

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

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

AND IN THE MATTER OF The Corporation of the City of Elliot Lake

**PHASE I WRITTEN SUBMISSIONS OF THE
CORPORATION OF THE CITY OF ELLIOT LAKE**

Dated: August 8, 2013

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PHASE I WRITTEN SUBMISSIONS OF THE CORPORATION OF THE CITY OF ELLIOT LAKE

INTRODUCTION

OVERVIEW

1. The City of Elliot Lake (“the City”) acted reasonably and appropriately, having regard to all of the relevant circumstances, in its response to the situation involving the Algo Mall (the “Algo Mall”).
2. The information disclosed to the City by the Algo Mall owner as well as members of its staff was fraught with error and dishonesty. The evidence heard by the Commission during this inquiry point to intentional efforts at deception and obfuscation by the Algo Mall owners to the detriment of the Elliot Lake Community and to those injured and deceased as a result of the roof collapse.
3. Moreover, even information reasonably relied on by the City from professional third party engineers, suggested that the structural integrity of the Algo Mall roof was never at risk.
4. For essentially the entire history of the Algo Mall, the true state of the structure of the Algo Mall was neither known nor appreciated by the City and, in the circumstances, could not have been known or appreciated.

RELEVANT HISTORICAL FACTS

5. In 1990, around the time that the library became a tenant in the Algo Mall, the uranium mines in the Elliot Lake area had closed. The City was engaged in a massive structural shift from a mining town to a community where tourism and retirement living was its main industry. As noted by Mr. George Farkouh (“Mr. Farkouh”), the City’s mayor for 18 years from 1988 to 2006, it was a “monumental task to be able to deal with the loss of an entire industry and which, all in, was about 9,000 jobs. To put that in perspective, in Ottawa that would be 300,000 jobs that would be lost.”

George Farkouh
May 7, 2013
Page 8402, Line 14

6. This transformation, and the resulting adjustments in terms of industry and job loss that were required of this community, form an important backdrop to this analysis of the City’s role in the Algo Mall collapse. The Overview Report - History of Elliot Lake **Exhibit “7”** underscores key factors in the challenges faced by the community and its municipal government in its efforts to ensure the survival of the “Jewel in the Wilderness.”

LITTLE WAS KNOWN REGARDING THE ALGO MALL’S STRUCTURE

7. Initially, the City appreciated that the roof leaks were a maintenance issue, which was a reasonable perspective, particularly during the early days in the Algo Mall's history and up to the inspection by the City's Buildings Department in 2006. Up to 2006, the City approached the issue of the roof leaks on four occasions as being a maintenance issue.

8. As noted by Dr. Saffarini during his testimony before the Commission on May 29, 2013,

A. So, if you're kind of insinuating that it is obvious that anybody who would know that the building, is -- a layman who would know that the building is leaking, that they would intuitively know that this would result in structural safety, I would say that that is not something that I would consider to be a layman's knowledge.

Q. That's your opinion of what a layman knows; right?

A. My opinion is that even some of the professional engineers had missed the severity and the seriousness, so I would safely say that a layman would be oblivious to this.

Dr. Saffarini

May 29, 2013

Page 12358, Line 21

9. After 2006, the City did have concerns that the leaking roof may result in a growing structural issue; however, a structural engineering report confirmed that the Algo Mall's structure was sound. The 2009 report of MR Wright stated that the building had no visual structural concerns and that the [roof] slabs had significant additional load carrying capacity (**Exhibit 103, Page 3, Paragraph 2**). MR Wright's opinion relating to the structural soundness of the roof was communicated to the City after Mr. Ewald's inquiries in and around late April 2012 (**Exhibit 139, Page 1**) as well as to the Algo Mall's owner. The MR Wright report stated that "we would consider the members still structurally sound" and it is "our opinion that the observed rusting at this time has not detrimentally changed the load carrying capacities of the structure, and no visual signs of structural distress were observed."

10. It is the City's position that its reliance on the opinions of MR Wright engineers was entirely reasonable.

11. The City was not provided with detailed information regarding the roof structure, but rather was given plans and documents approved by an engineer and an architect which purported to confirm that the Algo Mall structure was appropriate. All technical witnesses asserted that the design was compliant with the applicable regulations and codes. As such, it is the City's submission that it lacked jurisdiction to require the Algo Mall owners to utilize alternate repair techniques or materials than those proposed by the owner or to withhold building permits.

John Kadlec

March 6, 2013

Page 343, Line 25

12. Not a single engineering firm reported its findings to the City. For almost two decades, the true state of the building condition was concealed by the owners, including Mr. Bob Nazarian, who, in partnership with Mr. Alexandre Sennett, perpetrated a fraud in order to misrepresent the activity being done to repair the roof.

**Commissioner Belanger's questions to Mr. Alexander Sennett
May 14, 2013
Page 9715, Line 17**

13. The only other engineering report ever received by the City was the Halsall report, which was more than 8 years old when it was sent to the City in and around February 2007.

**Syl Allard
April 29, 2013
Page 7040, Line 5**

THE CONCEPT OF COMPLAINTS

MUNICIPAL DISCRETION IN ENFORCING ITS OWN BY-LAWS

1. The Ontario Court of Appeal in *City of Toronto v. Polai* [1970] 1 O.R. 483, affirmed [1973] S.C.R. 38 ("*Polai*") ruled that a municipality's discretion in its administration of its by-laws is not reviewable by the courts. The Court of Appeal further found that there is no legal duty on a municipality to enforce its by-laws. *Polai* was followed and cited with approval by Justice Gray in 2011 in the Superior Court decision in *Peel Condominium Corp. No. 108 v. Young* [2011], O.J. No. 1203 at paragraphs 22 to 26. Gray J. found that the facts at bar were analogous to a municipality selectively enforcing its by-laws. *Polai*, and the notion that a municipality possesses the discretion to enforce its own by-laws, was also cited with approval in *Sapone v. Clarington (Municipality)* [2001], O.J. No. 4991, affirmed [2003], O.J. No. 1531 (Ont. C.A.) by Justice Lane. Lane J. extrapolates from the Court's decision in *Polai* that if a municipality has no legal duty to enforce a by-law, there is likewise no legal duty to respond by investigating complaints (para. 14).

THE PROPERTY STANDARDS BY-LAW (EX. 6-7)

2. The Commission heard evidence pertaining to the City's Property Standards By-law and the method it utilizes to enforce its by-law.

Q. Some municipalities only deal with exterior of the building and not the interior of the building. What do you mean by that?

A. The City of Markham has a Property Standards by-law that only deals with the exterior of buildings and not the interior of buildings. So if you have say a tenant in Markham who has an issue with the interior of the rental unit they actually call the province, who sends a Housing Standards Officer to do the interior inspection. And if

he comes across anything on the outside that is a violation he will refer it back to the municipality.

Warrick Perrin

April 2, 2013

Page 3736, Line 11

3. The City must ensure that the orders are reasonably capable of being upheld should a prosecution become necessary. For example, where a councilor has directed a city staff member to commence an investigation, the resulting order may be met with an allegation that city officials acted inappropriately.

4. If the City must pursue charges in Provincial Offences Court pursuant to Section 36(1)(b) of the *Building Code Act* to prosecute a property owner for failing to abide by a City issued order, the property owner would have an inherent due diligence defence based upon the landmark Supreme Court decision of *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 which applies to strict liability offences, including violations of the Building Code Act (**Oshawa (City) v. Carter**, [2009] O.J. No. 4078). In the situation of the Algo Mall, a due diligence defence would have likely succeeded for all historical owners of the Algo Mall based upon their extensive maintenance efforts in controlling the leaks. In the specific case of Mr. Nazarian, his fraudulent invoices which were created along side of Mr. Sennet, those invoices may well have been a sufficient basis for establishing due diligence (**Exhibit 3773**).

COMPLAINT-BASED APPROACH & REDUCING COMPLAINTS TO WRITING

5. As noted by Mr. Warrick Perrin, there is nothing unusual about a complaint driven property standards by-law. He further noted that it is more than reasonable for the City to require complaints to be reduced to writing with a complainant's name linked to the complaint.

Q. And so I come back to my original question, why would you throw these obstacles up to a potential complainant?

A. I don't see it as an obstacle. Particularly given the fact that you know, if they came to me I would actually craft the letter of complaint for them. They just have to sign it.

Larry Burling

April 2, 2013

Page 3812, Line 17

Q. Okay. So the - it - I think you'll agree that one of its purposes is to ensure that buildings were safe for their intended use?

A. Well not in a pro-active sense, but generally, yes, I would agree with that statement."

Larry Burling

April 2, 2013

Page 3793, Line 11

A. The policy then it was complaint-driven.

Q. Which means what?

A. We had to receive a complaint and they wanted it in writing.

Q. If they came in to City Hall and wanted to make a complaint but didn't have it written out would you assist them in that process?

A. Yes.

Q. And what if anything information would you give to the person who's making a complaint? Would you give them any explanation as far as the process is concerned?

A. Absolutely.

Paul Officer
April 22, 2013
Page 6040, Line 5

Q. So would it be fair to summarize the situation, that in order for you to conduct an inspection, you required a written complaint, except if you or a member of your staff observed a dangerous situation; is that an accurate assessment of the – how you perceived the powers then?

A. It would appear that that would be proper.

Roger Pigeau
March 22, 2013
Page 2552, Line 5

Q. And what do you mean -- what did you understand to be meant by "a complaint duly filed"?

A. My understanding of it at the time, it was -- it had to be in writing, and it had to be of significant nature that the Building Department could follow up on it and have the legal basis to effect enforcement.

George Farkouh
May 2, 2013
Page 7945, Line 22

Q. And can you tell me, sir, had – in your experience had you come across complaint driven enforcement policies in municipalities for Property Standards By-laws?

A. That's very typical.

Tom Derreck
May 13, 2013
Page 9355, Line 10

Q. So an official complaint, you would agree that your testimony yesterday said an official complaint requires a name, is that fair to say, is consistent with your evidence yesterday?

A. Well, it requires a name under our procedure -- or under our by-laws, yes.

Al Collett
May 23, 2013
Page 11373, Line 7

6. By requiring that a complaint be linked to a specific complainant and be reduced to writing, the City ensures that it will not proceed with orders without supporting witnesses and documents. Actions by a municipality can be quashed for failing to follow its protocols and procedures as noted in the case of *Kim v. Mississauga (City)*, [1996] O.J. No. 2534.

7. It must be noted that the enforcement of the Property Standards by-law on a proactive basis would be untenable from a resources perspective as well as create disputes arising from allegations of bias.

8. Thus, for the City's Property Standards By-law to require a complaint is reasonable as well as the requirement that the complaint be in writing.

NO OTHER TENANTS EVER COMPLAINED TO THE CITY

Q. Okay. Did it ever occur to you, Ms. Cloughley, when you would go and see, you know, the leaks at Zellers or the library or the kiosk area, did it ever occur to you to complain to a City official?

A. No. In hindsight I wish maybe I had.

Barbara Cloughley

March 27, 2013

Page 3201, Line 19

A. And when I look at an organization like the Scotiabank or Zellers, who I also understand had some leaking issues, those are large corporations with significant experience in commercial leasing and legal departments of their own and it appears that never once did they send a letter to the building department. So I don't think it's necessarily unreasonable that I wasn't aware that leaky roof was a violation of the Property Standards By-law. And as I indicated earlier, there are some municipalities that don't have that provision in their Property Standards By-law.

Troy Speck

April 25, 2013

Page 6886, Line 2

Q. Okay, and you mentioned to Ms. Effendi that you had never contacted City Hall about the leaks?

A. That would not be my responsibility. I was the personnel manager, not the general manager.

Brian Cuthbertson

May 1, 2013

Page 7787, Line 10

Q. And I gather, Mr. Cuthbertson, that this is one of those property damage reports that would you has filed with head office?

A. Yes, after some water had damaged some merchandise.

Brian Cuthbertson
May 1, 2013
Page 7788, Line 10

Q. Did it ever occur to you to contact a City of Elliot Lake official, like the Building Department, to report to them the concerns you were having?

A. Well, being in Elliot Lake almost a year, and it being a small community, I think the City was well aware of what was going on within the Algo Mall, especially when I've had City officials in the store talking to me about buckets and how much rain had come through into the store.

Brian Cuthbertson
May 1, 2013
Page 7808, Line 17

Q. Did Zellers ever do or consider doing their own structural assessment of the roof?

A. Talking within -- in talking with Rica Taylor they were considering, you know, what -- from their aspect, what could be done to get the roof situation resolved.

Brian Cuthbertson
May 1, 2013
Page 7810, Line 4

Q. In the store. Can you recall any specific comments made by City officials about the conditions of Zellers?

A. There was a few times where they would come in and we would be talking about how many leaks I'd had ongoing, you know, about the buckets on the floor, areas we had to close off to the customers.

Q. Do you remember which specific City officials you spoke to about the disrepair?

A. Yes, I do.

Q. Can you tell me their names?

A. The mayor. A. Al Collett. And Reinhardt before he -- when he was on Council.

Brian Cuthbertson
May 1, 2013
Page 7918, Line 13

9. Zellers was a major Canadian corporation with a large legal department, significant resources and an in depth knowledge of almost all municipalities in Canada. Despite these resources, Zellers did not pursue a complaint pursuant to the Property Standards By-law. The By-law is a public document and is substantially similar to other property standards by-laws found throughout the province. Zellers would have extensive knowledge of municipal law considering their presence in almost every city in Canada. See **Exhibits** 12-4 and 13-5.

10. The mayor was not asked about these complaints during his testimony and Mr. Collett's evidence is clearly biased against the City. Mr. Reinhardt was not called as a

witness. Thus, the only certainty is that one of Canada's largest retail corporations, with retail locations across the country, never complained in writing to the City, despite their extensive knowledge of leasing, property and dealings with municipalities throughout of all Canada. The testimony of Mr. Cuthbertson should be discounted for the mere fact that it dovetails too perfectly in hindsight with that of Mr. Collett's evidence.

11. Other tenants included such Canadian corporate luminaries as Scotiabank and Tim Horton's, all with major dealings across Canada and extensive legal resources to pursue the roof leak issue if they chose to. Despite this, not a single tenant except the library ever complained in writing to the City from 1980 to 2012.

12. That list also includes the Quintes, who did not complain to the City (or CBO) despite the fact that an alleged piece of cement fell in their restaurant.

13. A municipality must not be seen to act in a unilateral or biased manner. It also does not have limitless resources. It is for this reason that the City instituted a complaint-based policy for non-commercial properties and for commercial properties that do not have a vacancy rate of more than 50%. Similarly, a municipality must be seen to follow its own procedures and practices.

14. It is the City's submission that its policy was reasonable and that its actions were consistent with that policy. While many complaints were received by various individuals associated with the City, no complaints were received by the Buildings Department in a manner sufficiently in line with its policy so as to constitute a complaint.

15. It is the City's submission that it would be viewed as inappropriate for a city staff member to unilaterally forward a complaint to the Buildings Department. For example, the complainant may not intend to complain to the Buildings Department and initiate the kind of response that would be forthcoming from the inspectors. Such conduct would certainly increase tension and disputes among community members. It may also be viewed as inappropriately proactive, and therefore biased, for a city staff member to contact a complainant and recommend that they complain to the Buildings Department. Where a complaint has been sent to numerous individuals, both within the municipality and beyond, such as with the McTaggart emails, it may be a matter of "too many cooks in the kitchen" – every person believing that some other person will respond.

16. There is an onus on the complainant to make clear to the appropriate department that a complaint is being made and that action by that department is expected. It is not enough to circulate information to dozens of individuals and expect the City to act for the reasons cited above.

<p>RECOVERING MUNICIPAL EXPENSES TO REPAIR THE ROOF "IN THE SAME MANNER AS TAXES"</p>
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17. It was suggested as part of opening submissions that the membrane on the roof could have been Ordered or forced by the City.

18. It is technically accurate but practically problematic to raise this possibility. It is important to understand that recovery of the cost of the roof repair, if it had to be done by the City, would have been far from certain. The evidence establishes that the roof repair would likely exceed \$1.5 million. That amounted to in excess of 15% of the City's annual budget and would have been a crippling expense to the City in a time of enormous financial restraint. Further, if the City did in fact do the work, the recovery of the expense "in the same manner as taxes" as opposed to "as deemed taxes" would mean that the City would not be in the same priority position vis-à-vis other creditors as it would be for a true tax liability.

19. As the Commission has seen in the evidence, there were only a limited number of buyers for the Algo Mall. Although Commission Counsel did not want to get into the semantic difference in this matter, it was confirmed by Mr. Speck.

20. A further complication in this eventuality would have likely been litigation. It is reasonable to assume that the Algo Mall owner and particularly Mr. Nazarian would challenge the municipal action in Court or would challenge the expenses incurred. It is reasonable to assume therefore, a significant delay and significant legal expense in pursuing this option.

21. Accordingly it is the submission of the City that the ability to do the work and recover expenses in the same manner as taxes is far from the panacea argued by Commission Counsel.

Q. Yes, I appreciate that. But the by-law did give the city or the town as the case may be the power to ensure compliance, correct?

A. It gave them the power to pursue compliance.

Larry Burling
April 2, 2013
Page 3794, Line 9

Q. Now that would have been a significant expense, both in time and in effort, to do these - all of these joints?

A. Yes. I believe we were in the neighbourhood of \$190,000 that year.

Rodney Caughill
March 19, 2013
Page 190, Line 4

Q. And you will agree with me that the Property Standards by-law provides that if the City does go onto the property and repair it, or in the worst case demolish it, that the cost of repairing or demolishing can be collected in like manner as municipal taxes by the City?

A. Yes.

Q. And if the City was -- one of the remedies that the City has with respect to collecting debts owed to it as municipal taxes is the right to seize and sell the property to pay the unpaid taxes; correct?

A. There is a subtle difference, in terms of looking at it, and as much as the legislation says it can be collected as a like manner of taxes, there is a difference that comes up in the legislation that creates some barriers in that, in that it doesn't state that any such charges are deemed to be taxes and therefore subject to recoveries under the Act.

Q. Well, sir, the by-law which City Council had passed, provided that in the event the municipal corporation demolished or repaired, the corporation could recover the expenses it incurs in so doing by action or in like manner as taxes; that's what the by-law provided; correct?

A. Yeah, and that is pursuant to the wording in the legislation and the difficulty we have there is the City would have to expend those monies in order to achieve the objective, whether it's to demolish or to remedy the situation, but there is no guarantee that those monies can be recovered through property sale in the *Property Tax Sale Act* –

Q. Well, sir, they could have sued them. It says "by action."

A. Yes.

Q. And did you really have any doubt that the Algoma Central Property Corporation did not have the assets to pay what that would cost?

A. I can't speak to that, as to whether or not there would be a separate corporate entity set up that would maintain and operate the Elliot Lake operation as opposed to the total operation.

Fred Bauthus
March 26, 2013
Page 3162, Line 16

Q. What I was referring to is that there is a spectrum of actions that the City can take in terms of getting compliance, is there not?

A. Yeah. You can issue notices or you can issue Orders on -- for a Property Standards violation. And if you have to you issue the Order and the City can eventually move forward. You supply the people with their appeal process that they can appeal the orders, and once that's done you can move forward so you can actually go and do the work and recover costs through taxes.

Paul Officer
April 22, 2013
Page 6043, Line 15

Q. However the policy the City was trying was to use litigation as a last resort?

A. Absolutely.

Q. It's first of all from the City's point of view it's the most costly way of proceeding, correct?

A. That's correct. We try to get compliance using honey instead of vinegar. And, you know, 90 percent of the time or more we were successful doing that.

Paul Officer
April 22, 2013
Page 6044, Line 13

Q. And in its simplest form, without going through every section and subsection, in its simplest form, the property standards officer, following an inspection of the property, can order the property repaired or demolished as the case may be, and if the owner does not do that, the City can do the required work and sue the owner for the cost of doing that work; is that a fair statement, sir?

A. Yes, it is.

(...)

A. (...) this is where the subtle difference comes into play because if something is deemed as taxes, then you can collect them exactly as taxes.

Q. And as I said I'm not interested in that subtlety, but in the general proposition, are we in agreement?

A. Yeah.
Troy Speck
April 24, 2013
Page 6662, Line 2

Q. Sir, did you know that the City, under the authority of the Property Standards By-law had the ability to Issue an order to the property owner to fix his or her property to bring it into compliance with the by-law?

A. Yes.

Q. And did you know that if the property owner did not comply with that order, that the City could do the work itself?

A. Yes.

Q. And that if the City did the work itself, the cost of that work could be recovered from the property owner, either initially by bringing an action and later after the law was changed, by adding it to the tax bill?

George Farkouh
May 2, 2013
Page 7942, Line 22

Q. And you knew that the City would then be in a position to either close the building or do the repairs themselves?

A. Yes.
George Farkouh
May 7, 2013
Page 8345, Line 19

Q. And you knew that if they didn't fix the leaks, the City could fix them and get the money from the owner via the property tax system, right?

A. Yes, sir.
Fred Bauthus
May 21, 2013
Page 10592, Line 8

22. The Municipal Act says that the "costs are added to the tax roll in the same manner as property taxes," the case law clearly states that Building Code Act violations are strict liability offences and strict liability offences have an inherent due diligence defence.

23. Ultimately, for fairly basic fire violations, Mr. Officer notes that Mr. Nazarian's refusal to comply cost the municipality \$24,000 and a lot of time.

Paul Officer
April 22, 2013
Page 6197, Line 8

24. If Mr. Nazarian was willing to engage in a bitter prosecution for fire violation compliance and allegedly made the statement that he does not "fucking care about the fire code," then how strongly would Mr. Nazarian have argued the due diligence defence of ongoing maintenance when prosecuted by the City for failing to install a against a \$1.5 million dollar roof membrane?

Bob Nazarian
July 30, 2013
Page 19023, Line 11

25. Keep in mind that the City has had a very difficult financial existence since the community was devastated by the mine closures in the early 1990s. There is no corporate tax base and there are many retirees on fixed incomes.

26. As seen above, the concept of the membrane costs being treated in the “same manner as property taxes” was also highlighted by Mr. Speck, but Commission Counsel simply bullied Mr. Speck on this point and ignored his evidence. It is odd that Commission Counsel would simply ignore the key fact that forcing the installation of the membrane may not actually guarantee recovery of the costs in the same manner as taxes. Mr. Farkouh and Mr. Bauthus were also both asked about recovering the costs of the installation via taxes, but were not notified of the potential for the taxes to go unrecovered or for litigation to ensue.

27. The goal for the City is for the owner to comply and the goal for the City is not to issue orders unless absolutely necessary. As noted by Chief Officer, issuing orders involves potential litigation and potential costs. This is the reality of the law in the province and there is no guarantee in recovering the cost of the membrane via realty taxes.

