only if there was no other tenant; Eastwood said there was one. If there was no other tenant, the City was giving up an important negotiating advantage since it clearly would have had the upper hand and could have obtained much more advantageous terms. As I previously pointed out, it was simply not willing to call Eastwood’s bluff.
- The Library was left with a weak water-infiltration clause that would be triggered only in the event of a water infiltration similar to the summer 2008 debacle, and even then this clause was encumbered by a 12-month notice requirement.

On August 24, 2009, City Council discussed the Library lease issue in closed session. As reflected in the minutes, the deputy mayor explained that a lease had been negotiated on behalf of the Library and that it was recommended that the Library board execute the lease.³⁵⁵

Mr. Collett testified that he did not agree whatsoever with the five-year term of the lease, the lack of a guarantee to fix the leaks, and the absence of compensation for damage caused by the leaks. Unfortunately, he was in the minority. Direction was given by council to staff to forward the lease to the Library board for its approval.³⁵⁶

August: The City realizes that no follow-up was done on the 2006 Notice of Violation

The day after council approved the Library lease, on August 25, 2009, Paul Officer, the fire chief, sent a handwritten note to Mr. Ewald on a copy of an email that Bruce Caughill had sent to Mr. Ewald on September 18, 2008 (on which Chief Officer had been copied). Chief Officer’s note read, “Bruce has this moved forward?”³⁵⁷ In the September 2008 email, Mr. Caughill had informed Mr. Ewald that his services had been terminated by Eastwood in relation to the 2006 Notice of Violation and that he had not performed any inspections or submitted a report to Eastwood. Mr. Caughill had also advised Mr. Ewald that he had recently prepared a report for Scotiabank on the roof leaks.³⁵⁸ Chief Officer testified that he would have been prompted to communicate with Mr. Ewald on August 25 because he probably heard that the Mall roof repairs had been completed.³⁵⁹ It is unclear what those repairs would have been because, as I indicated above, Bob Nazarian had not undertaken any new repairs except the recaulking of the joints.

Mr. Ewald recalled receiving this note. It was his evidence that this email began the process that led to the order he issued on September 24, 2009.³⁶⁰ He testified that, following the receipt of the August 25 note, he had several conversations with Chief Officer about the issue and how they would approach the situation. This discussion led to a package of documents, including the Notice of Violation and the 2006 correspondence between Mr. Bauthus and Mr. Nazarian, being put together by Chief Officer and sent to Mr. Bauthus and Mr. Ewald on September 23, 2009.³⁶¹

Mr. Ewald did not conduct an inspection of the Mall between August 25 and September 23, despite having been advised by Chief Officer of the 2006 Notice of Violation and that Eastwood had terminated Mr. Caughill. He did, however, testify that he read the materials in the file about the 2006 notice – and that there was very little in that file.³⁶² Syl Allard's inspection report to Tom Derreck, dated October 23, 2006, which outlined the potential structural problems, was not in the Building Department file he reviewed; it was located only after the Mall collapse, in a file kept by the chief administrative officer.³⁶³ He also testified that he had not seen the Notice of Violation until 2008 or 2009.³⁶⁴ The letter sent by Tom Turner (the mall manager) to Mr. Derreck (the chief administrative officer) on November 13, 2006, about the Notice of Violation was not in the file he had reviewed when he first started working for the City.³⁶⁵

Whether or not these documents were in the Building Department file in August 2009, Mr. Ewald ought to have attempted to locate the investigation report and conducted an inspection immediately after receiving Chief Officer's email of August 25, 2009. Instead, he waited one month to act.

Mr. Bauthus testified that, as of August 25, 2009, he was not aware of the 2006 Notice of Violation or this communication from Chief Officer.³⁶⁶ I accept his evidence. It appears that Mr. Ewald and Chief Officer did very little after Chief Officer's email other than to speak to each other.

In the meantime, the roof continued to leak. Indeed, on September 21, 2009, the Zellers manager reported to Hudson's Bay that 13 areas were leaking in his store, which had a total of 43 wet tiles.³⁶⁷

September–December: As the leaks continue, the City issues an Order to Remedy, Robert Wood deems the Mall structurally sound, and City Council ignores the Library board

September–October: Library lease – the council pressures the Library to sign the lease and the mayor and two councillors try to dissolve the Library board

On September 11, 2009, Mr. Bauthus met with Mayor Hamilton, Councillor Doug Soulière, and Councillor Scot Reinhardt regarding the Library lease. In his notes of the meeting, Mr. Bauthus wrote:

Can we dissolve library under the Act.

Meet with Al Collett.

Talk to Pat McGurk.

B – note on writing up staff up to constructive dismissal.

Letter to Kiviaho re issues from Rick.

[?] Monday 9:15 meet with Al on Monday before Council.³⁶⁸

As of September 11, 2009, the lease had not been signed because the Library board refused to do so. It was due to expire on September 30. Eastwood had also informed the City that the Library would have to vacate the premises if the lease was not signed by September 30. Mr. Bauthus testified that the discussion with the mayor and the two councillors related to the possibility of dissolving the Library board because of its refusal to sign the lease. Mayor Hamilton and Councillors Soulière and Reinhardt wanted to put in place a new board that would agree to sign the lease because, as Ms. MacLean had advised the City, the board had to sign it. Mr. Bauthus testified that he explained that the Library board was appointed for the same term as council and that it probably could not be dissolved.³⁶⁹

On September 8, 2009, Ms. Croxson, chair of the Library board, sent an email to members of the board enclosing the lease that had been negotiated by the City. She outlined her concerns over several provisions of the lease, including the water-infiltration clause (clause 26).³⁷⁰

On September 14, 2009, Councillor Reinhardt sent an email to Mayor Hamilton under the subject line, “Re: lease, what do you think? before I send this;” which he intended to send to Ms. Croxson in response to her September 8 email. Mr. Reinhardt took issue with Ms. Croxson’s position and the way the Library board had been dealing with the lease. He wrote, in the email he proposed to send:

On that note, it is obvious that you and a couple of other trustees are meeting and talking about issues that are coming before the Board ahead of the regular meetings. You actually made references yourself to such communication in the last few meetings. Meeting outside of the regular Board meetings with individual trustees is not technically a bad thing, in and of itself. But I am getting a growing sense that you are working an agenda of your own that includes pulling the Board further and further away from the long-standing relationship that it has had with Council. Again, I am not pleased with this move. Council has a highly interdependent relationship with the Library Board. We have shared HR services, planning services, the use of City equipment, finance services and so on, for many years. More importantly we essentially fund the library. To see the Board discussing this relationship in negative terms is disturbing to me and I will be discussing it with the Mayor and Council. I cannot remember the City ever interfering with the day-to-day functions of the library. In fact Fred and his staff have been extremely supportive of the library. Fred fights for library issues and their budget with equal enthusiasm and on equal footing with all the other budgets in the city. So I am not only confused about all the negativity toward the city but offended by it.³⁷¹

Councillor Reinhardt eventually sent the email to Ms. Croxson. Mr. Collett testified that he was given a copy by Ms. Croxson, who was very upset by Mr. Reinhardt’s accusation that she was doing things and meeting with the board improperly. Mr. Collett testified that he did not think that Councillor Reinhardt understood the role of the Library board or the fact that council had no control over the board. Mr. Collett did not agree with the views expressed by Councillor Reinhardt, particularly with his claim that the City was not interfering with the Library’s affairs. He explained that he was made aware of a number of times when the chair was called into Mr. Bauthus’s office and advised that the board should accept the lease. Mr. Collett testified, and I accept, that Mayor Hamilton and Councillors Soulière and Reinhardt were the ones having private meetings and not sharing information with the Library board.³⁷²

There is no doubt that, as the deadline of September 30, 2009, approached, there was a great deal of anxiety at city hall about the execution of the Library lease. This issue could have been completely avoided had council simply acquiesced to the Library board’s wishes to have a dry location and moved the Library temporarily to the Collins Hall.

The City claims the Library lease includes a number of points in its favour

On September 25, 2009, Mr. Bauthus sent an inter-office memo to the mayor under the subject line “Key points of the new lease,” in which he stated: “At this point we would wish to complete the lease as quickly as possible without further examination on the part of Eastwood as there are a number of points that had been created in our favor.”³⁷³ Mr. Bauthus agreed that, despite this message, among those issues identified as important in his July 22, 2009, email to Eastwood, only one was negotiated in favour of the City: a provision which provided that the City would pay the proportionate amount of taxes for the space occupied and not an inflated amount.³⁷⁴

Mr. Bauthus wrote in his memo, under the heading “Responsibility for water infiltration”: “The City now has wording that will allow us to cancel the lease on 12 month notice if the water infiltration problem continues on the same level as in 2008. It recognizes that the landlord is responsible for the repairs to the facilities however not to the books.” Mr. Bauthus admitted that the water-infiltration clause represented a significant retreat by the City from what the Library wanted – and for this reason the Library board refused to sign the lease.³⁷⁵ Mr. Bauthus also informed the mayor in his memo that if the lease was not signed by October 1, some five days later, the Library might be locked out. He did not, however, consider that a real possibility.³⁷⁶

The Library board refuses to sign the lease before an independent legal review

On September 29, 2009, Mayor Hamilton emailed Ms. Croxson, copying Councillors Soulière, Reinhardt, and Collett and Mr. Bauthus. The mayor inquired about the Library’s status regarding the review of the lease (since the lawyer approached by the Library could not do the review owing to a conflict of interest) and urged a timely response because the lease expired in two days. Ms. Croxson replied that the Library was seeking a new lawyer, and, until the lease was reviewed independently, the board would not sign. Mayor Hamilton subsequently asked for a timeline for the review and reaffirmed the City’s offer to discuss the matter with the board and Ms. MacLean.³⁷⁷

The next day, September 30, Mr. Bauthus sent an email to Mayor Hamilton and Councillors Reinhardt, Collett, and Soulière in which he indicated that he had spoken to Ms. MacLean, who agreed with him that the City was not authorized to execute the lease on behalf of the Library board. He also advised them that he instructed staff to provide Eastwood with a cheque, pursuant to the holdover provisions of the lease, in order to prevent a lockout by the Mall.³⁷⁸

Subsequently on that day, Councillor Reinhardt responded to Mr. Bauthus, writing:

Failing to reach a speedy agreement by the Board, in terms of the lease, would constitute a breach of their duty as it pertains to the act and its defacto [*sic*] and implied agreement with both the rate payers and the appointing body.

I am going to suggest that if the board is not prepared to demonstrate in writing their ability and intention to reach a decision on a lease that the city take the necessary measures to relieve the board of their duties and to operate the library outside of the Act.³⁷⁹

Mr. Bauthus did not share Councillor Reinhardt’s point of view and believed that the board members were acting in good faith and fulfilling their duty as they saw it. He did not believe that the board was acting against the interests of ratepayers.³⁸⁰

Later on September 30, Mr. Bauthus responded to Councillor Reinhardt’s email at Mayor Hamilton’s invitation. He wrote that the City had to allow the situation to proceed to a logical conclusion and that, to date, there had been no specific loss to the municipality – the Library was still open. Mr. Bauthus indicated that council had the authority to approve the allocation of funds for legal review and, if this approval was granted, it would

be up to the board to negotiate for the continued use of the premises until an agreement was reached. Later still, Councillor Reinhardt wrote again to Mr. Bauthus, indicating that the difference in their opinion was that Mr. Bauthus thought it better to wait for a loss or closure before acting. He also indicated that, in his assessment, the chair was steering the Library board in a poor direction on the lease and other critical matters. Councillor Reinhardt indicated that waiting could cost taxpayers a lot of money and the possible closure of the Library.³⁸¹ Like Mayor Hamilton, he held the view that the Library board should be forced to bow to the will of council.³⁸²

Mr. Collett testified that he did not agree at all with the opinion of Councillor Reinhardt and was shocked that he would go so far as to suggest getting rid of the Library board. He testified that he believed the board was doing its due diligence and that its motivations and intentions were legitimate.³⁸³ He also testified that he believed Mayor Hamilton was trying to force the chair's hand to sign the lease.³⁸⁴

I agree with the evidence of Councillor Collett and Mr. Bauthus. I also find it odd that not all councillors were copied on these emails. It was council that had made the decision to agree to the lease and submit it to the Library board. Mr. Bauthus acknowledged that all members of council should have been copied.³⁸⁵ The pressure on the Library board from the City may well have originated, to a great extent, from Mayor Hamilton.

Mayor Hamilton tries to force the Library board's hand in signing the lease

The next day, October 1, 2009, Mayor Hamilton sent another email to Ms. Croxson, copying Councillors Soulière, Reinhardt, and Collett and Mr. Bauthus. He advised her that the lease had expired and formally requested a meeting with her the next day. Later in the day, Mayor Hamilton wrote again to suggest an alternative date (October 5) because Ms. Croxson could not attend the following day. He reiterated the urgency of the matter.³⁸⁶

On October 2, Ms. Croxson replied that she was unavailable to meet at the suggested new date and was aware of the urgency of the matter. The board, she said, needed to do its "due diligence to protect the interests of the Library." Mayor Hamilton responded, asking whether another board member could attend in her place and posing several questions regarding the Library's lawyer – the advice obtained, and the funds used by the board to pay its lawyer.³⁸⁷

On October 3, Mayor Hamilton sent yet another email to Ms. Croxson, asking for a reply to his previous questions.³⁸⁸ He wrote again on October 4, this time stating that he assumed the meeting set for the following morning would not take place and asking for a reply to his questions.³⁸⁹ Later in the day, Mayor Hamilton wrote to Mr. Bauthus, with a copy to council, asking him to research legal remedies that might be available to obtain a response from the board to his questions.³⁹⁰

On October 6, Mr. Bauthus replied that he would consult with Ms. MacLean and with the Ministry of Municipal Affairs and Housing.³⁹¹

Eastwood allows the Library to stay in the space despite no lease

On October 2, 2009, Mr. Fabris sent a letter to Mr. Bauthus, informing him that the lease had ended on September 30. He wrote that he assumed the City would be using the carry-over period of the expired lease and that, when the new lease was signed, the new rate would be retroactively applied to the period carried over.³⁹² Mr. Fabris stressed that the new lease needed to be signed forthwith. Mr. Bauthus testified that when he received this letter, he was relieved because the Library's doors would not be locked.³⁹³

September 24–25: Three years on, the City again takes action against the Mall over the leaks

Chief Officer informs the chief administrative officer of the outstanding 2006 Notice of Violation; Mr. Ewald is not overly concerned

At the same time that the mayor and the City councillors were engaged in lease discussions with both the Library and Eastwood, and the Library was potentially facing eviction on September 30, 2009, the outstanding 2006 Property Standards Notice of Violation and *Fire Code* Order were once again brought to the fore.

On September 14, 2009, Chief Officer directed Darren Connors, a firefighter, to check whether the missing fireproofing from the steel beams had been corrected. Mr. Connors reported back the next day, stating that that it appeared to him that no attempt had been made to fix the problem.³⁹⁴

As mentioned, on September 23, 2009, Chief Officer sent an email to Mr. Ewald and Mr. Bauthus attaching a package relating to the 2006 Notice of Violation. The 19-page package sent by Chief Officer included the 2006 Notice of Violation issued by Mr. Allard; Mr. Derreck's letter of October 30, 2006, to Bob Nazarian; Chief Officer's letter of November 1, 2006, to Mr. Nazarian; the complaint made by Mr. Allard to the Fire Department; Mr. Turner's letters of November 13, 2006 (to Mr. Derreck) and November 28, 2006 (to Chief Officer); and Bruce Caughill's September 18, 2008, note to the City.

Mr. Ewald acknowledged that council in October 2006 had taken extraordinary steps in the circumstances.³⁹⁵ He also agreed that the direction from council (which was unusual) indicated that councillors were very concerned as a result of the inspections that showed breaches of the various laws and by-laws related to the structural integrity of the building and the health and safety of the public.³⁹⁶ He realized that no program of inspections and staged approvals had been carried out by the City as had been contemplated three years earlier.³⁹⁷ He testified that he knew that

- no repairs had been reported to the City in the prior three years;
- no review of the Mall had been carried out by a professional engineer, and no report had been provided to the chief building official certifying the acceptability of the existing condition;
- in 2006 there had been serious leakage problems that had to be fixed and that raised the potential of structural damage; and
- Mr. Allard thought that the leakage problems were serious enough that they could, potentially, have caused structural damage.³⁹⁸

Despite the above information of which he was aware, Mr. Ewald questioned whether Mr. Allard was seriously concerned about the leakage and structural issues. He had issued a Notice of Violation instead of an order. Although the City's policy stated that a notice was the first step of the process, Mr. Ewald maintained the view that if the problem was as serious as claimed by Mr. Allard, he would have issued an order. He testified, however, that he did not speak to Mr. Allard about the notice or his practice.³⁹⁹

Mr. Ewald maintained that he did not know when the leaking problem started at the Mall and that he was unaware it had been ongoing for a period before 2006, despite his acknowledgement that

- potential structural damage resulting from leaks, as noted by Mr. Allard, does not happen overnight;
- Mr. Turner's letter to Mr. Derreck of November 13, 2006, which was included in the package sent by Chief Officer, stated that the leaks had been ongoing for 25 years; he claimed he read the letter, but that the information did not "stay" with him;

- he believed a rooftop parking was a “dumb idea” because it was prone to leaks; and
- Mr. Allard had issued the 2006 Notice of Violation, and the council had treated the matter seriously.⁴⁰⁰

I find it astonishing that Mr. Ewald treated this matter so lightly and did not review the file he had in his possession with more detail and attention. The role of the chief building official has at its core the safety and protection of the public. It was apparent that the discovery of this outstanding Notice of Violation constituted an alert that public safety might be in danger.

Senior City staff and the mayor meet to discuss the outstanding 2006 Notice of Violation, and an inspection is ordered

Mr. Bauthus took the matter seriously. After reading the documents, he contacted Chief Officer and made arrangements to meet the next day with Mr. Ewald, Chief Officer, Mayor Hamilton, and Ms. MacLean.⁴⁰¹ Early in the morning of September 24, 2009, they met (with Ms. MacLean on the telephone) to discuss the issues raised by Chief Officer’s email.⁴⁰² It was unusual for all these senior officials to meet together.⁴⁰³ They evidently considered the matter serious and important.

Mayor Hamilton initially testified that he really did not know why Mr. Bauthus had asked him to be present at the meeting. When pressed, he admitted that he was probably asked to be there because he was the mayor and it was an unusual situation, and because Mr. Bauthus thought it was important that he be made aware of what was going on. Mayor Hamilton testified that he agreed it was appropriate for him to be present at that meeting because he needed to know about a serious situation such as this one, as did the council.⁴⁰⁴

In his notes of the meeting, Mr. Bauthus recorded the following:

- Need to issue property standards order.
- Need to have assessment, then remedy.
- Since 2006
- Need to give order under Bldg Code to assess and remedy.
- Fire to issue a notice when order is issued.
- Need to meet with Nazarian early – Friday, Sept 25.
- Do property search to search all interested parties.
- Register on title?
- Need to do whole building
- *Memo to Rick H [Hamilton].⁴⁰⁵

Ms. MacLean advised the group that this matter was serious and that the City had to move quickly.⁴⁰⁶

There was a discussion about the necessity to issue a property standards order against the Mall. It was agreed, however, that before an order could be issued, the Mall needed to be assessed by Mr. Ewald to determine the extent of the problems.⁴⁰⁷ It was also agreed, as Mr. Bauthus’s notes indicate, that the City would require an engineer to inspect the “whole building” and not only the leakage areas.⁴⁰⁸ Chief Officer agreed to wait for Mr. Ewald to issue his order before issuing a notice related to the *Fire Code* violations.⁴⁰⁹

Mr. Ewald testified that there was also a discussion about whether the situation presented an immediate life threat that would allow the City to issue an order under the *Building Code* and the *Fire Code* rather than the Property Standards By-law.⁴¹⁰ Mr. Ewald explained that the *Building Code Act* allows the chief building official to issue an order to remedy or close a building that is structurally unsound where there is a belief that there may be a threat to life.⁴¹¹

Mr. Bauthus was not sure whether he told Mr. Ewald at the meeting that he was aware the Library had ongoing leakage problems since moving into the Mall, but he believed he would have mentioned something along those lines. He testified that he did not advise Mr. Ewald that the leaks were such a problem that the Library was refusing to sign the lease with the Mall. He expected that Mr. Ewald would have learned from the meeting and other communications provided to him by Chief Officer the day before that the leakage problem was long-standing and predated 2006. Chief Officer and Mayor Hamilton were aware of the long history of leakage as well. The extent of the leaks was also discussed at the meeting.⁴¹²

Mayor Hamilton testified that, when he learned about the outstanding Notice of Violation, he was surprised that nothing had been done in the previous three years – and that this lack of response concerned him. He said he was aware, either at the meeting or shortly thereafter, that the notice Mr. Allard had issued in October 2006 required that repairs be carried out to the existing Mall parking surface to prevent leakage of water into the building. He was also aware that a request had been made at the time for a review by a professional engineer of the building's structural frame in leakage areas and a report certifying either the acceptability of the existing condition or the remediation steps necessary to be taken to ensure structural soundness. Mayor Hamilton was informed that neither had been done – the leaks had not been fixed and no report had been obtained.⁴¹³

When asked whether he recalled if some concerns were expressed at the meeting about the potential effects on the building of the water and the leaks, Mayor Hamilton testified that he was not sure that was the overriding issue at the time. He testified that the discussions focused on examining the 2006 Notice of Violation and determining if the violations still existed and what remedies were available.⁴¹⁴ Missing from the discussion was the reality that the Mall had been leaking for three decades, that the Library had been complaining about leaks since it moved in, and that three years of further deterioration had occurred since 2006.