28. Also, when considering the concept of forcing the installation of a membrane, one must consider the fashion in which the Nazarians conducted themselves as business people. Mr. Nazarian was defrauding the City regarding the amount he had spent on roof repairs (See **Exhibit 3773**) and on vacancy rebates as noted in the testimony of Ms. Laroue in the following testimony.

Q. So in other words, what you are telling me, if I understand you correctly, is that Mr. Nazarian would indicate to the City that a portion of the building was unused when in fact it was used; is that what you are saying?

A. Yeah, this says of the building. I believe for the Algo Mall it was done by units.

Henri Laroue

May 23, 2013

Page 11016, Line 16

29. Basically, Mr. Nazarian would have had the option of arguing to the justice of the peace that the due diligence defence was satisfied by the extensive costs incurred in maintaining the roof, whether based upon false invoices or not. The reality being that Mr. Nazarian was taking all reasonable steps to avoid the offending action.

30. Certainly, if charges would have been brought by the City against the original owner, the due diligence defence would have succeeded as the original owner spent \$190k in a single year to repair the leaking. **Exhibit 273**

31. It is not as simple as Commission Counsel makes it seem The City’s options were not simply choosing between “A” and “B.” There are numerous problematic third options which oddly enough were ignored by Commission Counsel. The owner could have sought a temporary or permanent injunction to keep the City from the forceful step of taking over a private landowner’s roof top parking lot to add a \$1.5 million membrane against his will. Similarly, the owner could have ignored the City issued order and forced

the City to proceed via Section 36(1)(b) of the Building Code Act to Provincial Offences Court where the due diligence defence is available to the owner.

THE DESIGN AND BUILD OF THE ALGO MALL WAS IMPROPER

32. It is clear from the reasoning of the Supreme Court of Canada in the case of *Ingles v. Tutkaluk Construction Ltd.* [2000], 1 S.C.R. 298 (S.C.C.) ("*Ingles*") that the duty of the municipality is to take whatever steps are appropriate to ensure that the premises that are under construction are going to be built in a manner that ensures the safety of future occupants. That obligation does not cast upon the municipality a duty to ensure that the building is completed exactly in accordance with the specifications set out for the developer by the owner.

33. In *Ingles*, the Court provides at para. 34 that:

The municipality will only be absolved completely of the liability which flows from an inspection which does not meet the standard of reasonable care when the conduct of the owner builder is such as to make it impossible for the inspector to do anything to avoid the damage. In such circumstances, for example, when an owner builder is determined to flout the building by-law, or is completely indifferent to the responsibilities that the by-law places on him or her, that owner builder cannot reasonably allege any damage suffered as a result of the failure of the building inspector to take reasonable care in conducting an inspection.

34. During the construction phase of the Mall in 1979, the City reasonably relied on the plans and drawings properly prepared and stamped by the architects and engineers involved in the design and construction. The City had no knowledge of, or basis to discover, the design defects of the Algo Mall . It cannot be stated that the City would have had or ought to have had concerns regarding the conformity of the Algo Mall design with applicable building codes or the safety of future occupants of the Algo Mall .

35. The City does not, nor is it permitted, to weigh in on the design of a building. Its role is clear: the City 'shall' issue the building permit where the design abides by the Building Code Act.

36. By stamping the certificate of substantial completion (**Exhibit 275**), the project engineer and architect provided, "This is to confirm that to the best of our knowledge, the Algo Centre Project at 151 Ontario Avenue has been substantially completed in accordance with our architectural and structural designs."

37. Despite information received from the project engineer and architects, it is now known that the design and build of the Algo Mall was improper.

Q. Well there must have been one big change to your drawings when they put the anchor bolts on the columns on the backside of the building.

A. Oh that one, yeah.

Q. Is that is a big change right?

A. Yes, I'm sorry.

Q. But you don't recall ever having to submit any changes [to the City]?

A. No (...) the Building was out of plumb - so to bring it back into plumb, it was bolted to the side of a mountain.

John Kadlec
March 6, 2013
Page 293, Line 12

Q. But did you warn Original owner? Did you warn anyone, the city or anyone that look, there's going to be some inherent problems there and the life expectancy of building is going to be shortened considerably?

A. No, no
John Kadlec
March 6, 2013
Page 305, Line 14

Q. And would you agree that pursuant to the Building Code the chief building official of the city has an obligation, in fact the Code says that they shall issue a permit except where the application is contrary to the Building Code?

A. Yes.

Q. Did you do anything to tell the city that you didn't like the design?

A. I had no dealings with the city at that time."

John Kadlec
March 6, 2013
Page 346, Line 23

Q. And the stamp on it is so that other people can look at this and rely on it that an engineer has reviewed everything that needs to be reviewed and that the structural design is in accordance with your plans?

A. To the best of your knowledge, yes.

John Kadlec
March 6, 2013
Page 348, Line 16

Q. And I am going to draw your attention to the person to whom it is addressed. Frank Hollick town of Elliot Lake Building Inspector. So to your knowledge this would have gone to the city?

A. Yes.

Dave Monroe
March 8, 2013
Page 822, Line 18

Q. Did you ever obtain an opinion about whether the leaks would structurally impact the building?

A. No, we did not obtain that opinion, but I think -- you know, we had concerns. That at some point in time that could be an issue. In a general way, I mean we always have that concern. And water intrusion in any structure can have that kind of effect at some point.

Q. And did you ever relay that concern to anybody at the city?

A. No

Dave Monroe
March 8, 2013
Page 826, Line 2

THE ARCHITECT AND THE ORIGINAL OWNER

38. The Commission heard evidence that the design of the Algo Mall roof was uncommon. However, the City did not have the expertise or the legal authority to identify an improper design or to specify a design change. To the extent that the design of the roof was improper, the City submits that it reasonably relied on the architect and engineer retained by the Algo Mall owner at the time.

Q. So the concept of a prime consultant is something that comes from this legislation being the Architect's Act or there is the same provision in the Professional Engineers Act?

A. Yes.

James Keywan
March 11, 2013
Page 1021, Line 15

Q. I don't know what a -- to me, a prime consultant in this case could be an -- would be an architect, the first guy that puts a picture on a paper.

Q. With special knowledge about construction techniques and the Building Code?

A. Sure.

James Keywan
March 11, 2013
Page 1023, Line 18

A. Well, he certainly controls it because he calls all the trades and he does the bidding and -- or for the bids on the trades, and he is the guy who pays. And that is usually the best control, the cheque at the end.

Q. It is certainly persuasive, isn't it?

A. Yes. That is our society and I love it. That is the way it should be.

James Keywan
March 11, 2013
Page 1026, Line 23

A. Well, I was the prime consultant in the sense that there is a design for a building this is the way it looks. And the discussion came up when the roof parking, that was an unusual -- an uncommon way to build a project, not very common. Otherwise, it would be done more often.

James Keywan
March 11, 2013
Page 1027, Line 10

Q. Okay. Was your role in this project ever reduced to writing? Do you know what I mean by that?

A. No, it wasn't.

James Keywan
March 11, 2013
Page 1030, Line 21

A. Well, it is not the process that we used in one sense. I only had the structural engineer. It says "your consultants." The others were not my consultants, although I knew some of them.

James Keywan
March 11, 2013
Page 1034, Line 10

Q. Fair enough. I'm just trying to understand the difference between this letter [**Exhibit 1978**] and what actually happened, and so I understand this letter appears to indicate that the other consultants, being mechanical, structural, electrical, would be reporting to you; do you agree that that's what the letter leads one to believe?

A. I think -- well, maybe that was the intention.

Q. Okay.

A. But they never did report to me.

Q. Right.

A. And I guess Mr. Hirt didn't find it necessary to report to me.

James Keywan
March 11, 2013
Page 1035, Line 25

Q. All right. Would you agree with me, Mr. Caughill that the roof at the Algo Centre Mall, never met either the Ontario Building Code or the municipal by-laws of the city of Elliot Lake because it was never in a water tight condition, which is what those laws require?

A. I would have to agree that it never met a water tight condition, yes.

Q. All right. And Algoma built that roof; correct?

A. That is correct.

Rodney Caughill
March 20, 2013
Page 2017, Line 25

A. Yes. They had indicated that they were continuing to do maintenance, localized maintenance.

Domenic Dell'Aquila
March 21, 2013
Page 2350, Line 5

BUILDING PERMITS

39. The Algo Mall owners ignored the City by-laws and rules relating to building permits, including the original owner when it ignored the City to obtain building permits to replace the roof expansion joints.

40. It is suggested that the original owners frequently sought to reduce or eliminate as much of the cost to erect the Algo Mall as possible and, furthermore, that the need for a building permit was ignore based on the fact that it likely would have required the disclosure of information and documentation relating to the roof structure.

41. The TROW engineering reports and later reports all noted that the roof was structurally at risk. **Exhibit 35, Page 13**, TROW Report #1 states that "it is our opinion that the design used for this roof slab is inappropriate in achieving a water-tight condition over commercial areas." The original owner was responsible for both the design and the contractors used in the construction of the Algo Mall .

42. Mr. Clouthier, issued an Order to Comply (**Exhibit 3997**) in November 2007 and thereafter, as the Acting CBO, issued an Order to Comply (**Exhibit 303**) in June 2008 based upon a failure by the Algo Mall owner to obtain the necessary building permits. Mr. Ewald had concerns that the roof repair work that was being conducted by the owner (**Exhibit 4995**) would add too much additional weigh to the roof. To assuage Mr. Ewald's concerns, the owner obtained a letter from MR Wright

reassuring the City that there were “no structural concerns over the additional loading of caulking or waterproofing.”

43. From this it can be seen that the City was (i) continually receiving indicia from the Algo Mall owners of its compliance and that, ostensibly, work was being done to the roof to repair it; (ii) the reality of the structure of the Algo Mall was consistently concealed from the City – either by the intentional acts of the Algo Mall owner and certain members of the Algo Mall staff or by the actions or inaction of the professional engineers engaged to confirm the safety of the structure.

Q. And Mr. Caughill, you didn't apply for a building permit on any of the work that I've talked to you about today, the expansion joints, the replacing of the bonded topcoat, and the cutting-in of the core slabs; did you?

A. No, sir, we didn't consider them a material change to the building or alteration.

Q. But you would agree that each one of those instances was affecting an engineered product, being the engineered discussion of the designation of the expansion joint, the engineered layer of the topcoat that affected the structural integrity of the topcoat and the slab, and the engineered aspect of the core slab itself?

A. Yes, it would have effects on them, yes.

Rodney Caughill

March 19, 2013

Page 1990, Line 2

Q. So, would it -- what is your opinion? Did you think that if they were going to replace an expansion joint, they required a building permit?

A. Yes.

Roger Pigeau

March 22, 2013

Page 2568, Line 10

Q. Do you recall, Mr. Clouthier, what this was about?

A. Yes. I was -- there was a call came in to our department stating that there was work going on top of the roof deck at the Algo Mall. And I went there because of the complaint or the information. And they were about to do what looked like a major job on the roof deck. There were some large compressors up there with hoses and jackhammers, and there was a crew up there with, you know, six, seven, eight guys and they were about to go about working on the roof. And I thought at that time since I was aware of it and responsible that I would -- I put a stop to it because it required a building permit.

Chris Clouthier

April 23, 2013

Page 6453, Line 6

44. As noted above, **Exhibit 7**, the Overview Report for the City, highlights many key facts which pertain to this analysis of the Algo Mall collapse.

BACKGROUND TO Retirement Living

45. As noted by Mr. Bauthus in his testimony before the Commission, after the mine closure, the financial state as well as the state of mind of the community was depressed. Against many odds, the community survived.

46. Well, with the mines closing, as I had indicated, that was a major crisis, given that that was the main source of employment. I'm not sure of the numbers, but 3,500 or 4,000 miners out of work, in terms of your direct labour, and the impact that would have on a local economy, especially a small, isolated community like Elliot Lake. And Elliot Lake had been -- had gone through a number of these ups and downs with -- as connected with the mining industry, as a lot of other resource-based communities. And during one of the -- the periods, they had constructed, the mining companies had constructed, a significant number of housing units in anticipation of ongoing contracts and mining continuing in the community. However, that didn't ensue, and as a result there were a number of housing units that were vacant, and some had never even been occupied. And it was the idea of one of the mining companies, Claire Dimock, VP of housing for Denison Mines.

THE COMMISSIONER:· Could you spell his (sic) name, sir, for the record?

THE WITNESS:· Claire -- it's Mrs. Dimock.· Claire, C-L-A-I-R-E, Dimock, D-I-M-O-C-K. And they were looking at ways they could utilize their housing without creating a burden on the community, given that jobs were at a -- were hard to find. And so they looked at the idea of advertising the housing at a very favourable rate for retirees, that they would be able to come to Elliot Lake in retirement, and their key cost, if you will, against their pension, being accommodation, would not be as significant as it might otherwise be in the larger communities. And to that end, a committee was set up comprising -- comprised of a representative from Rio Algo Mining, Denison Mining and the City, to do some marketing and work together on that. However, at that time, the housing still remained in the ownership of the mining companies. With the announcement that the mines were closing, one of the economic ideas to -- to look at was whether or not the Retirement Living program could be made into a viable and successful enterprise. And to that end, we engaged a consulting firm to look at all of the aspects of such a program, and develop a business plan and make recommendations if it were viable. Long story short, it was viable. As a result, the business plan was implemented.· The Elliot Lake Retirement Living Corporation, nonresident accommodation of Elliot Lake, was -- was formed as a not-for-profit, without shareholders, corporation, and was set up. The first general manager hired was Bill Morris, who had the responsibility to bring on board the staff and get things started, and to complete the negotiations for the acquisition of the housing infrastructure that would serve the program.

THE COMMISSIONER:· Was that coincident with your arrival on the scene, sir?

THE WITNESS: That happened, I'm thinking, about a year later. It was after the mines closed and we set up the study. So my involvement at that -- at that point was the evaluation of all the RFPs that came in for the study, and some of the coordination and working with the consultants during the study -- study period, and -- and providing some assistance when Mr. Morris started, where we could, but that -- that was the extent. I didn't have any -- any other professional or active role in that firm.

BY MR. DOODY:

Q. As I understand it, one of the mines -- I think it was Rio Algo -- donated a significant number of housing units, and -- as a charitable donation, and the other mining company --15-- I believe it was Denison -- negotiated a very reasonable price for the units which it sold. And those formed the bulk of the initial housing stock of Retirement Living; correct?

A. That is correct, yes, and --

Q. And that was facilitated with a grant from the Province, I believe?

A. Yes. Their -- well, as part of the -- the settlement with Ontario Hydro, and --

Q. Because Ontario Hydro had -- it no longer wanted to continue its contract requiring it to buy uranium for far into the future; right?

A. Yes, because the spot market had dropped to a certain price.

Q. Right?

A. And it was more expensive mining Elliot Lake uranium than they could buy otherwise. And the provisions of the -- of their contract, as I understand just from comment, is that they then exercised the escape clause in that. And as part of -- as part of the settlement, if you will, some \$250 million was allocated to Elliot Lake and the area. And I would point out that as -- part of the impacted area, if you will, was the five municipalities, being Elliot Lake, the North Shore, Blind River, Serpent River, First Nations and Spanish. So that these were the municipalities and the First Nations in the immediate area that were impacted as a result of the mine closure. And that \$250 million was made up of a number of different components. The lion's share --and I'm just going by memory, as it's been a long time since I've looked at that -- about \$180 million was to maintain one mine for five years so that the closure wouldn't be a sudden impact on the employment base in Elliot Lake.

Q. And a portion of that money was used as seed money, in effect, to get the Retirement Living project off the ground; is that fair?

A. That's -- that's what I understand, without going back and looking at the specific records on that. And so with that, you know, the impact was very, very significant. In fact, like, to the City of Elliot Lake, we had lost approximately 45 percent of our tax base. However, we had lost very little, if any, of our service requirements, given that the Municipality did not undertake and provide a high-level of service to the mine sites themselves.

Q. So as I understand it, the purpose of Retirement Living was to turn the – was to shift the City's economic base from mines which were closing, to a new -- a new economic basis, which was to attract retirees to the City; is that fair?

A. Yes.

Q. And Retirement Living, as you've said, was set up as a nonprofit corporation to bring that into effect; right?

A. That is correct.

Fred Bauthus
March 25, 2013
Page 2878, Line 7

Q. What was your staffing situation when you left the job in 1999?

A. One inspector and a secretary.

Q. So you had lost an inspector and a plumbing inspector?

A. Yes, I had.

Q. And these positions were full-time positions; is that correct?

A. Yes, they were.

Roger Pigeau
March 22, 2013
Page 2547, Line 15

Q. So we would necessarily assume that the problem was being dealt with and also that the maintenance staff for Original owner was quite diligent in trying to -- in repairing the leaks.

Roger Pigeau
March 22, 2013
Page 2556, Line 8

Q. As a -- they did quite a few repairs. You could see them working on the rooftop quite often.

Roger Pigeau
March 22, 2013
Page 2556, Line 22

A. No, I would have issued an order under the Property Standards By-law or I would have checked with the building code commission to see if there's anything more prevalent they could use with regard to enforcement.

Roger Pigeau
March 22, 2013
Page 2600, Line 5

A. Well, I can only assume, if I would have seen a report and pursued it, then that money would have had to come out of the coffers of original owner Realty to repair the problem.

Q. And it was a lot of money; correct?

A. Yes, a lot of money. Otherwise I can't see why they wouldn't have provided it.

Roger Pigeau

March 22, 2013

Page 2603, Line 1

Q. (...) [What] would you have done based on what you saw in those reports concerning the roof?

A. Well, I believe I would have had to take action. There was -- it was not necessarily this particular report of Halsall but the earlier ones, the TROW reports, did indicate some concern about the structure or in more definite terms than the one that's up right now.

Syl Allard

March 25, 2013

Page 7040, Line 16

Q. Would you agree that it was not uncommon from a municipal employee to wear several hats?

A. I agree to that, yes.

Larry Burling

April 2, 2013

Page 3908, Line 14

Q. And you've indicated that this is to be provided to Mr. Allard as well?

A. Yes.

Bruce Caughill

May 10, 2013

Page 9219, Page 10

Q. Thank you. Can you describe to us what is the relationship between Retirement Living and the City of Elliot Lake as you understood it?

A. They were totally independent beings, but we had to work together to - I mean the purpose of Elliot Lake Retirement Living was to sustain the community, to provide jobs for people who were here, and allow us to live with our families and not have to move. And so the purpose - or the working relationship between the City and Elliot Lake Retirement Living is more like, in my view, was, you know, let's work together to make this a viable place. Although totally independent of each other, there's, you know, City Council and the Board of directors for Elliot Lake Retirement Living.

Richard Quinn

April 11, 2013

Page 4811, Line 6

Q. And was it thought to be and is it thought to be to have representatives of the City on the Board because Elliot Lake Retirement Living is important, some would say essential, to the City's survival?

A. I believe that is reasonable. The problem was that we had, you know, the single-largest commercial landlord and hotel owner saying, I don't have a lot of faith in your community, okay, and I am not willing to necessarily bet on the future of your community, okay.

Richard Kennealy
April 16, 2013
Page 5184, Line 18

Q. Okay. What about in '96, when you started to work closely with the organization, what did you see and what was your impressions?

A. So when I started working with them, it became apparent that Retirement Living and the City of Elliot Lake quite often had common goals and that each potentially needed the other to be successful.

Rhona Guerin
April 19, 2013
Page 5825, Line 1

Q. Information would flow between the Elliot Lake Retirement Living and the City through the representatives that were on the Board?

A. I don't know if I ever interpreted it as being a flow of information, but more an opportunity for the organizations, all of the organizations, not just the City, to represent what is important to them and their interests. By default, there is flow of information, but I don't think it is a formal flow of information.

Rhona Guerin
April 19, 2013
Page 5835, Line 8

Q. The persons from the City on the Board, your expectation is that they would be bringing the City's perspective to whatever the issue was that is being discussed?

A. I don't really have an expectation of our directors. They are the directors. I would assume they have expectations of us.

Rhona Guerin
April 19, 2013
Page 5835, Line 18

Q. What I am referring to is the individual directors from the City who would be participating in some sort of a debate, whatever the topic is, would be putting forward the view of the City for the benefit of the debate; correct?

A. I -- yeah, I think that is fair, yeah, okay.

Rhona Guerin
April 19, 2013
Page 5835, Line 25

A. My understanding of this document is we weren't allowed to share information with anybody, and that if we chose to or we asked Mr. Leistner to share information with the City and he declined particularly on those two items

Q. Yes.

A. that he would reimburse us for those items.

Rhona Guerin

April 19, 2013

Page 5875, Line 12

Q. Okay. When you first started working at the City in 2004 how many people worked at the Building Department?

A. Three of us.

Q. So the CBO?

A. CBO, a Clerk and myself.

Q. Okay. And so there was one Building Inspector and that was you?

A. That's correct.

Chris Clouthier

April 23, 2013

Page 6323, Line 1

Q. Okay. And can you give us an idea of what at that time, that would be the end of 1997, the beginning of 1998, what you and from your impression others members of Council would have thought of the importance of the Algo Mall to the community?

A. I think they would have thought it was very important.

Q. And why?

A. Because it was really the central retail space within the community. If Algoma Central were to pull out, I mean the reason they would be pulling out is because the economy of Elliot Lake was in a tailspin. If they were to pull out, it's probably not very likely that there would be someone else looking to come in and buy it, so we'd have an empty building likely sitting there.

Q. And what would have been thought to be the likely result of that?

A. Well, probably, and again I'm speculating, cost to demolish it potentially.

Q. And any other effects on the community itself?

A. Well, again without that commercial activity in the community, it's just one less thing to make Elliot Lake attractive to potential retirees.

Troy Speck

April 24, 2013

Page 6695, Line 16

Q. Because without the Algo Mall , the Retirement Living program would be -- would be hurt significantly, right?

A. Yes, I think there was understanding that as far as the Retirement Living program or even in terms of the community is it would offer less than it perhaps could.

Q. Was Mayor Hamilton's attitude shared by other Councilors?

A. Again, whether that is taken as a generality, I would say yes.· But I didn't enter in that I can recall, any specific discussions along those lines.

Q. And did that attitude continue throughout your second tenure?

A. Yes, sir, I think so.

Q. And was that attitude shared – was that attitude one which was held by Mayor Farkouh and the Council before you left at the end of your first tenure?

A. Yes, sir.

Q. Was City Hall staff aware of that attitude?

A. I think there was an understanding that it was important, yes.

Q. Were any directions orally or in writing given by Mayor or Council with respect to taking any action against the Algo Mall that might result in its closure?

A. No, sir.

Q. Were any such directions given by you orally or in writing?

A. No, sir.

Fred Bauthus

May 16, 2013

Page 10190, Line 15

Q. Yes, it is.· And just before we go there, what can you tell me about your conversations with Mr. Nazarian about the leaks?

A. I had expressed the concerns that the leaks were continuing, and at every juncture he indicated he was working on it and sometimes a little more information, trying

something new that's going to work and they're working to remediate that issue.

Fred Bauthus

May 16, 2013

Page 10192, Line 11

47. As time progressed, due to staff turnover and cuts, the City lost people that were capable of inspecting and reporting on the condition of the Algo Mall . This lack of resources and lack of continuity undoubtedly contributed to the City's difficulty in inspecting the Algo Mall .

48. It is clear that almost all of the technical reports obtained by the various Algo Mall owners were withheld from the City. The precise reasons for this was not articulated but it can be surmised that the cost and magnitude of the repairs was something the owners did not wish the City to be aware of. Had the myriad of technical reports been provided to the City, a much clearer picture of the state of the Algo Mall would have prevailed and it is probable that the events of June 23, 2012 would have been avoided.
49. Specifically, as it relates to the building condition assessment, these reports (**Exhibit 67 and 70**) were never provided to the City, nor were they provided to the City representatives on the Retirement Living board. Retirement Living actually entered into a contract with the City to deliver the building condition assessment and market value appraisal (**Ex. 249**) but subsequently entered into a Non-Disclosure Agreement (**Exhibit 39**) with original owner to keep those reports from the City.
50. With respect to the library's location in the Algo Mall , all parties wanted the library to succeed in the Algo Mall . Even the library itself wanted to be in the Algo Mall despite the leaks. The leaks could not be controlled and the City was told by MR Wright on a number of occasions after 2006 that it was not a structural issue. Also, as noted herein, there was nowhere else for library to go and in making the best of a bad situation, the City obtained vast concessions from owner as it related to lease renewal, both in terms of price and maintenance responsibility."
51. Whether the Nazarians or Sennett are fraudsters is not relevant to the City. The reality is that the Nazarians provided ample "evidence" of work being done on the roof, whether appropriate/legitimate work on the roof or not.

RENEGOTIATING THE LEASE WAS THE ONLY VIABLE OPTION

52. The original 20-year library lease was required in order to assist the Library in obtaining its funding from the Province. The Library is, within the City's composition, its own entity and the City had nothing to do with the library's original lease at the Algo Mall . Furthermore, the lease was signed by Ms. Taylor with full knowledge of the issue of the leaking and no steps were taken to obtain legal advise from outside counsel. Only Mr. Gale, Council's representative on the Library Board and a lawyer, reviewed the lease.
53. Given the traffic in the Algo Mall and accessibility associated with being located at the Algo Mall , there were many advantages to the Library in terms of the Algo Mall location. It is clear from the evidence that a dedicated building in which to house the Library was not possible from a financial perspective; hence the basis for the lease renewal. The renewal of the lease also extracted important key concessions from the Algo Mall owners on matters relating to the term, maintenance responsibilities and exit clause language for leak related issues (**Exhibit 3760**).

54. Alternative locations for the Library were investigated, including Collins Hall and the Multiplex. The City hoped to obtain funds to build a multiplex, which would be an ideal new locale for the Library. However, the funding was never obtained (**Exhibit 11-36**).

55. In negotiating the new lease, Mr. Bauthus met with extreme and divergent opinions from councilors and the library board. Although perhaps not ideal, the best option in the circumstances was to renew the lease with terms that left no doubt that the roof leaks were the responsibility of the Landlord and which provided an option to vacate the Algo Mall in the event that the leaks were not resolved.

Q. And was anything else done at the Library Board?

A. It was very difficult, because we were tied into this 20-year condition imposed by the Ministry when the renovation was done when we first moved in.

Q. And Mr. Nazarian had told you he was going to put a membrane in?

A. Well, that was -- he had indicated that he was going to undertake and put the membrane in and that would, in all likelihood, fix the problem.

Q. And from what he had told you and what you had learned, a membrane was what was required?

A. That is correct, yes.

Fred Bauthus

May 16, 2013

Page 10233, Line 9

A. Notwithstanding the outcome of the remedial work on the roof, any rental agreement with the Algo Mall will have provisions to cover issues such as water infiltration, occupancy/vacancy limits and maintenance, all of which was discussed with Bob Nazarian and he indicated that he did not have an issue with these covenants on the agreement.

Fred Bauthus

May 16, 2013

Page 10259, Line 6

A. Well, the Library Board had already expressed their preference and because the city was the funder, they got the final decision.

Barb Fazekas

March 11, 2013

Page 1119, Line 24

Q. Did the Library Board hire a lawyer to examine the lease for it?

A. No.

Barb Fazekas

March 11, 2013

Page 1120, Line 17

Q. Do you recall the state of the library when it came to leaks when the library first moved into that space?

A. I don't remember leaks at that time.

Barb Fazekas
March 11, 2013
Page 1126, Line 25

Q. Because you were hoping to get federal financing to build the new multiplex; correct?

A. Right, and one of the conditions of that is that it had to be completed within a certain time frame. I think it was March – at that time, March '11.

Fred Bauthus
May 21, 2013
Page 10421, Line 25

Q. And am I correct that given that, what you have just told us and what you told the Mayor and Council, that you were faced with the situation of having to come up with an alternative place to put the library because it appeared that it may be impossible for them to go in -- to stay in the Algo Mall ?

A. That I was looking at an alternative that would work for the City, yes.

Q. Yes, because it appeared to you, at least, that the City may well have run out of options in the Algo Mall ?

A. Yes, sir.

Fred Bauthus
May 21, 2013
Page 10424, Line 21

Q. And why was the lease 20 years? Was there a reason for that?

A. I think the province, before they gave out capital grants, wanted to ensure that a project would have longevity and there would be a certain commitment to their funds being spent well.

Barb Fazekas
March 12, 2013
Page 1119, Line 14

Q. Since the library moved to the Algo Mall , both the traffic into the library and the use of the library's collection have increased considerably. Would that have been because of its location in the Algo Mall ?

A. That's correct.

Barb Fazekas
March 11-12, 2013
Page 1181, Line 16

Q. So did you think that when that Notice to Vacate was first sent that he actually had a tenant lying there waiting to occupy the space?

A. No, no, he didn't have any tenant.

Q. It was part of his negotiation with the City?

A. Yes, tactics, yeah.

Al Collett

May 23, 2013
Page 11179, Line 14

Exhibit 11-43

Q. And what did you understand were those benefits that Mr. Bauthus was referring to that were in the lease that needed to be captured?

A. I don't know what he was referring to with that, benefits. To who? I don't know who he is referring to. Benefits to the Board or benefits to the City? I –

Q. Did you think that the lease was beneficial to the Library Board?

A. Absolutely not.

Al Collett
May 23, 2013
Page 11246, Line 25

Q. This is a letter from Sue Morin to Ms. Croxston dated August 7, 2009, resigning as the Chief Librarian of the Public Library effective the end of that month, August 28th, and you were aware of this, sir?

A. After the fact, yes, sir.

Fred Bauthus

May 21, 2013
Page 10521, Line 3

Q. And you learned after the fact that she resigned because of the leaks and the refusal of Council to move out of the Algo Mall ?

A. Yes, sir, after the fact.

Fred Bauthus

May 21, 2013
Page 10521, Line 9

Q. The City now has wording that will allow for 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.

Fred Bauthus

May 21, 2013
Page 10566, Line 23

Q. Sir, it is fair to say that as at September the 30th, there was a significant dispute between the Library Board and City Council?

A. Yes, sir.

Q. And the Mayor was on the side that said the Library Board should be forced to bow to the will of Council, right?

A. Yes.

Fred Bauthus

May 21, 2013

Page 10578, Line 21

Q. Okay. And, sir, how did you justify to the ladies from the library at this meeting, how did you and the Mayor justify the library --the necessity for the library to stay in the Algo Mall, given the horrific conditions that they've been enduring for all that time?

A. I guess at that point in time, a decision was made that there wasn't a viable alternative that would work and we're still, you know, we're working on the issue ahead as an objective of the multiplex.

Q. And then the next bullet is: ""Arrange to have a structural engineer review the floor loading capacity at the Collins Hall, the No-Frills and the Retirement Living space.""

You did have that review done at the Collins Hall. Did you also have it done at the Retirement Living space?

A. No. I had discussed -- basically that was the discussion I had with Nazarian and the concern was that because that space was not on grade, that space was over the restaurant area and others, is that I had discussed that upon the availability and that we would have to pursue --pursue it both in terms of Building Code, relative -- Building and or Fire Code relative to the entrance as to what the impact on the entrance would be there."

Fred Bauthus

May 16, 2013

Page 10299, Line 4

Q. So start with the Council. What was your understanding of why the idea of moving into Collins Hall immediately was not well received?

A. Well, they felt that it was a community centre and it would have an impact on the use of that facility as a community centre and making -- having to make other arrangements for those uses. We had looked at those alternatives and because it -- I think at that time as well as in terms some of the public input, that it had indicated that Collins Hall had been donated to the community as a community centre years ago and should not be taken out of that service.

Fred Bauthus

May 21, 2013

Page 10438, Line 20

Q. Why would it be taking it out of the service of a community centre to put a library in it?

A. Well, they felt that it is there for the people to use as a community centre, not as a library or other use.

Fred Bauthus

May 21, 2013

Page 10439, Line 10

Q. Sure. Finally, Mr. Bauthus, we heard about the reluctance of the Library Board to be -- or dissatisfaction, I suppose, of the Library Board with the lease that you negotiated. Did they take any steps to avoid the lease or to not be bound by the lease after it was signed?

A. No, sir.

Fred Bauthus

May 22, 2013

Page 10714, Line 24

Q. Now, in this meeting or at any other time, to your recollection, did Ms. Croxston ever request that the Library Board negotiate the lease themselves?

A. No, at no time did she do that."

Fred Bauthus

May 22, 2013

Page 10706, Line 5

Q. Are you aware as to whether or not the Library Board gave some sort of authority to the CAO to negotiate the lease on its behalf?

A. No, I don't think we did, no.

Al Collett

May 23, 2013

Page 11138, Line 4

Q. So on the issue of the alternatives and the issue of Collins Hall, at that time what was your reaction to what Mr. Bauthus was advising you that staff was doing?

A. In my opinion, the Collins Hall was not a good location, and my particular reasoning for that is that being a long-time resident of Elliot Lake, I considered the Collins Hall to be an historical site and I didn't want any changes to the structure of that building to accommodate a library.

Al Collett

May 23, 2013

Page 11170, Line 1

<p>1989 LEASE MAINTENANCE LANGUAGE v. 2009 LEASE MAINTENANCE LANGUAGE</p>
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56. Regardless of whether roof leaks were going to be corrected as per library satisfaction, the City was still going to ensure language within the lease that protected the City and library. This is fundamentally an important point since the City did not want to be without a library, it was doing the best it could with a terrible situation. See **Exhibit 1547**.

Exhibit 345

Q. Repairs by tenant is section 44 and it states: "The Tenant covenants to repair, maintain and keep the Leased Premises and all equipment and fixtures therein including, without (...) So that is the 1989 lease, Mr. Collett, just so that you are familiar with the language I am going to be going to.

A. Yes.

Q. And yesterday there was a lengthy discussion sort of about the process and, you know, for lack of a better term, a bit of the battle that was going on in renewing that lease, and there is various statements that you made into evidence. You stated in your evidence in-chief that you didn't know what was being referred to with benefits, when Mr. Bauthus put in an e-mail that there were benefits pursuant to the lease?

A. That's correct, yes.

Q. And you didn't know if it was benefits to the Board or benefits to the City. You also stated in an answer to a question from Commission Counsel: And is it fair to summarize [...] -- She says: And is it fair to summarize that you had concern with respect not only with the liability of the Board members, but also the fact that there was no guarantee in there" -- the lease -- "that the owner would basically be responsible for damages that would occur because of the leaks and because there was no opportunity for the library to be able to get out of the lease in case of leaks?" Correct?

A. That's correct.

Al Collett
May 24, 2013
Page 11386, Line 18

Exhibit 2340

Q. Thank you. And 26, Mr. Collett, is a paragraph that is not in the 1989 lease, and it says:

"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 be as severe as that experienced during the 2008 calendar year or continues to the point that it substantially impacts on the Tenant's use of the facilities, the Tenant has a right to terminate the lease upon twelve (12) months 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."

Would you agree with me, Mr. Collett, that the addition of this paragraph was a benefit to the library?

A. I can't say whether it was a benefit or not, because when you look at section 25, it still holds the tenant responsible for damages. So I don't think that would be any particular benefit to the Board itself at the time, because it was just an ongoing thing that he was always doing, repairing the roof.

Q. Okay. And would you say that your answer yesterday is that there was no opportunity for the library to be able to get out of the lease in case of leaks, and isn't it the case that there is a statement directly in paragraph 26 that the tenant has the right to terminate the lease on twelve months' notice, written notice to the landlord?

A. Yes, and the "tenant" refers to the City of Elliot Lake and not the Library Board, because the City is the tenant.

Q. Okay. And isn't it true that the guarantee that was referred to by Commission Counsel as well, it said there was no guarantee – your evidence was -- this was your evidence from yesterday: The understanding was that if we signed a new lease, those leaks would be fixed and a guarantee that any future leaks damage would be at the cost of Mr. Nazarian." That was your evidence from yesterday.

A. Yes, that was the Board's opinion.

Q. Yes, and isn't it the case here that in 26 it is saying the landlord will be responsible for the continuing maintenance of the roof and they are going to attempt to attenuate the infiltration of water caused by the elements, and that, alternatively, notwithstanding paragraph 25 it says, so removing paragraph 25 from the equation which says the tenant is responsible for the costs: ""[...] it shall be the responsibility of the Landlord to undertake the repairs [...]" So isn't that exactly what your evidence is saying you guys were looking for, "you guys" being the Library Board?

A. Not particularly. There was other parts of what we were looking for, and that is liability issues, which I stated earlier.

Q. Okay.

A. And this was strictly the opinion of the Board. They wanted other guarantees.

Q. That was not enough what was added in there is what you are saying?

A. No, absolutely, no.

Al Collett
May 24, 2013
Page 11390, Line 11

ADDITIONAL PARKING WAS MADE AVAILABLE BY THE CITY
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57. The relevance of the sale of additional parking to the collapse is tenuous, since the City was more than willing to sell the parcel to Mr. Nazarian and took the necessary steps to do so as noted in **Exhibit 3465**, Page 12 by declaring the land surplus and obtaining an appraisal of the lands. The City was entitled to rely on its appraisal in negotiating a sale of the land and, arguably, would have breached its duty by agreeing to sell the land parcel at a significant discount (**Exhibit 1467**).

Exhibit 1330

Q. The first item he [Mr. Fabris] refers to is the fact that, as he says, there's a lot of people parking in his lot that are going elsewhere. Stop there. Sir, you saw the Algo Mall parking lot regularly, right?

A. Yes, sir.

Q. Did it ever look full?

A. At some point in time, but not totally.

Fred Bauthus
May 16, 2013
Page 10350, Line 25

Q. Never? Was there ever -- can you recall a time when you could not find a parking spot?

A. Any time that I've gone there, you know, on the weekend, I've always been able to find a spot, even sometimes when I was going there and not parking at the back or City Hall, having to go there, always down on the Ontario Street frontage.

Q. You could always get a spot on the Ontario Street side of the parking lot?

A. Yes, I never had a problem doing that.

Fred Bauthus
May 16, 2013
Page 10351, Line 9

Q. This is the public minutes of that meeting of April 14th. And if you go to the very last page, you will see that there is a resolution of Council, first of all, to receive your report that we just looked at and then, secondly, to declare the lands in question surplus and then to get an appraisal. And that is what Council did on April the 14th, 2009; correct?

A. Yes, sir, that is correct.

Q. And that is what was required under the City's by-law to sell City land?

A. Yes, sir, that is correct.

Fred Bauthus
May 21, 2013
Page 10401, Line 14

Q. And what would the next step be in the ordinary course after land was declared surplus and an appraisal was obtained?

A. There would be the advertisement that the land is surplus, and we would get an appraisal of the said land.

Fred Bauthus
May 21, 2013
Page 10402, Line 1

Q. And what is the policy or what was the policy of the City with respect to showing appraisals of this kind?

A. We don't usually do that.

Q. Why?

A. I guess it is just as a – because we had commissioned it and at that time we wouldn't have shown it.

Fred Bauthus
May 21, 2013
Page 10408, Line 10

58. The lack of trust by the City in Mr. Nazarian extended to Eastwood Mall's solicitor who was seemingly misrepresenting the true state of affairs regarding parking availability at the mall. This was all seemingly part of a scheme to get additional property for parking at a discount, but in reality the roof was going to be used as a solar farm.

59. Ultimately, it is unclear how the evidence regarding the sale of additional parking is relevant to the collapse, since the City was more than willing to sell the parcel to Mr. Nazarian and took the necessary steps to do so as noted in **Exhibit 3465**, Page 12 by declaring the land surplus and obtaining an appraisal of the lands.

60. Ultimately, the concept of negotiations requires each side inform themselves of the value of the asset they are looking to sell or that someone else is looking to buy and there is absolutely no good reason why the City should have turned over the appraisal to the Nazarians, whom the City did not trust. In any event, Mr. Fabris reported to Bob Nazarian that the City would not accept anything less than the low-end of the appraised value, being \$55,000.00. See **Exhibit 1467**.

THE CAUCUS MEETING HAVE NO CONNECTION TO COLLAPSE OF MALL
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RELEVANT TESTIMONY RE: CAUCUS MEETINGS

Prior to Commission Counsel knowing about Caucus Meetings

Exhibit 11-84

Q. Troy, I feel that this is something we must deal with at our next caucus meeting, which I believe is this coming Monday, May 2nd at 4:00 p.m. What do you think?"

A. I can tell you that I've – that the City has provided to us agendas for all of the meetings through this period of time and there was not a meeting of Council on May the 2nd. There was a meeting the Monday prior, which I think was April 25, then a meeting the Monday subsequent was May 9th.

Troy Speck
April 24-25, 2013
Page 6765, Line 16

After Commission Counsel knew about Caucus Meetings

Q. And during these meetings, do you recall any discussion about the attitude which the City should use when dealing with the mall?· In other words, was there is discussion

that the mall should be treated any differently from any other business in Elliot Lake given its importance to the community?

A. I don't remember a discussion like that, no.

Q. Are you telling me there was no such discussion?

A. I'm telling you I don't remember a discussion like that.

Troy Speck

April 24-25, 2013

Page 6819, Line 7

Q. And it's likely that in those Library Board matters in the secret meetings, the issue of the leaks was discussed, was it not?

A. May have been.

Troy Speck

April 24-25, 2013

Page 6827, Line 4

Q. And would it be fair to conclude, from your evidence so far, that at that meeting of June the 6th, 2005, which was held in secret, members of Council discussed with you the issue of the leaks at the library and how to deal with them?

A. I think that would be fair assumption. They were provided to us as part of a database containing all of the electronic records of the city and obviously because the search terms which were used did not include the word caucus, they weren't located. and then when they were reviewed manually, their relevance did not become apparent, if they did survive the electronic culling, their relevance didn't become apparent because it's only in the course of the evidence that it's become apparent were Councilors at all told to hide the existence of these meetings?

Troy Speck

April 24-25, 2013

Page 6842, Line 13

Q. But to be clear, they were held in the absence of the public?

A. They were, though they weren't secret. I heard the word secret a lot. And certainly you can see in some the e-mails of Ms. McTaggart, she's copied a number of members of her board, I believe, referencing a caucus meeting and I don't think if it was a secret generally that we had caucus meetings. But they were not advertised. The meetings may not have been advertised according to the municipal act, but they were certainly not secret.

Troy Speck

April 24-25, 2013

Page 6921, Line 13

Q. And not to seem facetious at all, but were they told to destroy documents that were handed to them at those meetings?

A. I don't believe so.

Q. And were they – where were the meetings held?

A. I believe they – the document shows the Committee Room at City Hall.

Q. Okay. And what time usually were they held?

A. They mostly seem to be at 4:00 p.m.

Q. Okay. And do you know, if at all, the doors would have been locked on the Committee Room?

A. No, they wouldn't be.

Q. So from what we've heard on is the as sort of the facts surrounding the meetings and, you know, how would you characterize those meetings?

A. I think, as I've said, they were informal update sessions.

Q. Mr. Speck, if at all, would delegations be permitted to attend those caucus meetings?

A. As I said before, I recall from time-to-time there being other presentations.

Troy Speck

April 24-25, 2013

Page 6941, Line 10

Q. And the idea of discussing ideas together collectively was surely to move municipal decision-making forward, that they would all have a better appreciation of what the pressing issues were and have an opportunity of discussing those while they were all together, not in their separate silos of standing committees; isn't that fair?

A. Yes, yes, that's fair.

George Farkouh

May 7, 2013

Page 8425, Line 23

Q. If you go to the last page of Ms. McLean's opinion, she writes: "It is recommended that the City's Procedural Bylaw be amended as follows: To include the definition of meeting, to make it clear that a caucus meeting is a meeting,

Tom Derreck

May 13, 2013

Page 9453, Line 17

Q. I see. Was there a decision made which ultimately saw itself in a resolution at an open session of Council?

A. There were no – there were – these are not official meetings so there's no resolution. But in my opinion by the time those meetings were concluded it had been decided what would be later affirmed in a motion of Council.

Tom Derreck

May 13, 2013

Page 9504, Line 14

Q. So now, Mr. Farkouh, can you tell me your impressions about your thoughts with respect to Commission Council's characterization of the caucus meetings?

A. My evidence was that they were open to the public. And to me, they were public meetings.

George Farkouh

May 15, 2013

Page 10120, Line 16

Q. Is it fair to say that at these meetings, issues of concern to the City and to Councilors were discussed?

A. Yes. Obviously in terms of the work going on and they were briefed as to what the status of various projects were at that time.

Fred Bauthus

May 16, 2013

Page 10149, Line 18

Q. And on occasion, consensus was reached?

A. Yes, I would – as to the direction, yes.

Fred Bauthus

May 16, 2013

Page 10149, Line 24

A. Would be another committee of Council that would be deliberating. And in this particular case, there was no resolutions and no minutes that were kept. But it was an open meeting of Council. If a member of the public chose to come in and the topic was not an in camera topic, then it would be discussed.

Q. And did you find them to be an effective or useful tool?

A. Yes, they were.

George Farkouh

May 15, 2013

Page 10121, Line 3

THE COMMISSIONER: Didn't you feel that or did you feel that these meetings were useful in developing consensus among members?

A. THE WITNESS: Yes.

Q. THE COMMISSIONER: And for that purpose or at least once a consensus was developed, it might obviate the need for debate at Council, would it not?

A. THE WITNESS: In some cases, but in most cases, there was always a debate that would take place because there's reports that would have to be attached and brought forward. In some cases, you would be correct, Your Honour, but in most cases, I wouldn't say the consensus were fait accompli, but they were part –

THE COMMISSIONER: But they were in some cases.

THE WITNESS: They were in some cases, yes.