The City consults Bruce Caughill about a possible inspection at the Mall

On the same day as the meeting,* Mr. Ewald contacted Bruce Caughill to ask him whether he could perform a review of the Mall. Mr. Ewald advised Mr. Caughill that he had concerns about the Mall, but did not provide any specific details.⁴¹⁵ Mr. Caughill testified that he understood the inquiry from Mr. Ewald to be a request for assistance on behalf of the City. He was not sure what kind of assistance the City was looking for, but he believed it was in the context of the 2006 Notice of Violation.⁴¹⁶

Mr. Ewald testified that the purpose of his conversation with Bruce Caughill was twofold. He wanted to know (1) whether a 30-day timeframe to request an engineering report was appropriate; and (2) what would be involved if the City decided to obtain its own engineer to review the building.⁴¹⁷ Mr. Ewald testified that Mr. Caughill advised him that 30 days was acceptable.⁴¹⁸

Regarding the second issue raised by Mr. Ewald, at 9:09 a.m., following the call, Mr. Caughill sent an email to Mr. Ewald advising him that a review of the Mall would be beyond his capabilities:

As discussed, the review of this building would be beyond my staff and time capabilities.

I called Bob Wood of MR Wright Associates to see how they might respond. I have worked with MRW and Bob Wood on many files over the past 30 years and believe they are the right fit.

Between their resources and experience my knowledge of the building the 30 day time frame is achievable.

• • • • •

* It is not clear whether the conversation between Mr. Ewald and Mr. Caughill occurred before or after the meeting with the other City officials discussed above: Ewald testimony, May 27, 2013, p. 11579.

One complication may be that MRW is currently doing some non-structural work for Eastwood – a small tenant space prep in the former Retirement Living space.

Bob is currently reviewing with his staff to be sure that that would be the only possible conflict.

I'll get back to you shortly.⁴¹⁹

Mr. Caughill confirmed that he spoke with Mr. Wood on the same day he sent the email to Mr. Ewald. During their conversation, Mr. Wood did not advise Mr. Caughill of anything he had observed at the Mall while doing work there or any specific knowledge he had about the Mall.⁴²⁰

During his conversation with Mr. Ewald, Mr. Caughill did not tell him that he had inspected the Scotiabank location in the Mall in September 2008 and had recommended that the bank ask the landlord to obtain a report on the structural integrity of the Mall. Mr. Caughill did not believe this information was useful for Mr. Ewald in the context of their 15-minute telephone call.⁴²¹ I find this omission surprising, to say the least, particularly considering Mr. Caughill's knowledge of the state of the leaks at the Mall and the fact that he had thought it necessary, at least in September 2008, to inform the City about his retainer by Scotiabank.

At 9:34 the same morning, 25 minutes after his first email, Bruce Caughill sent another email to Mr. Ewald:

Bob Wood is interested but has concerns on the ethics (my word) of the situation. Given that Eastwood is currently his client how ethical is it that he would undertake a review ...

MRW would like to do the review but only with the prior knowledge and consent of Eastwood.

If not MRW then I believe you should contact Halsall.⁴²²

Mr. Ewald testified that after receiving this second email from Mr. Caughill, he did not contact Halsall because he was just looking into options at that point. The City ultimately determined that it would have the owner hire his own engineer through the Property Standards By-law process. Mr. Ewald added that this decision was discussed at the meeting with the other City officials that morning.⁴²³ Mr. Ewald testified that the City decided to let the owner hire the engineer because the Professional Engineers Association guides all engineers and because the City would not have to go through the cost-recovery procedures. Mr. Ewald agreed that if the City had hired the engineer, it would have been able to determine the scope of work via its order.⁴²⁴

Although this plan would have been logical, it is not what happened. Mr. Ewald never ascertained the actual scope of work given to Robert Wood by Eastwood when it retained him.

An inspection is conducted of the Mall: Evidence of water infiltration and rust is abundant

As a result of the meeting, on September 24, 2009, at 10:30 a.m., an inspection of the Mall was conducted by Mr. Ewald along with Chief Officer, Firefighter Connors, and Dimitri Yakimov, as representative of the Mall.⁴²⁵

Chief Officer discovers Fire Code violations

In the course of this inspection, Chief Officer discovered certain deficiencies, which he noted in an inspection report. It cited four locations in the Mall where fireproofing material was observed to be missing from beams above the ceiling on the second floor. The areas were between the lottery kiosk and the escalator, in the back corner of the Dollarama store, in the Bargain Shop, and in the service corridor (exit corridor) behind the Dollarama store.⁴²⁶ The report noted that although only four areas were identified in this inspection, all

water-damaged areas would require inspection and remediation as needed. The inspection revealed some other *Fire Code* violations. The report concluded:

The owner is requested to provide appropriate documentation satisfactory to the Chief Fire Official by October 24, 2009, showing that a building permit has been applied for which will result in work being undertaken to correct the violations. Further, be advised that failure to correct these violations within 3[0] days of the date as determined by the Chief Building Official may result in prosecution.⁴²⁷

Chief Officer explained that his expectation was that giving Bob Nazarian a deadline would move the work forward and provide him with a schedule for the proposed repairs.⁴²⁸

Mr. Ewald discovers property standards violations

Mr. Ewald described the inspection as random and not based on a prior knowledge of where the worst leakage areas were located.⁴²⁹ In fact, he did not inspect Scotiabank or the Library.⁴³⁰ This was the first City inspection of the Mall in 2009.⁴³¹

During his inspection, Mr. Ewald testified that he used a ladder in some locations, including the lottery kiosk area.⁴³² He noted that ceiling tiles had been removed in many parts of the Mall owing to leaks.⁴³³ In the locations where he used the ladder, Mr. Ewald testified that he touched the beams with his hands, but he obviously did not conduct an analysis of the structural stability or strength of the steel.⁴³⁴

In his inspection report, Mr. Ewald noted the following 13 observations:

- 1) Evidence of water leakage on upper level of mall above the lottery ticket booth adjacent to the food court. Missing fire proofing on structural steel members; rust on structural steel (2 pictures taken)
- 2) Evidence of water leakage from above the Dollarama. Missing fireproofing on structural steel beams and rust is also evident (2 pictures taken)
- 3) Evidence of water leakage above the Bargain Shop with missing fireproofing and minor rust on structural steel beams noted in several location of the store (2 pictures). Missing fire proofing noted in the rear storage room on the structural steel (1 picture)
- 4) Evidence of water leakage in service hall behind the Dollarama. Missing fire proofing and rust evident on structural steel (2 pictures)
- 5) Missing door closure on fire door in service corridor closest to washroom corridor (1 picture taken)
- 6) Evidence of water leakage, missing fire proofing and rust at structural steel in service corridor behind Library (1 picture)
- 7) Exit doors to parking deck above Scotiabank and Zellers area do not operate properly (2 pictures on inside and 2 pictures on outside). An addition metal plate has been added to the right door (from inside) that does not permit the left door to open without first opening the right door
- 8) Lighting levels in the west service corridor are well below req'd levels
- 9) Missing fireproofing on structural steel above main corridor in front of new mall office (2 pictures)
- 10) Evidence of multiple leaks (more than 20) on ceiling tiles in the Zellers store (3 pictures)
- 11) Evidence of rusted steel stairway outside in front of Foodland (1 picture)
- 12) Rusted structural steel all along covered walkways adjacent main mall entrance (1 picture)
- ...
- 13) It is also noted that the up escalator was not functioning at the time of the inspection⁴³⁵

The photographs taken by Mr. Connors during Mr. Ewald's inspection⁴³⁶ are in Exhibits 4374 through 4395 (see figures 1.10.2–1.10.7).

The first observation Mr. Ewald made of water leakage on the upper level of Mall above the lottery ticket booth is depicted in figure 1.10.2. He confirmed that this photograph showed rust on the structural steel I-beam that eventually collapsed – as I have already described in chapter 3, *Causes of the Collapse*.⁴³⁷ Mr. Ewald testified that, during his inspection, he was not specifically looking for the connections but was observing the beam in order to assess what shape it was in and whether further inspection was necessary. He concluded from his observations that a further inspection was necessary for the entire building, including the connections, because the connection between the horizontal and the vertical members of any structure is crucial to structural stability.⁴³⁸

The second observation Mr. Ewald made is depicted in figure 1.10.3.⁴³⁹ He confirmed that this photograph showed the missing fireproofing and rust (see red-brownish colour on I-beam) on the structural steel above the Dollarama store.⁴⁴⁰

The third observation Mr. Ewald made is depicted in figure 1.10.4,⁴⁴¹ where, once again, infiltrating water had caused rust and missing fireproofing on the I-beam, this time above the Bargain Store.⁴⁴²



Figure 1.10.2 Missing fireproofing and rust on a structural steel beam in the upper level of the Mall above the lottery kiosk

Source Exhibit 4374

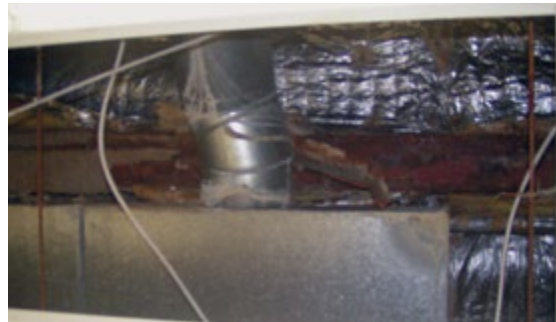


Figure 1.10.3 Missing fireproofing and rust on a structural steel beam above the Dollarama store

Source Exhibit 4377



Figure 1.10.4 Rust and missing fireproofing caused by water leakage on the I-beam above the Bargain Store

Source Exhibit 4378



Figure 1.10.5 Rust and missing fireproofing on the bottom of the structural steel and smaller pipe in the service hall behind the Dollarama store

Source Exhibit 4381



Figure 1.10.6 Evidence of water leakage, missing fire proofing, and rust on the structural steel in the service corridor behind the Library

Source Exhibit 4384

The fourth observation Mr. Ewald made is depicted in figure 1.10.5,⁴⁴³ where water leakage has caused fireproofing to fall and rust to form on the bottom of the structural steel and smaller steel pipe in the service hall behind the Dollarama store.⁴⁴⁴

Surprisingly, Mr. Ewald checked all four of these areas in the Mall in approximately 15 minutes.⁴⁴⁵

The sixth observation during this inspection – evidence of water leakage, missing fireproofing, and rust on the structural steel in the service corridor behind the Library – is depicted in figure 1.10.6. Mr. Ewald agreed that this photograph showed rust on the I-beam, which is resting on the poured concrete wall. He also agreed that the darker red colour on the I-beam farther from the wall was an area of heavier rust. He could not confirm from the photo whether the area where the I-beam enters the concrete showed that rust had eaten away at the edge of the flange of the I-beam, but believed it may have been rust. He testified that, because of the possibility of rust, he ordered an inspection to be conducted by an engineer. Mr. Ewald agreed that the pipes that were suspended below the I-beam showed significant areas of moisture ingress and discolouration on the concrete wall.⁴⁴⁶

With regard to the 10th observation, which took place at Zellers, Mr. Ewald confirmed that this store had experienced more leaks than any other premises in the Mall.⁴⁴⁷

For his inspection of areas five through 10, Mr. Ewald covered them all in approximately 40 minutes.⁴⁴⁸

The 11th observation – evidence of the rusted steel stairway outside the Mall and in front of Foodland, leading from the ground floor to the second floor – is depicted in figure 1.10.7. Mr. Ewald agreed that the photograph showed rust that had eaten through the steel and made holes in it.⁴⁴⁹ However, he did not appear to be concerned about this deterioration. He explained that in an area with lighter weight, such as this one, the steel was intended to support the concrete poured over it only until it cured. For that reason it needed little structural capacity.⁴⁵⁰



Figure 1.10.7 The rusted steel stairway outside the Mall and in front of the Foodland store

Source Exhibit 4394

The 13th and final item on the report indicated that “[i]t is also noted that the up escalator was not functioning at the time of the inspection.”⁴⁵¹

After his inspection, Mr. Ewald came to the conclusion that there had been potentially serious issues regarding leaks over some time at the Mall and that there might be structural damage. This conclusion prompted him to request further investigation by someone more qualified than he was in these areas.⁴⁵²

Mr. Ewald’s inspection revealed one thing for certain: the leaks had not improved since the Notice of Violation had been issued in 2006. Rather, it appeared that the situation had become much worse.

City Council is informed of the outstanding 2006 Notice of Violation, and the former chief administrative officer is unfairly blamed

Following Mr. Ewald’s inspection, in the afternoon of September 24, 2009, Mr. Bauthus sent an email to council members, copying Chief Officer, Mr. Ewald, and Ms. MacLean:

This is to advise that we are presently reviewing the past issues respecting the impact of water infiltration *on the support structural members at the mall*. In 2006 notices were issued to connect the fire proofing of the support members however nothing was done to date and current investigations brought this to our attention. Some of the reason for the lack of follow up was as a result that the former CAO had arranged that communications respecting the issue would be done with the then manager of the mall; both of these parties are no longer with the respective employers.

Current inspections suggests [*sic*] that the issues are being addressed but without benefit of a building permit and engineering assessment.

A meeting has been requested with Eastwood Mall as soon as possible to address the concerns and we will be following up to ensure that code is met and there are no life safety issues. This will involve the issuance of an order. Staff are ensuring that we are doing all that is required under the legislation.⁴⁵³ [Emphasis added.]

Mr. Bauthus’s reference to the correspondence being between parties no longer with their employers referred to Mr. Turner and Mr. Derreck, who had left the employ of Eastwood and the City, respectively, in 2007. He agreed, however, that there was no letter indicating that Mr. Derreck was taking over from Mr. Allard responsibility for the issue.⁴⁵⁴ Mr. Bauthus was not aware of the results of Mr. Ewald’s inspection when he sent the email. He did know,

however, that there were serious issues with leaks and there was a possibility that the structural capacity of the Mall had been affected.⁴⁵⁵ Mr. Bauthus agreed that a building whose structural capacity has been affected could possibly collapse and that he relayed this concern to council by stating that staff would ensure that the *Building Code* was adhered to and that safety issues would be resolved.⁴⁵⁶

By this time, members of council who had been present in 2006, including Mayor Hamilton, knew, or should have known, about the seriousness of the matter. Mayor Hamilton testified that when he received this email, he knew there was a potential for water damage on the structural support members at the Mall.⁴⁵⁷ In addition, council knew that the owner of the Mall had been telling the City for years that he was fixing the leaks – and that he had not in fact done so. Although Mayor Hamilton claimed he was concerned there might be rust that would damage and weaken the structural steel members, he testified that he did not consider it necessary, after receiving Mr. Bauthus’s email, to ask him whether the inspection had shown structural damage or if the chief building official was issuing an order.⁴⁵⁸

Mayor Hamilton testified that, as of this date, the lease with the Library had not yet been signed. He testified that when he found out about the potential for structural problems and the fact that, despite a Notice of Violation, nothing had been done in three years, it did not cause him to rethink whether the lease with the Library should be signed. When asked whether he was worried that maybe the City was forcing the Library to stay in a building that had not been fixed and might be structurally unsound, Mayor Hamilton testified:

- A. Well, this was about the entire mall, so I was more concerned about the entire mall, yes. There was some concerns then.
- Q. You were concerned –
- A. But I didn’t equate it to the lease. The lease was the last thing on my mind when I saw this.
- Q. You were concerned about the entire Mall and the potential for structural instability, is that your evidence?
- A. Well, what it states here, water infiltration on the support structure members of the mall, that is what I was aware of, yeah, so that concerned me, because it was being reported to us by our ... Chief Administrative Officer.
- Q. So what did you do about that concern?
- A. I believe, again, what the minutes do indicate, that our staff ... went in and investigated and issued the appropriate orders, from what I understand.⁴⁵⁹

I do not agree with Mr. Bauthus’s assertion that Mr. Derreck can be blamed for the failure to enforce the 2006 Notice of Violation. In my view, that was caused by Mr. Allard’s inaction and his failure on his retirement to advise his successor, Chris Clouthier, of the outstanding notice.

I am skeptical of the mayor’s evidence. Those are not the words of a man concerned by what had been uncovered. How could the issue of the Library lease not come to his mind in these circumstances given that the very reason the Library board was refusing to sign the lease was the leaks, which had been ongoing for decades?

I do not agree with Mr. Bauthus’s assertion that Mr. Derreck can be blamed for the failure to enforce the 2006 Notice of Violation. In my view, that was caused by Mr. Allard’s inaction and his failure on his retirement to advise his successor, Chris Clouthier, of the outstanding notice. Quite the opposite. Mr. Derreck was actually the instigator of the only real action ever taken by the City. The 2009 Order to Remedy was issued only because the City failed to ensure that the 2006 notice was enforced.

The City issues an order against Eastwood, requiring it to get the Mall inspected and deficiencies corrected

On September 25, 2009, Mr. Ewald issued an Order to Remedy to Eastwood, requiring that a series of deficiencies, including those relating to the structural soundness and watertightness of the roof of the Mall, be remedied by October 30, 2009. The order stated:

DEFICIENCY: An inspection has revealed damaged fire proofing materials and/or excessive rust due to long term water infiltration on structural steel beams in the following areas:

- a. Above the lottery ticket booth adjacent the food court.
- b. Above the Dollarama store.
- c. Above the Bargain shop.
- d. Above the service hall behind the Dollarama.
- e. Above the service corridor behind the Library.
- f. Above the main corridor in front of the new mall office.

Further to this it was noted that there was evidence of numerous leaks (more than 20) above the Zellers store and evidence of rusted structural components outside in front of the Foodland and the main entrance to the mall.

REMEDY: The owner shall have the entire mall area inspected by Structural Engineer licensed in the Province of Ontario and correct all deficiencies noted above and any further deficiencies which may be discovered by the engineer in the manner prescribed by the afore mentioned engineer. Obtain a building permit for the required work to be undertaken pursuant to Section 8.(1) of the Ontario Building Code Act.

...

DEFICIENCY: An inspection has revealed that a door closure is missing on the fire door in the service hallway adjacent to the upper level washroom corridor. Also the fire doors on the upper parking deck from the service corridor exit behind the Scotia Bank are not functioning as intended.

REMEDY: The owner shall have these items repaired by a competent locksmith / service technician.

...

DEFICIENCY: An inspection has revealed that the escalator travelling from the hotel lobby to the upper level adjacent to the food court is not functioning.

REMEDY: The owner shall have the escalator repaired by a competent service technician.

[All bolding in the original.]⁴⁶⁰

I note the following from the above order:

- Mr. Ewald chose to issue an order, unlike Mr. Allard who, in 2006, had issued a Notice of Violation. An order has the force of law, in contrast to a notice, which attempts to produce voluntary compliance. The order was the first step, failing compliance by the owner, before the City would lay charges and/or undertake the repairs itself and require the owner to pay the cost;⁴⁶¹
- Mr. Ewald referred in his order to “damaged fire proofing materials and/or excessive rust due to *long term* water infiltration on structural steel beams” [emphasis added]. Mr. Ewald testified that, by “long-term,” he meant that the Mall had been leaking since at least 2006. As I noted above, although Mr. Ewald admitted that the City had received correspondence from the owner stating that the Mall had been leaking for 25 years, he does not believe “that actually clicked in [his] brain;”⁴⁶²

- Mr. Ewald referred in his order to the six areas he had inspected the day before;⁴⁶³
- The remedy he imposed, however, required that the “entire Mall area” be inspected. Mr. Ewald testified that he used the words “the entire Mall area” because he did not want the engineer to assess only the areas he had inspected. His own inspection had been cursory, and he wanted the engineer to review the entire Mall.⁴⁶⁴ Mr. Ewald agreed that the deficiencies to be corrected included long-term water infiltration, and he expected the connections between the horizontal and vertical support beams and columns to be checked by the engineers;⁴⁶⁵
- In his order, Mr. Ewald required that the owner obtain a building permit for the required work. He testified that the requirement for a building permit would have allowed the Building Department to be satisfied that the work was being done appropriately, was reviewed, and, if necessary, was supervised by an architect or an engineer.⁴⁶⁶

Mr. Ewald testified that, before issuing his 2009 order, he *skimmed* the 1999 Halsall report found in the Building Department’s file but did not read it fully and carefully until after the collapse.⁴⁶⁷ He admitted that, had he read the entire report, he would have been aware that leakage had been ongoing at the Mall since the day it opened. As a result, he would have taken a more proactive role regarding the leakage problem, such as being concerned about the structural steel and asking for items to be uncovered during the inspection, and would have considered having the City step in and make the necessary repairs to the roof.⁴⁶⁸

Considering the tragic result that led to this Commission, the lack of interest and diligence on the part of the chief building official has proven most regrettable, to say the least.

Mr. Ewald testified that, as had been discussed at the September 24 meeting with the other City officials, he conducted a title search to see if there were any mortgagees on title or other encumbrances because he wanted to give notice of the order. Although such notice would have allowed recipients to know there was a serious issue that required the City to issue an order, the fundamental intention was for the City to get Bob Nazarian’s attention. The City was hoping that these individuals would communicate with Mr. Nazarian to put pressure on him to fix the roof.⁴⁶⁹

In less than 48 hours after discovering the outstanding Notice of Violation, the City had inspected and issued an order against Eastwood to fix the leaks and assess its structural capacity – remedies similar to those included in the 2006 Notice of Violation. Unfortunately, the chief building official would rescind the order in a relatively short time after its issuance and without its being complied with.

Bob Nazarian is advised of the 2009 Order to Comply: He understands he has to stop the leaks

A meeting to discuss the newly issued order was scheduled with Bob Nazarian less than two days after Mr. Bauthus had been alerted to the outstanding 2006 Notice of Violation. Mr. Bauthus testified that the City moved expeditiously because it was felt that the matter required immediate action.⁴⁷⁰

In the afternoon of September 25, 2009, Mr. Bauthus, Mr. Ewald, and Chief Officer met with Bob Nazarian and Mr. Fabris to present them with the order.⁴⁷¹ In the notes he took of the meeting, Chief Officer recorded:

We were here to discuss the issues with the mall and the fire proofing material.