THE COMMISSIONER: All right, thank you.”

George Farkouh
May 15, 2013
Page 10122, Line 10

Q. Mr. Farkouh, can you think of any way at all that the existence of the committee of the whole meetings or the caucus meetings prejudiced the City’s inspection or enforcement of the mall issues?

A. Not at all, that I can recall.

George Farkouh
May 15, 2013
Page 10125, Line 3

Q. And is there any connection that you can envision between the existence of these meetings and the collapse of the mall?

A. No.

George Farkouh
May 15, 2013
Page 10125, Line 9

THE COMMISSIONER: Thank you. To respond to Mr. Myles’ position, I don’t disagree that there might be very significant interest by the citizens of this community into what he states was a culture of secrecy. That culture might very well exist, but there has to be a nexus between that culture, a demonstrated nexus between that culture and the events into which I am mandated to inquire and the broad mandate of the Commission.

Tom Derreck
May 13, 2013
Page 9475, Line 5

61. The questions to Mr. Farkouh coming directly from the commissioner are honest and forthright answers and it supports the fact that Mr. Farkouh’s evidence is credible and that his testimony should carry considerable weight generally and specifically to the caucus meetings.
62. The first mention of the concept of “caucus” meetings and the Commission Counsel didn’t even bother asking about the details of these meetings because the Commission Counsel was not aware of the term “caucus” meeting being any different than as initially described by Mr. Speck (being in camera).
63. The City received many opinions from Mr. MacLean, ranging from withholding rent issues, pursuing the notice of violation, status of library as a separate entity and re: caucus meetings. The City acted properly in seeking and receiving legal opinions on these important issues. It is unclear why Ms. MacLean was not called as a witness by Commission Counsel.

64. This is the first time caucus meeting is mentioned as part of the inquiry. Further, Commission Counsel's questions to Mr. Speck were asked in such a way that Mr. Speck was advised that Commission Counsel had not found any agendas for these "caucus" meetings, so that's the fashion in which Mr. Speck was answering these questions above when initially asked about caucus meetings.
65. Firstly, Mr. Speck readily admitted, upon being provided these documents that these caucus meetings were without notice, in contradiction to his prior evidence. This was admitted on the stand by Mr. Speck after he was essentially surprised with the documentation relating to these meetings and his memory was refreshed by the agendas. Mr. Speck's credibility in telling the truth upon being confronted with this evidence should add credibility to his other answers and his evidence should be well regarded by this Commission.
66. Secondly, the hard drive on which these files were suddenly discovered was provided to Commission Counsel long before the commission inquiry began.
67. As soon as the City was advised of the caucus meeting agendas, Mr. Speck's testimony was interrupted and the documents were disclosed by the City (again) to Commission Counsel. This disclosure hurt the City more than anyone, but under the rules of professional conduct and the grandeur concept of ethical obligations to the Inquiry, it was the only thing to do.
68. The City (and specifically Mr. Speck's) testimony in this regard should be provided special consideration and credibility because the Commission Counsel missed these documents through their computer investigations, despite this hard drive admittedly being provided to them.
69. What occurred with the disclosure of these documents mid-testimony was essentially surprise evidence which, in the same circumstances in a regular trial, Commission Counsel would have likely not been able to mention the word "caucus" for the remainder of the trial/inquiry.
70. Truth be told, these caucus meetings have absolutely no correlation to the purpose of the inquiry, which is the roof collapse. In any event, it has been a personal goal of Commission Counsel's to highlight these meetings as breaches of the municipal act despite the fact that this highly prejudicial questioning has caused anxiety and grief for all City witnesses when these caucus meetings have no connection to the mall collapse. Commission Counsel has continued to insistently call these "secret" meetings when the truth of the evidence is these were not "secret" under any definition of that word. Were they closed to the public? Yes. Were they secret? No. Are they relevant to the mandate of the inquiry? No.

71. If the caucus meetings are going to be considered in any way by this commission of inquiry, the truth of the matter is that they provided an additional forum for library leak issues to be discussed.
72. As evidenced by **Exhibit 2351**, library representatives appeared before council at the caucus meetings to discuss the library on at least two occasions May 2004 (2351, Pg. 6) and July 2005 (Pg. 19).
73. The fact the meetings occurred meant that library issues had another medium to be discussed and the leaks were believed to be a maintenance issue because all previous owners kept the City intentionally uninformed re: structural problems.
74. Further, these caucus meetings did not in any way impede the City response to the library complaints. The caucus meeting of July 6, 2005 provided an additional forum for council to discuss Mr. Speck's efforts to pressure Retirement Living. The library board, as evidenced by Ms. McTaggart's various emails re: appearing at the May 2004 "caucus" meeting, would have known of the existence of this additional forum (See **Exhibit 11-84**).
75. The idea that somehow these caucus meetings conspired against the library or the Nazarians makes absolutely no sense, since on occasion, the library board members were present at the caucus meetings and secondly, the City council members are appointed to the library board and the City councilors would have known about the existence of these meetings, including councilors sympathetic towards the library.
76. Thereafter, a legal opinion was sought about caucus meetings and the practice ceased immediately as the meetings were clearly noted as being in violation of the Municipal Act.
77. Despite all of the above evidence, it has been a personal goal of Commission Counsel to highlight these meetings in a nefarious fashion. Ultimately, as noted above, these meetings are not relevant to the collapse and all the City witnesses have been consistent in their evidence re: caucus meetings, this evidence being they were not "secret" in any way.

ROGER PIGEAU = AUG 1980 – NOV 1999

Q. First of all, you've said the tenants never complained. I assume by that answer, you mean that the tenants never complained to you; is that correct?

A. That's right.

Roger Pigeau

**March 22-25, 2013
Page 2556, Line 24**

Q. Now, my question to you is: You have been told by Mr. Liautaud that they have hired an engineering company to look into it, and you've been told that there is a report forthcoming, and Mr. Liautaud, in writing, confirms that. What I would like to know is did you ever ask Mr. Liautaud for the report?

A. Yes, I did.

Q. Did you get the report?

A. No, I didn't.

Roger Pigeau

**March 22-25, 2013
Page 2587, Line 14**

Q. Did he actually say to you, "No, you cannot have a copy"?

A. I don't necessarily recall him saying "no," but he was questioned as to why we haven't received a copy.

Q. Did he give you any sort of a credible explanation for why you hasn't got a copy?

A. No, I didn't."

Roger Pigeau

**March 22-25, 2013
Page 2591, Line 12**

A. Well, I can only assume, if I would have seen a report and pursued it, then that money would have had to come out of the coffers of Original owner Realty to repair the problem.

Q. And it was a lot of money; correct?

A. Yes, a lot of money. Otherwise I can't see why they wouldn't have provided it.

**Roger Pigeau
March 22-25, 2013
Page 2603, Line 1**

Exhibit 35

I gather you did not see this document during the time that you were working as the CBO, correct?

A: Yes

**Roger Pigeau
March 22-25, 2013
Page 2604, Line 9**

Exhibit 44

Q. This is a further report from TROW Consulting Engineers, and it's dated the 9th of November of 1994. Did you see this report during you tenure as CBO?

A: No, I didn't"

Roger Pigeau

March 22-25, 2013
Page 2612, Line 10

Exhibit 51

Q. This one is dated the 6th of November 1995. We can see that Algoma is still looking for a solution to their leaking problem. And did you see this report, sir, during your tenure as the CBO in Elliot Lake?

A: No I didn't

Roger Pigeau
March 22-25, 2013
Page 2614, Line 11

Q. This is a report dated the 26th of October 1996 by an engineer from Sault Ste. Marie by the name of Paul Meyer. Again, did you see this report?

A: No I didn't

Roger Pigeau
March 22-25, 2013
Page 2617, Line 12

Exhibit 67

There is a "Building Condition Assessment for Elliot Lake Retirement Living Final Report (...) did you see this report?

A: No I didn't

Roger Pigeau
March 22-25, 2013
Page 2625, Line 17

Q. I've shown you a number of engineering reports over the course of the afternoon, and you've told us that you did not see any – any of them. With the exception of the one that Mr. Liautaud told you about, were you aware of the fact that these reports were being prepared?

A. No, I was not aware whatsoever.

Q. Were you aware that there were engineers retained by, mainly, Algoma Central, and latterly, Elliot Lake Retirement Living, actually on the premise doing inspections?

A. No. I was not aware of that.

Roger Pigeau
March 22-25, 2013
Page 2627, Line 6

Q. This is another report [Exhibit 70], dated the 10th of May, 1999. Like the other reports, can you tell us whether or not you saw this while you were the Chief Building Official?

A. No, I didn't.

Roger Pigeau

March 22-25, 2013
Page 2627, Line 16

Q. Are you able to offer any explanation as to why this information wasn't given to you? Because you could do something about it; agreed?

A. I could have, but under the circumstances, I didn't think the problem was overly critical. It did not create an unsafe situation, an unsafe condition. And the mall people didn't complain and the – the business was conducted on an ongoing basis, even though everybody was talking about leaks. And the mall people sort of maintained an ongoing maintenance of the problem.

Roger Pigeau
March 22-25, 2013
Page 2647, Line 17

Q. In other words, would this lead to a condition that you would be obligated to report as a public safety hazard?

A. At the time, due to the leakage and observations noted, it wasn't something that we felt was a safety issue."

Q. If I understand you correctly, what you are saying is you are aware of your obligation to report a safety issue, but in 1991, when you look at it, you don't see it's a safety issue?

A. At that time, no.

Q. I presume that TROW did not advise the City of Elliot Lake about the findings or the recommendations that were made either?

A. No, this report would have gone directly to the owner.

Remy Iamónico
March 21, 2013
Pages 2350, Line 15

Q. After some time had passed after this report, and in light of the fact that the client didn't follow your 1991 recommendations, did you do anything to follow up to determine whether repairs had been made?

A. I don't recall. I don't think so. I don't recall. I'm not sure if anybody else from TROW would have followed up. I'm not sure."

Remy Iamónico
March 21, 2013
Pages 2353, Line 2

78. Keeping in mind that Mr. Pigeau was the CBO from 1981 to 1999, he never had a tenant complain to him directly. The TROW report was extremely problematic for original owner as it specifically states, "it is our opinion that the design used for this roof slab is inappropriate in achieving a water-tight condition over commercial areas"

79. It is not difficult to believe that original owner would not have sent the report to the City, despite Mr. Pigeau's requests, considering that the recommendations contained in the TROW report and the potential cost consequences for original owner.
80. Although it now seems clear why the report was not provided as promised, at that time, the City had no reason to be suspicious that the report was hidden since this was the first ever complaint in writing regarding leakage at the mall. No reports were provided to the City during Mr. Pigeau's tenure as the CBO. The original owner knew where the water problem was coming from and what was causing it.
81. They did not tell Mr. Pigeau because it would have been pursued under the property standards by-law or building code. Subsequently, Retirement Living knew before they even owned the mall that there were issues with the live loading, structural integrity and water infiltration and they took no action in regards to informing the City during their six years of ownership. Cumulatively, the City of Elliot Lake had at least six reports withheld from it over the course of the two first owners. Had the City known about the extent and severity of the issues, it would have taken the appropriate action pursuant to the Building Code Act.
82. To compound this concealment, the TROW engineers were not required to send their reports to the City as there is no obligation to report to anyone other than your client. However, after a number of years passed without a membrane being installed, TROW still did not inform the City that there may be a public safety risk from the continued deterioration of the roof top parking.

THE SENNETT/NAZARIAN FRAUD

Q. And why did you sign this?

A. Because Mr. Nazarian's son did the work that's how much funds they will need to repair the mall, and they needed this just for that. They are the ones who repaired everything.

Q. So you're telling me that they repaired –

A. They prepared like all these documents and they asked me to sign the last page. I said no problem.

Q. But as far as you know, was there concrete work done for 310,000; drainage system add on for 231,000; new drain insulation of 488,000; and additional caulking for 98,000; temporary patching of 88; expansion joints of \$323,000; and, sealants of \$115,000? Do you know if any of this work was done

A. No.

Alexander Sennett

May 14, 2013

Page 9713, Line 15

THE COMMISSIONER: Why are you doing this? This looks to me to be a complete fraud.

THE WITNESS: It's -- I didn't look at it that time in this way. He asked me that what they are looking for and they are just new trying to work with him especially since he had a new projects going on and I looked for the opportunity.

THE COMMISSIONER: I mean, you're an educated man and no little bells going off?

THE WITNESS: I know. I trusted the man. I trusted I'm working with professionals like his engineer, his lawyer, and so on, so I trusted them.

THE COMMISSIONER: Okay.

Alexander Sennett

May 14, 2013

Page 9715, Line 17

Q. Okay. But you'll agree with me and the Commissioner that these are certainly anyone reading these and given the fact that no work was done, certainly no work was done by the Empire Roofing, that these are fictitious invoices?

A. Yes.

Alexander Sennett

May 14, 2013

Page 9718, Line 6

83. The evidence regarding **Exhibit 3773** was based upon the testimony of Mr. Sennett and later the Nazarians. Regardless of who may or may not have committed a fraud among these two parties, it is clear that the fictitious costs relating to the roof repairs could have been used as part of a due diligence defence against any City order considering it was used as proof of roof repairs with their attempted ELNOS financing.

SYL ALLARD = SEPT 2002 – MAY 30 2008

84. Building inspections pursuant to the Property Standards By-Law 79-15 are complaint-based, subject to commercial buildings with a vacancy of 50% or more. The rationale for a complaint driven policy is at once recognition that resources are limited as well as a requirement that the municipality appear unbiased in its enforcement of property standards issues.

85. As noted by Mr. Allard,

Q. But was this commonplace in small communities or large communities? Why is it complaint driven in a city the size of Elliot Lake?

A. Well, in my experience it's common. In Sault Ste. Marie it was complaint driven as well. I think it is essentially to recognize the limitations of a municipal enforcement office and also to deflect any idea that the municipality has an agenda that they're just going to take up certain items that they wish to take up, so it is a more consistent way of

bringing the public and having the public satisfied that issues of the Property Standards are being dealt with.

Syl Allard

April 29, 2013

Page 6983, Line 4

Q. When you say the limits of the community, you mean that complaint driven will control the amount of work that the City will get and therefore can manage?

A. Oh, I would say that in smaller municipalities the workload is an issue. It's not only that they're doing these duties as Property Standards officers, they're doing an array of other duties, including building maintenance themselves, for City properties and Building Code and other by-law enforcement issues.

Syl Allard

April 29, 2013

Page 6983, Line 19

86. The first inspection conducted by Mr. Allard was on October 19, 2006 on instructions from the City's CAO Tom Derreck. A Notice of Violation dated October 24, 2006, **Exhibit 1524**, was issued listing two violations and the required remedies, including provision of a repair and a report of a professional engineer by Dec 15/06. The repair program and timetable was provided to the City on November 13, 2006 which also indicated that an engineer's report was forthcoming, see **Exhibit 11-24**.

87. As noted in **Exhibit 1704**, Mr. Allard says, "this appears to be the first time in the past 4 years an ongoing leakage problem with the mall roof has been brought to the attention of Building Department staff for either structural concerns or property standards compliance matters."

88. Although an engineer's report was not provided by the deadline indicated in the Notice of Violation, Mr. Allard continued to receive indicia of compliance from the mall owner and staff, including email correspondence in February of 2007 from Bruce Caughill – a reputable engineer that was known to Mr. Allard, advising that he had been retained and a report would be submitted within six months (**Exhibit 816**). At the time of Mr. Allard's retirement in 2008, he had received no indication from either the mall owner or its staff that it did not intend to comply with the Notice of Violation. Thus, although it took considerable time for City to follow up on the Notice of Violation, which is unacceptable, a number of contributing human errors occurred and mitigating factors, including the departure of Tom Derreck as CAO, the departure of Tom Turner, the departure of Syl Allard, Mr. Caughill oversight on notifying the City regarding his involvement and the lack of a reminder system as later implemented by Mr. Ewald.

89. The key point being that after 2006, the City's efforts changed directions because of the potential structural issues and the City remained on top of the issue with a Notice of Violation (**Exhibit 175**), Order to Comply (**Exhibit 303** and **Exhibit 3397**), Order to Remedy (**Exhibit 1241**), an update regarding the weight added to the roof

structure (**Exhibit 139**) and numerous fire department inspections and a prosecution and conviction against the mall owner for Fire Protection and Prevention Act violations.

CHRIS CLOUTHIER = CBO BETWEEN MAY 2008 AND JULY 2008

Q. Okay. So just to clarify then, the complaint can be oral or in writing?

A. That's correct.

Q. Okay. And if it was in writing could it be in the form of an e-mail to the City?

A. I would imagine so, yes.

Chris Clouthier

April 23, 2013

Page 6328, Line 23

Q. And what would happen if you as a Building Inspector became aware of a violation of the Property Standards By-Law but no complaint had been made?

A. If it wasn't a safety issue I don't believe we would have done anything. It was complaint driven so you had to get the complain to go investigate.

Q. Can you elaborate? You said ""unless it's a safety issue."" What do you mean by that?

A. If I was driving around the City and I seen, as an example, long grass in someone's yard I couldn't stop or write something up and deal with it. It would have to be -- a complaint would have to be given first.

Chris Clouthier

April 23, 2013

Page 6329, Line 15

Q. Okay. And would you expect other members of the City to be -- to know? To basically forward that information on to the Building Department?

A. They did on a fairly regular basis.

Q. Okay. So it wasn't something that wasn't uncommon for someone else from the City, either from the political side or the staff, to forward on to you a complaint, to the Building Department a complaint?

A. It happened quite often, yes.

Chris Clouthier

April 23, 2013

Page 6331, Line 6

Exhibit 3335

Q. So I gather that at the time you did not see any buckets or tarps in relation to leaks?

A. No, I don't recall seeing any at that time, no.

Chris Clouthier

April 23, 2013

Page 6343, Line 12**Exhibit 3337**

Q. And do you recall seeing any leaks a few weeks later when you went to this inspection?

A. No, I did not. I again it would have been through the same side door, walking probably less than a hundred feet, maybe more like 50 feet from that door there's an escalator. You go right up the escalator and at the top to the left is where the location of this restaurant would be. And at that time I didn't see anything.

Chris Clouthier

April 23, 2013

Page 6346, Line 4

Exhibit 1704

Q. Mr. Allard then says: The following observations were made: This appears to be the first time in the past 4 years an ongoing leakage problem with the mall roof has been brought to the attention of Building Department staff for either structural concerns or property standards compliance matters." I gather, Mr. Clouthier, from your previous answer that you agree with that?

A. I do agree with that, yes.

Chris Clouthier

April 23, 2013

Page 6394, Line 3

90. Complaints would be forwarded to CBO where appropriate. However, since all the reports re: structural had been concealed from the City, other City staff believed that the leaks were a maintenance issue and not a structural issue requiring the CBO. Even when complaints from library went to the CBO, it was dealt with as a maintenance issue until 2006 and then it was dealt with essentially continually from 2006-2012 by keeping pressure on Mr. Nazarian. There was no evidence of buckets from Clouthier's 2004 inspections. Of course, all of the CBO and inspectors would have dealt with the complaints that came to them, but in 2005, Mr. Speck was dealing with the library request to put pressure on the owner because it was believed it was a maintenance issue, which makes sense considering that the City had never received evidence it was a structural problem. Further, Mr. Clouthier agrees with Mr. Allard's evidence from **Exhibit 1704**, which states that there had been no complaints from anyone to the building department for at least four years prior to Oct 2006, which if we consider the 2005 emails to Mr. Speck as a maintenance complaint only, there had actually never been a structural complaint to any City CBO.

BRUCE EWALD = JULY 8 2008 – PRESENT
--

Q. So prior to his retirement did he brief you on any outstanding files or matters that were ongoing at the City?

A. He didn't. But Mr. Allard likely would have cleaned up everything that he could've cleaned up prior to leaving. He wouldn't have left anything outstanding I don't believe. He was quite thorough.

Chris Clouthier

April 23, 2013

Page 6451, Line 21

Q. Okay. So my question to you is: You are terminated in July of 2007, why did you wait a year, over a year, to notify the City that you had been terminated?

A. That's an oversight on my part.

Bruce Caughill

May 10, 2013

Page 9231, Line 8

Exhibit 168

Q. This is Mr. Ewald's letter dated February 11 of 2010, in his capacity as Chief Building Official, Property Standards and By-Law Enforcement of the City to Eastwood Mall Inc., indicating that subsequent to an inspection taken that day, February 11, 2010, Mr. Ewald made a finding that: [...] all conditions of the Property Standards Order issued on September 25, 2009, that is the Order to Remedy, have been completed to the satisfaction of this department. Please accept this letter as your notification that all matters pertaining to the order have been labeled complete and this order is now rescinded.

Q. Now, sir, were you part of any discussion or meeting which preceded the issuance of this letter?

A. No, sir.

Q. Were you told of the letter after the fact, after it was issued?

A. I would have been told about the time that it was being issued or just after.

Q. Now, was it therefore Mr. Ewald's complete responsibility as Chief Building Official to be satisfied that all conditions of the Property Standards Order of September 25th, 2009, were satisfied?

A. Well, he would have the responsibility as the statutory officer to satisfy himself and would not be relying on me to give him information.

Q. And in fact, he was exercising his statutory authority, and at that point clearly Eastwood Mall Inc. was not in breach of any order; nor was it in breach of any statutory provision covered by the Order to Remedy, according to that letter?

A. According to that letter, yes, sir.

Fred Bauthus

May 21, 2013

Page 10676, Line 17

Exhibit 175

Q. Did you know, sir, shortly after you started that a Notice of Violation had been issued in 2006?

A. I believe I received some correspondence. It was -- I believe it was from Paul Officer, the Fire Chief, and that would have been in August or September of 2008, I believe.

A. I believe that was 2008 that made mention of it, and I believe that was triggered by some correspondence from Bruce Caughill.

Bruce Ewald
May 24, 2013
Page 11452, Line 1

(...)

Q. And if you go to the next page, the next page is the signed copy of it, and this is the Notice of Violation issued by Mr. Allard on October 24th, 2006. When did you first see that, sir?

A. I can't say for certain. I believe I probably would have seen this document likely in September of 2008.

Bruce Ewald
May 24, 2013
Page 11452, Line 17

Q. I thought you told us you cancelled the application because -- I'm sorry, I thought you said because it was inadequate; is that not what you said?

A. No, I said that I cancelled it because I understood that the project wasn't going to proceed, and so no more information would be forthcoming on it.

Q. Okay. And when did you learn that, how long after you started work?

A. I'm guessing it was within the first two months of my employment there.

Bruce Ewald
May 24, 2013
Page 11473, Line 6

Exhibit 986

Q. Sir, this is an e-mail to you -- lower it, please, so I can see the top, thank you -- from Bruce Caughill with the re line 151 Ontario Avenue, The Algo Centre Mall, sent on September the 18th, 2008. It is sent to you with a copy to Mr. Officer, and Mr. Caughill writes:

Bruce, you and I have not yet met - hope to change that soon as we have a number of active files in Elliot Lake. I was talking with Paul on Tuesday and mentioned that this would follow. Recent publicity on the leaking parking deck reminded me of the matter referenced in the attached letter. The original letter included a commitment to notify you if conditions of our engagement changed - and I had not done that. I was in the mall and on the deck last Thursday preparing a report on the current Eastwood leak repairs to Scotiabank - who had some major interior water damage recently.

Bruce Ewald
May 24, 2013
Page 11505, Line 18

Q. · And so other than the order you issued on September the 24th and the report you got, which we'll deal with, you had yourself not determined whether or not there was a structural issue?

A. · No, I don't believe I was -- I saw anything there that I could make a definite conclusion on that point.

Bruce Ewald

May 24, 2013

Page 11553, Line 23

I don't know whether saying they fell through the cracks. · They were dealt with in 2009. · I was in the middle of doing a review of the new Hampton Inn blueprints that had just arrived, so I was somewhat preoccupied between that particular project and getting settled into my new position, so these were -- they slipped through the cracks.

Bruce Ewald

May 24, 2013

Page 11509, Line 1

Q. · And despite the fact that the text of the report and the photographs in the report were confined to areas that you had written about in your report, in your inspection, did you conclude that he had looked at other areas?

A. · I don't know that I really gave it a great deal of thought, in hindsight. · It did not occur to me at the time of reading this report that it appeared that he only looked at the areas that -- that I had noted in my report.

Q. · But it wasn't --

A. · It was --

Q. Sorry.

A. · Sorry. · It was possible in my mind that those were the only areas that he found that were of a concern.

Bruce Ewald

May 27, 2013

Page 11668, Line 8

As a building inspector, we understand construction. · We can make a determination as to, you know, there may be a problem there, but if you don't actually see something, I mean, obviously we can make -- for instance, the NORR Report -- and I know we'll get into that later on, but some of the damage to the steel that I saw in the NORR Report, when I read that, had I seen anything like that I would have pulled the fire alarm and closed the place immediately.

But you weren't able to see that; that was all hidden behind stuff, that you couldn't see it.

Bruce Ewald

May 27, 2013

Page 11675, Line 7

After I received the engineer's report and I was speaking with Bob Wood, I did speak to him about the additional concrete in that area. I do have a recollection of that. I don't recall, in my conversation, whether we discussed the movement, but it would make sense to me that if I spoke to him about the additional concrete, I quite likely spoke to him about that, as well, but I -- I can't say with all certainty that that did happen.

Q. Did you ask him whether these issues were in the scope of work he had been given by the engineer that -- sorry, by the owner that resulted in his report of October 28th?

A. I wouldn't have worded it like that, but yes, I did.

Q. And what did he say?

A. Well, even in his report, he's -- he's referring to the -- both the structural steel and the core slab.

Q. But his report, sir, does not refer to the extra concrete issue or the movement, does it?

A. No. And I'm assuming because it -- it was not an area of concern in his mind.

Bruce Ewald

May 27, 2013

Page 11682, Line 18

THE WITNESS: You're -- you're absolutely correct. Now what we have -- and I demand that all complaints flow through the administrative secretary so -- or assistant, so that it is entered into the database. I do not permit my staff -- other staff -- to take the complaints. If the complaint comes to them, they're required to forward it immediately to the administrative assistant, so that it does get entered into the computer and then we have a record of when we received it and -- and specifically what that complaint is. She is then responsible to direct that complaint to whichever staff member she feels is appropriate, and if she's not sure, she generally checks with me to see who do you want this complaint to go to.

THE COMMISSIONER: All right.

Bruce Ewald

May 28, 2013

Page 11952, Line 5

Q. Ms. Bear, we are now looking at the letter from Mr. Wood to you dated April 30th, 2012, and this had to do with your applying or the mall applying a new form of caulking material. Did you read this letter with some care when you received it?

A. Yes.

Q. And it was provided, to the best of your knowledge, to the Chief Building Official, Mr. Ewald?

A. Yes, it was.

Rhonda Bear

June 11, 2013

Page 14033, Line 5

91. The fact that Mr. Derreck and Mr. Turner were terminated, and Mr. Allard retired hampered the City's efforts to follow up on the 2006 Notice of Violation. Combined

with this is the fact that Mr. Caughill was supposed to advise the City if his relationship with Eastwood Mall changed and he failed to do so for two years. Chief Officer, being the only remaining employee with involvement in the 2006 Notice of Violation was the only one who knew about it and, in that regard, was the one who brought it back to the forefront in 2009. One helpful practice that has since been implemented at the City by Mr. Ewald is a reminder system. It is the City of Elliot Lake's position that the type of reminder system implemented by Mr. Ewald would be an excellent recommendation to be implemented across the province. Mr. Clouthier testified that it was very unlike Mr. Allard to not stay on top of a matter and so it is a number of contributing factors, many of which are human error, which resulted in the Notice of Violation being delayed. This was not solely the human error of the City.

92. As mentioned, the fact that not only the CBO retired, but both the Mall Manager and the CAO were terminated made it so that nobody at the City had institutional knowledge of the Notice of Violation. Mr. Ewald could not have been expected to inform himself of matters which nobody could have briefed him on at the City. Mr. Ewald has since implemented a reminder system which he described in his testimony:

93. Mr. Ewald's testimony evidences that the work on the mall roof was not ongoing and therefore the building permit was cancelled. Though it has been alleged that Mr. Ewald "failed to ensure by the owner on the mall parking deck... was stopped", Mr. Ewald was in fact leading the pursuit of violations by the owner. At **Exhibit 172, Pg. 97**, Mr. Ewald's notes reveal the steps he was taking to ensure the roof work had the appropriate building permits. In his final note on July 10, 2008, only three days into his new job, he demands specifications from the architect and engineer on the project.

94. The City did not have the manpower (without the implementation of a reminder system) to pick up on Notice of Violation which nobody had institutional knowledge of.

95. As Mr. Ewald later testified, Building Department employees know about construction, but they do not know about engineering. This technical information is beyond the scope of their knowledge and they should not be held up to that standard. If the instruction in the Order to Remedy stated that the engineer was to inspect the entire mall, the City should not have to go behind the report and determine whether such an inspection was in fact done. **Exhibit 103** is the engineers report. After item 4 on page 3, Mr. Wood states that "Based on the above it is our opinion that our inspection revealed no visual structural concerns both with the structural steel or prestressed slabs."

96. Mr. Yakimov's concern was raised with Mr. Wood and Mr. Wood concluded that there was no issue with the area outside of the upper deck mall entrance as

expressed in **Exhibit 1446**. If Mr. Wood said this, it was not Mr. Ewald's place to doubt it.

97. Mr. Ewald was very active in his years as the CBO. He was never advised of the Notice of Violation and there was no reminder system in place to alert him of this fact. Mr. Ewald was often concerned with Mr. Nazarian's efforts to avoid building permits and Mr. Ewald's complaints and concerns in this regard continued until as late as April 2012. In **Exhibit 139**, Mr. Ewald is copied on a response from Mr. Wood to Ms. Bear, the mall manager at the time, which states that MR Wright has "no structural concerns over the additional loading of caulking or waterproofing." Further **Exhibit 139** specifically mentions that it was a concern of the City's (i.e. Mr. Ewald) that prompted this response. Furthermore, Mr. Bear's testimony and **Exhibit 4995** specifically indicate that she had contacted Mr. Wood based upon Mr. Ewald raising concerns about the work being done on the roof. Mr. Ewald's initial correspondence to Ms. Bear is included in **Exhibit 4995**. The response of MR Wright to Mr. Ewald's concern is found at **Exhibit 139**.

MAYOR GEORGE FARKOUH (MAYOR 1989 – 2006)

Exhibit 3374 (Pg. 5)

Mr. Derrick records his recollection of a meeting with Mayor Farkouh on October 19, 2006 as:

Outstanding - Draft action plan approved by all. Discussed briefly with Mayor, who approved of what has been done to date and noted the economic sensitivity needing care in how we proceed (*i.e. We don't want to bring about the closure of any part of the mall and thereby put it in jeopardy while at the same time showing due diligence of action on the City's part from the standpoints of health, safety and addressing the costs emanating from leakage, now topping \$12,000.00*)

Mr. Farkouh's recollection of this meeting is as follows:

Q. Sir, did you approve of what had been done to date by Mr. Derreck?

A. Yes. I commended him on his ---- his efforts, and at the same time, I encouraged him to take that to Council and – and receive the full support of Council, as his direction to follow up on his plan

And in my recollection, I also pointed out to him that he should follow all the appropriate legal steps to insure that all the due diligence is done, and if that should lead to the ultimate closure, partial or otherwise, then we're on sound foundation.

George Farkouh
May 7, 2013
Page 8329, Line 9

Further, we would also like to refer the Commissioner to Mr. Derrick's answers to Mr. Broadbent's questions in this regard:

Q. Okay. Now did he – did he elaborate on the economic sensitivity and what he meant by that?

A. Pretty much what I described there. Again, keeping in mind that I only arrived on the scene, and I think perhaps reasonably if were Mayor and I had a chap jump in three, four days and all of a sudden he's talking about issues that might impact a major commercial and social centre, I might react the same way.

Tom Derreck
May 13, 2013
Page 9842, Line 24

CAO: FRED BAUTHUS (1ST PERIOD FEB 5 1990 – JUL 21 2000)

Q. Enforcement is complaint driven." That was a description of the level of service and enforcement that was being used as at the time this report was written. Do you know, sir, how long that had been the basis of the enforcement of the by-law?

A. What, that it was complaint driven?

Q. Yeah.

A. As long as I can remember.

Fred Bauthus
March 25, 2013
Page 2895, Line 13

A. That, in my understanding, is a fairly common level of service throughout the province.

Fred Bauthus
March 25, 2013
Page 2897, Line 3

Q. I wonder if you could explain to us, sir, what your understanding, when you were the CAO of the City, was meant by "complaint driven." What does that mean when it says "enforcement is complaint driven"?

A. That there -- well, basically that there is a specific complaint about an issue and if it were -- and if whatever that issue is, was contrary to one of the regulatory by-laws, City staff would pursue that.

Q. And did the complaint have to be in writing?

A. Preferably, but if they came in and talked to the appropriate official or if you, you know, like, in terms of animal control a phone call would have that looked after.

Q. All right. To whom did the complaint have to be made?

A. In the majority, majority of cases, it would be done to the by-law's officer, who in this case is the Chief Building Official.

Fred Bauthus
March 25, 2013

Page 2897, Line 6

Q. Sir, would this letter constitute a complaint, such as to allow or – not allow, but rather authorize Mr. Pigeau to carry out an investigation under the enforcement policy that we looked at yesterday?

A. I would take it that it would be a complaint, and I would take it, as is indicated here, that Mr. Pigeau would follow up with the parties concerned, and given that they were undertaking work to attempt to remediate it, that they were working on that problem.

Fred Bauthus

March 26, 2013

Page 2922, Line 7

Q. Thank you. If I could ask you to turn up **Exhibit No. 35** at tab 83. This, sir, is the first report prepared by the TROW Engineering firm, and it's the report that was referred to in Mr. Pigeau's note that we just looked at. Sir, had you seen this report before preparing for this Commission of inquiry?

A. No, sir, I did not.

Fred Bauthus

March 26, 2013

Page 2925, Line 3

And if you look at the second page, Mr. Caughill has written:
In general: "Iamonico does not believe that we have a structural problem yet ..."

And "yet" is underlined:

"But he cautions that the corrosion seen will accelerate exponentially, if the leakage is not treated."

Fred Bauthus

March 26, 2013

Page 2929, Line 22

Q. Do you recall getting this letter, sir?

A. Having seen it, yes, it came across my desk and I turned it over to Mr. Pigeau to act on, and according to the notes affixed hereto, the Chief Building Official met with the Librarian, and I understood that the issues with regard to the ceiling -- ceiling tiles and that were fixed.

Fred Bauthus

March 26, 2013

Page 2938, Line 10

Q. If I could ask you to turn up the next tab, sir, which is **Exhibit No. 44**. This is the report produced by TROW for Algoma, dated November 9th, 1994. And, sir, prior to preparing for this Commission of inquiry, had you seen this document?

A. Prior to you providing them to me, no.

Fred Bauthus

March 26, 2013

Page 2941, Line 1

Q. Sir, if you had seen this report at the time it was produced, what would you have done?

A. Again, as I said, it would have been turned over to the Chief Building Official to undertake the review, comment and act according to his authority under the Act.

Fred Bauthus

March 26, 2013

Page 2945, Line 11

Q. Did you ever understand that the importance of the mall to the community and the importance of the library to the mall, should influence, in any way, the manner in which you or City staff should deal with the issue of leaks in the mall?

A. No, there was nothing ever intimated or stated specifically on that respect.

Q. And just to be clear, do I understand from your evidence that there was no understanding on the part of City staff that they ought to treat the mall differently with respect to the leaks because of the importance of the mall to the community and the library to the mall?

A. No, there was no direction or discussion on my part that we should treat the mall differently and I know I did not direct staff to do that otherwise.

Fred Bauthus

March 26, 2013

Line 2949, Line 17

Q. Did you refer -- in October of 1998, did you refer the issue of the leaks to Mr. Pigeau so that he could deal with it as a breach of the Property Standards by-law which required the mall to be watertight?

A. No, I don't recall at that time that I did. I don't think I did, but I can't recall.

Q. Can you explain to me why you did not do that?

Fred Bauthus

March 26, 2013

Page 2954, Line 13

Q. If I could ask you to turn two pages along. This is a letter dated December 30th, 1998. It's in the same exhibit. And in the letter -- this is a letter from Ms. Fazekas to Mr. Burling, the clerk. She writes to tell him that at the November 12th meeting -- this is a letter that was dated December 30th, 1998, and she writes to say that:

"At the November 12th meeting of the Library Board ... the Board passed the following resolution ...

Fred Bauthus

March 26, 2013

Page 2955, Line 20

Q. And, sir, would you consider this report of the Library Board to Council, as a complaint within the meaning of the by-law enforcement policy that we discussed yesterday?

A. It could be construed as a complaint for the water leaks.

Q. You say, "It could be construed as a complaint."

A. Yes.

Q. Could you explain to me how it could not be construed as a complaint; isn't it pretty obviously a complaint?

Fred Bauthus

March 26, 2013

Page 2971, Line 10

Q. Sir, at the time -- at this time in 1999, throughout this time, but particularly in 1999, when you were -- when you were privy to the formal report of the Library Board, did you think about the potential effect of the leaks on the structure of the building?

A. No, sir, I -- you know, I guess if I look at that, I did not draw a straight line relationship between the leaks and the structural integrity of the mall. And you know, on that, I think in terms of my view of this -- I did not draw that direct inference at any time. And I would suggest to you, you know, when you -- when we go back and look at this, neither did any of the engineers -- and there were a whole number of them through those years that had examined the water issue, and none of them had felt at that time that the water issue created an imminent safety issue.

None of them had felt at any time -- and I guess if you take a look at the engineers that looked at this, and when I go back, you know, in hindsight and look at the reports, you know, they have a professional obligation, as well. In fact, you know, that if they felt that there was an issue -- an imminent safety issue in a public building, they are required under their professional standards to report that. However, none of those individuals had done that.

I look at here, the issue, in that the Ministry of Labour had come in on a number of occasions and addressed the leaks, and they came in and they just worried about at that time and reported on two instances, through the material that I've seen here, with regard to the air quality and the mold, and they too are mandated with the responsibility of workplace safety and they did not draw a direct line between the water and the structural safety. And these people, the engineers and that, these people are trained in that. Myself, I'm a financial person.

Fred Bauthus

March 26, 2013

Page 2975, Line 7

Q. Sir, was the expectation that -- at the time this contract was approved by Council, was the expectation that the two deliverables related to the mall -- that is a summary of the physical building condition and a value of the facility -- was the expectation that they be given to the City?

A. I would assume that at the time, yes.

Q. And, sir, were they given to the city?

A. No, sir.

Fred Bauthus

March 26, 2013

Page 3032, Line 11

Q. And I appreciate hindsight is 20/20, but can you think now of a reason why -- that the City would understand and accept why the physical building condition assessment ought to have been kept secret from the City?

A. No, I can't. I didn't draw any conclusions on that regard.

Fred Bauthus

March 26, 2013

Page 3044, Line 22

Sir, if you had seen this report at the time, can you tell us what you would have done?

A. Again, I would have turned it over to the Chief Building Official, and looked at the opportunities suggesting that we proceed with additional studies to verify or amplify the information that they're recommending.

Fred Bauthus

March 26, 2013

Page 3057, Line 4

Q. Thank you. And if you had seen this report at the time, what would you have done, sir?

A. Well, again, it would have been turned over to the CBO to follow up and ensure that that work of some nature was done to remediate the -- the water.

Fred Bauthus

March 26, 2013

Page 3059, Line 19

BY MR. ELLIOTT:

Q. My question is: Why was the City of Elliot Lake not enforcing this by-law with respect to this particular entity for so many years when they would have enforced the by-law against someone else?

THE WITNESS: Now, with regard to the issue that -- of -- because of the economic value of the -- the mall being a consideration for the City not undertaking anything specific was not there, in terms of anything, as I said previously, direction to me from Mayor or Council, or my direction to any of the staff, with regard to what may have happened or transpired relative to the -- the water and the ongoing issues on the water, is a number of actions were taken, in talking to the mall owner. They had shown a continual work and maintenance to attempt to resolve that situation. And even in taking a look at the reports coming back, unfortunately they did not do everything, perhaps, that might have otherwise been -- been necessary. But, however, in the purpose of

enforcement, had the City undertaken any level of enforcement at the time and moved ahead for court action, one would look at -- at it in a way anything else has happened. If the owner has undertaken appropriate due diligence to attempt to remediate the problem, that would have been shown as evidence that they are trying to work to clear up the problem.

Fred Bauthus

March 26, 2013

Page 3079, Line 6

A. Yes, in terms of -- well, through the restructuring part, from the City perspective, there were serious challenges. And as I indicated earlier, in just being able to maintain services, with a significant loss in taxable assessment with the mine sites having gone off the tax rolls; however, the residential component of the community, with its services - roads, sidewalks, parks and all the other components that the City was responsible for -- remained virtually the same.

Fred Bauthus

March 26, 2013

Page 3084, Line 2

Q. I want you to try to go back in time to the period between 1990 and 2000. I want you to avoid hindsight, if possible. I know it's difficult. You did not have the engineer's reports. What were your thoughts back then, if you put an order on the mall and closed it down, what were your concerns or did you have any thoughts of that?

A. I guess, in terms of undertaking an order, in closing down a facility, our immediate thought would be ensuring that we had done it pursuant to the right reasons and had evidence that we were pursuing down that road, and in looking at this situation, it would have been that we would have had incontrovertible proof that there were some -- there were safety issues caused by the water infiltration, and a concern would be that if we did not have the supporting rationale to support stop up and closing, I would feel that the City would be subject to considerable liability from the parties involved in the site, not only the property owner, the business owners, and the employees for loss of income.

Fred Bauthus

March 26, 2013

Page 3157, Line 2

A complaint must be in writing and be filed with the proper department. These are the two most basic fundamental aspects of the enforcement process. As we can see from the Library 'complaints', there was only one time, in 2006, that the library carbon copied a complaint to the CBO. This complaint can be found at **Exhibit 1698**. Regarding the complaints, Mr. Bauthus does not say he did not refer the matter to Mr. Pigeau, he states that he does not recall whether he did or not. This is an unfortunate event of trying to recall matters that took place nearly two decades prior to giving evidence on it. Clearly, somehow, it was received by Mr. Pigeau, likely from Mr. Bauthus or Mr. Burling. IN any event, proper protocol was followed and the complaint was resolved. The mall wasn't given a Notice of Violation or an Order prior to '06 because the City always

believed the roof leaks to be a maintenance issue rather than a structural issue. There was no concerted effort to treat the mall differently than any other building in town, except for the truth of the matter, that the mall was one of the last economic engines for the City.

As it relates to the budget increase request, **Exhibit 11-3, Pg. 9**, Mr. Bauthus goes on to explain that “if you look at what happened with the library, they, in fact, got more – more money during this period for their operations. See **Exhibit 3259**, noting a \$6,000.00 increase in the library’s budget. So, they did not suffer the attrition or the reductions that were dictated by the “Who does what?” For an explanation of what “Who Does What” is, see Fred Bauthus Testimony – March 26, 2013 – Page 2961, Line 15.

Fred Bauthus

March 26, 2013

Page 2961, Line 22

98. As Mr. Warwick Perrin testified, there is no standard across the province as to whether property standard by-laws are passively or actively enforced. The City of Elliot Lake chose to passively enforce their by-law, and thus, required a complaint in order to execute the inspection mechanism of the by-law. The City’s decision to enforce their by-law passively is a matter of resources. As is obvious, the City had limited resources and could not afford to hire any number of additional building inspectors to go out and actively enforce the Property Standards Bylaw. The policy that lays out enforcement is **Exhibit 6-8**

99. Attempts to conceal the severity of the problems with the roof structure stemmed as far back as 1991 when original owner owned the mall. There are many examples to keep reports from the City after Mr. Pigeau was already told they’d be getting an engineer’s report. Once the report was received, the original owner certainly was not forthcoming with its findings and did not follow the recommendations therein.

100. The report at **Exhibit 44** recommends a structural review in 1994 to “determine the capacity of the roof slab”. If the City would have had this report in 1994 or shortly thereafter, it wouldn’t have taken another 15 years to finally get a structural report. Although, as has since become evident, the fact that an engineer determined the building was structurally sound may not have prevented the collapse.

101. At the time of the third TROW Report, at **Exhibit 55**, which states “Ongoing leakage through the joints in the topping and core slabs will continue to cause deterioration of the topping and core slabs due to freeze/thaw cycles and chloride contamination of the core slabs and subsequent corrosion of the pre-stress strands in the core slabs and the supporting steel beams.”, there is no longer any chance original owner simply wasn’t handing the reports over because of an oversight. This is an explicit effort by original owner to prevent the City from getting these reports.

102. In December 1998, the City was doing the legwork on preparing the building condition assessment and valuation for the mall to advance the cause of Retirement

Living purchasing the mall so that it could support their main business purpose. This is evident by Mr. Bauthus trying to organize the terms of reference for the building condition assessment at **Exhibit 1244** in early December of 1998. Mr. Leistner replies to Mr. Bauthus' fax shortly after it is sent, that reply is found at **Exhibit 3226**. Then, by January, at **Exhibit 397**, the City has been shut out, and Retirement Living signs a non-disclosure agreement with original owner to specifically keep information from the City, and more specifically, the individuals listed on the non-disclosure agreement, which can be found at **Exhibit 390**.