Issued order to Mr. Nazarian.

*Get Darren [Connors] to get list of pictures of the mall so I can get it [to] Rene

All was explained and the order in which he needs to get this done. It was explained to Mr. Fabris why he needs a building permit. This will ensure an Engineer verifies structure and controls restoration, proper fire proofing and so on.⁴⁷²

The meeting covered the following points:

- The City officials explained the order to Bob Nazarian, emphasizing the fact that he needed to get an engineer to do the work; Mr. Nazarian advised the others he would hire an engineer to do the work.⁴⁷³
- No one thought to ask Mr. Nazarian what he had done to comply with the 2006 Notice of Violation and why he had not complied with it.⁴⁷⁴
- Mr. Fabris said that he did not believe that Eastwood needed a permit to do repairs on the roof, so it was explained to him that a permit was necessary.⁴⁷⁵
- Mr. Nazarian said that if he sprayed fireproofing without the roof being sealed 100 per cent, the fireproofing would just wash away again.⁴⁷⁶

Chief Officer had reservations about Bob Nazarian's level of co-operation going forward.⁴⁷⁷ That was entirely reasonable, considering the absence of co-operation shown by Mr. Nazarian to date with respect to the 2006 Notice of Violation.

Was there a relationship between the Library lease negotiations and the order of September 24, 2009?

No one informed the Library board that an order had been issued requiring the owner to fix the leaks. No explanation was provided for this omission.⁴⁷⁸

Mayor Hamilton testified that the Library lease issues and the potential for its eviction were completely unrelated to the Order to Remedy being issued.⁴⁷⁹ Mr. Bauthus testified that he had no discussions with Mayor Hamilton in September and October 2009 about the potential structural issues that caused an Order to Remedy to be issued, even though the mayor was aware of these concerns and council had been informed of the order.⁴⁸⁰

It is apparent, as Mr. Bauthus testified, that Mayor Hamilton had taken a personal and significant interest in getting the lease signed and having the Library stay in the Mall.⁴⁸¹ The order followed an inspection that occurred immediately after the unprecedented September 24 meeting among the mayor, Mr. Bauthus, Mr. Ewald, and Chief Officer to discuss the issues arising from the lack of response to the October 2006 Notice of Violation. Mayor Hamilton took part in that meeting where the discussion included the potential to immediately issue an order against the Mall if Mr. Ewald's inspection showed imminent structural concerns.

The Order to Remedy was issued on September 25, 2009, less than a week before the lease was to come to an end and with the Library facing potential eviction. Eight days later, on October 2, 2009, Mr. Fabris advised Mr. Bauthus that the Library would not be evicted. Very soon afterward, the City appears to have lost interest in enforcing the order.

I find it passing strange that these two series of events, both involving the Mall and the issues it faced about the leaks, occurred without, at the least, Mayor Hamilton and Mr. Bauthus recognizing and discussing the potential for one to affect the other. It is difficult to conceive that the two events were totally serendipitous and unrelated. The Order to Remedy – preceding by one week Eastwood's abandonment of its position that the Library would have to vacate the Mall – appears to have been happenstance and coincidence.

Mr. Ewald did nothing to enforce the Order to Remedy

Despite his suspicions that Bob Nazarian would not be eager to comply with the order, given his non-compliance with the 2006 Notice of Violation, Mr. Ewald did nothing to ensure that his order was complied with. He testified:

Q. And so you knew that Mr. Nazarian had not complied with the order of three years before.

I take it you knew from that, that he may not be terribly eager to comply with this?

A. I had those suspicions, yes.

Q. And so what did you do in an attempt to allay those fears?

A. I'm not sure I understand the question. I did an order.

Q. Okay. Other than the order, did you do anything else to follow up?

A. I may have but I don't have a distinct recollection at this point of what else I may have done.
The order is generally sufficient.⁴⁸²

Mr. Nazarian did not take the order seriously

Bob Nazarian testified that

- he agreed there was damaged fireproofing and/or excessive rust on the structural steel beams but stated, "those damages and leakage of waterproofing was nothing new. They had been there for a very, very long time";
- he agreed with the description in the order of the numerous leaks in different areas of Zellers – in fact, when asked whether the description was true, he said "[o]bviously";
- he understood that the order required him to have the entire Mall inspected by a structural engineer, not just the areas that were identified, in order to determine whether there were deficiencies, including structural deficiencies;
- he knew the order required him to correct the deficiencies, including fixing the leaks, the fireproofing, and everything else listed in the order or discovered by the engineer; and
- he knew the order required him to obtain a building permit to perform the work.⁴⁸³

Surprisingly, Levon Nazarian, who was attempting to sell the Mall, testified that he was not aware of the 2009 Order to Remedy at the time.⁴⁸⁴

When asked what he did to fix the leaks after receiving his order, Bob Nazarian stated:

Sir, we never stopped working to fix the leaks. This is nothing now [sic]. You know that. I know that. This has been going on for very, very long time. I should say from the time that they have built, now that it is revealed, so I was doing everything in my power, almost every day, to repair the leak and keep the mall in a good condition. As you saw, we have spent lots of money, lots of energy and try to do our best. Now it's very easy to say "Do it" – but how? Yet, when it comes to help, they just simply issue order.

Okay. It's much easier to write down order. If you don't do it, I'll kill you. Okay, fine, kill me, I can't do it.
What can I say?⁴⁸⁵

Mr. Nazarian agreed that, in light of the order, it was clear that what he had been doing thus far was not working and he would not be complying with the order if he kept doing what he had been doing since 2005. When it was put to him that he could have fixed the leaks by installing a thin membrane as recommended by Mr. Holford, Mr. Nazarian responded:

A. It would not work, sir.

Q. Well, Mr. Holford [Andrew Holford, an engineer from Kleinfeldt Consultants] said it would work.

A. I don't care what Mr. Holford said. I know more than Mr. Holford about this roof. It is not that – I'm not an engineer but I know enough, with the experience and exercise that this roof was not going to be fixed unless we remove all the parking and we put a thick layer of rubber membrane and cover it with something very thin and forget about the roof, not to snow clean, not to let anybody drive on or so on; that was the solution. I knew that. And thin layer would not work under any circumstances.

Imagine if you put a piece of plastic on top of a car, and then you scrape with something very heavy; it's not going to stay.⁴⁸⁶

Mr. Nazarian also agreed that, when he got the 2009 order, he did not hire anybody to give him any other advice:

Q. So Mr. Holford didn't know what he was talking about?

A. No, he knew ... on the paper it looks good, but when you have three, four, ton pressure from the blade coming on a thin layer of plastic it would not last, sir. It would not.

Q. So you rejected his advice and you did not hire an engineer to give you any other advice about how to fix the roof; correct?

A. Sir, may I –

Q. Is that not true?

A. There were dozens of engineers.

Q. Who did you hire to give you advice about how to fix the roof after you rejected Mr. Holford's advice.

A. We had Mr. John Clinckett, Mr. Holford. We had other engineer after Mr. Holford.

Q. Yes, you had ... Mr. Sarvinis, right?

A. Mr. Sarvinis, yes.

Q. We'll get to him. And that was in 2010; right?

A. Yes.

Q. But in 2009 you got this order, you did not hire anybody to give you any other advice; right?

A. No.

Q. And you had not hired anybody since you fired Mr. Holford?

A. Yes.⁴⁸⁷

In sum, in 2009 Bob Nazarian did not attempt to fix the leaks – and he no longer wanted to fix them. He testified that the only way he could stop the leaks was to put on a normal roof and get the cars off the roof.⁴⁸⁸ As I have explained, he testified that he came to this conclusion in 2008. However, as will be seen, he did not take any specific steps to initiate this project until 2011 – and he never completed it.

September 28: Robert Wood is retained by Eastwood to inspect the Mall

Mr. Fabris restricts the scope of work of Mr. Wood

After receiving the Order to Remedy, Bob Nazarian instructed Mr. Fabris to hire an engineer. He claimed that he advised Mr. Fabris to give instructions to the engineer to comply with the City's order, inspect the entire building, and prepare a structural report. Mr. Wood appears to have been selected because he had been working with the Mall for a few years and Mr. Nazarian trusted his judgment.⁴⁸⁹

On September 28, 2009, Mr. Fabris sent a letter to M.R. Wright enclosing a copy of the Order to Remedy. In his letter, Mr. Fabris stated: "The Order to Remedy Violation includes the mall [*sic*] to have the mall inspected by a structural engineer, *specifically the items located under deficiency*"⁴⁹⁰ [emphasis added]. Mr. Wood confirmed that he believed he received the letter.⁴⁹¹

Mr. Fabris would not agree that his statement restricted the inspection to be performed. In his view

[Mr. Wood] had to pay more attention to that, specifically pay attention to those deficiencies, but the whole order was given to Mr. Wood and I certainly didn't restrict him in any way. He had to pay special attention to those areas.⁴⁹²

Mr. Fabris understood that the inspection would be of the entire Mall but would not include any destructive testing, or that any such testing would be minimal.⁴⁹³ Mr. Wood, in contrast, testified that, from Mr. Fabris's letter, he understood that he was being asked to inspect the Mall according to the specific items listed in the Order to Remedy.⁴⁹⁴ Despite acknowledging that the structural soundness of the building and its watertightness were part of the two by-law provisions identified as deficiencies in the Order to Remedy,⁴⁹⁵ Mr. Wood testified that his mandate did not include determining the adequacy of the watertightness of the Mall during his review.⁴⁹⁶

Although it does appear that Mr. Fabris's letter somewhat restricted the scope of Mr. Wood's work, I find it difficult to accept Mr. Wood's evidence about his understanding of his mandate. Knowing that he was retained because of the Order to Remedy, Mr. Wood should have determined what regulatory provision was alleged to have been violated by his client, whether that was in fact accurate, and how these deficiencies could be fixed. In any event, the letter and spirit of the order were clear enough. Mr. Wood had a great depth of experience. The plain wording of the order should have been sufficient.

Bob Nazarian is made to believe that the matter is not "that serious"

Later on September 28, 2009, Mr. Fabris sent a reporting letter to Bob Nazarian regarding the meeting he attended on September 25 with City officials and the 2009 Order to Remedy. Mr. Fabris stated in the letter:

While initially both the City and the Building Department were concerned that there might be some structural damage, they did voice their opinion that it was not as serious as they had initially thought, and thus no stop work violation had been issued.⁴⁹⁷

Mr. Fabris explained that during the meeting with the City officials, they told him that if they had thought the problems at the Mall were really serious, they would have closed down the Mall. According to Mr. Fabris: "They didn't think it was that serious."⁴⁹⁸

Given Mr. Fabris's knowledge of the leaks at the Library, and particularly his role as counsel to Eastwood, I find it rather curious that he would suggest to his client that the matter was not "that serious," implying that the matter could be taken lightly.

Mr. Wood accepts the mandate but is not provided with all the background about the Mall

On September 29, 2009, Mr. Wood responded to Mr. Fabris's letter of September 28 and advised that he would be

pleased to offer our Structural Engineering Services to conduct an inspection at the Mall on Monday, October 5th to familiarize ourselves with the project and to specifically assess the validity of the City's concerns regarding the parking level roof structure over the shopping complex.

We plan to be on site at 9:00 a.m. and look forward to meeting with mall representatives. We are forwarding the attached to the property Owner and look forward to meeting the Local Manager Monday morning and hope to arrange access to inspect the areas of concerns.⁴⁹⁹

Bob Nazarian claimed that after he hired Mr. Wood, he met with him on the top of the roof and walked around with him. He showed him some critical tenant spaces, including Dollarama, the Library, Zellers, Scotiabank, and Northern Reflections, and then left it between him and Mr. Fabris to ensure that the City would be happy with

the inspection. Mr. Nazarian thought Mr. Wood was there for the inspection for one to two hours. He stated that he told Mr. Wood he needed the entire Mall inspected. They did not go up and pull ceiling tiles down or move them aside. Mr. Nazarian stated that Mr. Wood came on another day to do the inspection but could not recall when.⁵⁰⁰

I do not accept Bob Nazarian's evidence on this point. The evidence before me shows that Mr. Wood attended at the Mall only once for the purpose of this retainer.

Although I have concluded that Mr. Wood unduly limited the scope of his own mandate and failed to properly review the Order to Remedy issued by the City, which required him to inspect the entire Mall, I have also concluded that Bob Nazarian failed in his responsibility to inform the engineer of important historical information about the Mall. He failed to advise him

- of the 2006 Notice of Violation;
- of the Mall's history of leaks before Mr. Wood's involvement in the Mall in 2009;
- that in 2008 the Royal Bank had suggested that a structural review of the building was necessary;
- of Mr. Clinckett's report and the work he had completed in 2008;
- of the Kleinfeldt proposal from August 2008 (see Chapter 9, December 2007 to Fall 2008); and
- that he realized very early that the Mall was a "white elephant."⁵⁰¹

Mr. Nazarian testified that he did not believe it was his responsibility to give Mr. Wood prior engineering reports or to provide him with additional information regarding the history of leaks.⁵⁰² I cannot but wonder how Mr. Wood would have been able to obtain this information if it were not from the owner of the building. There was no evidence, however, to suggest that Mr. Wood requested copies of previous reports or asked questions of Mr. Nazarian that could have led to the discovery of facts relating to the history of the Mall. Although there is no doubt that Mr. Wood was less than diligent in conducting his research on the property, I conclude that Mr. Nazarian also deliberately withheld from him the prior engineering documents concerning the Mall which were in Eastwood's possession.

Mr. Wood does not deem it important to review the 1998 Halsall report for the purpose of his 2009 inspection

As I discussed above, in April 2009, when Mr. Wood was hired to conduct a structural review of the former Retirement Living space, he was provided with the 1998 Halsall report but did not find it relevant to his mandate and consequently did not review it in detail.⁵⁰³

When asked whether the information in the 1998 Halsall report would have been useful for his October 2009 report, Mr. Wood testified:

A. It would.

Q. But you don't recall whether you used it?

A. I had far greater issues to look at than this report. This was a preliminary report that I don't know who it was written for and it had got placed in a file that ... I wasn't looking at that area at that time.⁵⁰⁴

In my opinion, the report of another structural engineer written 10 years before on the same issue he was asked to investigate should have been of interest to Mr. Wood, at least so he could familiarize himself with the project as he had indicated to Bob Nazarian he intended to do. The other engineers who testified all agreed that the receipt of previous engineering reports would have been helpful and informative. Mr. Wood's professed indifference to previous relevant reports is absurd.

Gregory Saunders would have done it differently

Gregory Saunders, an engineer and the former partner of Mr. Wood, testified that he did not see the September 2009 Order to Remedy.⁵⁰⁵ He was not aware that the City of Elliot Lake's Property Standards By-law required that a building be structurally sound and capable of sustaining its own weight and any load to which it may be subjected.⁵⁰⁶

Mr. Saunders testified that the Order to Comply, which required that an engineer inspect the entire Mall, was a very large undertaking. He testified as follows:

- Taken literally, the order required that the entire Mall be inspected. However, even in an inspection of the entire Mall, not every single connection, beam, and brace would be inspected, but rather a random sampling based on the history and the drawings would be inspected.
- The Order to Comply did not suggest that the inspection could be limited to a visual inspection of several areas. The order pointed out the areas that had been identified by the building inspector to require an inspection, but the City also wanted an engineer to decide if there were other deficiencies elsewhere.⁵⁰⁷
- To fulfill the obligations set out in the Order to Comply, Mr. Wood first had to determine whether the structural integrity of the building had been properly maintained.
- If Mr. Wood determined that the structural integrity of the building had not been properly maintained, then he was to prescribe a method to fix it.⁵⁰⁸
- The Order to Comply required an inspection of the building to determine if it was watertight; and if it was not, then the engineer inspecting the building was to prescribe the method to remedy the deficiency.⁵⁰⁹

I accept Mr. Saunders's evidence as the correct approach that should have been followed by Mr. Wood in fulfilling the requirements of the Order to Remedy.

October 5: Mr. Wood fails to conduct an adequate inspection

On October 5, 2009, further to his letter of September 29, 2009, confirming his retainer with Eastwood, Mr. Wood attended at the Mall to conduct an inspection. He subsequently wrote a report dated October 28, 2009, which he provided to Eastwood.⁵¹⁰

Mr. Wood fails to review the past M.R. Wright reports about the Mall

Mr. Wood provided the following evidence with respect to his knowledge of the history of the Mall before the inspection:

- Based on his experience, or lack thereof, with buildings of similar design to the Algo Mall, he was not expecting to see any rust or corrosion of any kind at the Mall;⁵¹¹
- When he attended at the Mall, he was looking for the areas where he had been advised there were leaks. He did not expect the leaking to have been going on for an extended period, as he subsequently learned had been the case.⁵¹² He testified that Ms. Laroue told him previously that there was leakage, but he did not realize that the Mall had been leaking for more than three or four years. He did not ask anyone if his assumption was accurate because (he said) there was no one to ask;⁵¹³
- For the purposes of preparing the October 2009 report, he did not look in the M.R. Wright files to see if they included any previous reports relating to the Mall. Mr. Wood testified that he did not know of the existence of the previous reports;⁵¹⁴

- At the time of his inspection and subsequent report in 2009, he was not aware of the 2005 report prepared by M.R. Wright, which specifically identified leaks in the Library that, as of 2005, had been occurring for 16 years;⁵¹⁵
- If he had known there had been leaks in the Library for 16 years, he would have gone to the Library during his inspection to see what effect the long-term leakage had on the structure, although the Library was not an area to which he had been directed;⁵¹⁶
- Anyone reading the 2005 M.R. Wright report on the Library would have known that it was the parking deck which was causing the leaks and the mould inside the Library; Mr. Wood also agreed that one would not have to be a structural engineer to know that water and salt leaking into a structure is not good.⁵¹⁷

This failure to review previous reports was yet another lost opportunity on the part of Mr. Wood to inform himself of the history of the Mall and, particularly, the history of the leaks.

Mr. Wood conducts an initial structural review by simply examining the original drawings and plans

Mr. Wood testified that he read the Order to Remedy and understood that he had to review the entire Mall and examine its structural integrity. He testified that this task involved an initial review of the original structural and architectural plans of the building. He noted that the plans were prepared by an architect registered and licensed in Ontario, were in good condition, and had been submitted for review to the Office of the Fire Marshal and the Ministry of Labour. Mr. Wood explained that he was extremely pleased that there was a full set of drawings to review because it gave him a great degree of confidence that the structure had been built in accordance with the regulations applicable at the time.⁵¹⁸ He testified that it appeared as though the building had been constructed in a structurally sound manner.⁵¹⁹ This conclusion was solely based on his review of the plans and not the actual as-built condition of the Mall.

Mr. Wood agreed, however, that the Order to Remedy required him to do more than just look at the original design because the building might no longer be in the same condition as it was 30 years before.⁵²⁰

Mr. Wood visually inspects only the areas identified in the order – he does not inspect the entire Mall

When he attended at the Mall to conduct his inspection, Mr. Wood brought with him a tape measure, a flashlight, and a notepad. He testified that he may have had some other tools in his vehicle.⁵²¹ Although he claimed he would have taken notes during his inspection, detailed notes were not produced to the Commission.⁵²² The only ones produced were summary in nature and provided no indication of the precise locations inspected.⁵²³ No one else from his office attended at the Mall with him for the inspection.⁵²⁴

Mr. Wood testified that, during the course of his inspection, he did not observe any leakage despite the fact that the pictures included in his report showed water ponding on the roof.⁵²⁵ He said that, at the time of his inspection, he was told there were leaks in the Mall, and, in fact, the Order to Remedy identified the areas that had leaks. Following his review of the drawings, Mr. Wood testified, Mr. Yakimov took him on a tour and showed him the specific areas he (Mr. Yakimov) was concerned about – the same ones listed in the Order to Remedy.⁵²⁶

Mr. Yakimov, in contrast, testified that he was not with Mr. Wood during the inspection and that he met with him only before and after it took place. It was his evidence that, when they met beforehand, he brought to Mr. Wood's attention those areas that the City had inspected.⁵²⁷ Whether Mr. Yakimov was with Mr. Wood during the entire inspection is of little importance. What is clear from the evidence is that Mr. Wood chose to inspect only those areas mentioned in the deficiency list and not the entire Mall, as directed by the Order to Remedy.

Mr. Wood testified that, although he recognized that the Order to Remedy required that the entire Mall be inspected, he did not do so because

[w]e determined it was not necessary on the basis of the fact that the building, as I stated, was designed by professionals, registered by the professional body of Ontario, and registered by the Architectural Association of Ontario. I wasn't ... under any requirement to second guess those professionals. I accepted their ability and I accepted their knowledge and I accepted the fact that they were registered.⁵²⁸

When asked why he would not have taken a closer look at the Mall to determine if the building was still as fit as shown in the architectural and structural drawings of 30 years earlier, Mr. Wood testified:

[W]ith due respect the deficiency noted specific areas with the mall. I was taken to those specific areas by people that ... work in that Mall. The maintenance staff. And I relied on their expertise to show me the areas of concern that they'd already shown to the building officials. I don't expect to have to go and look at every nook and cranny when they've got a specific shopping list already in their hands.⁵²⁹

When it was pointed out to Mr. Wood that the Order to Remedy specifically provided that the City had identified the list of deficiencies to be remedied but also wanted an engineer to see if there were any additional deficiencies and to prescribe the correction for all of them, he responded:

- A. If you take it in the plain English that you lawyers use, I would agree. But in the plain English of a structural engineer, there is no point in digging up every foundation; there's no point in breaking into every piece of concrete to check if the rebar is there; there's no point in doing all these things because the building has been built ... under the design, care and supervision of a Registered Professional Engineer. That's what we rely on. That's what the public relies on.
- Q. Well, what do you need an inspection for then if all you can rely on is the original design?
- A. I was inspecting the areas of concern that related to the fact that water was leaking into the building.⁵³⁰

Mr. Wood appeared to have put a great deal of faith on the stamps on some drawings to determine that the building was structurally sound. In my view, this approach to determining the structural integrity of a building is dangerous. Mr. Wood failed to take into consideration the fact that, after 30 years, a building may no longer have the same structural integrity as it did the day it was built on account of numerous factors, including water leakage and alterations made to the structure with or without a building permit and with or without proper engineering supervision. Mr. Wood's rather blind faith in the drawings allowed him to disregard the realities of the as-built condition of the Mall, which included

- the lack of supervision by James Keywan (the Mall's architect) during the course of construction;
- the lack of coordination between the trades owing to the failure by Algocen to have retained Mr. Keywan to fulfill the role of the prime consultant; and
- the fact that Mr. Keywan signed and sealed the Certificate of Substantial Compliance despite the fact that, as he testified, he had never set foot on the project site or inspected the building during construction.

Mr. Wood testified that he conducted a "visual" inspection of the Mall because the general procedure, according to him, required that initially a visual inspection be carried out to determine if it is necessary to go further.

Mr. Wood alleged that he tried to get the history of the building sorted out; that he asked for the available data in the possession of the Mall; and that he was "ecstatic" when he was provided with a full set of drawings, both structural and architectural. Mr. Wood also testified that he had information from people who worked in the Mall daily and took him around and showed him the problems they were having. He disagreed that he looked only at the areas listed in the Order to Remedy. He stated that he looked everywhere he went, including the parking deck. "I looked for things that they didn't show me," he testified, "but nothing really came to mind."⁵³¹

As I indicated above, Mr. Wood confirmed that he did not ask anyone how long the water had been leaking into the Mall and stated that workers' memory was limited to their time at the Mall.⁵³² The irony is that Mr. Wood had a piece of the history of the Mall in his file. Indeed, as I also indicated, had Mr. Wood reviewed the 1998 Halsall report, he would have learned that the Mall had been leaking for decades.

It was suggested to Mr. Wood by counsel that, in light of the fact that he did not know how long the Mall had been leaking, it would have been better to be cautious rather than assume that nothing was wrong. He responded by diverting responsibility onto the City: if the Mall had been leaking earlier, there would have been an earlier Order to Remedy. Mr. Wood testified that because the City was in the Mall daily, looking at renovations in the building throughout the years, and because there was no Order to Remedy until 2009, he was justified in concluding that the leaks were a new problem.⁵³³

This evidence is disingenuous. It was an attempt by Mr. Wood to deflect any blame for failing to conduct the thorough investigation required by the Order to Remedy.

Mr. Wood testified that the leakage known to the Mall employees drove his inspection because these employees guided him during his inspection.⁵³⁴ Mr. Wood did not inspect the areas where there was no indication of leakage (e.g., where there was a pristine drywall or a clean, unstained ceiling tile).⁵³⁵ Mr. Wood agreed that waiting for water stains to appear on ceiling tiles and drywall was of little help.⁵³⁶

Mr. Wood also testified that, during his inspection, he might have taken some measurements of flanges. He testified that he went up above the ceiling tiles and was close enough to touch the beams. He may have measured the flange width to see whether it was comparable to the drawing, but he acknowledged that, because he was more concerned with what the leakage was doing to the structure, he did not do a detailed review.⁵³⁷ Despite this claim, he never provided any warnings about the consequences of failing to stop the leaks or the long-term effect of salt-laden water leaking onto the steel structure.

Mr. Wood testified that he was not expecting to see any rust or corrosion of any kind at the Mall. Notwithstanding this statement, he was altogether unconcerned by the rust he did discover. His main concern was that the original fireproofing had fallen away from the steel beams.⁵³⁸

He confirmed that he would have been prepared to recommend that something more than a visual inspection be carried out if he had seen something that warranted such a recommendation.⁵³⁹ Unfortunately, Mr. Wood would never make this recommendation, and the City would not order it either.

Mr. Yakimov advises Mr. Wood of his concerns over the vibration

Mr. Wood testified that, during his inspection, he went up onto the parking deck with Mr. Yakimov, who expressed concern about vibration felt in the area of the deck. It was Mr. Wood's recollection that they went to the area of the eventual collapse to review the vibrations. Mr. Wood testified that he and Mr. Yakimov stood in the area for about 10 to 15 minutes: although several vehicles drove by, neither of them felt any vibrations. Mr. Wood testified that he subsequently explained to Mr. Yakimov that structures routinely deflect under load, and especially under wheel load that is moving across the deck. Mr. Wood did not see anything that was out of the ordinary while he was standing on the parking deck.⁵⁴⁰ The vibration of the structure did not concern him.

Mr. Yakimov testified that he advised Mr. Wood that he thought the vibration or movement was a safety issue.⁵⁴¹ Mr. Wood, however, denied that Mr. Yakimov had told him that. He testified that Mr. Yakimov never really quantified or identified what he was concerned about in the area. The engineer said that he assumed Mr. Yakimov was concerned about the deflection under load. Mr. Wood further testified that, following his conversation with Mr. Yakimov, he did a check on the beam at gridline 16 (the one that eventually collapsed),

performed some quick calculations, and determined that the deflection was acceptable for a structure subjected to moving loads. He also took a picture of the underside of the beam in question.⁵⁴²

Mr. Wood did not include any reference in his report to the concerns relayed by Mr. Yakimov or his findings on them because he did not consider those issues to be of consequence.⁵⁴³ He denied that he excluded Mr. Yakimov's concerns from his report because it was outside his mandate. Further, Mr. Wood disagreed with Mr. Yakimov's concerns that the movement could have been related to the condition of the connection in the area – because, Mr. Wood said, connections do not deflect; they do not move. Mr. Wood disagreed that a weakened connection could result in movement of the structure.⁵⁴⁴

It is not for me to evaluate and determine the cause of the vibrations and/or movement noted by Mr. Yakimov. NORR ultimately concluded that although there was a two-stage failure in the area of the collapse, the first failure likely did not occur as early as 2009 and an early failure was not the likely explanation for the phenomenon reported by Mr. Yakimov. This issue is explored further in Chapter 3, Causes of the Collapse. Mr. Wood's response to Mr. Yakimov's concerns has been included to illustrate the cavalier manner in which Mr. Wood conducted his inspection and dismissed concerns brought to his attention.

Mr. Wood should have done more than what in my view amounted to "calculations on a dinner napkin"; he should have taken the time to actually inspect the conditions brought to his attention. If he recommended further investigation and Mr. Nazarian refused to provide him with this mandate, then it would have been incumbent on him to notify the City. He was there to respond to the requirements of an order issued by the City.

Mr. Wood fails to inspect the connections in the Mall

When asked whether he looked at the connections during his inspection, Mr. Wood claimed he did and that he included photographs of connections in his report. He testified that picture 4 in his October 28 report depicted a steel beam connected into a stiffener plate above the yellow tarp. The photograph, however, made no reference to the connection. The report was also silent on this point. Mr. Wood identified a further photograph he had taken,⁵⁴⁵ although it was not included in the report, which, he testified, showed a beam and connection with a bit of white effervescence. When asked whether he took these pictures because he was looking at the connections, he stated that "[he] happened to take a picture of where there was leakage. There happened to be a connection there." He then attempted to justify his actions by stating that "most of the leakage ... is at the mid-span of structures, because mid-span is where the structure deflects, it's where the water ponds and it's where it primarily leaks. So that's where I was mostly looking in areas where there are no connections."⁵⁴⁶ He testified that, during his inspection, he noted that the leakage tended to be at mid-span and that most of the places he was taken to were areas where the fireproofing had fallen off the mid-span of the beam members.⁵⁴⁷

Mr. Wood was never able to explain why, if the leakage had occurred at mid-span of the beam, the NORR engineers had found so many heavily corroded connections.⁵⁴⁸

Mr. Wood testified that he had calculated that there were 2,170 connections (beam to beam, beam to column) within the Mall and more than 800 connections within the bracing of the structure. In his view, more than 80 percent of the connections were covered with sprayed-on fireproofing and totally concealed. He testified that, in light of the number of connections and the difficulty in seeing them (because of fireproofing), it was necessary to restrict the inspection of a building to the areas where leakage had occurred or was known to be occurring.⁵⁴⁹

Mr. Wood agreed that within an angle connection there would be less steel to corrode because the angle is not as thick as the other components in the structure.⁵⁵⁰ He agreed that the angle connection would become structurally weaker more rapidly than the beam and column as a result of water and chloride infiltration and corrosion.⁵⁵¹ Despite this acknowledgement, he never agreed that it was an error on his part to have ignored the

connections. Instead, he persisted in holding to a complicated explanation to support his thesis that there was no water leaking at the location where the connection failed.

It was put to Mr. Wood that Chris Hughes, the architect on the NORR panel of engineers, had testified that the drawing S4 showed an elevated ridge in the area of the collapse, running north and south in the middle between gridlines FX and G, and that the elevated portion of the surface of the parking garage directed water toward the west and east.⁵⁵² Although he had conducted an initial structural review by reviewing the drawings and the original plan, Mr. Wood testified that he was not aware of that detail at the time. He agreed that this detail is what was shown on the architectural drawing. It was suggested to Mr. Wood that the elevated portion of the surface of the parking garage would have directed water to the connection that failed. In response, Mr. Wood testified that the architect had attempted to direct water in that direction but that the deflection of the beam under dead and live load would have counteracted the topping, such that it was not possible for the water to drain that way. As support for his position, he pointed to the fact that a drain had been introduced in the area to take away water that was ponding in the area.⁵⁵³

Mr. Wood agreed that the camber in the precast concrete slabs is in the mid-span and would run north–south. He further agreed that a camber in the mid-span of the slab would be directing water north and south to the beam at gridline G-16. Notwithstanding his agreement with these propositions, Mr. Wood maintained in his evidence that no water would have gone to the connection because the beam at gridline G-16 was a particular type that was 24 inches deep and weighed 110 pounds per square foot. He testified that this beam would sag under the dead weight of the concrete and would sag under a live load. It was his evidence that the deflection under dead load was comparable to the sloped topping that the architect had specified, causing the water to go toward the mid-span. He agreed that his explanation did not take into account the water being directed by both the precast slab and the ridge down the middle toward the western side of the area.⁵⁵⁴

It concerned me during Mr. Wood’s testimony that he was so rigid in his position and unwilling to acknowledge the obvious. There is little doubt the water leaked at the connection, and there was no evidence to the contrary. However, Mr. Wood refused to accept that the explanation requiring the fewest assumptions is most likely to be correct.

Mr. Wood inspects the beam that collapsed

During his inspection of the lottery kiosk area, Mr. Wood inspected and photographed the beam on gridline 16 – the one that ultimately collapsed. The photograph is included in his report at picture 6 (see figure 1.10.8).

Mr. Wood testified that the area of the beam at gridline 16 showed the worst evidence of leakage in that zone. Part of the fireproofing had fallen away, exposing the steel beam. He testified that the red colour in the photograph was partially red-oxide paint and partly rust, which was not an indication, in his view, that it was a major structural problem. He testified that the area that looked worse was the leakage through the joint between the slabs, which he identified as the top right area of the photograph.⁵⁵⁵



Figure 1.10.8 Rust and missing fireproofing on the beam at gridline 16 – the one that later collapsed

Source Exhibit 103

He explained that the beam at gridline 16 was 34 feet long, that the other two ends of the beam were above the drywall ceiling, and that there was no indication of any problems with the drywall ceiling.⁵⁵⁶ He testified that, given the location of the beam, he could not visually observe the connections. He would have had to remove the fireproofing in order to see them.⁵⁵⁷ Mr. Wood admitted, however, that, in hindsight, he should have gone to the Mall while the fireproofing contractor was present, had him remove the fireproofing from the connections of the beam at gridline G-16 for inspection, and then had the contractor replace the fireproofing. Mr. Wood claimed it never occurred to him to proceed in this manner because the water damage that could be seen was in the mid-span of the beam. He agreed that, in hindsight, with his current knowledge, it would have been a “brilliant” idea to look at the connections.⁵⁵⁸

Although it is difficult for me to determine the extent to which Mr. Wood could have examined the connections, his failure to make any attempt to look at any of them or to recommend a more in-depth review clearly fell short of his obligation to conduct a thorough review of the entire Mall, as he was expected to do. Furthermore, in his exchanges with examining counsel, I was struck by his defensive and unapologetic attitude about the issue.

October 28: Mr. Wood concludes that there are no structural concerns with the Mall despite the fact that it has been leaking for more than three decades

Mr. Wood submits his report: He finds no structural concerns and provides no solution for the leaks

Following his October 5, 2009, inspection, Mr. Wood prepared a report for Eastwood, dated October 28, 2009.⁵⁵⁹ Although the report had a notation marked “draft report” on the first page, Mr. Wood testified that it was an error – the notation was put on that page when it was submitted to the client and never removed. Mr. Wood confirmed that the report was not revised after October 28, 2009. The last page of the report is signed and sealed by Mr. Wood and therefore showed, according to him, that it was intended to be a final report.⁵⁶⁰

In his report, Mr. Wood described the scope of his work:

As per your request we visited the above noted Mall Complex on Monday, October 5, 2009, to specifically review and report on concerns that water leakage through the parking deck may have created a weakening of the structure and damaged the required sprayed-on fireproofing of the steel structure.⁵⁶¹

He did not deem it necessary to make reference in his report to the Order to Remedy because, according to him, the order had not been addressed to him.⁵⁶²

According to Mr. Wood, he was not retained to review the leakage or the cause of the leakage, or to remedy the leakage. He was retained only to review the structural concerns as they were related to the leakage that had occurred previously. He had not been retained to prescribe the manner in which the leaks were to be fixed, nor was he asked to comply with the order. A copy of the Order to Remedy was sent to him only as information.⁵⁶³

I find this interpretation by Mr. Wood of his scope of work not only unduly restrictive but also unreasonable.

Mr. Wood went on in his report to make the following observations:

The review of the building consisted of a visual inspection in areas of significant leakage within the Mall below the parking deck ...

At the time of our inspection the installation of additional caulking and waterproofing repairs were still in progress on the parking deck over the Zellers Store at the south end of the Mall ... Efforts over the years appear to have attempted to waterproof the mall utilizing the concrete topping and the noted caulked joints located over joints in the precast slabs with no waterproofing members ...

From the mall ceiling tile it is evident that many leaks have occurred over the years. We attempted through inspection to review the condition of structural steel and precast concrete in the most severe areas of leakage as follows:

1) Zellers Store ...

There are several leakage areas, within the Zellers Store predominantly at grid lines. Our inspection revealed that grid line 5 was the most severe. At this location elaborate collection systems have been installed above the suspended ceiling to collect water infiltration through the roof structure ...

The structural steel is not fire-rated throughout Zellers. The primer painted structural steel has surface rusting, but in all areas inspected no loss of steel section was observed.

2) Service Corridor North and West ...

Water leakage has occurred into the perimeter corridor structure around the upper mall mostly at steel beam support locations, where there is a joint in the precast slabs. Water has soaked the sprayed-on fireproofing ...

The steel is rusting particularly on the top of the bottom flange, however, we are of the opinion that the rusting has not created any structural loss of beam capacity. We could not inspect the underside of the precast slabs, due to the covering of foil faced fibreglass insulation.

3) Main Mall at Ticket Kiosk ...

The steel beams along Line 16 are in a location of significant previous water leaks. ...

Similar to other areas inspected much of the exposed steel has only minor surface rusting with exposed original primer paint, where the fireproofing has fallen off due to water saturation.

... No deterioration of the precast slabs was observed.

4) Mall Area East of Hotel

Beams in areas of leaks over the Bargain Shop have fireproofing missing on bottom flange of steel beams. No loss of section of the steel beams was observed.⁵⁶⁴

Mr. Wood then concluded:

Based upon the above it is our opinion that our inspection revealed no visual structural concerns both with the structural steel or prestressed slabs. The positive camber on the slabs appear [*sic*] to inhibit surface drainage. This indicates structurally that the slabs have significant additional load carrying capacity.

Our major concern is the loss of fireproofing on the bottom flange of steel beams that are required to have complete fire protection. We are recommending that in areas where the original fireproofing has fallen away that the top and bottom surfaces of the bottom flange be cleaned off and suitably sprayed with a fireproofing product that is not water absorbent.⁵⁶⁵

Mr. Wood testified that the area with the most extensive leakage was in the Zellers store. It was in this area that he observed evidence of extensive ponding on the roof deck and the most leaking in the structure.⁵⁶⁶ When asked how he could observe, as he noted in his report, that there was no loss of section in all areas inspected throughout Zellers, Mr. Wood explained that if steel still had the primer paint on it, then there was no loss of section.⁵⁶⁷ He explained that the beams in the Mall were “massive, wide flange and welded wide flange beams,” and that “surface rust does not affect that thickness of steel.”⁵⁶⁸

Mr. Wood testified that he did not take any measurements of the flange in picture 6 (figure 1.10.9), which depicted the beam that actually collapsed). Although it had some corrosion, he did not see any need for measurements. The corrosion he observed was not the type that he would associate with loss of section.⁵⁶⁹ He testified that the issue of whether to measure the corrosion was a judgment call to be made by the inspector, based on his training in that sort of procedure, and in this instance he did not see anything within the building that gave him concern.⁵⁷⁰

Mr. Wood did not include in his report any indication that there were areas he had not inspected as a result of their being obstructed by various materials. He testified that “the materials that excluded the visual examination were materials that would have been damaged by water penetration . . . and would show up as an area that . . . should be inspect[ed].”⁵⁷¹ Although this explanation might be the case, it would seem to me that an indication from Mr. Wood in his report that he did not inspect any areas other than those noted in his report would have been useful. Furthermore, being an experienced engineer, Mr. Wood should have known that there was a possibility that the owner might have deliberately masked any sign of water infiltration, as was Bob Nazarian’s practice, and that he could not simply rely on a visual inspection to determine whether leaks were occurring. That was particularly so with this Mall, given that Mr. Wood should have been aware that the leaks had been ongoing for a number of years, as noted in his report, and given the information in his possession.

Bob Nazarian reads the report and does not follow up with Mr. Wood – even though his report did not indicate that he inspected the entire Mall

Bob Nazarian testified that he read Mr. Wood’s 2009 report at the time. He agreed the report was done in response to the Order to Remedy issued by the City against Eastwood. In his view, because he had given a copy of the order to Mr. Wood, the issue was one between the City and the engineer. If the City was not satisfied with the report, it could have asked the engineer to inspect more areas. He admitted that if he had given the order to an engineer and asked him to do what it said, and if the engineer came back after inspecting only one beam in only one area, he would not have been in compliance with the order. He insisted, however, that he did not normally “follow engineers” when they were doing their inspection.

In this case, despite having read the report, being aware that he had been ordered to have the entire Mall inspected, and knowing that the engineer had not inspected the entire Mall, Mr. Nazarian did nothing.

Mr. Nazarian nonetheless admitted that he has no hesitation about contacting engineers and asking them to change their reports. In this case, despite having read the report, being aware that he had been ordered to have the entire Mall inspected, and knowing that the engineer had not inspected the entire Mall, he did nothing. He claimed that he left the matter to be dealt by his lawyer and the engineer to satisfy the City. He felt he met his responsibility by hiring an engineer to do the job and giving him a copy of the order.⁵⁷²

Levon Nazarian testified that he saw the report in late 2009 or in 2010 and gave it to potential purchasers. He never asked anyone why this report had been obtained.⁵⁷³

Mr. Fabris admits his letter may have affected the scope of Mr. Wood’s work

Mr. Fabris testified that he received Mr. Wood’s 2009 report in or around December 2009, but that he never discussed the report with Bob Nazarian.⁵⁷⁴

During cross-examination, Mr. Fabris admitted that it was apparent from a review of Mr. Wood’s report that the engineer had not conducted an inspection of the entire Mall and had limited his inspection to the most severe areas. Mr. Fabris also admitted that there was a connection between the instructions he gave Mr. Wood in his letter of September 28, 2009 – to look specifically at the areas listed in the deficiency portion of the order – and the report produced by Mr. Wood.⁵⁷⁵

October–December: Despite not meeting the requirement of the order, City staff accept Mr. Wood’s report, advise council that the Mall has no structural problem, and ignore the requirement to fix the leaks

City staff are advised of Mr. Yakimov’s structural concerns, but they do nothing

On October 28, 2009, Chief Officer emailed an update to Mr. Ewald, copying Mr. Bauthus, Mayor Hamilton, and Mr. Connors, on the various outstanding issues involving the orders issued to Eastwood and occurring since the meeting with Bob Nazarian and his lawyer on September 25, 2009.⁵⁷⁶ In his email, Chief Officer noted three issues: (1) Hotel retrofit; (2) Offence Notice re: missing fireproofing on steel beams; and (3) structural integrity of water-exposed beams (rust). He also advised them that he had met with Dimitri Yakimov on the same day, October 28. He described his meeting as follows:

Dimitri [Yakomov] came in at 11:00 a.m. this morning. He informed me that he has concerns with the mall, that work will not be addressed correctly as Mr. Nazarian asked him to stall the Fire Department and to use the water leak issue. Dimitri said he would not and he was let go off as of [sic] today. (This could be a sour grape issue?)

He also advised he spoke to Bruce Ewald and gave him copies of the drawings as he has concern [sic] of 2 panels on the car park level just outside of the lobby doors and also to the left of the doors. He indicated that his hotel audit and dealing with H.R. Wright [sic] inspection with Mr. Bob Wood showed that the drawings of the area in question has the core slab and 3 inches of concrete topping. Upon inspection, the area shows the core slab and 6 inches of concrete topping. He is concerned about the added weight of the extra three inches of concrete. He also indicated that there is a substantial amount of movement on this location. I asked if this new concern about the integrity of the core slab is in the scope of work for H.R. Wright [sic] and he, Dimitri, indicated that it was not.⁵⁷⁷

Mr. Yakimov testified that he did not inform Chief Officer of these things because he was bitter about being fired that day. He testified that he had learned from Ms. Laroue that Mr. Wood’s upcoming report would be positive, which made him upset and worried, and led him to speak to Chief Officer.⁵⁷⁸ In his view, he was fired because he raised these issues with Bob Nazarian.⁵⁷⁹ Considering Mr. Nazarian’s record of hiring and firing consultants who did not provide him with the answers he sought, I have no difficulty accepting Mr. Yakimov’s evidence.