103. The City paid \$48,150.00 for the Retail Study and Building Condition Assessment. The resolution authorizing the expenditure is at **Exhibit 249**. Retirement Living then got reimbursed for the amounts they used, of the City's money, by original owner if they agreed to withhold the building condition assessment from the City. This is what is set out in the Non-Disclosure Agreement at **Exhibit 390**. So Retirement Living doubled their profit on the retail study. The Building Condition Assessment that was ultimately reported to the two members of council who were on the Retirement Living board was a total fabrication. The Summary provided to board members is at **Exhibit 3276**. The actual NIB report is **Exhibit 66**. Obviously the City would have taken action had they received all these reports, since a new firm was coming in and supporting the findings of TROW which had previously found there were structural concerns.

104. As long as the owner could show that they were doing continuous work on the roof, the City would likely be unsuccessful in any litigation against the owner. This is why they undertook the only avenue they had available to them. That being, issuing an Order to Remedy, which demanded a structural engineer's report, which said the building was structurally sound.

105. Needless to say, the City lost 50% of its tax base but did not provide many municipal services to the mines, and so, their financial responsibilities were not reduced in a similar fashion.

CAO: TROY SPECK FEB 13 2001 – JULY 26 2006

Q. Do you have any recollection of complaints of leaks during that time period at the library?

A. I don't have -- I don't remember specific complaints, no.

Troy Speck

April 24, 2013

Page 6685, Line 7

Q. And do you agree with me, sir, that this is a tenant complaint of a breach of the Property Standards Bylaw?

A. I don't know that I would say that. It looks like a request for funding. I don't see the Property Standards Bylaw referenced.

Troy Speck

April 24, 2013
Page 6717, Line 19

Q. And the letter, which indicates that the administration was directed to formally approach the landlord for the purpose of seeking a resolution of the issues, indicates that the Council was treating this as something that the landlord should fix, right?

A. That's right.

Troy Speck
April 24, 2013
Page 6720, Line 2

Q. And you don't recall this letter in 2002, but do I take it from your evidence that you took no steps in at least in the first few years of working for the City, through 2002, to see what was going on with the leaks in the library?

A. Not that I recall. And as I look at the evidence, I don't see, other than this letter which doesn't appear to be -- have been copied to me, I don't know that I see any evidence in those first few years of leaks. In fact, I know somewhere in the documentation there was a 2003 Health and Safety report that indicated that the staff had reported no issues.

Q. Sir, I'm not --

A. When I look at my time as CAO, I don't see any evidence and don't recall any complaints of leaks in '01. I didn't see this letter in '02. And I don't see any other evidence of complaints. In 2003, I see the letter from the Health and Safety Inspection that indicates no reports of concern and don't see any complaints. 2004, I don't see any complaints or haven't so far in the documentation until 2005. So that leads me to believe, anyhow, if the documentation is accurate that I wouldn't have been receiving complaints. So perhaps the landlord made some fixes in the patching on the roof. I don't know.

Q. Well, sir, I didn't ask you for what conclusions you'd reached after reviewing the documentation, did I?

A. You asked me if I took any steps --

Q. I asked --

A. -- and I explained to you why I wouldn't have taken any steps. I think it's a reasonable thing to do.

Troy Speck

April 24, 2013
Page 6749, Line 4

Q. Were you aware that the library was complaining of continuing leaks in 2002?

A. I don't recall being aware of this letter. I know that I'm not copied on it.

Exhibit No. 11-13
Troy Speck

April 24, 2013

Page 6747, Line 9

Exhibit No. 3292

Q. Can we agree that she's telling you that there is a complaint, if not from her, from Councilor Denley that the roof should be repaired and the library should not have to put up with the leaks?

A. She is indicating that he said that, yes.

Troy Speck

April 24, 2013

Page 6754, Line 3

Q. Did you take any steps to determine whether that complaint was a valid one?

A. No, I did not. And I did not because, quite frankly, Councilor Denley liked to stir the pot often.

Q. So you discounted any complaint he made?

A. When I hear a report from a fellow Councilor expressing dismay over his actions and presentation at a board meeting, and knowing some of the political motivations that were behind a lot of what Councilor Denley did, I would have discounted that, yes.

Troy Speck

April 24, 2013

Page 6754, Line 11

Exhibit No. 11-84

"Mrs. Fazekas was directed to prepare a memo or report, documenting all of her concerns regarding the building, leaking, working conditions, etc. She was also directed to get someone in to test the air quality and test for mold ASAP. These are the steps that need to be taken to address any problems, and once they have been taken, staff will move forward to a solution. Given that was the direction that was supposed to be being taken, I am not sure why it now seems to have become an issue requiring Council involvement and discussion. "Mrs. Fazekas, if you can please follow through on the direction from last week, you, Mr. Gagnon and I will be in a better position to deal with the Landlord regarding these issues."

Sir, can you tell me, sir, why you were chastising Ms. Fazekas or perhaps it was Ms. McTaggart for taking this to Council?

Troy Speck

April 24, 2013

Page 6766, Line 11

Q. And you'll agree with me that that frustration would be reasonable?

A. Yes.

Troy Speck

April 24, 2013

Page 6770, Line 6

Exhibit No. 11-14

And this is letter that you appear to have been asking for and it's the letter from Ms. Menzies, the chair of the Board, same day, April 28th.

Troy Speck
April 24, 2013
Page 6771, Line 19

Q. You then wrote her back and said this, and this is at the top of the page. "You are the manager of that facility. I am the manager for the City. Surely to God we can deal with this, or we shouldn't have our jobs. Why would you send it to Council? Please get me the letter ASAP." Why did you write that e-mail, sir?

(...)

A. I believe what was in my mind at the time was the fact that of the health and safety complaint going out to Council rather than going through the proper -- proper channels. And again, still frustrated that I thought we'd developed a plan to move forward. And instead of getting the answers to the questions that I'd asked, I just kept getting the concerns and complaints. And I didn't feel like things were moving forward the way I felt they should.

Troy Speck

April 24, 2013
Page 6771, Line 9

Q. Can you tell me why you thought it inappropriate -- sorry, why you thought that she should report to you rather than to Council when there is no reporting or supervisory relationship between the two of you?

A. I never thought Ms. Menzies should report to me.

Q. Why did you want her to write the letter to you?

A. They called me and asked me for help, sir.

Troy Speck

April 24, 2013
Page 6774, Line 24

A. Okay. Can I have -- give me a minute to respond. First of all, the reason I didn't want -- first of all, this letter from Ms. Menzies isn't the letter I was looking for. What I was looking for was the objective data that we could go to the landlord with, as I said before, mold test results, air quality test results, cost of doing repairs. The reason you would send it to Council is because it's me and her trying to fix this thing. What's Council going to do with that information? It's up to us. We're the administrators. She's the CEO of the library. I'm the CAO of the City. Get the letter to me. You have called me for help. Get the letter to me so that we can draft the letter that eventually went out June 1st to the landlord and try and find a solution to this, which we eventually did because they wound up fixing everything and paying for everything and sitting down to meet with the Library Board eventually. Second of all, I believe you've insinuated that I'm saying she hasn't got me the letter. This letter dated April 28th from her, if you read a reply that I gave to

her, and I don't know where it is in all of this, but my reply to her acknowledges that I did not receive this letter until I believe it was May 4th or May 3rd. So that's why -- that's why I'm saying you haven't given me the information yet because this letter dated April 28th from Ms. Menzies did not arrive to me until sometime in May.

Troy Speck

April 24, 2013

Page 6776, Line 21

Q. Exhibit No. 11-88.

This is a form from the Ontario Ministry of Labour and it records a meeting with Barbara Fazekas and Mr. Reagan on the 3rd of May accompanied by a gentleman by the name of Tony Fontana, a hygienist from the Ministry of Labour, to indicate that some air monitoring was done and this was the result of the complaint to the Ministry of Labour, correct?

Troy Speck

April 25, 2013

Page 6792, Line 19

Q. Well, the Property Standards Bylaw says that if there's a complaint, it's a complaint-driven policy, so that if there's complaint, the building official was supposed to investigate, was he not?

A. I do not believe that I appreciated at that time that a leaky roof was a violation of the Property Standards Bylaw.

Q. Well, sir, you were on Council when the Property Standards Bylaw was passed. Are you telling me you did not understand that's what it said?

A. I did not understand those specifics, no.

Troy Speck

April 25, 2013

Page 6817, Line 2

Q. And as a regulator, they could make an order?

A. I don't recall whether I did it specifically because they could make an order. I recall that we asked them to come in and do some testing. I know I believe that testing done by them would be something that the landlord would sit up and take notice of. But there may have been an order.

Troy Speck

April 25, 2013

Page 6827, Line 17

Q. Okay. Did you consider doing anything other than meeting with the landlord?

A. I don't recall thinking of -- considering anything else.

Troy Speck

April 25, 2013

Page 6835, Line 19

Q. **Exhibit No. 11-100.** This is your letter of June 1st, 2005, from -- sorry, to Mr. Kennealy, right?

A. Yeah.

Q. And you write in the first paragraph:

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

Troy Speck

April 25, 2013

Page 6839, Line 22

Q. **Exhibit No. 11-101.** And this is a letter from -- it's an undated letter from Ms. Menzies

(...)

And then she goes on in the last paragraph on that page to write:

"A meeting with the Board, the Mayor, our Council representative and yourself would be appreciated. Since the Board does not meet during the summer, a September meeting could be arranged."

Do you recall getting this sir?

A. I don't recall getting it, no.

Troy Speck

April 25, 2013

Page 6845, Line 21

Ms. Fazekas wrote this.

"He [Mr. Kennealy] outlined the structural challenges faced by the flat roof of the mall and the attempts at ameliorating the problem over the past 5 years."

That would be the length of time they owned the mall, right?

A. Yeah.

Q. "The structure of the parking roof is two layers of cement slabs approximately 4 to 5 feet apart. Solutions proffered by the experts include the insertion of a rubber membrane between the two layers, involving the removal of the top cement layer or the construction of a structure over the roof that would necessitate increased structural support. This latter option would cost approximately \$1.5 million."

Exhibit 11-18

Troy Speck

April 25, 2013

Page 6848, Line 3

Q. **Exhibit No. 11-103,** I think. These are your notes, sir, I understand?

A. Yes, they are.

Q. Of that meeting on June the 15th?

A. Yes.

Q. And reading them from the top they say: "Library Board RK, the Board is the customer, the legal entity, proper way to communicate is in writing." Do you recall Mr. Kennealy saying that?

A. I don't recall that, but my notes certainly reflect that.

Troy Speck

April 25, 2013

Page 6849, Line 20

Q. **Exhibit No. 11-104.** These are the minutes of a meeting of the Joint Health and Safety Committee dated June 22nd. And item number two is Review of Complaint Report and recommendation form for the Library. And under the item Recommendation, they noted their earlier recommendation which was, "Ensure the landlord has the problem of roof leakage fixed to eliminate the hazardous conditions that occur when it rains."

And under Action Taken it says: "The roof was resealed by the landlord. COMPLETE."

Troy Speck

April 25, 2013

Page 6852, Line 21

Q. And, sir, did this cause you to revisit your earlier conclusion that it had been fixed?

A. Well, obviously it hadn't been fixed. And the minutes indicate that the CEO of the library is going to meet with the new landlord to discuss it.

Troy Speck

April 25, 2013

Page 6855, Line 15

A. This is a new mall owner, though. You have to give him an opportunity, no?

Q. Why?

A. Because you're not going to go to a court with a brand new mall owner who is showing efforts to do things and have a court side in your favour. They'll have a due diligence defence if they're trying things to fix the problem.

Q. What does a due diligence defence have to do with an order under the Property Standards By-Law requiring the mall to be repaired? It has nothing to do with it does it, sir?

A. You're the lawyer. I don't know.

Q. You were the one who talked about a due diligence defence, sir, and you're a lawyer, right?

A. My understanding is --

Q. Is that not right?

A. Yes, I am.

Q. And a due diligence has to do with a defence to a charge, a regulatory charge under a provincial statute, right? That's what a due diligence defence is about, right?

A. My understanding was that it was also available for the matter like this.

Q. Are you telling me --

A. If I'm wrong, that's fine.

Q. Okay. So your evidence, sir, is that at the time you considered making --

A. No.

Q. Just let me finish the question. Is your evidence that at the time you considered making an order under the Property Standards By-Law and concluded you should not do so because there was a potential due diligence defence, is that your evidence?

A. No. No, that's not my evidence.

Troy Speck
April 25, 2013
Page 6870, Line 24

Q. Okay. And what, if anything, do you believe was the difference in the leak situation that you confronted in April and May of 2005 versus the information and evidence you've seen regarding the leak situation that was confronted in October of 2006?

A. Just that it looks like it's gotten worse and I've read that in the summary that I've seen prepared by Tanya-Lee Williams, I believe it was --

Q. Okay.

A. -- that things started to go downhill from 2005 onward.

Troy Speck
April 25, 2013
Page 6882, Line 17

Q. Okay. And after you departed -- and those individuals presumably, they would have been -- they would have been, at your direction, responding to these issues regarding the library leak complaint?

A. Yeah, they would have. I mean, I think if you look back at the history of it, you know, although the end result may not have been satisfactory by the time I left, I did more than any of my predecessors with regard to helping the library with its issues.

Q. Okay.

A. And certainly I think the work we did and the documentation we did to establish the issues, which had not been done before, may have been some help in moving forward to an order.

Q. Okay.

Troy Speck
April 25, 2013
Page 6884, Line 19

A. Well, as I look at it, just given the fact that over a span of about eight months, I only attended, I think, three of those meetings 14 years ago, I think that speaks to why I can't remember being on the Board.

Q. Okay. And what if any other involvements did you have at that time in 1999?

A. I was on the Board of ELNOS, and several committees of Council.

Troy Speck

April 25, 2013
Page 6890, Line 18

Q.· It seems by virtue of the continuous stream of correspondence from, for instance, Ms. Fazekas and others at the library pleading with you about remedial action, they were constrained. They didn't have the resources, the finances themselves, to correct and remedy things within.

A. I don't know that that's the case. I mean, they -- I think they would have had sufficient funds to go get their own independent legal advice if they wished.

Troy Speck
April 25, 2013
Page 6900, Line 22

Q. Okay, thank you. And, sir, in your evidence yesterday, you acknowledged to Mr. Doody the CBO's independence from Council as a statutory officer under the Building Code Act?

A. That's correct.

Q. I'd like to ask, in your years as either a Councilor or the CAO, did the Mayor, elected Councilors, or senior City officials ever direct the CBO how to do his job?

A. Not that I recall.

Troy Speck
April 25, 2013
Page 6906, Line 20

Q.· I want to suggest to you, though, that it's obvious and you agreed with me that there was that chain of command with library personnel, Ms. Fazekas and the Board essentially having to then come to you or Council.· They were limited and not free to act independently.

A. If -- if they wanted more money than they budgeted for the year, yes, but otherwise they were independent.

Troy Speck
April 25, 2013
Page 6902, Line 16

A.· No, no.· That was just -- I felt as she is CEO of the library and having asked me as CAO of the City for advice, and having given her some advice that -- and I thought having agreed on a plan of action that she would implement that plan of action and consult me if she had any other questions.· And I didn't understand why that wasn't happening and instead e-mails were going to Council.

Troy Speck
April 25, 2013
Page 6930, Line 6

106. It is the submission of the City of Elliot Lake that there were no Property Standard complaints between December 1994 and December 1999. From 1990-2006, the City was dealing with this issue as a maintenance issue as a result of their

lack of knowledge regarding the true structural state of the mall because there was no evidence ever provided to the City of structural problems until sometime after 2006. As a maintenance issue, it was the owner's responsibility to stop the leaking roof, not the City's responsibility.

107. Mr. Speck is correct in correcting the statement made by commission counsel that he "took no steps" because, as he describes in his explanation, there were no complaints in 2000 or 2001 and the 2002 letter did not go to him, or the building department and therefore could not have been dealt with. It is submitted by the City of Elliot Lake that Mr. Speck properly answered the question in the first instance and was not avoiding providing an answer. It is not evasive to give a response with an explanation when asked a question. Further, it is the submission of the City of Elliot Lake that **Exhibit 3292** is not a complaint but rather, could be categorized as triple hearsay allegedly from Mr. Denley to Ms. McTaggart to Mr. Speck via email. The City of Elliot Lake submits that Councilor Denley's actions post-collapse show serious questions about his motives and credibility. Mr. Speck is raising the same issue with regard to weight of Councilor Denley's testimony and is highlighting this point years before the collapse.
108. The use of the word "chastising" in the question is, in the submission of the City of Elliot Lake, used to provoke a reaction from the witness. It is a question that will almost certainly cause the witness to be defensive and thus, argue back. Mr. Speck corrects Commission Counsel because nothing in this email is chastising Ms. Fazekas. Mr. Speck had clearly requested that steps be taken and those steps had not been taken yet for some unknown reason. The steps were Mr. Speck's way in which he was responding in an active fashion to complaint #5. Anyone who works in a field with processes and procedures in place would understand the frustration behind asking the library to get some materials together (so Mr. Speck could speak to Mr. Kennealy) and the fact is that the library was not complying with Mr. Speck's request for due diligence but rather was sending emails to other people. Mr. Speck was attempting to deal with the matter rationally and did want Ms. Fazekas going above his head to his boss (council) when Mr. Speck has already outlined a proposed plan to deal with the issue.
109. In relation to **Exhibit 11-14**, it is absolutely confusing to Mr. Speck and should be to the commission as to why Mr. Speck is being criticized for a) the library seeking his help, b) Mr. Speck trying to keep the library board on point and c) actually crafting a demand and meeting with the owner whereby the owner paid for various amounts expended by the library on leak issues. In the circumstances, it is the submission of the City of Elliot Lake that in the circumstances Mr. Speck handled the City response to the complaint appropriately. Again, it is not unreasonable to think that if everyone at the City believed this was a maintenance issue. Not even the City's solicitor Virginia MacLean made the connection between the leaks and the property standards by-law until much later in the mall's existence.

110. The meeting to pressure the landlord seemed to be enough, along with the due diligence required by Mr. Speck, to get a partial reimbursement from Retirement Living and Mr. Speck believed that they were putting pressure on Retirement Living. Mr. Speck had no idea that Retirement Living was going to be selling in one month and neither Mr. Speck (nor the City) had any idea that the leaks were anything more than a maintenance issue.
111. Ultimately, the library thanked Mr. Speck for sending a letter to Retirement Living (See EX 11-101) and as noted by Mr. Speck in his testimony, the library was always frantic about the leaks, up until there was something else to concern themselves with, i.e. summer holidays.
112. Mr. Kennealy is the landlord and the library board is the tenant. The City was simply trying to help library, but the truth of the matter is that the City saw this as a landlord/tenant issue, which is what it was until the City later understood that it may be a structural issue after 2006 at which point the City pursued the post-2006 issues differently. However, even post 2006, an engineering report provided to the City stated that the mall was structurally sound.
113. After Mr. Speck's efforts, almost immediately (June 22), one of the JHSC requests of which Mr. Speck used these requests to exert pressure on Retirement Living, was already satisfied (See Ex. 11-104, Pg. 1). Namely, the resealing of the roof, which is almost immediate evidence of the City response to Complaint #5 and the fact that the City had some degree of success in pressuring Retirement Living.
114. Suddenly, in August 2005, the owner changed and the problem was that there is a new landlord/tenant relationship established which likely wiped out the advances made by Mr. Speck efforts. The reality is that the Library and the City were affected in the same negative fashion by the facts and law of potential litigation against the new owner, Mr. Nazarian.
115. The evidence has shown that the situation was considerably worse in 2006 than in 2005 when Mr. Speck was dealing with library. As such, the next CAO (Tom Derreck) took the steps necessary to issue a Notice of Violation because Tom Derreck better understood that this might be a Property Standards Bylaw structural problem from his prior experiences with libraries. Further, the individuals who worked closely with Mr. Speck and the information obtained by him were clearly of some value to Mr. Derreck moving so quickly with the Notice of Violation when he became CAO in Oct 2006. Further, as noted by Mr. Speck, the situation in 2006 as compared to the photos and video in 2005 was much worse in Mr. Speck's opinion. It is unfortunate and should be mentioned to the commissioner that Mr. Dan Gagnon (CAO), Ms. Tanya Lee Williams and Ms. Leddy (JHSC) were never asked to testify and all of them could have supported the City efforts undertaken during that time, including the efforts of Mr. Speck.

116. Mr. Speck's testimony should not be discounted for the mere fact that he cannot recall actually having sat on the Retirement Living board, especially considering that it was 14 years before his testimony and as we've seen, the City is a community of limited resources and few professionals. Individuals like Mr. Speck are required to be on innumerable boards, committees, community groups and Mr. Speck was starting a law practice and a family. Further, Mr. Speck attended three meetings relating to the Retirement Living board and it is simply not believable that Mr. Speck was provided the full binder of information re: sale of mall from original owner to Retirement Living (**Exhibit 3251**).

CAO: TOM DERRECK OCT 10 2006 – JUL 27 2007

A. So I went in to see Mr. Clouthier and I asked for the same records and I was told there were no records, which surprised me. And he told me that he -- I began to talk about the situation, what I had found there, and how could there possibly be no records? And he basically told me he knew nothing about leaks at the library.

Tom Derreck

May 13, 2013
Page 9381, Line 16

Q. And did you tell Mr. Derreck during that conversation that you had not been aware of these leaks? Did you express to him your surprise that you didn't know there were leaks at the library?

A. I'm not sure if I told him that at that time. It was the first time that I was told that there's a heavy leak going on at the library. And I went away -- I went over right away to look into it.

Chris Clouthier

April 23, 2013
Page 6378, Line 7

Q. You were then to contact the City solicitor, Ms. Virginia McLean, fill her in and get her advice about you proceeding to contact the mall owner directly by telephone, and subsequent e-mail and written communication to hopefully elicit, as you wrote: "...a quick and effective resolution of the problem on the owner's part as well as demonstrating and recording due diligence and a proactive response to the matter on the City's part....particularly because the issue impacts other commercial areas of the building and poses a potential health and safety threat to members of the general public as they visit and shop."

And that's what you wrote and that's what you were concerned about?

Tom Derreck

May 13, 2013
Page 9393, Line 2

Q. So were you seeking advice from Ms. McLean about the City's interest as a regulator, City's interest as a the funder of the library, or the City's interest, as you put it, as the party that has to approve the lease?

A. Yes to all three. –

Tom Derreck

May 13, 2013

Page 9404, Line 6

(...)

Q. Now, sir, do I understand that items numbered 1 through 5 that's what Ms. McLean recommended?

A. Yes, that's the short answer.

Tom Derreck

May 13, 2013

Page 9416, Line 12

Q. Why did you say -- why did you point out to Council that nothing had been done that might result in the mall's partial or total closure?