Chief Officer stated that he would have communicated Mr. Yakimov’s concern about overloading the roof deck to Mr. Wood when he subsequently called him. Chief Officer testified that he clearly recalled speaking to Mr. Wood about this issue, even though his email refers only to speaking about the delivery of his report.⁵⁸⁰

Mr. Ewald testified that Mr. Yakimov did not speak to him and he did not give him any drawings.⁵⁸¹ He did not speak with Mr. Yakimov about the concern regarding the weight of the additional concrete or about the movement on the parking deck in that same location.⁵⁸² He did not call Mr. Yakimov to inquire about these issues because he was no longer employed at the Mall, and he did not look for his personal number either.⁵⁸³ Mr. Ewald testified, however, that after receipt of the email, he spoke to Chief Officer and they both concluded that Mr. Yakimov was providing them with this information now because he had been fired.⁵⁸⁴ It apparently did not occur to Mr. Ewald that perhaps Mr. Yakimov was coming forward now that he was not employed by Eastwood and therefore could not be harmed by his employer.⁵⁸⁵ As a result, Mr. Ewald did nothing to investigate the issues raised by Mr. Yakimov. He did eventually speak to Mr. Wood about the additional concrete, but only after receiving his report.⁵⁸⁶

Mayor Hamilton testified that he did receive and read this email at the time and that it did cause him concern. But again he did nothing about it,⁵⁸⁷ except reply to the email three days later stating that council should be advised of this recent development.⁵⁸⁸

Mr. Bauthus testified that on receiving this email, he probably talked about it with Mr. Ewald but did not do more than that because he assumed Mr. Ewald would follow up.⁵⁸⁹

Consistent with previous attitudes, City officials failed to consider the seriousness of the concerns that were brought to their attention. This was yet another missed opportunity on the part of the City to compel the owner of the Mall to undertake repairs that could have prevented the collapse or led to the Mall's closure. It is clear from the evidence that the "closure of the Mall" was an outcome to be avoided at all costs in the minds of the City officials.

Mr. Ewald is satisfied by Mr. Wood's report despite the fact that it does not meet the requirements of the Order to Remedy

Mr. Wood testified that after he delivered his report to Bob Nazarian and it was passed on to the City, he did not receive any complaints from the City that the scope of work was inappropriate or not acceptable. He did not receive any instructions from any City official or from Bob Nazarian (or anyone else on his behalf) to enhance or expand the scope of his work.⁵⁹⁰

Mr. Ewald testified that he received Mr. Wood's 2009 report at the end of October but could not remember the specific date.⁵⁹¹ It appears from the documentary evidence before me that he in fact received it on October 30, 2009.⁵⁹²

When he was asked whether he expected the report from Mr. Wood to be a visual inspection only, Mr. Ewald testified that it was not "untypical" for a report to be based on a visual inspection. He agreed that his order required an inspection by a structural engineer of the entire Mall area to determine whether there were deficiencies, including the extent of corrosion on the steel I-beams. However, he testified that it was up to the engineer to decide how to make an assessment of corrosion.⁵⁹³ Despite Mr. Wood indicating in his report that he had performed a "visual inspection," Mr. Ewald was of the view that Mr. Wood could have touched the steel beams and taken measurements as long as he was not doing a destructive inspection, meaning he was not removing material from the building.⁵⁹⁴

When asked whether he knew that Mr. Wood did not remove anything in order to look behind the material covering the structural members, Mr. Ewald testified that Mr. Wood could have removed waterproofing material or a ceiling tile if he was concerned. This procedure would not, according to Mr. Ewald, have been considered a destructive inspection, unlike removing drywall or removing pieces of the building to do further testing. Mr. Ewald did not know, however, if Mr. Wood had removed fireproofing during his inspection.⁵⁹⁵ It was his understanding that Mr. Wood would have done whatever was necessary to inspect the entire Mall and come to a conclusion, including proceeding with destructive testing if that was what he needed to do.⁵⁹⁶

Mr. Ewald testified that he believed Mr. Wood would have inspected connections between horizontal and upright structural members in various locations, but he did not expect him to inspect every connection. Mr. Ewald knew that Mr. Wood did not look at all the connections because some of them were hidden behind drywall.⁵⁹⁷

When asked whether he would have expected Mr. Wood to remove the drywall if it was in front of a connection, Mr. Ewald testified:

Well, I'd like to clarify that ... an engineer ... and even a building inspector, for that matter, if you believe there is an issue that you can't see and you need to look at, in order to do your job properly, you can request that that material be removed.

But it would appear from his report that he didn't see any reason to proceed to that level.⁵⁹⁸

Mr. Ewald agreed, however, that Mr. Wood did not remove drywall and said he did not know whether Mr. Wood thought about the necessity to remove it. Mr. Ewald testified that he did speak to Mr. Wood after receiving his report but did not ask him whether he had looked at the connections between the upright and horizontal structural members. As Mr. Ewald explained, given that the report indicated that Mr. Wood “reviewed the steel structure, obviously the connections are part of that.” He admitted, however, that the report did not in fact refer to connections.⁵⁹⁹

Mr. Ewald testified that he communicated with Mr. Wood after receiving his report to discuss with him (1) the fact that the report had the notation “Draft Report”; and (2) the concerns raised by Mr. Yakimov to Chief Officer. Mr. Wood informed Mr. Ewald that the notation “Draft Report” was simply an oversight – he had neglected to remove it.⁶⁰⁰

As for Mr. Yakimov’s concerns, Mr. Ewald testified that Mr. Wood advised him he did not have any concerns about the additional depth of concrete in one area. Mr. Ewald could not recall whether he spoke to Mr. Wood about the movement of the roof in the area of the collapse as described by Mr. Yakimov, but agreed that, depending on the type of movement, it might have indicated a serious structural concern. Mr. Ewald testified that he did not ask Mr. Wood whether the issues raised by Mr. Yakimov were part of his scope of work. He agreed that Mr. Wood’s report did not make reference to these two concerns, but he once again assumed these issues were not included because they were not concerns. Mr. Ewald agreed, however, that he could not conclude whether these issues were in fact within Mr. Wood’s scope of work since they were not mentioned in either the report or the order.⁶⁰¹

During his conversation with Mr. Wood, Mr. Ewald did not ask him to identify the areas of significant leakage he had inspected and did not ask him how he knew there were such areas. Despite the fact that Mr. Wood indicated in his report that the “review of the building consisted of a visual inspection in areas of significant leakage within the Mall” and “[w]e attempted through inspection to review the condition of structural steel and precast concrete in the most severe areas of leakage as follows,” Mr. Ewald testified that he believed Mr. Wood had inspected the entire Mall but reported only on areas of concerns. He did not wonder whether Mr. Wood actually had reviewed the condition of the structural steel anywhere other than the places listed (which corresponded to the areas inspected by Mr. Ewald). Mr. Ewald based this belief on the first sentence of Mr. Wood’s report (“... to review and report on concerns that water leakage through the parking deck may have created a weakening of the structure ...”) and the fact that areas of leakage were throughout the Mall.⁶⁰²

Mr. Ewald made numerous assumptions following his review, none of which were supported by the contents of the report. I find, as I have stated before, that the City was hoping to avoid the closure of the Mall because of the perceived impact it would have on the economy. The receipt of an engineering report that gave a clean bill of health to the Mall provided the City with the excuse to continue with the *status quo*. I am not surprised that Mr. Ewald accepted the report, despite its glaring deficiencies.

When pressed, Mr. Ewald admitted, however, that the report did not state that Mr. Wood had looked at the entire Mall and that he did not ask Mr. Wood during their conversation if he had indeed inspected the entire Mall.⁶⁰³ Except for one picture of the parking deck, all the photographs included in the report were of the areas referred to in the order.⁶⁰⁴ He also agreed that an inspection of the entire Mall to determine whether it was structurally sound would take longer than an hour and a half, and possibly more than a day.⁶⁰⁵ However, he testified, he did not give any thought to the fact that Mr. Wood had been in the Mall for only one day or, indeed, whether Mr. Wood had looked at other areas.⁶⁰⁶

Despite the fact that his order noted rusted structural components outside Foodland and the main entrance as a deficiency that he required be corrected, and although there was no reference to it in Mr. Wood's report, Mr. Ewald testified that he concluded that Mr. Wood had indeed examined that area (because Mr. Ewald believed Mr. Wood had examined the entire Mall). However, it was not a concern Mr. Wood felt was worth mentioning in his report.⁶⁰⁷

Mr. Ewald admitted that, despite his order requiring that the leaks be fixed, Mr. Wood's report did not address the repair of the leaks but mentioned only that "they were working on it."⁶⁰⁸ No information was received from an architect or engineer regarding how the repairs were going to be achieved by Bob Nazarian – the owner would proceed with the same methods he had always used.⁶⁰⁹ Moreover, Mr. Ewald agreed that the 2006 Notice of

Violation had also required the leaks to be fixed, that the Mall had continued to leak, and that there had been unsuccessful efforts over the years to fix them.⁶¹⁰

I find it deplorable that Mr. Ewald did not exercise his powers and request a further and better engineering report that actually addressed the deficiencies he had outlined in his Order to Remedy. Although the City this time, unlike in 2006, had an engineering report, it did not address the crux of the problem: the leaks.

Mr. Ewald admitted that he did not call or write to Mr. Wood to inquire what was involved in his visual inspection.⁶¹¹ He also did not speak to Mr. Wood about the scope of his work. It did not occur to Mr. Ewald that the scope of that work was insufficient to answer the questions set out in the order.⁶¹² He did not speak to Mr. Wood before issuing the letter in February 2010 rescinding the order.⁶¹³

I find it deplorable that Mr. Ewald did not exercise his powers and request a further and better engineering report that actually addressed the deficiencies he had outlined in his Order to Remedy. Although the City this time, unlike in 2006, had an engineering report, it did not address the crux of the problem: the leaks.

A re-inspection by the Fire Department reveals that no action has been taken on the missing fireproofing

On October 30, 2009, Mr. Connors of the Fire Department conducted a re-inspection. He noted in his re-inspection report that the missing fireproofing

had not yet been replaced. However, he gave Eastwood 15 days from November 5, 2009, to provide a schedule of compliance and 30 days from November 5, 2009, to complete the work outlined in the M.R. Wright report.⁶¹⁴

City Council is advised of Mr. Yakimov's concerns

On November 3, at the urging of Mayor Hamilton, Mr. Bauthus forwarded the report of Chief Officer dated October 28 to council members, copying Chief Officer and Mr. Ewald. He stated: "Staff is following up with the mall to ensure that there is the follow through on the items that require addressing."⁶¹⁵ Mr. Bauthus informed council of these significant issues of concern. Six days later, City Council voted to execute the Library lease. Mr. Bauthus testified that he did not remind council during that discussion that the dispute with the Library was all about the leaks and the resulting damage. He also failed to discuss with council whether the Library's concerns might be legitimate, given the Order to Remedy issued by the chief building official and these recent developments.⁶¹⁶

Despite the reference to the structural integrity of the Mall in Chief Officer's report, Mr. Collett testified that he thought the report from Chief Officer had more to do with fireproofing and fire regulations than with structural integrity.⁶¹⁷

Mr. Ewald does nothing to ensure that the leaks have been fixed; he concludes that, because no water entered on the day he was in the Mall, everything is fine

On November 12, 2009, Mr. Ewald sent a letter to Mr. Nazarian in which he wrote:

Dear Bob,

On October 30, 2009 pursuant to a Property Standards Order issued on September 25, 2009 I received a draft report from MRW Consulting Engineers pertaining to deficiencies at the mall. At this time I have not received an Application to Construct along with the information required for the issuance of a permit. It is imperative that these deficiencies be corrected as soon as possible. I would request that the pertinent repair details be prepared by your engineer and submitted to this department along with an application to construct so that a permit can be issued and the work undertaken as quickly as possible. Failure to comply will result in prosecution.⁶¹⁸

Mr. Ewald explained that he sent this letter because he had not received an application for a building permit to fix the leaks and rusted areas, according to his order of September 25, 2009. He testified that he received an application only for the fireproofing material.⁶¹⁹ When asked whether he ever received a building permit application to fix the things in his order, he testified:

A. The methods they were using for the leaks did not require a building permit, and obviously to clean or paint steel, that wouldn't require a permit, as well, but the fireproofing definitely required a permit.

Q. You wrote this letter and you told him that what – that fixing what you put in the Property Standards order, which you just told me meant the leaks and the rusty steel, needed a building permit. Did you ever ... change your mind about that?

A. If they had used a different methodology in the repairs of ... the roof, it would have had to have been ... determined whether or not a permit was required.

Obviously, if they had all of a sudden decided that they were going to a membrane and three inches of asphalt wear course, yes, that would definitely require a building permit.

Q. But this letter says they need a building permit. It doesn't say you need a building permit depending on what you do. It says you need a building permit, period, full stop. That's what it says; right?

A. You're absolutely correct. That is what it says.

Q. Did they ever write you and tell you: Here's what we're doing and here's why we don't need a building permit?

A. I don't believe they put it in writing, no.

Q. Were you told orally what they were doing?

A. I was aware of what they ... were doing, because I had been over to take [sic] look at it. I don't have a distinct recollection ... of the conversation or who would have told me, but I was aware that they were proceeding to clean the grout lines and re-caulk.

Q. And that didn't need a permit?

A. No.

Q. Did you ever write them and say:

Okay. Sorry, I was wrong. You don't need a permit?

A. On that occasion, no. On another occasion, I did.⁶²⁰

Mr. Ewald was not able to confirm whether work on the leaks was performed after he sent this letter.⁶²¹

On November 17, 2009, Mr. Ewald spoke to Ms. Laroue about the Order to Remedy and made the following note about his conversation:

Spoke to Henri at the mall at 3 pm regarding outstanding issues pertaining to the order issued September 25, 2009. She indicated that an individual was coming in to price the application of the fireproofing to the steel beams where req'd. She also indicated that MRW Engineering would be preparing a report with regards to surface preparation and installation of the fireproofing. I also asked Henri to ensure that all other items on the order be completed immediately. Henri said she would attend my office tomorrow in order to start the permit application process.⁶²²

At the time of this conversation, Mr. Ewald was not sure whether the leaks had been repaired, but he recalled doing a "loose" inspection of the Mall on a rainy day in November. He did not have notes of this inspection, was not accompanied by anyone, and was not in the Mall for longer than half an hour. He visited the halls outside the Library and Scotiabank but did not go inside the Library, Scotiabank, or Zellers. He did not speak to anyone during this inspection. Mr. Ewald testified that he "saw nowhere that there was . . . water coming in" and therefore concluded "that what they had been doing with regards to the caulking was working, and that they had stopped up the leaks at that point in time." Mr. Ewald admitted, however, that he was not aware that throughout the entire period since the Mall had been built the leaks would periodically improve and then get worse again. He never took any steps to learn about the Mall's history of leaks. Nonetheless, on the day he visited the Mall in November, he believed that the order had been complied with in regard to fixing the leaks.⁶²³

I am surprised by Mr. Ewald's conclusion considering that nothing new had been done by the owner to permanently fix the leaks except to do what had been done for the past three decades. Furthermore, it is apparent from the evidence before me, including the complaints from the Library, that the leaks in fact never stopped until the day of the collapse.

Council is advised that the M.R. Wright report concluded that there is no structural problem with the Mall, but it is not told that the leaks had been fixed

On November 18, 2009, Chief Officer followed up on his report of October 28, 2009, about the concerns by emailing Mr. Bauthus and council members, with copies to Mr. Ewald and Trudy Rheume, the coordinator of the Fire Department. He wrote: "Just an update on the Mall concerns. They have supplied the Engineering report from M.R. Wright that does not have any concerns with the structural components of the building that have been subject to the leaks all these years."⁶²⁴

Mr. Bauthus recalled speaking to Mr. Ewald about the M.R. Wright report, but not actually reading it himself. Mr. Ewald told him that there were no structural issues. Mr. Bauthus admitted that the Mall continued to leak and therefore the order had not been complied with. He did not take steps to deal with the non-compliance or to ask Mr. Ewald about the matter – leaving it to be handled by Mr. Ewald, who was knowledgeable in that area.⁶²⁵ However, he recognized that Mr. Ewald had not taken an interest in the situation until Chief Officer's email on September 23, when Mr. Bauthus called Mr. Ewald into a meeting. Nonetheless, Mr. Bauthus testified that he did not think at the time about following up with Mr. Ewald.⁶²⁶

Mayor Hamilton agreed that the report from Chief Officer did not indicate that the leaks were fixed. In fact, the mayor did not believe that the leaks had been fixed.⁶²⁷

After the receipt of the report from Mr. Wood, the City was no further ahead than it had been on September 23, 2009. It had no report from an engineer or architect that addressed the issue of the leaks and recommended a method or repair, or certified that there was no issue with the structure with respect to watertightness.⁶²⁸ As Mr. Ewald admitted, all it had was a report from an engineer stating there was a problem that needed to be dealt with.⁶²⁹

A building permit is issued to install fireproofing, but no work is done to fix the leaks

On November 25, 2009, Mr. Ewald signed a building permit issued to Bob Nazarian “to patch existing i-beams with fire retardant spray-on material.” There was no reference in the building permit application to fixing the leaks.⁶³⁰

Mr. Ewald focuses on fireproofing and forgets about the leaks

It is apparent from the evidence before the Commission that, following the issuance of the Order to Remedy, the City did nothing to satisfy itself that indeed the leaks had been fixed, apart from Mr. Ewald’s “loose inspection.” Its focus was on the *Fire Code* violations. But what is more perplexing is the fact that even Mr. Ewald, whose role as chief building official and property standards officer should have been to focus on the structural integrity of the Mall as well as its watertightness, was interested only with ensuring that the fireproofing was being applied to the areas where the leaks had caused it to be dislodged.

On December 1, 2009, Ms. Laroue reported to Mr. Fabris that Mr. Ewald had gone to the Mall to inspect the work being done by the company hired to spray the fireproofing material. She informed Mr. Fabris that Mr. Ewald had advised the Mall staff to spray all areas that needed spraying, not just the ones that were indicated on his order.⁶³¹

Mr. Nazarian had instructed Ms. Laroue that only the four specified areas should be sprayed and that she was not to let the City inspect the other areas.⁶³² Mr. Fabris testified that he told Ms. Laroue that the order required that all areas in need of fireproofing be addressed, and not just the four specific ones.⁶³³

Ms. Laroue had explained to Mr. Nazarian that the fireproofing was a safety issue. She described Mr. Nazarian’s lack of co-operation with the Fire Department as follows:

Q. And how so? Or was that what you were referring to earlier about not letting them on the property?

A. Don’t let them on the property. Don’t answer it. Don’t do the work. Just put it aside. Wait until they come back again. Yes, those were instructions commonly received.

Q. And did you get those instructions or were they part of your instructions as far as the fireproofing issue was concerned that we talked about just earlier this afternoon.

A. For fireproofing, for repairing the fire protection system in the hotel, also any time that they came and did inspections as far as anything from fire hydrants to lights not working to the exit signs not being lit, it was never something that was promptly dealt with. It was always drag our heels until the last possible minute.⁶³⁴

Ms. Laroue further testified that, according to Mr. Nazarian, this issue was not about safety, but dollars.⁶³⁵ This pithy statement, in my view, reveals a great deal about Mr. Nazarian’s priorities.

Mr. Ewald’s concern about the fireproofing was reiterated in a letter to Mr. Fabris on December 3, 2009, in which he stated:

Please note however that the areas identified in the Order dated September 25, 2009 were examples only and not intended to be construed as the only areas requiring work, the scope of work was to be determined by the structural engineer hired by the mall.⁶³⁶

Mr. Ewald testified that this letter dealt only with the fireproofing issue.⁶³⁷ It was not meant to address the repairs to stop the leaks. After all, Mr. Ewald had already concluded that what the owner “had been doing with regards to the caulking was working” and that the leaks had stopped.

On December 16, 2009, Chief Officer's inspection of the Mall revealed that the four specified areas, but nothing more, had been dealt with. It was pointed out, once again, that it was the owner's responsibility to inspect the Mall fully and to replace any missing fireproofing as required by the *Fire Code*.⁶³⁸ The reason the order had not been fully complied with, according to Ms. Laroue, was Mr. Nazarian's refusal to pay for it.⁶³⁹

Finally, following a subsequent re-inspection on February 1, 2010, Chief Officer was satisfied that the fireproofing was in compliance with the *Fire Code*.⁶⁴⁰

This issue had been simmering since the fall of 2006. Chief Officer's lack of diligence, coupled with Mr. Nazarian's *modus operandi* of dollars before safety, allowed it to drag on for an inexcusable duration.

October–November: Despite the City having concerns over the structure of the Mall, the Library is forced to remain in it

The Library wants to be independent from the City

On October 15, 2009, Mr. Bauthus attended a meeting of the Library board, where Peter Cavanagh, a lawyer retained by the Library, was also present. Mr. Bauthus's notes of the meeting indicate:

- Peter Cavanagh, lawyer to appear.
- Question re incorporation of libraries.
- Follow-up re additional space at other libraries.
- How many libraries are incorporated as a not for profit corporation?
- Determine how many manage their own leases, accountings, etc.
- Contact Teresa Cassan re library board – financial mgmt.
- Pull library stats re bank account.⁶⁴¹

Mr. Bauthus testified that this meeting was held because the Library was interested in incorporating itself as a not-for-profit corporation, separate from the City. The board wanted to run its own financial and operational management.⁶⁴² Mr. Bauthus testified that the City tried to explain to the board that, pursuant to the *Public Libraries Act*, the board was already incorporated and the City supported it financially. He also explained to it that although larger boards had incorporated as not-for-profit corporations, the process would be quite costly for the board to undertake on its own.⁶⁴³

The Library wanted to become independent of the City because it wanted to leave the Mall and it did not like the City getting involved in its affairs. The City had been carrying on the negotiations for the lease entirely outside the control of the Library.⁶⁴⁴

Councillors Soulière and Reinhardt unilaterally schedule a special meeting of the Library board to try to convince it to sign the lease

On October 27, 2009, Councillors Soulière and Reinhardt sent a letter to Ms. Croxson, as well as the other members of the Library board, requesting a special meeting of the board on November 4, 2009. They wanted to meet with Ms. MacLean to discuss and explain the issues relating to the constitution of the board pursuant to the *Public Libraries Act*, liability coverage for members of the board related to the operations of the Library, and the outstanding issues on the lease for the space in the Mall.⁶⁴⁵

The meeting with the Library board took place on November 4, 2009, with Ms. MacLean, insurance broker Rick Fournier, and Mr. Bauthus also present. Ms. MacLean advised the board that the Library was a corporation under the *Public Libraries Act* and had all the attributes of a corporation – that it was a person at law, and that the individual members of the board did not incur personal liability for the actions of the board. Mr. Fournier informed the board that all its members were covered under the City’s insurance policy.⁶⁴⁶ Despite the information provided, the board was not satisfied and did not sign the lease at the end of this meeting.⁶⁴⁷

Contrary to the City solicitor’s advice, Mr. Bauthus recommends to City Council that it execute the lease

On November 5, 2009, Mr. Bauthus sent a report to council recommending that the City enter into a lease agreement with Eastwood and then provide the space to the Library for it to occupy. In his report, under the heading “Analysis,” Mr. Bauthus stated:

The authority for the Library Board to execute a lease for premises to be used for the library is under the Public Libraries Act and the appropriate course of action would be to have the Board execute the lease knowing that the financial aspects have been reviewed and agreed to by City Council in the recommendation made August 24, 2009. For various reasons known to the Library Board members, the lease has not been executed. It would be prudent for us to do something before we lose the opportunity of capturing some of [the] benefits agreed to in the lease.

The Municipality under the Municipal Act has the authority to enter into the lease. In this respect the Municipality can execute the lease that allows the library to operate out of the space so leased for the term of the lease.⁶⁴⁸

Mr. Bauthus concluded his memo by indicating that if council executed the lease, the City would be able to complete the outstanding issues respecting the Library and could direct its attention to the more pressing operational concerns related to the Library and the City.⁶⁴⁹ Mr. Bauthus recognized that the advice he was now giving council was contrary to the opinion of Ms. MacLean, who had confirmed that the board had to sign the lease.⁶⁵⁰ He testified that, after the legal opinion was received, he spoke with Ms. MacLean, who indicated that there was a grey area concerning the City’s authority to execute a lease.⁶⁵¹ Ms. MacLean did not put this advice in writing. Mr. Bauthus admitted that he did not ask the Library whether it wanted to operate out of the Mall. He simply told the Library that the City had executed the lease, and it was to operate out of that space.⁶⁵²

Mr. Collett testified that he did not agree with Mr. Bauthus; however, by that time, the Library board was more or less defeated and it did not matter what it had to say or whether it opposed the lease. The City was going ahead and executing the lease regardless of its concerns. Mr. Collett testified that he did not believe the lease was beneficial to the Library board.⁶⁵³

Mayor Hamilton testified that he did not question the advice of Mr. Bauthus, despite the fact that it was contrary to the opinion of the City’s solicitor. He was asked if, before deciding that the City should sign the lease, he had given any consideration to whether the Library might have been right about wanting to get out of the Mall, given the issues about the leaks and the potential structural damage that had been uncovered over the previous six weeks. He testified that the Library board and staff were certainly concerned about the leaks – that was their primary reason for wanting to move out – but his concern was that he did not want the Library to move out until the multiplex was ready. Mayor Hamilton testified that the events which had transpired between August 2009 (when council recommended that the Library sign the lease) and November 5, 2009 (including the City officials’ meeting of September 24, Mr. Ewald’s inspection, the Order to Remedy, and the concerns expressed by Chief Officer in his email of October 28) did not cause him to revisit the issue and conclude that the Library might be right in wanting to move out.⁶⁵⁴

City Council executes the lease on behalf of the Library, despite the Library's protest

On November 9, 2009, a meeting of the City Council addressed the Library's lease. By a majority of five to two, council received the report of Mr. Bauthus dated November 5, 2009, passed a resolution to enter into a lease agreement with Eastwood for the Library, and passed a resolution to enact a by-law authorizing the lease agreement. Councillors Collett and Patrie voted against the resolutions.⁶⁵⁵

Mr. Collett testified that he voted against the two resolutions because of the concerns he had about the lease – including the fact that there was no guarantee that the owner would be responsible for damages in case of leaks, and that there was no opportunity for the Library to get out of the lease in case of leaks. Mr. Collett testified that, when the Library board learned of the resolutions, the reaction of the members was one of defeat and disappointment.⁶⁵⁶ Very few options were available for the Library, given that its funding was approved by City Council. Yet the leaks continued in the Library until the time of the collapse.

Mayor Hamilton voted in favour of the lease. He gave the following evidence about the water-infiltration clause (referred to below as the “escape clause”) during cross-examination by Chuck Myles, a representative of the Seniors' Action Group of Elliot Lake (SAGE):

- Q. My question to you is what authority did City Council have to negotiate conditions of the Property Standards By-Law? You are telling this owner that he doesn't have to fix the roof, and if it continues to leak, you are going to move out. But you are not telling him to fix the roof. You are telling him if he doesn't fix it, so you are giving him permission not to fix the roof. What authority do you have to negotiate that by-law in that way which says that the building is to be watertight?
- A. Well, first of all, sir, we are not negotiating a by-law with the property owner. By-laws are addressed and approved by Council, not with a private property owner.
- Q. But isn't this escape clause in effect telling him he doesn't have to pay attention to that by-law?
- A. Absolutely not, sir.
- Q. I interpret it that it would ... you have given him permission not to seal that roof and make it watertight. You are telling him that you will move out if he doesn't ... fix the leaks, which means he can go ahead and do what he has been doing for 18 years but the leaks never get fixed; is that correct?
- A. That is your view, sir, yeah.
- Q. Isn't that contrary to what the by-law says?
- A. No. The by-law is still in place.
- Q. But you are not enforcing it and you are not telling him he has to make it watertight?
- A. We were enforcing it. As you see, there was orders [sic] issued.
- Q. I'm talking about negotiating this lease with that clause in there, which I am sure he could get legal advice to argue that point that you are giving him permission he does not have to seal it and make it watertight; he can continue with the maintenance that he is doing to fix the leaks now and it is going to leak another month from now when it rains.
- A. I'm not sure what legal advice you speak to, but –
- Q. Well, an argument, you could make that argument? That is what you are doing. You are telling him you don't have to seal this building. You are to fix the leaks. They have been fixing leaks for 18 years and it never stopped the leaks, never made that building watertight. And you are giving him an out, which he took, by the way. He didn't have to fix the leaks, and he never did. And that was my point.

THE COMMISSIONER: But ... do you have a question, Mr. Myles? ...

BY MR. MYLES:

Q. Well, my question was, what authority does the City have to give him that right that he doesn't have to make that building watertight?

A. We have no authority to do that.

Q. How is it that the people on Council who know about that building by-law could put this through without questioning the by-law and the enforcement of the by-law?

A. You would have to ask the Councillors that.

Q. Well, you are the head of the Council, and I am asking you.

A. Well, you asked my opinion, yeah, but you asked me how could Councillors do that. That is what I understood your question to be, sir.

Q. I have one more question for you, sir. Would ... it help Council if the Building Official sat in the Council meetings and would be present when some of these things were discussed so he could bring his expertise to bear on matters dealing with by-laws such as the Property Standards By-Law?

A. Well, what I can say to you is if a by-law revision such as property standards came to Council and when it did come to Council, the Chief Building Official was present and was available to answer questions. So that is a regular course of business at City Council and has been for the entire period of time I have been on Council. So I think that answers your question.

Q. You don't think his presence there when you are negotiating this lease would have made a difference?

A. Okay, that is not what I understood your question to be. What, have the Chief Building Official as part of the negotiations? Our Chief –

Q. No, attend Council meetings, like the Fire Chief does.

A. Okay, that is what I just answered, sir. He does attend Council meetings when matters relevant to his department or to his job duties are before Council. That is a regular practice of Council.⁶⁵⁷

I agree with SAGE that, by executing the lease, the City was effectively endorsing the conduct of Eastwood, which was clearly in violation of the Property Standards By-law. In fact, the City had recognized that very violation by issuing its Order to Remedy less than two months earlier.

Mayor Hamilton loses interest in the leaks after the Library lease is signed; he views his job as being done

Mayor Hamilton testified that after the Library lease was signed in November 2009, he did not inquire into the situation or ask what was going on with the leaks at the Mall or at the Library.⁶⁵⁸ After all, Mayor Hamilton and the majority of council had achieved what they had intended to do: force the Library to stay in the Mall, and thereby impose their mindset about the economic stability of the Mall and the City.

November: Despite what Mr. Ewald thought, the leaks were not fixed

On November 26, 2009, Mr. Davison of the Royal Bank emailed David Miller, a property inspector, asking him to conduct an inspection of the Mall to determine whether, as Bob Nazarian had advised him, the leaks had been corrected and all ceiling tiles had been replaced as the result of the \$800,000 that Eastwood had spent.⁶⁵⁹ When asked whether he had spent this amount to fix the leaks by November 2009, Mr. Nazarian answered with his usual cryptic "possible." He could not recall informing Mr. Davison of that amount or that the leaks had been fixed. He agreed that the leaks were not corrected by November 2009.⁶⁶⁰

There is no evidence that Bob Nazarian actually spent \$800,000 to fix the leaks in the entire period he owned the Mall. Here was yet another attempt by Bob Nazarian to mislead the bank into thinking that he had corrected the deficiencies it had noted in its previous annual inspection.

October–December: Eastwood continues to try to sell the Mall

On October 29, 2009, Eastwood received an offer to purchase from Iftikhar Hossain for \$10.2 million, with a \$50,000 deposit. Schedule A stipulated that there would be a land swap for a \$3 million property and the payment of a further \$6.05 million.⁶⁶¹

Levon Nazarian testified that the parties went back and forth on the price.⁶⁶² On December 2, 2009, Eastwood's solicitor prepared an unsigned agreement of purchase and sale between Eastwood and Mr. Hossain for the price of \$9.4 million, including a partial land swap. This agreement was a further iteration of the October 29, 2009, offer from Mr. Hossain.⁶⁶³

Bob Nazarian testified that the agreement with Mr. Hossain did not close. In an email from Mr. Hossain's solicitor to Eastwood's solicitor dated December 10, 2009, it appears that Mr. Hossain was not content with the financial disclosure of the Mall. Nonetheless, Bob Nazarian testified that the deal did not close because Mr. Hossain was not able to arrange for his own financing and not because he was unhappy with the financial information provided.⁶⁶⁴

November–December: Land purchase – Bob Nazarian is in “no hurry” to buy the land, despite the structural concerns about the Mall

Bob Nazarian offers to buy the City land for \$15,000

On November 18, 2009, Mr. Fabris wrote to Mr. Bauthus with a counter-offer of \$15,000 for the municipal land sought to be purchased by Bob Nazarian, a price far below the appraised value. Mr. Nazarian testified he would have paid the \$55,000 market value if he had to, but he never made that offer. He would later increase his offer only to \$20,000. Mr. Nazarian was clearly in no hurry to buy the land, close the parking on the roof, and permanently stop the leaks.⁶⁶⁵

Despite the price being below the appraised value, the same day Mr. Bauthus wrote Mr. Fabris, advising him that the City was in receipt of his client's request and that it would be forwarded to the Planning and By-law Committee to be reviewed at its next meeting, on December 7, 2009.⁶⁶⁶

City Council is advised by Ms. Sprague that the Mall is “facing serious structural problems;” nothing is done about them

On November 30, 2009, Ms. Sprague sent a report to members of council, updating them on the issue of the parcel of land. She advised councillors that the land had been declared surplus by the City and appraised at \$55,000 to \$60,000; that a draft agreement of purchase and sale had been forwarded to counsel for Bob Nazarian and that it included, among other things, a condition that the purchaser commence construction on the property within 24 months and complete it within six months thereafter; and that Mr. Nazarian had offered \$15,000 for the property (approximately one-quarter of the appraised value). She also wrote:

The creation of this additional parking area is required in order to create an alternative parking area. The Mall building is currently *facing serious structural problems* associated with leakage from the rooftop parking area.⁶⁶⁷ [Emphasis added.]

When asked where or from whom she obtained the information that the building was facing serious structural problems, Ms. Sprague testified:

Those are my own words describing all the information we had been provided to up to that point by Mr. Fabris on behalf of his client. They wanted to remove parking or reduce weight and traffic on the roof, and those are just my own words to say obviously they are looking to remove the parking from the roof ...

I'm not qualified to make any judgments about the structural integrity, but I mean, the leaking roof to me is a – it is a structure and it is a serious problem because it has been leaking. It is not – to not read anything more into it than that ...

Well, the roof is a structure. A roof is a structure, I know this. But I'm not qualified to make any judgments about how good the structure is.⁶⁶⁸

...

Because I didn't look at it as a serious structural problem. I didn't realize the meaning of those words. It is an unfortunate choice of words in hindsight. Those words were not – I didn't bring that to the attention of the committee.⁶⁶⁹

Ms. Sprague testified that she meant the additional land would assist the owner with its continuing maintenance of the roof, which was seen by her as a serious issue. She testified that she did not have any actual factual information about the matter – that her statement was based just on what she had read in Mr. Fabris's letters and was not taken from any engineering report. She testified that the chief building official did not suggest those words to her.⁶⁷⁰

Mr. Bauthus testified that he did not take any action when he read Ms. Sprague's statement about the structural problems because the engineer's report had already stated that there were no structural issues. He did not ask Ms. Sprague where she had received this information, and he did not speak to Mr. Ewald about her report.⁶⁷¹

When asked what he thought about Ms. Sprague's statement that the Mall was facing serious structural problems associated with the leakage, Mr. Collett testified that he was wondering about the source of her information and whether it was true. He did not, however, ask those questions of Ms. Sprague. Nor did he give a copy of the report to Mr. Ewald so he could inquire about the structural problems of the Mall. He assumed Mr. Ewald was aware of this report, given his role as secretary of the By-law and Planning Committee.⁶⁷²

Mayor Hamilton testified that, although he read Ms. Sprague's report, he did not recall reading the particular sentence about the structural problems, which appeared under the "Links to the Strategic Plan" heading. He agreed that the statement was fairly serious, especially since it was made after council had received a report from Chief Officer advising that the City had received the report from M.R. Wright, which said there were no structural concerns. Mayor Hamilton testified that, as far as he was aware, nobody discussed this particular sentence at any meetings.⁶⁷³

Mr. Ewald testified that Ms. Sprague's mention of "serious structural problems" did not give rise to a concern on his part because Bob Nazarian had already made such a remark at a meeting with Mr. Bauthus, Ms. Sprague, and Mr. Fabris, and because he believed Mr. Nazarian was simply making that comment to prompt the City to sell him the property at a reduced price. Mr. Ewald testified that that meeting would have taken place in the month before Ms. Sprague's report. He is not sure whether he had Mr. Wood's report when this issue was raised at the meeting with Mr. Nazarian. He testified that, if he did not have the report at the meeting, Mr. Nazarian's comment would not have caused him greater concern because he would have been waiting for Mr. Wood's report. On the other hand, if he did have the report at the meeting, he would not have been concerned because Mr. Nazarian said such things to get what he wanted. Mr. Ewald testified that he did not read these reports (Mr. Wood's and

Ms. Sprague's) in depth, but he also stated that he read this statement (that the Mall "was facing serious structural problems") at the meeting. When pressed, Mr. Ewald admitted that he did not believe that the statement by Ms. Sprague was true, but he did not speak to anyone about it.⁶⁷⁴ I don't think I am being too cynical when I say that it seems as though few things Mr. Ewald learned about the Mall ever gave him any concern.

Bob Nazarian denied that Ms. Sprague's information came from a conversation he had with Mr. Ewald. He "hardly talked with Mr. Ewald," he explained. The only time they spoke was about the building permit issue with Mr. Clinckett in July 2008. He did not recall meeting him any other time.⁶⁷⁵

Although I agree with Mr. Ewald that Bob Nazarian wanted to acquire the land at the lowest possible price and was trying to convince the City to accept his offer, I am not persuaded by his evidence that the information in Ms. Sprague's report came from a meeting that took place with Mr. Nazarian. Ms. Sprague repeatedly testified that the information was simply an unfortunate use of words on her part and did not suggest that it came from Mr. Nazarian. If that had been the case, I believe she would have said so during her testimony.

I am unable to reach a conclusion about the source of the statement.

What is clear, however, is that the mayor, all councillors, Mr. Bauthus, and Mr. Ewald were told by Ms. Sprague, in writing, that the Mall was facing serious structural problems associated with leakage from the rooftop parking area. The glaring reality is that it was true. And nothing was done about it, even though Mr. Ewald's order, requiring an inspection of the entire Mall by a structural engineer, had been made just two months beforehand the resulting report had not indicated that such an inspection had been carried out. I was given no explanation for this state of affairs. It is incomprehensible. Did anyone care whether there were, in fact, structural problems at the Mall? It seems that no one did.

The City is not prepared to sell the land below fair market value

On December 7, 2009, the By-law and Planning Committee met and discussed the most recent offer to purchase the land from Eastwood. The offer was rejected.

Ms. Sprague testified that the committee did not discuss the note in her report about the Mall's serious structural problems, and neither did she bring that part of her report to the attention of the committee. It was not regarded as a major issue, given that everybody knew about the leaking roof and why Eastwood wanted to purchase the land. Ms. Sprague testified that she did not believe it was explained to the committee that the reasons the owner wanted to buy the property were (1) to reduce the weight; (2) to alleviate the leaks; and (3) to get alternative parking.⁶⁷⁶

The next day Ms. Sprague sent a letter to Mr. Fabris, advising him that the By-law and Planning Committee had considered Eastwood's offer.⁶⁷⁷ Ms. Sprague then went on to state that in June the City had provided a draft agreement of purchase and sale at a price of \$55,000, the low end of the appraised value. She then referred to section 106 of the *Municipal Act*, which provides that a municipality shall not grant assistance by leasing or selling any property at below fair market value. She advised Mr. Fabris that the committee would consider a reasonable offer, provided the value was not so drastically discounted and more accurately reflected the fair market value.⁶⁷⁸

Bob Nazarian testified that he left the negotiations to Mr. Fabris and that it was not just the price that was objectionable. He also objected to some conditions. He was not in a rush to purchase. He testified that if he had funds available, he would have bought the land immediately, regardless of the price.⁶⁷⁹

Despite that statement, I do not believe that Bob Nazarian was prepared to purchase the municipal land at market value. He claimed he was not happy with the “conditions” imposed by the City. As far as I can discern, Mr. Nazarian was hoping to be able to close the roof to parking, buy the land, and take his time transforming it into a parking lot. The City’s wish to get assurances from Mr. Nazarian that he would use the land to create a new parking lot within a reasonable period was understandable.

Scotiabank did not have three consecutive weeks without leaks in 2009

On September 16, 2009, Mr. Fabris sent a letter to Scotiabank advising that no mould had been found in the vicinity of the bank.⁶⁸⁰ On October 6, 2009, Mr. Fabris sent another letter to Scotiabank, in which he proposed an action plan where Eastwood would fix the damaged drywall and the ceiling and replace the carpet damaged from leakage. He further wrote that it had rained for the past week and a half, and there were no discernible leaks or moisture in the bank. Ms. McCulloch, the bank’s customer service manager, testified that she did not have any recollection of the bank ever being leak-free when it rained.⁶⁸¹

In a letter to Mr. Fabris on October 9, 2009, Scotiabank reiterated that it needed three weeks during rainy season without leaks before it would allow any work to be done at the branch.⁶⁸² Ms. McCulloch testified that, as of October 2009, there had not been three weeks without rain.⁶⁸³

Despite the bank’s clear opposition, contractors came into the branch, advising staff that construction would begin. On October 13, 2009, Scotiabank advised Bob Nazarian again that no work could begin until the three-week condition was met.⁶⁸⁴

On October 21, 2009, Mall staff requested that branch staff sign a form confirming there had been no leaks for three weeks, despite the fact that it was not true.⁶⁸⁵ On October 26, 2009, Mr. Fabris advised Scotiabank that Eastwood had retained M.R. Wright to conduct mould testing.⁶⁸⁶ Although torrential downpours had occurred in October, that same day Mr. Fabris sent a second letter to Scotiabank, stating that there had been four weeks without leaks. He also stated that the owner would forgive the unpaid rent and that the repairs performed by Scotiabank “were done without cause” because they were carried out before the completion of the roof repairs.⁶⁸⁷

I find this statement difficult to fathom. Scotiabank had received numerous reports from Pinchin confirming the presence of mould and the necessity to remove it expeditiously. Bob Nazarian had not fixed the roof. An email sent to Bob Nazarian by Scotiabank on the same day as Mr. Fabris’s letter shows that leaks continued to occur. The email advised of leaks in the storage room, the rear entrance, and the electrical room.⁶⁸⁸

In November 2009, Scotiabank began to consider the possibility of relocating the branch “due to the ongoing problems with water penetrating into the branch.”⁶⁸⁹

On December 9, 2009, Bob and Irene Nazarian sent an email to Scotiabank claiming that they had “completed the roof repair.”⁶⁹⁰ This claim was patently untrue. Eastwood had not been doing anything other than what it had done since purchasing the Mall – re-caulking the roof. The leaks at Scotiabank would never stop until the branch moved out in December 2011.