A. Because the Mayor's already expressed to me his concern, I think legitimately. And myself I was going to stop short of anything that was going to lead to that. In the end it wasn't my -- I had no authority to bring about a closure. That's either going to come from the CBO or through one of the ministry's -- an appropriate ministerial official. I had no say in that and I wasn't going there.

Q. The Property Standards Bylaw enforcement though, it itself could have resulted in the mall's partial or total closure, right?

A. It could have but at this point that had not been recommended.

Tom Derreck

May 13, 2013

Page 9418, Line 10

A. It may be a flaw in the approach to Property Standards. And I say that because in the -- before I came to Elliot Lake I never encountered or heard about a Property Standards issue dealing with a severe safety problem. Usually if something like that came up the building officials that I dealt with would be on it through the Building Code Act, that's where they would go.

Tom Derreck

May 13, 2013

Page 9357, Line 4

Q. Why was that unusual?

A. I had not encountered it before in other municipalities that I had worked with, either the building services were attached to and reported to the City Engineer or if there was no engineer it was generally the CAO.

Tom Derreck

May 13, 2013

Page 9342, Line 24

Q.· Would it have been in your view just as open to the City, given the seriousness of the matter as you perceived it, to have arranged for its own engineering inspection and to have charged the cost back to the mall owner?

A. I think that goes the CBO's outlook on this matter. It's not something I would have anticipated. It's a private property. And I think that the City's attention would go to the library's situation, what to do about that. If a -- if a public safety issue arises as something that's accelerated then I'm presuming we'd go to our lawyer and ask for advice about what we do. In terms of the City actually getting an engineer to do it, that's not something I would have thought of.

Tom Derreck

May 13, 2013

Page 9493, Line 16

A. I was referring to everyone who was in place in an official capacity, at a senior level for the City of Elliot Lake who had been apprised of the problem over the years.· So we're talking about the City Mayor, the elected officials, my predecessors, the Chief Building Official, whoever was informed about it and did not contribute to something being done.

Tom Derreck

May 13, 2013

Page 9494, Line 14

A. Well I was getting so much bits and pieces of information. And what I like to do is consult with people to get the information I need and not piecemeal.· So I thought the best thing to do was to assemble everyone who would have some input, can answer some questions that I still needed answering before I do anything to move on.

Q. And so that's the people who attended, Ms. Croxston, Ms. Morin, Mr. Gagnon, Ms. Leddy, Ms. Williams and you, correct?

A. Yes.

Tom Derreck

May 13, 2013

Page 9390, Line 20

Q. Sorry, you said "his response was", were you referring to –

A. Mr. Nazarian, I beg your pardon. He was chagrined just generally with the conditions that he'd inherited.· And then now of course when the City comes along, after he's had the building for about a year and hadn't heard from us, we're suddenly clamping down. So he didn't understand where did this come from? So our conversation initially was about that part of it.

Tom Derreck

May 13, 2013

Page 9434, Line 1

Q.· And can you tell me why was the meeting between you and Mr. Nazarian why was not Mr. Allard at it?

A.· Well Mr. Allard may have. It's just my style.

Tom Derreck

May 13, 2013

Page 9434, Line 11

Q. And was it correct, as Mr. Turner said in the letter, that you and he agreed to communicate regularly on the progress of the repairs to the deck and the internal structure and any difficulties they might encounter along the way? Is that accurate?

A. That's accurate, but it's for a reason. I made it clear to Mr. Turner that I don't have an active enforcement role. The Fire Chief has issued his orders. It's up to the Fire Chief, you'll be dealing with him on these things and he'll be satisfied or not satisfied with your response, and the same with Mr. Allard. But at the same time I appreciated this because it kept me in the loop of what was going on.

Tom Derreck

May 13, 2013

Page 9441, Line 18

Q. And did he tell you how things were coming along in terms of fixing the leaks?

A. Yes, he did generally. In fact I think it's fair to say that I got most of my information from Mr. Turner.

Tom Derreck

May 13, 2013

Page 9442, Line 18

Q. And so was it brought to your attention that this was the only e-mail complaint that was ever addressed to Mr. Allard?

A. No.

Tom Derreck

May 13, 2013

Page 9525, Line 16

117. There is no question that the building department had a file on the library. If there were complaints in it that were filed with the building department or somehow made their way to the building department, they would have been in that. Mr. Burling was criticized by Commission Counsel for suggesting that one of the reasons why complaints must be in writing is because of potential litigation. Mr. Derreck was not even asked about the idea of complaints being in writing. Mr. Derreck's evidence further supports Mr. Burling's belief that potential litigation had to be considered because Mr. Derreck specifically states that he recommended going in camera because of the potential for litigation by going through with the Notice of Violation in this case.

118. Mr. Derreck further reiterates that complaint driven enforcement policies in municipalities are very typical sort of enforcement, so there was no problem with the Property Standards Bylaw being enforced as "complaint" driven. Mr. Derreck was in touch with Ms. McLean to put pressure on the owner as noted in Mr. Derreck's Action Plan at **Exhibit 1706, Page 3**.

119. Mr. Derreck put the concept of the Property Standards Bylaw front and centre because he understood that there may be structural aspects to the leaking. However, MR Wright ultimately deemed the structure to be sound in 2009 and again in 2012.
120. The closure of the mall would have decimated the City. While true that the Property Standards Bylaw could result in the closure, it was not such a straightforward process as Commission Counsel made it seem. The closure would not have been consented to by the owner and litigation would almost definite have ensued.
121. The City didn't see the leaking as a public safety issue but rather a maintenance problem. The City does not have the resources to commission engineering reports. The City was not equipped and nor are other small municipalities to get expert reports for commercial buildings owned by private enterprise.
122. It is irrelevant who the CBO reports to. They have legislated obligations and duties, and they must follow the legislation. If the City had resources to have 10 department heads, the Building Department would surely be its own department. Truth is, they did not, so they structured the Building Department as a division within Clerks department in an effort to make the municipal structure efficient. There is no evidence that the distance of the CBO to the CAO has not been shown in any way to be relevant to the mall collapse.
123. Many of the same City staff were involved in the City response to complaint from library in 2005 (Ex. 2018 and response 11-100) were involved in Mr. Derreck's efforts, such as Mr. Gagnon, Ms. Leddy and Ms. Williams.
124. Mr. Nazarian references the "clamping down" as some sort of conspiracy against Eastwood when in reality Mr. Derreck's experiences with library issues/structural concerns/Property Standards Bylaw experience led to the "clamp down" and this had no connection whatsoever to a conspiracy to avoid clamping down on Retirement Living. It is a coincidence that Mr. Derreck started not long after Eastwood acquired the mall. It is also submitted by the City of Elliot Lake that Mr. Nazarian cannot be believed when he states he did not know of the leaks before he purchased the mall. Any tiny amount of due diligence at the time of purchase would have determined that the mall had leaked essentially since it was opened. Additionally, in **Exhibit 10-10** Mr. Nazarian is reported to have said 'he was aware of the mall's leaky roof prior to the purchase and does not regret buying the building.' Mr. Nazarian first says his words were recorded in this interview:

"Q. Okay, so then it says:

"When 'The Standard' spoke to Nazarian, he said he did not create the leaks."

And there is actually a quote. Do you remember speaking into -- or having your --

A. Yes, I remember.

Q. -- words recorded?

A. I remember perfectly. I did not create it. I have heard that.”

B. Nazarian
July 30, 2013
Page 118, Line 2

125. Then when confronted with his own words about knowing about the leaky roof prior to purchasing the mall, he backs down from his previously absolute assertions that he remembers “perfectly” that the interview was recorded.

Q. Did you remember say that?

A. No. That is –

Q. So that part of the tape recording was wrong?

A. That part is wrong, yes. I didn't know before purchase.

B. Nazarian
July 30, 2013
Page 119 Line 18

And Mr. Turner and I we just talked. And I think he was demonstrating or trying to demonstrate diligence in attempting to meet the requirements of the City. And so he kept me posted on communications as well.

Tom Derreck
May 13, 2013
Page 9437, Line 22

126. Mr. Derreck was spearheading the Mr. Nazarian response and thus Mr. Turner kept in touch directly with Mr. Derreck. This is evident by the correspondence in November 2006, at **Exhibit 351** and **Exhibit 308**. When Mr. Turner and Mr. Derreck were ultimately terminated from the mall/the City respectively, there was no one to keep this issue active. Compounding this oversight was the fact that Bruce Caughill had told the City he would inform them if the situation changed as well as Syl Allard's retirement, and the fact that Bruce Caughill did not inform the City of the change in relationship until the fall of 2008. That led to the Notice of Violation only resurfacing in 2008 when, by that time, Fred Bauthus was the new CAO and Bruce Ewald was the new CBO. At **Exhibit 357** Fred Bauthus explains why this Notice of Violation has only resurfaced 3 years after it was issued.

127. Mr. Caughill's evidence in regards to the oversight is as follows:

Now, at this point we're now into --so the letter essentially confirming your termination. You indicated you were terminated in July, but you sent the letter to Mr. Nazarian in September of '07, but at that time you were terminated. A year goes by before you advise the City that you are no longer looking after that Notice of Violation. Why did you wait so long to advise the City -- and so this is your email and actually the document next to it confirms that you're not retained.

Bruce Caughill
May 10, 2013
Page 9230, Line 1

Exhibit 11-23 (Pages 18 and 37)

Q. Okay. So my question to you is: You are terminated in July of 2007, why did you wait a year, over a year, to notify the City that you had been terminated?

A. That's an oversight on my part.

Bruce Caughill
May 10, 2013
Page 9231, Line 8

128. It was an oversight and this is human error that can easily happen, just like it was an oversight that there was no reminder system in place when Mr. Allard left and Mr. Ewald took over. These are errors that can only be avoided by implementing required systems and protocols and can only be demanded of a City (and held against a City) if the law requires these reminders.

FRED BAUTHUS (2ND PERIOD SEP 4 2007 – JUN 8 2010)

Q. At this stage, sir, it had been 18 years since you started at the City and these leaks had remained the same throughout that period of time, correct?

A. To a varying degree, yes." "It is not part of the evidence that the leaks were as problematic from 1990-2006 as they were in and around Jan 2008.

Fred Bauthus
May 16, 2013
Page 10197, Line 21

Q. And under chronology of events she writes: The lease for the library was signed June 1, 1989. Water leaks have been a problem since the Library moved into the mall. Anytime it rains or snows the library roof leaks for two to three days after. And you knew that was correct, right? For each of the complaints highlighted in the Williams report, the City had taken steps in every instance. The City is not the owner. The City recommends changes to the legislation because the City was not equipped to deal with the owner and the potential for the owner litigating.

Fred Bauthus
May 16, 2013
Page 10200, Line 9

And the date of the e-mail is March the 25th. So eight days after the last e-mail we looked at. And Ms. Morin writes: Good morning Fred: After the meeting on Thursday, March 20, 2008 Bob Nazarian, Alex Sennett, John Klinkett and Brian England came to Library. They agreed to deal with the immediate issues of the leaks and the following is to be done this week: Ceiling tiles will be replaced, Air scrubbers to be installed, More

diapers (tarps) to be installed, Electrician to inspect lights before turning them back on, Electrician to disable lights that are left on after hours, Carpets to be cleaned ASAP.

Fred Bauthus
May 16, 2013
Page 10215, Line 9

Further to our meeting on March 18th, 2008 respecting the library, I met with Bob Nazarian and Bryan England to discuss the current water situation and the proposed lease. Also in attendance at that meeting was Alex Sennett, security consultant for the mall, John Klinkett, architect for the mall, and Sue Morin, Chief Librarian for the library.”

Fred Bauthus
May 16, 2013
Page 10216, Line 19

Q. And this is all within days of Ms. Morin's report to you that I read portions of just prior to the break this morning?

A. Yes.

Q. So you got Ms. Morin's report, which outlined the -- sorry, you got Ms. William's report, which outlined the situation in early March of '08. You met with the Mayor and Council. You met with Nazarian. And you reported back to the Mayor and Council, right?

A. Yes.

Fred Bauthus
May 16, 2013
Page 10219, Line 19

Q. And Mr. Nazarian had told you he was going to put a membrane in?

A. Well, that was -- he had indicated that he was going to undertake and put the membrane in and that would, in all likelihood, fix the problem.

Q. And from what he had told you and what you had learned, a membrane was what was required?

A. That is correct, yes.

Fred Bauthus
May 16, 2013
Page 10233, Line 9

129. It is unfortunate that Ms. Williams was not called as a witness. She likely would have had important information in support of the City efforts, including Ms. Williams' extensive efforts as part of the JHSC. The City responded to every library complaint, although the degrees of success of those responses are questionable, there is no doubt that when the library complained, the City listened and tried to respond. Ultimately, the problem was not resolved, but the City had a structural report (Ex.

101) and follow up letter (Ex. 139) stating that the building was structurally sound. The City also met with owners the owners took remediation and repair steps as noted by Ms. Morin in **Exhibit 3147**.

Q. Well, what -- the Mayor was worried about the mall and he wanted to save the mall, did he not?

A. He was concerned about the ongoing viability of the mall, yes.

Q. He wanted to save the mall, right?

A. In terms of the emphasis on saving the mall, he was aware of the integral relationship between the mall and the library and the economic well-being of the community.

Q. He wanted to save the mall, right?

A. Well, he was concerned about the ongoing viability of the mall, yes.

Q. But those are his words. He wanted to save the mall, did he not?

A. In terms of looking at it in those words, yes.

Fred Bauthus

May 15, 2013

Page 10265, Line 1

130. This is an example of where words can be used to have someone accept a proposition that isn't true. In fact, Mr. Hamilton said the exact opposite of what commission counsel put to Mr. Bauthus. At **Exhibit 1547**, Mr. Hamilton advises Mr. Bauthus that "A little less emphasis on saving the mall would work." The use of repetition can wear a witness down to accepting an incorrect reality. There is no doubt that everyone at the City was to ensure the mall was viable so that the community had a place to congregate. The mall was the life blood of the community. This was much more than simply a mall is to a city like Toronto or Ottawa. The mall in Elliot Lake would be akin to Parliament Hill in Ottawa or the Sky Dome in Toronto.

DAN GAGNON JUN 9 2010 – FEB 4 2011

131. Mr. Gagnon was not called as a witness despite being requested by City Counsel.

132. Mr. Gagnon was integrally involved in the time period between Mr. Speck's efforts re: leaks in April 2005 and Mr. Derreck's issuance of the Notice of Violation in October of 2006.

133. It is entirely unfair to Mr. Speck, who relied upon Mr. Gagnon to a great degree during the period between April and June of 2005, that Mr. Gagnon did not give evidence before the Commission. It allowed Tom Derreck, who directed that a notice of violation be issued, to claim that Mr. Gagnon's efforts during that period were of no effect on Mr. Derreck's issuing of the notice of violation within the first 14 days as an employee of the City.

134. Furthermore, Mr. Gagnon was one of the few individuals that had extensive knowledge of the leaks after Mr. Derreck's hasty departure from the City, which is

during the time period of 2007-2008 when the notice of violation issued was lost in the shuffle of great deal of turnover at the City and the mall.

CAO: ROB DEBORTOLI: MARCH 1 2011 – PRESENT

Q. Okay. And did you then meet with -- during the period when you were COO, did you meet with Mr. Ewald regularly?

A. I did. I tried to meet with him every two weeks on a regular basis, because that was part of my process of trying to garner information and learn more about his role within the organization and get a good handle of what the Building Department was all about, as this was a new assignment to my portfolio.

Q. And did that continue? Did those meetings continue after you became CAO in March of 2011?

A. Yes, Mr. Ewald and I have continued to meet on a regular basis simply because there are issues that he feels that are worth having a discussion over at a regular basis.

Rob deBortoli

June 12, 2013

Page 14164, Line 13

Q. And there has been some suggestion in some of the evidence here that that would be inappropriate. And can you tell us why, in your view, if you came to the conclusion it was necessary, you would find it to be appropriate?

Rob deBortoli

June 12, 2013

Page 14165, Line 5

Q. Right, okay. And when did you learn that the two issues I have asked you about, the necessity for structural stability and watertightness, were part of the Property Standards By-Law?

A. That was during my orientation of the Building Department with Mr. Ewald.

Rob deBortoli

June 12, 2013

Page 14176, Line 12

Q. Now, you told me Mr. Ewald spoke to you when you were doing your orientation in the fall of 2010 about leaks at the mall. What did he tell you?

A. Well, nothing too extensive other than the fact that we discussed that the roof did leak. I knew that there had been some concerns that were presented to Mr. Ewald that he had issued an order on the mall I believe in 2009 requesting that its structural -- a structural review be performed on the building and that there had been a report issued through M.R. Wright to that extent, and that the structure was referred to in the report as being sound; albeit there were some concerns about the fireproofing on some of the beams, which I knew were being addressed with conversations both with Mr. Ewald and the Fire Chief.

Rob deBortoli

June 12, 2013
Page 14179, Line 18

Q. All right. And similarly, if a citizen had what amounted to a complaint of the Property Standards By-Law and she sent it to the Mayor or a member of Council, would you expect them to send it on to the CBO?

A. Yes, I would.

Q. Directly or through you?

A. Well, they should probably send it through me. It doesn't always happen that way though.

Rob deBortoli
June 12, 2013
Page 14185, Line 7

Q. And, now, sir, in your role as the Chief Administrative Officer, and I am going to get to the Property Standards By-Law and Policy in a few minutes, but in your role as Chief Administrative Officer and before that as Chief Operating Officer, if you learned of issues at a building in the City, would you be hesitant to ask Mr. Ewald to look at it and determine whether anything ought to be done?

A. No, I would have no issue with that.

Q. And would you have any issues, in this hypothetical situation, of if you thought it appropriate directing Mr. Ewald to issue an order?

A. I would hope that this type of situation would not come about because I would have the confidence in Mr. Ewald, based on his experience and his knowledge of the area that he is working in, that he would take it upon himself to issue an order. But if there was a point in time where I felt that an order needed to be issued, I would definitely advise him to do so.

Q. And you have told us about the report that Mr. Ewald obtained in October of 2009 from the M.R. Wright firm about the structural capacity of the mall. Did you ever see that report?

A. I didn't see it until this Inquiry started, but I was aware of it.

Q. And you were aware of it as a result of what?

A. My conversations with Mr. Ewald.

Rob deBortoli
June 12, 2013
Page 14196, Line 4

Q. If you turn to the third page, sir, the next page, under the heading "Links to the Strategic Plan" Ms. Sprague wrote in the second -- in the third sentence, she 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. Sir, did you read that at the time?"

A. · No, I did not.

Q. · Prior to this Commission of Inquiry being created, had you ever heard or been told or read anything in a document that stated that the building, the mall building was facing serious structural problems?

A. · No, I did not.

Q. · Had you ever read anything or heard anything prior to the Commission being created that indicated that there were serious problems of any sort associated with leakage from the roof top parking area?

A. · With regard to structural integrity?

Q. · We'll start with that.

A. · No, I did not.

Rob deBortoli
June 12, 2013
Page 14218, Line 5

Q. · And did you ask Mr. Ewald why, if he had ordered a year before that the leaks be fixed, why it was still leaking?

A. · No, I did not.

Q. · Can you explain why not?

A. · Well, I think I just did. · I was aware of the fact that Mr. Ewald along with our Fire Chief were still dealing with issues at the mall. · There was ongoing work on the roof with respect to trying to mitigate the leaks, and therefore, the topic of conversation did not come up.

Rob deBortoli
June 12, 2013
Page 14224, Line 5

Q. **Exhibit No. 5195.** Now, sir, when you were CAO, did you receive these monthly Librarian's Reports?

A. No, I did not.

Rob deBortoli
June 12, 2013
Page 14232, Line 11

Q. Were you advised of this, sir, do you recall?

A. · No, I was not.

Q. · Exhibit No. 5289 --

A. · Well, let me take a step back, Mr. Doody.

Q. · Sure.

A. · I was not advised of this through this particular report, if that was your question.

Q. · Oh, okay, no, my question was were you told that there were leaks such as those in March of 2011?

A. Yeah, given that I just provided the information that there were a couple of times in '11 where I do remember this being brought up, it may correlate to a meeting where she may have mentioned this early in '11, but afterwards the reports of water leaking into the library did diminish.

Rob deBortoli
June 12, 2013
Page 14233, Line 4

Q. And if you turn to the minutes of the previous meeting on April 21st, you can see that Mr. Moyer was listed as in attendance, and then if you go to the page that is numbered in the bottom right-hand corner with the number that ends 005. And this document, as I understand it, is a document which was prepared by Keith Moyer in response to a request for members of the Advisory Committee to provide suggestions as to how to improve and rejuvenate interest in the mall; was that your understanding?

A. Yes.

Rob deBortoli
June 12, 2013
Page 14247, Line 1

Q. And she indicates in the letter that, as I just read to you, that to fix the roof, they need to end the parking and driving on it. Did you direct this to Mr. Ewald's attention?

A. No, I did not.

Q. She is telling the City and particularly the Council that the problem with the leaks is so bad that they have to get the cars off there, and it is in Mr. Ewald's bailiwick to enforce the Property Standards By-Law which says that buildings shouldn't leak. So can you tell us why you didn't direct this to his attention?

A. Well, this came forward as part and parcel of their expression of interest again to acquire the land, and she is simply illustrating the need to have the parking removed from the upper level so that

Rob deBortoli
June 12, 2013
Page 14264, Line 13

Q. And can you explain why you would not have brought these things to Mr. Ewald's attention?

A. Well, we were -- as I said to you earlier, we were in the negotiation process or hopefully in a process that would have enabled the transaction of land to bring this matter to a close once and for all, because obviously, as you had stated, the cars had to be removed in order for the leaks to be effectively stopped. And you know, it was just a matter of the vehicles that were causing the leaking with respect to the constant traffic flow on that roof and preventing a permanent seal. And obviously, that had an impact on their ability to attract tenants, so we were -- this was, you know, part of the process that was at hand. We were hoping that we would have a successful land deal and that the correct work to the roof would be done in due time once that was in place.

Rob deBortoli

June 12, 2013
Page 14282, Line 25

Q. In the months after the meeting in August 2011, you did not turn your mind to consider whether, since the solution did not appear to be coming to fruition, you ought to at that point ask Mr. Ewald to investigate or inspect?

A. Perhaps I should have, but I didn't.

Rob deBortoli
June 12, 2013
Page 14288, Line 9

Q. And my question for you is you'll recall that that report, which is **Exhibit No. 2357**, spoke of the serious structural problems associated with leakage from the roof top parking area. Did any Councilor or staff person raise the issue of property standards as it applies to the mall as a result of seeing the Clerk's report?

A. No.

Rob deBortoli
June 12, 2013
Page 14323, Line 19

135. Mr. deBortoli as CAO kept informed of what Mr. Ewald was doing as the CBO, but the CBO's department is statutory in nature to a great extent and the meetings were for information sharing and exchange. Mr. deBortoli is acting properly in keeping himself informed at a CAO level of Mr. Ewald's activities.