Notes

- ¹ Sprague testimony, July 12, 2013, pp. 16066–7; Exhibit 1039; Hamilton testimony, July 9, 2013, p. 15168.
- ² Exhibit 313.
- ³ Bob Nazarian testimony, July 23, 2013, pp. 18215–17.
- ⁴ Collett testimony, May 23, 2013, pp. 11161–3.
- ⁵ Collett testimony, May 23, 2013, pp. 11161–4.
- ⁶ Sprague testimony, July 12, 2013, pp. 16067–9; Exhibit 313.
- ⁷ Exhibit 13-25.
- ⁸ Exhibit 13-25.
- ⁹ McCulloch testimony, June 13, 2013, p. 14448.
- ¹⁰ Exhibit 13-25, p. 041; McCulloch testimony, June 13, 2013, p. 14448.
- ¹¹ Exhibit 1327 or 13-26; see also McCulloch testimony, June 13, 2013, pp. 14449–50.
- ¹² Bob Nazarian testimony, July 25, 2013, pp. 18217–21.
- ¹³ Bob Nazarian testimony, July 25, 2013, pp. 18217–21; Exhibit 1327.
- ¹⁴ McCulloch testimony, June 13, 2013, p. 14449.
- ¹⁵ Exhibit 13-129.
- ¹⁶ Exhibit 13-129; McCulloch testimony, June 13, 2013, p. 14451.
- ¹⁷ Exhibit 13-27.
- ¹⁸ McCulloch testimony, June 13, 2013, pp. 14452–3.
- ¹⁹ McCulloch testimony, June 13, 2013, pp. 14453–4.
- ²⁰ Cuthbertson testimony, May 1, 2013, pp. 7878–9; Exhibit 12-75.
- ²¹ Fabris testimony, July 11, 2013, pp. 15740–1.
- ²² Exhibit 3460; Bauthus testimony, May 16, 2013, pp. 10360–3; Fabris testimony, July 11, 2013, p. 15741.
- ²³ Exhibit 11-182; Bauthus testimony, May 16, 2013, p. 10363.
- ²⁴ Hamilton testimony, July 9, 2013, pp. 15171–3.
- ²⁵ Exhibit 3461.
- ²⁶ Bauthus testimony, May 16, 2013, pp. 10363–4.
- ²⁷ Bauthus testimony, May 16, 2013, pp. 10364–5.
- ²⁸ Bauthus testimony, May 16, 2013, pp. 10365–7.
- ²⁹ Bauthus testimony, May 16, 2013, p. 10366.
- ³⁰ Exhibit 346.
- ³¹ Exhibit 261 (same as Exhibit 127).
- ³² Exhibit 261.
- ³³ Bauthus testimony, May 16, 2013, p. 10370.
- ³⁴ Exhibit 1330.
- ³⁵ Bauthus testimony, May 16, 2013, p. 10371.
- ³⁶ Bauthus testimony, May 16, 2013, p. 10378–9.
- ³⁷ Collett testimony, May 23, 2013, pp. 11166–7; Exhibit 261.
- ³⁸ Hamilton testimony, July 9, 2013, pp. 15169–71; Exhibit 261.
- ³⁹ Sprague testimony, July 12, 2013, pp. 16070–2; Exhibit 261.
- ⁴⁰ Sprague testimony, July 12, 2013, p. 16072.
- ⁴¹ Ewald testimony, May 24, 2013, p. 11533.
- ⁴² Ewald testimony, May 24, 2013, p. 11534.
- ⁴³ Ewald testimony, May 24, 2013, pp. 11535–7.
- ⁴⁴ Ewald testimony, May 24, 2013, pp. 11537–8.
- ⁴⁵ Ewald testimony, May 24, 2013, pp. 11538–9.
- ⁴⁶ Exhibit 339; see also Sprague testimony, July 12, 2013, p. 16072.
- ⁴⁷ Exhibit 3462.
- ⁴⁸ Bauthus testimony, May 16, 2013, p. 10386.
- ⁴⁹ Bauthus testimony, May 16, 2013, p. 10387.
- ⁵⁰ Exhibit 11-183.
- ⁵¹ Bauthus testimony, May 16, 2013, pp. 10389–90; Exhibit 11-183, p. 3.
- ⁵² Collett testimony, May 23, 2013, pp. 11167–71.
- ⁵³ Exhibit 312.
- ⁵⁴ Sprague testimony, July 12, 2013, pp. 16073–5; Exhibit 312.
- ⁵⁵ Bauthus testimony, May 16, 2013, pp. 10382–3.
- ⁵⁶ Bauthus testimony, May 16, 2013, pp. 10383–5.
- ⁵⁷ Exhibits 3465, 165.
- ⁵⁸ Exhibit 165.
- ⁵⁹ Exhibit 3465; Bauthus testimony, May 21, 2013, p. 10401.
- ⁶⁰ Bauthus testimony, May 21, 2013, p. 10398.
- ⁶¹ Bauthus testimony, May 21, 2013, pp. 10398–401.
- ⁶² Sprague testimony, July 12, 2013, pp. 16075–6.
- ⁶³ Collett testimony, May 23, 2013, p. 11174; Exhibits 165, 3465.
- ⁶⁴ Hamilton testimony, July 9, 2013, pp. 15176–7; Exhibits 165, 3465.
- ⁶⁵ Collett testimony, May 23, 2013, pp. 11173–5; Hamilton testimony, July 9, 2013, pp. 15177–8; Exhibits 165, 3465.
- ⁶⁶ Exhibit 1037.
- ⁶⁷ Exhibit 264.
- ⁶⁸ Sprague testimony, July 12, 2013, pp. 16076–7.
- ⁶⁹ Sprague testimony, July 12, 2013, p. 16077; Exhibit 265.
- ⁷⁰ Exhibits 4450, 4451.
- ⁷¹ Laroue testimony, May 22, 2013, p. 10800.
- ⁷² Laroue testimony, May 22, 2013, p. 10807.
- ⁷³ Laroue testimony, May 22, 2013, p. 10804.
- ⁷⁴ Laroue testimony, May 23, 2013, pp. 10970–2.
- ⁷⁵ Laroue testimony, May 22, 2013, p. 10801.
- ⁷⁶ Laroue testimony, May 22, 2013, pp. 10801–2.
- ⁷⁷ Laroue testimony, May 22, 2013, pp. 10808–10.
- ⁷⁸ Laroue testimony, May 22, 2013, pp. 10813–15.
- ⁷⁹ Laroue testimony, May 22, 2013, pp. 10886–9.
- ⁸⁰ Laroue testimony, May 22, 2013, pp. 10889–95.
- ⁸¹ Laroue testimony, May 22, 2013, pp. 10803–4.
- ⁸² Exhibit 4452.
- ⁸³ Laroue testimony, May 22, 2013, pp. 10806–8.
- ⁸⁴ Bob Nazarian testimony, July 25, 2013, pp. 18229–31.
- ⁸⁵ Exhibit 4454.
- ⁸⁶ Bob Nazarian testimony, July 26, 2013, pp. 18582–4.
- ⁸⁷ Exhibits 4453, 4454.
- ⁸⁸ Bob Nazarian testimony, July 26, 2013, pp. 18579–81; Exhibit 4453.
- ⁸⁹ Exhibit 1474.
- ⁹⁰ Bob Nazarian testimony, July 26, 2013, pp. 18584–6; Exhibit 1474.
- ⁹¹ Exhibit 1474.
- ⁹² Bauthus testimony, May 21, 2013, pp. 10404–6.
- ⁹³ Fabris testimony, July 11, 2013, p. 15743.
- ⁹⁴ Exhibit 1474.
- ⁹⁵ Fabris testimony, July 11, 2013, p. 15744.
- ⁹⁶ Exhibit 13-135; McCulloch testimony, June 13, 2013, p. 14458.
- ⁹⁷ Exhibit 13-29 (same as 5434); McCulloch testimony, June 13, 2013, pp. 14456–7.
- ⁹⁸ Exhibit 5146.
- ⁹⁹ Exhibit 13-29; McCulloch testimony, June 13, 2013, pp. 14457–9.
- ¹⁰⁰ McCulloch testimony, June 13, 2013, p. 14459.
- ¹⁰¹ McCulloch testimony, June 13, 2013, p. 14461; Exhibit 5146.
- ¹⁰² McCulloch testimony, June 13, 2013, p. 14462.
- ¹⁰³ Bob Nazarian testimony, July 25, 2013, pp. 18231–3.
- ¹⁰⁴ Bob Nazarian testimony, July 25, 2013, p. 18233.
- ¹⁰⁵ Bob Nazarian testimony, July 25, 2013, pp. 18233–6.
- ¹⁰⁶ Exhibit 1036.
- ¹⁰⁷ Hamilton testimony, July 9, 2013, pp. 15178–9; see, however, footnote 1805 in Chapter 6.

- ¹⁰⁸ Sprague testimony, July 12, 2013, p. 16077.
- ¹⁰⁹ Wood testimony, June 6, 2013, pp. 13268–72; Exhibits 5217, 5216.
- ¹¹⁰ Wood testimony, June 6, 2013, pp. 13241–4.
- ¹¹¹ Wood testimony, June 7, 2013, pp. 13406–12.
- ¹¹² Wood testimony, June 6, 2013, pp. 13245–6.
- ¹¹³ Wood testimony, June 6, 2013, p. 13245.
- ¹¹⁴ Exhibit 5219.
- ¹¹⁵ Wood testimony, June 6, 2013, pp. 13270–2; Exhibits 5217, 5219.
- ¹¹⁶ Wood testimony, June 6, 2013, p. 13275.
- ¹¹⁷ Wood testimony, June 6, 2013, p. 13277, 13280.
- ¹¹⁸ Wood testimony, June 6, 2013, p. 13279; Exhibit 66, p. 035.
- ¹¹⁹ Wood testimony, June 6, 2013, pp. 13279–80; Exhibit 66, p. 035.
- ¹²⁰ Wood testimony, June 6, 2013, p. 13282.
- ¹²¹ Exhibit 5312; Pinchin was approached by the Royal Bank in May 2009 about a proposal but was officially retained on June 1, 2009.
- ¹²² Hass testimony, June 14, 2013, p. 14553.
- ¹²³ Exhibit 101 (colour copy at Exhibit 105).
- ¹²⁴ Exhibits 5330, 5307; Hass testimony, June 14, 2013, pp. 14539–41.
- ¹²⁵ Hass testimony, June 14, 2013, pp. 14519–23.
- ¹²⁶ Hass testimony, June 14, 2013, pp. 14539–41; Exhibit 5307.
- ¹²⁷ Hass testimony, June 14, 2013, p. 14542.
- ¹²⁸ Hass testimony, June 14, 2013, pp. 14598–9.
- ¹²⁹ Hass testimony, June 14, 2013, pp. 14615–16; Exhibit 5307.
- ¹³⁰ Exhibit 5307.
- ¹³¹ Hass testimony, June 14, 2013, pp. 14543–4; Exhibit 5307.
- ¹³² Hass testimony, June 14, 2013, pp. 14544–6.
- ¹³³ Hass testimony, June 14, 2013, pp. 14546–8; Exhibit 5308, p. 002.
- ¹³⁴ Exhibit 5308.
- ¹³⁵ Hass testimony, June 14, 2013, pp. 14548–50.
- ¹³⁶ Exhibit 5312.
- ¹³⁷ Hass testimony, June 14, 2013, pp. 14550–2; Exhibit 5312.
- ¹³⁸ Hass testimony, June 14, 2013, pp. 14552, 14621–2.
- ¹³⁹ Exhibit 5310.
- ¹⁴⁰ Hass testimony, June 14, 2013, pp. 14553–4.
- ¹⁴¹ Hass testimony, June 14, 2013, p. 14554.
- ¹⁴² Hass testimony, June 14, 2013, p. 14564.
- ¹⁴³ Hass testimony, June 14, 2013, p. 14564.
- ¹⁴⁴ Hass testimony, June 14, 2013, pp. 14579–80; Exhibit 101.
- ¹⁴⁵ Exhibit 5330, p. 005.
- ¹⁴⁶ Hass testimony, June 14, 2013, pp. 14573–4.
- ¹⁴⁷ Hass testimony, June 14, 2013, p. 14565, 14571; Exhibit 101, p. 431; Exhibit 105, p. 028.
- ¹⁴⁸ Hass testimony, June 14, 2013, p. 14573.
- ¹⁴⁹ Exhibit 105, p. 021.
- ¹⁵⁰ Hass testimony, June 14, 2013, p. 14576; Exhibit 101.
- ¹⁵¹ Hass testimony, June 14, 2013, p. 14595.
- ¹⁵² Exhibit 105, p. 025.
- ¹⁵³ Hass testimony, June 14, 2013, p. 14577.
- ¹⁵⁴ Hass testimony, June 14, 2013, pp. 14577–8.
- ¹⁵⁵ Hass testimony, June 14, 2013, p. 14578; Exhibit 105, p. 026.
- ¹⁵⁶ Hass testimony, June 14, 2013, pp. 14555, 14559; Exhibit 105, p. 026.
- ¹⁵⁷ Hass testimony, June 14, 2013, p. 14582; Exhibit 101.
- ¹⁵⁸ Hass testimony, June 14, 2013, pp. 14574–5.
- ¹⁵⁹ Hass testimony, June 14, 2013, p. 14707.
- ¹⁶⁰ Hass testimony, June 14, 2013, pp. 14707–8.
- ¹⁶¹ Hass testimony, June 14, 2013, p. 14710.
- ¹⁶² Exhibit 101.
- ¹⁶³ Hass testimony, June 14, 2013, p. 14563; Exhibit 101.
- ¹⁶⁴ Hass testimony, June 14, 2013, pp. 14583–4; Exhibit 101, p. 405.
- ¹⁶⁵ Exhibit 101, pp. 405–6.
- ¹⁶⁶ Hass testimony, June 14, 2013, pp. 14585–6.
- ¹⁶⁷ Hass testimony, June 14, 2013, p. 14586.
- ¹⁶⁸ Hass testimony, June 14, 2013, p. 14624.
- ¹⁶⁹ Hass testimony, June 14, 2013, p. 14587; Exhibit 101, p. 406.
- ¹⁷⁰ Hass testimony, June 14, 2013, p. 14587.
- ¹⁷¹ Exhibit 101, p. 420.
- ¹⁷² Exhibit 101, p. 438.
- ¹⁷³ Hass testimony, June 14, 2013, pp. 14588–9; Exhibit 101, p. 438.
- ¹⁷⁴ Hass testimony, June 14, 2013, pp. 14590–1.
- ¹⁷⁵ Hass testimony, June 14, 2013, p. 14591.
- ¹⁷⁶ Hass testimony, June 14, 2013, p. 14591.
- ¹⁷⁷ Hass testimony, June 14, 2013, pp. 14591–2.
- ¹⁷⁸ Hass testimony, June 14, 2013, pp. 14592–4; Exhibit 101, p. 420.
- ¹⁷⁹ Hass testimony, June 14, 2013, p. 14594.
- ¹⁸⁰ Hass testimony, June 14, 2013, pp. 14595–6.
- ¹⁸¹ Hass testimony, June 14, 2013, p. 14596.
- ¹⁸² Hass testimony, June 14, 2013, p. 14597.
- ¹⁸³ Hass testimony, June 14, 2013, p. 14608; Exhibit 5343, p. 002.
- ¹⁸⁴ Hass testimony, June 14, 2013, p. 14627.
- ¹⁸⁵ Exhibit 263 (same as Exhibits 1334, 5441).
- ¹⁸⁶ Sprague testimony, July 12, 2013, pp. 16077–9.
- ¹⁸⁷ Bob Nazarian testimony, July 25, 2013, pp. 18237–9; Exhibit 5441.
- ¹⁸⁸ Bob Nazarian testimony, July 25, 2013, pp. 18242–3; July 26, 2013, pp. 18584–6; Exhibit 1474.
- ¹⁸⁹ Exhibit 262.
- ¹⁹⁰ Exhibit 1468.
- ¹⁹¹ Exhibit 1036.
- ¹⁹² Bauthus testimony, May 21, 2013, p. 10408.
- ¹⁹³ Sprague testimony, July 12, 2013, pp. 16080–2.
- ¹⁹⁴ Exhibit 5837.
- ¹⁹⁵ Bob Nazarian testimony, July 25, 2013, p. 18245.
- ¹⁹⁶ Bob Nazarian testimony, July 25, 2013, pp. 18244–47; Exhibit 5837.
- ¹⁹⁷ Fabris testimony, July 11, 2013, pp. 15745–50.
- ¹⁹⁸ Bauthus testimony, May 21, 2013, pp. 10413–14.
- ¹⁹⁹ Bauthus testimony, May 21, 2013, p. 10414.
- ²⁰⁰ Bauthus testimony, May 21, 2013, p. 10415.
- ²⁰¹ Fabris testimony, July 11, 2013, pp. 15748–9.
- ²⁰² Exhibit 11-191.
- ²⁰³ Bauthus testimony, May 21, 2013, p. 10420.
- ²⁰⁴ Bauthus testimony, May 21, 2013, pp. 10417–18.
- ²⁰⁵ Exhibit 3478.
- ²⁰⁶ Collett testimony, May 23, 2013, pp. 11177–9.
- ²⁰⁷ Collett testimony, May 23, 2013, p. 11179.
- ²⁰⁸ Fabris testimony, July 11, 2013, pp. 15750–2.
- ²⁰⁹ Fabris testimony, July 11, 2013, p. 15753.
- ²¹⁰ Fabris testimony, July 11, 2013, p. 15753.
- ²¹¹ Bob Nazarian testimony, July 25, 2013, p. 18121.
- ²¹² Exhibit 11-35, p. 4802.
- ²¹³ Exhibit 11-35, p. 4802. Mr. Fabris was not examined about this letter.
- ²¹⁴ Exhibit 11-36.
- ²¹⁵ Laroue testimony, May 23, 2013, pp. 11008–9; Exhibit 11-36.
- ²¹⁶ Bauthus testimony, May 21, 2013, pp. 10420–2.
- ²¹⁷ Exhibit 11-190.

- 218 Bauthus testimony, May 21, 2013, p. 10424
- 219 Exhibit 11-190.
- 220 Collett testimony, May 23, 2013, pp. 11179–81.
- 221 Bauthus testimony, May 21, 2013, p. 10428.
- 222 Exhibit 11-190.
- 223 Bauthus testimony, May 21, 2013, pp. 10429–30.
- 224 Bauthus testimony, May 21, 2013, p. 10431.
- 225 Exhibit 11-171.
- 226 Bauthus testimony, May 21, 2013, pp. 10430–3.
- 227 Collett testimony, May 23, 2013, pp. 11179–83.
- 228 Hamilton testimony, July 9, 2013, pp. 15187–92.
- 229 Hamilton testimony, July 9, 2013, pp. 15192–3.
- 230 Exhibit 2353.
- 231 Exhibit 3481.
- 232 Hamilton testimony, July 9, 2013, pp. 15193, 15199–201; Bauthus testimony, May 21, 2013, pp. 10440–1; Collett testimony, May 23, 2013, p. 11186.
- 233 Collett testimony, May 23, 2013, pp. 11183–4.
- 234 Exhibit 2353.
- 235 Bauthus testimony, May 21, 2013, p. 10438.
- 236 Bauthus testimony, May 21, 2013, pp. 10438–9.
- 237 Bauthus testimony, May 21, 2013, p. 10439.
- 238 Exhibit 5843.
- 239 Bauthus testimony, May 21, 2013, p. 10441.
- 240 Bauthus testimony, May 21, 2013, pp. 10441–2.
- 241 Hamilton testimony, July 9, 2013, pp. 15192–9.
- 242 Hamilton testimony, July 9, 2013, pp. 15192–9.
- 243 Hamilton testimony, July 9, 2013, pp. 15192–9.
- 244 Exhibit 11-190
- 245 Exhibit 11-35, p. 4804
- 246 Exhibit 11-198
- 247 Collett testimony, May 23, 2013, pp. 11186–8.
- 248 Exhibit 11-197.
- 249 Bauthus testimony, May 21, 2013, p. 10447.
- 250 Hamilton testimony, July 9, 2013, pp. 15201–5.
- 251 Hamilton testimony, July 9, 2013, pp. 15206–7.
- 252 Exhibit 11-199; see also handwritten notes at Exhibit 3482.
- 253 Bauthus testimony, May 21, 2013, p. 10450.
- 254 Bauthus testimony, May 21, 2013, pp. 10450–1.
- 255 Bauthus testimony, May 21, 2013, p. 10451.
- 256 Bauthus testimony, May 21, 2013, pp. 10452–3.
- 257 Bauthus testimony, May 21, 2013, p. 10453.
- 258 Bauthus testimony, May 21, 2013, pp. 10453–4.
- 259 Bauthus testimony, May 21, 2013, pp. 10459–60
- 260 Bauthus testimony, May 21, 2013, p. 10460.
- 261 Hamilton testimony, July 9, 2013, pp. 15207–12.
- 262 Exhibit 11-35.
- 263 Exhibit 11-35.
- 264 Collett testimony, May 23, 2013, pp. 11188–93; Exhibit 11-35.
- 265 Hamilton testimony, July 9, 2013, pp. 15212–22.
- 266 Bauthus testimony, May 21, 2013, pp. 10467–9.
- 267 Bauthus testimony, May 21, 2013, p. 10470.
- 268 Exhibit 11-201; Hamilton testimony, July 9, 2013, pp. 15227–9.
- 269 Bauthus testimony, May 21, 2013, pp. 10476–7.
- 270 Bauthus testimony, May 21, 2013, pp. 10477–8.
- 271 Collett testimony, May 23, 2013, pp. 11194–5.
- 272 Ewald testimony, May 28, 2013, p. 11910.
- 273 Exhibit 11-201.
- 274 Hamilton testimony, July 9, 2013, pp. 15229–33; Bauthus testimony, May 21, 2013, pp. 10490–2.
- 275 Collett testimony, May 23, 2013, pp. 11195–6.
- 276 Exhibit 11-201.
- 277 Exhibit 3483.
- 278 Hamilton testimony, July 9, 2013, pp. 15226–7.
- 279 Exhibit 11-201.
- 280 Hamilton testimony, July 9, 2013, pp. 15227–35.
- 281 Bauthus testimony, May 21, 2013, pp. 10490–3.
- 282 Collett testimony, May 23, 2013, pp. 11193–7; Exhibit 11-201.
- 283 Exhibits 3484, 11-206.
- 284 Bauthus testimony, May 21, 2013, pp. 10495–6; Exhibit 3484.
- 285 Hamilton testimony, July 9, 2013, pp. 15235–9.
- 286 Exhibit 11-206.
- 287 Hamilton testimony, July 9, 2013, pp. 15235–40.
- 288 Exhibit 11-38.
- 289 Exhibit 11-204.
- 290 Bauthus testimony, May 21, 2013, p. 10503.
- 291 Collett testimony, May 23, 2013, pp. 11197–8.
- 292 Bauthus testimony, May 21, 2013, p. 10499.
- 293 Collett testimony, May 23, 2013, pp. 11198–200.
- 294 Hamilton testimony, July 9, 2013, pp. 15240–2.
- 295 Hamilton testimony, July 9, 2013, pp. 15242–3; Bauthus testimony, May 21, 2013, p. 10502.
- 296 Hamilton testimony, July 9, 2013, pp. 15246–8; Exhibit 11-208.
- 297 Exhibit 11-207.
- 298 Hamilton testimony, July 9, 2013, pp. 15243–6.
- 299 Exhibit 11-209.
- 300 Bauthus testimony, May 21, 2013, pp. 10505–6.
- 301 Collett testimony, May 23, 2013, p. 11200.
- 302 Bauthus testimony, May 21, 2013, pp. 10506–10.
- 303 Exhibit 11-209.
- 304 Exhibit 11-209.
- 305 Collett testimony, May 23, 2013, pp. 11200–4; Hamilton testimony, July 9, 2013, pp. 15248–51.
- 306 Bauthus testimony, May 21, 2013, p. 10516; Exhibit 3490.
- 307 Bauthus testimony, May 21, 2013, pp. 10516–17.
- 308 Collett testimony, May 23, 2013, p. 11204.
- 309 Hamilton testimony, July 9, 2013, pp. 15248–54.
- 310 Exhibit 11-209.
- 311 Bauthus testimony, May 21, 2013, pp. 10514–15.
- 312 Hamilton testimony, July 9, 2013, pp. 15258–63; Exhibit 3751.
- 313 Hamilton testimony, July 9, 2013, pp. 15258–63; Exhibit 3751.
- 314 Bauthus testimony, May 21, 2013, pp. 10515–16.
- 315 Exhibit 11-210.
- 316 Bauthus testimony, May 21, 2013, pp. 10517–20.
- 317 Exhibit 3508, p. 137.
- 318 Collett testimony, May 23, 2013, p. 11205; Bauthus testimony, May 21, 2013, p. 10521.
- 319 Exhibit 13-155.
- 320 Exhibit 13-32 or 5838.
- 321 Exhibit 13-118, p. 005.
- 322 Exhibit 13-160.
- 323 Exhibit 13-162.
- 324 Fabris testimony, July 11, 2013, pp. 15763–4.
- 325 Exhibit 12-53.
- 326 Exhibit 13-177.
- 327 McCulloch testimony, June 13, 2013, pp. 14464–5; Exhibit 13-33.
- 328 McCulloch testimony, June 13, 2013, p. 14465; Exhibit 13-35.
- 329 Exhibit 13-165.

- ³³⁰ McCulloch testimony, June 13, 2013, pp. 14465–6.
- ³³¹ Bob Nazarian testimony, July 25, 2013, pp. 18257–8; Exhibit 5445 (see also Exhibit 5447, p. 2449).
- ³³² Bob Nazarian testimony, July 25, 2013, pp. 18258–63; Exhibit 5447.
- ³³³ Bob Nazarian testimony, July 25, 2013, pp. 18258–63; Exhibit 5447.
- ³³⁴ Bob Nazarian testimony, July 25, 2013, pp. 18258–63; Exhibit 5447.
- ³³⁵ Exhibit 5451.
- ³³⁶ Bob Nazarian testimony, July 25, 2013, pp. 18263–5; Levon Nazarian testimony, July 15, 2013, pp. 16357–60.
- ³³⁷ Levon Nazarian testimony, July 16, 2013, pp. 16508–17; Exhibit 1085.
- ³³⁸ Exhibit 3751.
- ³³⁹ Collett testimony, May 23, 2013, pp. 11205–6.
- ³⁴⁰ Bauthus testimony, May 21, 2013, p. 10522.
- ³⁴¹ Hamilton testimony, July 9, 2013, pp. 15258–9.
- ³⁴² Exhibit 3494; Bauthus testimony, May 21, 2013, pp. 10522–4.
- ³⁴³ Bauthus testimony, May 21, 2013, pp. 10524–5.
- ³⁴⁴ Hamilton testimony, July 9, 2013, pp. 15263–6.
- ³⁴⁵ Exhibit 3497.
- ³⁴⁶ Bauthus testimony, May 21, 2013, pp. 10526–7.
- ³⁴⁷ Exhibit 11-41.
- ³⁴⁸ Hamilton testimony, July 9, 2013, pp. 15268–71.
- ³⁴⁹ Bauthus testimony, May 21, 2013, p. 10529.
- ³⁵⁰ Bauthus testimony, May 21, 2013, pp. 10530–1.
- ³⁵¹ Exhibit 11-41.
- ³⁵² Bauthus testimony, May 21, 2013, pp. 10534–5.
- ³⁵³ Hamilton testimony, July 9, 2013, pp. 15268–75.
- ³⁵⁴ Bauthus testimony, May 21, 2013, pp. 10534–5.
- ³⁵⁵ Exhibit 11-41.
- ³⁵⁶ Collett testimony, May 23, 2013, pp. 11208–12.
- ³⁵⁷ Exhibit 302.
- ³⁵⁸ Exhibit 302.
- ³⁵⁹ Officer testimony, April 22, 2013, pp. 6133–6.
- ³⁶⁰ Ewald testimony, May 24, 2013, p. 11540.
- ³⁶¹ Ewald testimony, May 24, 2013, pp. 11541–2; Exhibit 3750.
- ³⁶² Ewald testimony, May 24, 2013, pp. 11542–3.
- ³⁶³ Ewald testimony, May 24, 2013, p. 11451.
- ³⁶⁴ Ewald testimony, May 24, 2012, pp. 11452–3.
- ³⁶⁵ Ewald testimony, May 24, 2013, pp. 11454–5; Exhibit 11-24.
- ³⁶⁶ Bauthus testimony, May 21, 2013, p. 10539.
- ³⁶⁷ Cuthbertson testimony, May 1, 2013, p. 7881.
- ³⁶⁸ Bauthus testimony, May 21, 2013, pp. 10539–40; Exhibit 3503.
- ³⁶⁹ Bauthus testimony, May 21, 2013, pp. 10539–42.
- ³⁷⁰ Exhibit 11-217.
- ³⁷¹ Exhibit 11-217.
- ³⁷² Collett testimony, May 23, 2013, pp. 11214–21; Exhibit 11-217.
- ³⁷³ Exhibit 11-218.
- ³⁷⁴ Bauthus testimony, May 21, 2013, p. 10566.
- ³⁷⁵ Bauthus testimony, May 21, 2013, pp. 10566–7.
- ³⁷⁶ Exhibit 11-218.
- ³⁷⁷ Exhibit 4366.
- ³⁷⁸ Exhibit 11-42.
- ³⁷⁹ Exhibit 11-42.
- ³⁸⁰ Bauthus testimony, May 21, 2013, p. 10573.
- ³⁸¹ Exhibit 11-42.
- ³⁸² Bauthus testimony, May 21, 2013, pp. 10578–9.
- ³⁸³ Collett testimony, May 23, 2013, pp. 11231–5.
- ³⁸⁴ Collett testimony, May 23, 2013, pp. 11235–8.
- ³⁸⁵ Bauthus testimony, May 21, 2013, pp. 10569–70.
- ³⁸⁶ Exhibit 4366, p. 105.
- ³⁸⁷ Exhibit 4366, p. 104.
- ³⁸⁸ Exhibit 4366, p. 104.
- ³⁸⁹ Exhibit 4366, pp. 103–4.
- ³⁹⁰ Exhibit 4366.
- ³⁹¹ Exhibit 4366.
- ³⁹² Exhibit 3519.
- ³⁹³ Bauthus testimony, May 21, 2013, pp. 10593–4.
- ³⁹⁴ Exhibit 3507.
- ³⁹⁵ Ewald testimony, May 24, 2013, p. 11544.
- ³⁹⁶ Ewald testimony, May 24, 2013, pp. 11545–6.
- ³⁹⁷ Ewald testimony, May 24, 2013, p. 11554.
- ³⁹⁸ Ewald testimony, May 24, 2013, pp. 11556–9.
- ³⁹⁹ Ewald testimony, May 24, 2013, pp. 11556–9.
- ⁴⁰⁰ Ewald testimony, May 24, 2013, pp. 11537, 11555–62.
- ⁴⁰¹ Bauthus testimony, May 21, 2013, p. 10545.
- ⁴⁰² Bauthus testimony, May 21, 2013, pp. 10545–6.
- ⁴⁰³ Hamilton testimony, July 9, 2013, p. 15281–3; Ewald testimony, May 24, 2013, p. 11564.
- ⁴⁰⁴ Hamilton testimony, July 9, 2013, pp. 15291–2.
- ⁴⁰⁵ Exhibit 3515.
- ⁴⁰⁶ Bauthus testimony, May 21, 2013, pp. 10547–9; Hamilton testimony, July 9, 2013, p. 15288.
- ⁴⁰⁷ Ewald testimony, May 24, 2013, p. 11566.
- ⁴⁰⁸ Bauthus testimony, May 21, 2013, pp. 10551–2; Ewald testimony, May 24, 2013, pp. 11570–2.
- ⁴⁰⁹ Ewald testimony, May 24, 2013, p. 11569.
- ⁴¹⁰ Ewald testimony, May 24, 2013, p. 11567.
- ⁴¹¹ Ewald testimony, May 24, 2013, pp. 11568–9; see *Building Code Act, 1992*, SO 1992 c 23 as amended by SO 2002, c 9, ss 26, 15.9, 15.10.
- ⁴¹² Bauthus testimony, May 21, 2013, pp. 10549–50.
- ⁴¹³ Hamilton testimony, July 9, 2013, pp. 15281–8.
- ⁴¹⁴ Hamilton testimony, July 9, 2013, pp. 15281–8.
- ⁴¹⁵ Caughill testimony, May 10, 2013, pp. 9256–7; Exhibit 4112.
- ⁴¹⁶ Caughill testimony, May 10, 2013, p. 9265.
- ⁴¹⁷ Ewald testimony, May 27, 2013, pp. 11580–1.
- ⁴¹⁸ Ewald testimony, May 27, 2013, p. 11581.
- ⁴¹⁹ Exhibit 4112.
- ⁴²⁰ Caughill testimony, May 10, 2013, p. 9260; Exhibit 4112.
- ⁴²¹ Caughill testimony, May 10, 2013, pp. 9257–8.
- ⁴²² Exhibit 4111.
- ⁴²³ Ewald testimony, May 27, 2013, p. 11582.
- ⁴²⁴ Ewald testimony, May 27, 2013, pp. 11582–4.
- ⁴²⁵ Officer testimony, April 22, 2013, pp. 6136–8.
- ⁴²⁶ Exhibit 171.
- ⁴²⁷ Exhibit 171.
- ⁴²⁸ Officer testimony, April 22, 2013, pp. 6143–4.
- ⁴²⁹ Ewald testimony, May 27, 2013, p. 11586.
- ⁴³⁰ Ewald testimony, May 27, 2013, pp. 11650–3.
- ⁴³¹ Ewald testimony, May 27, pp. 11803–5; Exhibit 3459; see also Clouthier testimony, April 23, 2013, pp. 6468–9.
- ⁴³² Ewald testimony, May 27, 2013, p. 11592.
- ⁴³³ Ewald testimony, May 27, 2013, p. 11593.
- ⁴³⁴ Ewald testimony, May 27, 2013, pp. 11592–4.
- ⁴³⁵ Exhibit 170, p. 72; see also Exhibits 1648, 1649, 1650.
- ⁴³⁶ Exhibit 170, p. 74.
- ⁴³⁷ Ewald testimony, May 27, 2013, pp. 11587–8.

- 438 Ewald testimony, May 27, 2013, pp. 11589–90.
 439 See also Exhibit 4376.
 440 Ewald testimony, May 27, 2013, pp. 11591–2.
 441 See also Exhibits 4379, 4380.
 442 Ewald testimony, May 27, 2013, pp. 11595–6.
 443 See also Exhibit 4382.
 444 Ewald testimony, May 27, 2013, pp. 11596–8.
 445 Ewald testimony, May 27, 2013, p. 11598.
 446 Ewald testimony, May 27, 2013, pp. 11599–02.
 447 Ewald testimony, May 27, 2013, pp. 11606–7; Exhibits 4391 to 4393.
 448 Ewald testimony, May 27, 2013, p. 11607; Exhibit 170, p. 74.
 449 Ewald testimony, May 27, 2013, p. 11608.
 450 Ewald testimony, May 27, 2013, pp. 11607–9.
 451 Ewald testimony, May 27, 2013, p. 11609; Exhibit 1650.
 452 Ewald testimony, May 27, 2013, pp. 11609–10, 11612, 11553.
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 454 Bauthus testimony, May 21, 2013, p. 10558.
 455 Bauthus testimony, May 21, 2013, pp. 10559–60.
 456 Bauthus testimony, May 21, 2013, pp. 10560–1.
 457 Hamilton testimony, July 9, 2013, p. 15294.
 458 Hamilton testimony, July 9, 2013, p. 15296.
 459 Hamilton testimony, July 9, 2013, pp. 15292–9.
 460 Exhibit 102, p. 004 (same as Exhibit 170).
 461 Ewald testimony, May 27, 2013, p. 11621.
 462 Ewald testimony, May 27, 2013, pp. 11623–4.
 463 Ewald testimony, May 27, 2013, p. 11624.
 464 Ewald testimony, May 27, 2013, pp. 11625–6.
 465 Ewald testimony, May 27, 2013, p. 11626.
 466 Ewald testimony, May 27, 2013, pp. 11626–7.
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 468 Ewald testimony, May 28, 2013, pp. 11936–8.
 469 Ewald testimony, May 27, 2013, pp. 11619–20; Exhibit 3511.
 470 Bauthus testimony, May 21, 2013, pp. 10564–5.
 471 Ewald testimony, May 27, 2013, p. 11627.
 472 Exhibit 3516.
 473 Bauthus testimony, May 21, 2013, pp. 10563–4.
 474 Bauthus testimony, May 21, 2013, pp. 10563–5; Ewald testimony, May 27, 2013, p. 11629.
 475 Ewald testimony, May 27, 2013, pp. 11629–30.
 476 Bob Nazarian testimony, July 29, 2013, pp. 18602–3; Exhibit 3516.
 477 Officer testimony, April 22, 2013, pp. 6151–2.
 478 Bauthus testimony, May 21, 2013, pp. 10589–93.
 479 Hamilton testimony, July 9, 2013, p. 15297.
 480 Bauthus testimony, May 21, 2013, pp. 10589–91.
 481 Bauthus testimony, May 21, 2013, p. 10589.
 482 Ewald testimony, May 27, 2013, pp. 11629–30.
 483 Bob Nazarian testimony, July 25, 2013, pp. 18273–9.
 484 Levon Nazarian testimony, July 15, 2013, pp. 16377–9.
 485 Bob Nazarian testimony, July 25, 2013, p. 18279.
 486 Bob Nazarian testimony, July 25, 2013, pp. 18279–80.
 487 Bob Nazarian testimony, July 25, 2013, pp. 18280–2.
 488 Bob Nazarian testimony, July 25, 2013, p. 18282.
 489 Bob Nazarian testimony, July 29, 2013, pp. 18603–6; Exhibit 1324.
 490 Exhibit 828.
 491 Wood testimony, June 6, 2013, pp. 13291–2; Exhibit 102, p. 003.
 492 Fabris testimony, July 11, 2013, p. 15785.
 493 Fabris testimony, July 11, 2013, pp. 15785–6.
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 495 Wood testimony, June 6, 2013, p. 13297; Exhibit 102, pp. 004–006.
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 497 Exhibit 1324.
 498 Fabris testimony, July 11, 2013, p. 15784.
 499 Exhibit 4483.
 500 Bob Nazarian testimony, July 25, 2013, pp. 18283–5; Exhibit 828.
 501 Bob Nazarian testimony, July 30, 2013, pp. 19037–8, 45, 48–49; July 31, 2013, pp. 19212–13, 19217; Exhibits 175, 1259, 4314.
 502 Bob Nazarian testimony, July 31, 2013, p. 19224.
 503 Wood testimony, June 6, 2013, p. 13288.
 504 Wood testimony, June 6, 2013, pp. 13288–9.
 505 Saunders testimony, June 6, 2013, p. 13133; Exhibit 102, pp. 004–006.
 506 Saunders testimony, June 6, 2013, pp. 13134–6.
 507 Saunders testimony, June 6, 2013, pp. 13137–9; Exhibit 102, pp. 004–006.
 508 Saunders testimony, June 6, 2013, pp. 13139–40.
 509 Saunders testimony, June 6, 2013, p. 13142.
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 511 Wood testimony, June 6, 2013, pp. 13246–7.
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 514 Wood testimony, June 6, 2013, pp. 13249–50.
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 516 Wood testimony, June 6, 2013, p. 13250; June 7, 2013, p. 13465.
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 528 Wood testimony, June 6, 2013, pp. 13301–2.
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- 547 Wood testimony, June 7, 2013, p. 13343.
- 548 Wood testimony, June 7, 2013, p. 13344.
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- 551 Wood testimony, June 7, 2013, pp. 13351–2.
- 552 NORR testimony, May 29, 2013, pp. 12226–7, 12229–30.
- 553 Wood testimony, June 7, 2013, pp. 13344–5; Exhibit 1876, p. 041.
- 554 Wood testimony, June 7, 2013, pp. 13346–7.
- 555 Wood testimony, June 6, 2013, pp. 13313–14; Exhibit 102, p. 017.
- 556 Wood testimony, June 6, 2013, pp. 13313–14; Exhibit 102, p. 017.
- 557 Wood testimony, June 7, 2013, pp. 13352–3; Exhibit 102, p. 017.
- 558 Wood testimony, June 7, 2013, pp. 13353–4, 13486–7.
- 559 Wood testimony, June 6, 2013, p. 13290; Exhibit 103 (see also Exhibit 102, p. 011).
- 560 Wood testimony, June 7, 2013, p. 13486; Exhibit 103.
- 561 Wood testimony, June 6, 2013, p. 13290; Exhibit 103 (see also Exhibit 102, p. 011).
- 562 Wood testimony, June 6, 2013, pp. 13323–4; Exhibit 102, p. 011.
- 563 Wood testimony, June 6, 2013, pp. 13324–7.
- 564 Exhibit 103.
- 565 Exhibit 103.
- 566 Wood testimony, June 7, 2013, pp. 13445–7; Exhibit 102, pp. 011, 017, 033.
- 567 Wood testimony, June 6, 2013, pp. 13318–19.
- 568 Wood testimony, June 6, 2013, pp. 13319–20.
- 569 Wood testimony, June 6, 2013, p. 13320; Exhibit 102, p. 017.
- 570 Wood testimony, June 6, 2013, pp. 13320–1.
- 571 Wood testimony, June 7, 2013, p. 13488.
- 572 Bob Nazarian testimony, July 25, 2013, pp. 18292–300; Exhibit 103.
- 573 Levon Nazarian testimony, July 15, 2013, pp. 16374–7; Exhibit 103.
- 574 Fabris testimony, July 11, 2013, pp. 15787–8.
- 575 Fabris testimony, July 12, 2013, pp. 15871–2.
- 576 Exhibit 1446.
- 577 Exhibit 1446.
- 578 Yakimov testimony, May 15, 2013, pp. 9982–84, 10006, 10015–16.
- 579 Yakimov testimony, May 15, 2013, pp. 9916–18.
- 580 Officer testimony, April 22, 2013, pp. 6156–60; April 23, 2013, pp. 6280–2.
- 581 Ewald testimony, May 27, 2013, pp. 11677–8.
- 582 Ewald testimony, May 27, 2013, pp. 11678–9.
- 583 Ewald testimony, May 27, 2013, p. 11681.
- 584 Ewald testimony, May 27, 2013, p. 11680.
- 585 Ewald testimony, May 27, 2013, pp. 11681–2.
- 586 Ewald testimony, May 27, 2013, pp. 11682–3.
- 587 Hamilton testimony, July 9, 2013, pp. 15299–303.
- 588 Exhibit 1443.
- 589 Bauthus testimony, May 21, 2013, p. 10610.
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- ⁶⁶⁰ Bob Nazarian testimony, July 25, 2013, pp. 18302–5.
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- ⁶⁶² Bob Nazarian testimony, July 25, 2013, pp. 18300–1; Levon Nazarian testimony, July 15, 2013, pp. 16384–8; Exhibit 5464.
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- ⁶⁶⁷ Exhibit 1034.
- ⁶⁶⁸ Sprague testimony, July 12, 2013, pp. 16088–89, 91.
- ⁶⁶⁹ Sprague testimony, July 12, 2013, p. 16095.
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