136. There has been no suggestion that the CAO ought not to direct the CBO so long as it was consistent with the statutory obligations of the CBO. The CAO directing the CBO would not result in the City order being quashed. It is only if a councilor directs staff where that risk exists, hence why Mr. Ewald advised Mr. Collet to have the Quintes complain directly pursuant to the Property Standards Bylaw. A complaint, should for all intent and purposes, be sent as follows for the sake of proper process and procedure and to ensure the potential municipal action is not quashed:

1. From the complainant to the CAO (and then CAO to CBO)
2. From the complainant to the CBO directly
3. From the complainant to any councilor and then to council and then to the CAO and then the CAO to the CBO (so there is no risk of an argument that an individual councilor directed the CAO or CBO directly)
4. From the complainant to any councilor and the councilor telling the complainant to complaint directly to the CAO (See #1) or CBO (See #2). This was the way the Quinte situation should have been handled after Mr. Collet and Mr. Ewald discussed the alleged piece of concrete that fell from the Quinte's ceiling.

137. Not only was there ongoing work to the roof, evidencing the owner's continued due diligence defence, it was appropriate that the concentration of City be on the work being done because Mr. Wood had provided a report, found at **Exhibit 103**, stating the structure was sound and then an update came to Mr. Ewald's attention in April 2012, found at **Exhibit 139** stating that Mr. Wood's was not concerned about the structure.
138. In relation to the language of Ms. Sprague's report, Ms. Sprague does not have a role with respect to building department enforcement. The characterization of Ms. Sprague's report might in fact hinder the Commissioner's objectives as it can only serve to misunderstand the Clerk's role. Ms. Sprague's role is to keep records of the City and related bodies, which is what Ms. Sprague did via her report.
139. If this were to be interpreted as a property standards complaint, it would bring municipal reporting and procedure to a halt. It would be impossibly burdensome on a municipality with grossly limited resources to have to treat council reports as bylaw complaints.
140. Further, the same concept applies to Ms. Bear's presentation to council regarding the potential to purchase the additional parking that was a push by the owner to get the parking for a reduced price. It should also be noted that Ms. Bear's presentation includes a slide noting that Mr. Nazarian was going to use the additional roof top space for solar panels, which completely contradicts Mr. Nazarian's pitch to the City about alleviating the weight on the roof by moving some parking to the proposed additional parking lot. Additionally, the same argument applies to the idea that Mr. Moyer's report at **Exhibit 923** should have been forwarded by Mr. deBortoli to Mr. Ewald.
141. Ultimately, the library reports were not sent to CAO. Mr. deBortoli does admit that he knew of the leaking concern relayed in those reports but he also notes that in and around early 2011, the leak concerns were diminishing. Furthermore, keep in mind that the City considered the leaks one of two things, either a maintenance concern (1990-2006) or a potential structural concern (2006-2012). The structural concern for the last six years was pursued via a Notice of Violation, then a number of Order's to Comply and then Mr. Ewald's Order to Remedy was issued. Ultimately, MR Wright reiterated that the structure was sound in 2009 and April 2012. The CBO was already investigating and Mr. deBortoli would have known of Mr. Ewald's activities from their monthly meetings.
142. Without trying to minimize Ms. Sprague's general knowledge, she herself admitted in her testimony that those words (and those exact same words contained in **Exhibit 1034**) were simply based upon her layman understanding that the roof had problems. Ms. Sprague admittedly states that she has no idea or experience in differentiating a maintenance problem from a structural problem.

Q. The significance of that choice of words, which you have indicated was your choice of words, is that this is the only document that I am aware by which the City has been made aware of serious structural problems with the mall. The City had never received engineering reports. In fact, a month or two before you wrote these words, they received Bob Wood's report that said there was no problem. This is the first time, and I think the only time, that language is used by a City employee and provided to City Council alluding to structural issues, and I just really implore you to think where you came up with that language? What did you rely upon? Who did you speak to? And why would you have chosen those words?

A. Those were my own words. They were not taken from an engineer's report or anything. In hindsight, I realize I was totally unqualified to make such a statement. I was aware over the years from 2008 to 2011 that the mall wanted to purchase the land, and in their letters they had expressed concerns about the roof and parking. So those words were a result of layman's terms.

Q. By way of elimination, would it be fair to say were those words suggested to you by the Chief Building Official?

A. I don't think so.

Q. Were those words ever used or suggested to you by Mr. Fabris or anyone from Eastwood Mall?

A. Well, I believe I had created those words by reading correspondence that came from Mr. Fabris, which everyone has seen.

Leslie Sprague
July 12, 2013
Page 16139, Line 4

143. Both Mr. deBortoli and Mr. Ewald would have accept the structural engineers evidence over the reference of Ms. Sprague contained within the "Strategic Plan" section of Ms. Sprague's report. That is for no other reason that Mr. Wood was a structural engineering expert at the time of his 2009 report and thereafter, Mr. Wood reiterate the soundness of the structure in April 2012 in correspondence to Mr. Ewald, who, as noted above, met on a monthly basis with Mr. deBortoli and likely would've conveyed this message.

<p>CHIEF PAUL OFFICER CBO FROM: May 10 2000 – Feb 3 2002 CHIEF OF FIRE DEPARTMENT FROM: Feb 4 2002 - Present</p>

Exhibit No. 3583

Q. I just want to jump ahead here so we can contextualize this as we're moving forward, Chief. You ended up in early February laying two charges under the Fire Protection Act against Eastwood Mall Inc. correct?

A. That's correct.

Paul Officer

April 22, 2013
Page 6185, Line 18

A. Out of all the inspections that we do, and we do a lot of them per year, we have a very good success rate. I've never come across an individual like this before. I've only -- we've only laid two charges that we've had to lay. A big part of the inspection program is the education with the owners so that they understand why these things need to be done. And it was obviously clear now that there's -- he just doesn't care, period.

Paul Officer
April 22, 2013
Page 6193, Line 12

So failure to satisfy this order, in and of itself could form the basis of a prosecution?

A. Then you charge with fail to comply.

Q. Fail to comply with the order?

A. Yes.

Paul Officer
April 22, 2013
Page 6203, Line 20

Q. You recall giving that evidence about that delay?

A. Yeah, that's what I said. In hindsight it became apparent that, or it seems that he was trying to delay."

Paul Officer
April 23, 2013
Page 6274, Line 22

Q. Okay. Now we've heard considerable evidence concerning the leaking at the mall. During your time as a Building Inspector, and in fact as Chief Building Officer, were you ever in receipt of a complaint written or otherwise of leaking at the mall?

A. No, I was not.

Paul Officer
April 23, 2013
Page 6044, Line 23

Exhibit No. 11-19

A. Okay. Sorry, your question is?

Q. I'm asking, it appears that you are being kept in the loop as far as the ongoing leakage problems that the library is having and the trouble they're having dealing with it?

A. Yes, that's probably spurred that October inspection that we did, or part of the reason I guess.

Paul Officer
April 22, 2013
Page 6081, Line 18

Exhibit No. 11-23, Page 4

Q. This is the public complaint form of the 23rd of October 2006. And you can see the particulars of the complaint. "Syl called," that would be Mr. Allard?

A. Yes.

Q. "... with reference to a Property Standards complaint at the mall. He said during his inspection at the library and Zellers that he noticed the fireproofing material protecting the structural steel has fallen off leaving sections of the beam exposed. He will be putting a [sic] order for them to review all structural steel components, and remedy the leak, he felt the fireproofing was a Fire Code issue."

Paul Officer

April 22, 2013

Page 6088, Line 9

Exhibit No. 102

Q. So the feeling was that it hadn't reached the point where the building had to be closed but rather we still need an engineer to have a look it?

A. Yes.

Paul Officer

April 22, 2013

Page 6153, Line 20

Exhibit No. 1446

Q. No, I know that. But did you tell him [Mr. Wood] what Mr. Yakimov told you about the concrete being six inches?

A. Yes, that's why I called.

Q. So he was given that information at that point in time?

A. Yes.

Paul Officer

April 22, 2013

Page 6160, Line 15

Exhibit No. 342.

Q. This is a follow-up inspection done by Mr. Connors to follow up on the inspection done on the 24th of September, correct?

Paul Officer

April 22, 2013

Page 6160, Line 22

Exhibit No. 1241

Q. Okay. On the -- dealing with the service corridor he says:

"The steel is rusting particularly on top of the bottom flange, however, we are of the opinion that the rusting has not created any structural loss of beam capacity."

And then with the main mall, the ticket kiosk,

"Similar to other areas inspected much of the exposed steel has only minor surface rusting with exposed original primer paint..."

Paul Officer
April 22, 2013
Page 6165, Line 10

Q. And I'm sure you will agree with me that 39 months is not a reasonable period of time in order to do this work, correct?

A. Yes. Originally we were dealing with the library. Actually when I say "all of the work is complete" it's not quite all complete. The work is complete on the fire resistance rating of those members, but we're...

Paul Officer
April 22, 2013
Page 6170, Line 8

Q. If you can now look tab 52, and that is **Exhibit No. 3565**. This is a draft dated the 19th of March of 2010, provided by Mr. Wood of the hotel retrofit office, correct?

A. Yes.

Paul Officer
April 22, 2013
Page 6176, Line 16

Q. Well I won't press it further, Mr. Officer, but it does appear to me, and I put it to you, that you're trying to recollect what happened. But I'm suggesting that you don't have a clear recollection of the conversation.

A. It's not stated in the document, that's correct. So it's an awful convenience that I'm calling him right after that complaint and I'm also forwarding this on to -- in the e-mail.

Paul Officer
April 23, 2013
Page 6282, Line 6

Exhibit No. 3720

"Pleas were entered and the Court ordered that a \$5,000.00 fine be imposed per count."

Paul Officer
April 22, 2013
Page 6197, Line 22

A. This ended up costing me -- not costing me, excuse me. But costing the municipality \$24,000 and a lot of time. I did go to Council when -- and told them I would be spending their money on chasing these infractions. And they -- I had their full support to do so.

Paul Officer
April 22, 2013
Page 6197, Line 8

144. Chief Officer and other City witnesses have testified that Mr. Nazarian was completely unreasonable in his dealings. Mr. Nazarian didn't care to follow the rules.

This is amply clear as well by the fact he falsified invoices indicating repair work on the roof. Mr. Nazarian told Vipond, at **Exhibit 940**, that “he doesn't care about the fucking fire code.” Chief Officer spoke to Vipond and then laid charges against Mr. Nazarian. Mr. Nazarian was convicted and his two separate fines of \$5,000.00 remain unpaid. At **Exhibit 243, page ending 1842**, the Fire Department had been trying to communicate with Mr. Nazarian for some time. There was an order issued against him and was to be charges laid. The charges were never laid after the mall collapse.

145. The exact process outlined by all the City witnesses re: "complaints need to be in writing" existed to get to the Notice of Violation. This is required to ensure the City was on proper footing to pursue a notice (and then potentially an order if need be). As noted by Mr. Burling and other City witnesses, a complainant would be required to complete a complaint in writing (even if the complainant was the City's own CBO - Syl Allard - which is what occurred with the Oct 24/06 Notice of Violation). The fact the process was followed for the Notice of Violation indicates to this Inquiry that the evidence provided by the City witnesses in this regard should be considered credible and should be believed. The process followed for the Notice of Violation further supports the answers provided by Mr. Burling that the correct way in which to conduct bylaw type complaints was in writing, even if the complainant was the CBO making a fire complaint. The lack of fire proofing was ultimately deemed to be related to the potentially structural issues relating to the roof leaks and so this complaint form is highly relevant and supports the City testimony re: written complaints pursuant to the Property Standards Bylaw and other complaint-driven bylaws.
146. The City was correct in its assessment considering that the engineer report required as a follow up to the Order to Remedy came back saying that the building was structurally sound, found at **Exhibit 102**. Mr. Wood also provided another report in May 2012, found at **Exhibit 110**, which again stated that the structure was sound. Furthermore, Mr. Ewald was informed via **Exhibit 139** that Mr. Wood, who had provided the 2009 report, had “no structural concerns over the additional loading of caulking or waterproofing.” As soon as Mr. Yakimov came to Chief Officer, the Chief sent an email to Ewald/CAO/Mayor and called Bob Wood. He called about the report due and he called about Yakimov concerns regarding the roof even though Mr. Yakimov may have been complaining because of sour grapes as he had just been fired by Mr. Nazarian. In any event, the Chief follows up in writing to the CBO and Mayor and followed up with the mall's engineer, MR Wright, regarding Mr. Yakimov's structural complaint. As noted by Mr. Officer, it is too coincidental for this evidence not to be true, considering it was the only call from Officer to Wood and there is an email supporting Mr. Officer's contemporaneous thoughts.
147. Thereafter, in September of 2009, the City (Mr. Ewald) issued an Order to Remedy which covered both water tightness and fire separation issues within the mall pursuant to the Property Standards Bylaw. As well, there was a follow up

inspection on Oct 30, 2009 by Mr. Connors from the City fire department, found at **Exhibit 342**. The City conducted itself appropriately in the situation. Specifically, MR Wright's 2009 report (Ex. 103) says the rusting "has not created any structural loss of beam capacity." So the City has taken the necessary steps both in 2006 and in 2009 and the structure was deemed sound in 2009. Thereafter, the structure was deemed sound again in 2012 by Mr. Wood's correspondence at **EXHIBIT 139**. At the same time, the City fire department was keeping the pressure on Mr. Nazarian and obtained Fire Prevention and Protection Act convictions against the mall owner.

LESLEY SPRAGUE – DEPUTY CLERK AND CLERK
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148. The idea that Ms. Sprague, the City Clerk potentially "mismanaged matters relating to the structural integrity of the mall" is completely off base and is unfortunate that she is being considered a factor at all in this tragedy.
149. Firstly, as noted throughout these submissions, the City responded to every single written complaint received by the library, including complaints #1, #2, #3 and #5 which actually were received by the City CAO or CBO. Further, after 2006, as noted herein, the structural soundness of the roof was investigated and it was opined by an expert in structural engineering that the mall was sound structurally. Ms. Sprague cannot even be considered a generalist in building/structure/maintenance experience and her opinion clearly was not accepted by anyone above that of Mr. Wood and nor should it have been.
150. As it relates to the library reports, there were simply forwarded to council by Ms. Sprague. The library had previously complained in writing enough times that it was certainly not the case where Ms. Sprague would be required to complain on the library's behalf for these monthly reports.
151. Furthermore, that is not the purpose of the Property Standards Bylaw complaint protocol. The library was complaining and efforts were being taken by the City, including a Notice of Violation, an Order to Comply, an Order to Remedy and a report regarding the weight of the caulking being applied to the roof (April 2012).
152. The Property Standards Bylaw complaint process is not to have internal City staff complain on behalf of independent parties (library/residents) when procedural items such as monthly reports and reports to council make their way to City staff.
153. If commission counsel is attempting to suggest that procedural items such as the Moyer report, the Bear report, the library minutes, etc. should be the basis for City staff filing complaints with the CBO, this would create a ridiculous system of attempted enforcement that would become an administrative nightmare, especially considering that most individuals appearing before council have a complaint of some sort and their complaint likely relates to a bylaw of some sort.

154. As also noted herein, the caucus meetings are not correlated in any fashion to the roof collapse and if anything, they may have provided an additional forum to pursue the roof maintenance pressure as the caucus meetings were prior to 2006 when the City only understood the roof leak problem to be a maintenance issue.

MAYOR RICK HAMILTON: MAYOR, 2006-PRESENT

Q. Do you direct -- do you consider it appropriate for you to direct the Chief Building Officer how to do his job?

A. No.

Q. Is it appropriate for anyone to direct him how to do his job?

A. Other than the CAO, no.

Rick Hamilton

July 8, 2013

Page 14913, Line 23

Q. Was this a complaint, in your view, of a building not being "watertight" as that word is used in the Property Standards By-Law?

A. No.

Q. It is not?

A. Well, just I'm looking at it here as a complaint. This is being an issue raised with staff, so this was a health and safety complaint, as I understand.

Q. Well, sir --

A. Yeah, I mean, you are asking my opinion.

Rick Hamilton

July 8, 2013

Page 15010, Line 16

Q. Okay. And, sir, is this letter that you have before you, Exhibit No. 11-14, is that a complaint of a building not being watertight?

A. It was written to our CAO, so from what I understand, this is a health and safety issue.

Q. Where does it -- it doesn't say anything about health -- well, it says "working conditions are poor", but --

A. I'm looking at the title, sir. It says "Health and Safety Issues at Library".

Rick Hamilton

July 9, 2013

Page 15022, Line 15

Q. Well, I guess I'm trying to figure out what that complaint process was, because we have seen some documents here and we'll see more where people complain in writing to very senior people in the City about the leaks, all of which are breaches of the by-law, and nobody passes them on to the CBO. So my question to you is, sir, was there any process?

A. Well, there was no formal process, if that is the way you describe it, no.

Q. Well, was there an informal process?

A. · I think I just described that, yeah. · If we got a complaint, we would pass it on to the CAO, and the CAO would move that on to the appropriate person.

Q. · Was that in writing anywhere?

A. · No.

Rick Hamilton

July 9, 2013

Page 15028, Line 8

Q. · Right. · And did you take any steps as a result of reading this to have the issue of the leaks dealt with?

A. · In what regard, sir?

Q. · Did you ask anyone to refer it to the Chief Building Officer?

A. · No, I did not.

Rick Hamilton

July 9, 2013

Page 15119, Line 12

Q. · And did you ever follow up after this meeting to find out what the -- what was going on with the \$980,000 repairs that were being carried out?

A. · No, I did not.

Rick Hamilton

July 9, 2013

Page 15140, Line 16

Q. · And did you ever consider the effect of those leaks on the structure of the mall?

A. · No.

Q. · Did anyone, to your knowledge, ever talk about the effect of the leaks on the structure?

A. · No.

Q. · Was there ever any discussion prior to 2005, because we are going to -- prior to 2004, because we already looked at that e-mail from Councilor McTaggart, do you recall any discussion during your time as a Councilor about the leaks in the mall and whether they were being fixed?

A. · I'm sorry, with who?

Q. · With anybody, with anyone --

A. · No, I --

Q. · -- fellow Councilors, City staff, anybody?

A. · No

Rick Hamilton

July 8, 2013

Page 14953, Line 2

Q. · So he was telling you that the lawyer said, and he agreed, that there was potential structural failures which could cause injury, right?

A. · That is what he was telling us, yes.

Q. ·And that is just common sense if there is rust on the structural beams, right?

A. ·No, I don't think I could give you a competent answer whether a rust on a structural beam would cause a failure. · I'm not a structural engineer, sir.

Q. ·Well, did you know that the beams held the building up?

A. ·I knew some beams held the building up, yeah.

Q. ·Well, would you know that a beam that is called a structural beam held the building up?

A. ·Yes.

Q. ·And did you know that when metal rusts, it loses its strength?

A. ·It depends on the extent of the rust, sir, I would think. · But again, I'm not at structural engineer, so I don't think this discussion is going to take us very far.

Rick Hamilton

July 9, 2013

Page 15055, Line 14

Q. ·Well, we don't -- we have heard no evidence that he was taking any concrete steps, and particularly we have heard no evidence that he was asking the Chief Building Official to do anything.

A. ·Well, yeah, that I can't say.

Rick Hamilton

July 9, 2013

Page 15121, Line 5

Q. ·And this -- no, that is the -- yeah, that is it. · So this is the Nicholls Yallowega Bélanger report of November 12th, 1998, and it had attached to it a report from the Halsall Engineering firm. · Did you see this report -- either of those reports, sir?

A. ·No, sir.

Rick Hamilton

July 8, 2013

Page 14970, Line 18

As I understand it, that was this committee's blessing to the sale of the land, right?

A. ·Yes, or at least to the process that started, yes.

Q. ·Right.

A. ·Yeah.

Q. ·And because the process, as I understand it, is that if the City wanted to sell lands, first of all, this committee had to look at it and make a recommendation, right?

A. ·Yes.

Rick Hamilton

July 9, 2013

Page 15175, Line 3

Q. ·Right. · And then he goes on to say:

“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.”

And then:

"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."

So Mr. Nazarian was mixing the issue of the land purchase with the lease renewal, right?

A. That seems clear, yes.

Rick Hamilton

July 9, 2013

Page 15184, Line 10

Q. So what did you understand to be the policy?

A. That if somebody had a complaint, they would file a complaint with the City, and that was normally in writing, outlining the complaint with some identifiable attached to it so that somebody could follow up on the complaint. That is what I understood it to be.

Q. And what were the policy reasons for that?

A. I think, well, as it was explained to me was that workload was one issue, and of course, the second one would be they wanted to make sure that the complaints were legitimate and that they could actually follow them up versus somebody who would be perhaps fighting with their neighbour and just wanting to, you know, file a complaint for the sake of filing a complaint. That was the way I understood it, sir.

Rick Hamilton

July 8, 2013

Page 14996, Line 1

Q. And so you and other members of the committee knew, at least as at November 5th, 2007, that the library wanted out of the mall because of the leaks, right?

A. Yes.

Q. And their options, they had some, and consistent with what Mr. Speck had written them in the letter back in '05, their options were to move out, right?

A. That is correct.

Rick Hamilton

July 9, 2013

Page 15069, Line 21

Q. Can you tell me why Council reversed its position on this?

A. Yeah, Council at this particular time was trying to minimize the impact on the library with respect to moving. We were certainly still interested and then waiting for the results of the funding application with regards to the multiplex, and certainly Council was concerned about moving more than once.

Rick Hamilton

July 9, 2013

Page 15194, Line 22

Exhibit No. 11-197.

Q. This is an e-mail dated July 16th, 2009, from Ms. Croxston to Ms. Morin, and she writes that she has contacted Reg, Dorothy and Isobel to discuss points regarding the lease, and I take it those are Board members?

A. I believe so.

Q. And then she says:

"These are the points we agree with or wish to add to:"

And at item number 5 she says:

"the 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."

Were you aware that that was the Library Board's position?

A. Certainly the memo says that, yes.

Rick Hamilton

July 9, 2013

Page 15201, Line 23

Q. "The act states that the Board has the right, with the consent of Council, to negotiate a lease. Council has only the financial control. Why are we negotiating the lease." Was that a rhetorical question you were asking, sir?

A. Yes, it was.

Q. Because you knew that Council had made the decision that Council was going to negotiate the lease, hadn't it?

A. Yes.

Q. Why?

A. Because the Library Board did not want to negotiate the lease, that's why.

Q. Because the Library Board wanted out, right? That is why they didn't want to negotiate the lease; they wanted out?

A. They didn't want to negotiate any lease, and that is where –

Q. They wanted to talk about moving somewhere else?

A. Well, that is my answer, sir. They didn't want to negotiate a lease.

Rick Hamilton

July 9, 2013

Page 15249, Line 15

Q. Now, sir, at the beginning of August, Ms. Morin resigned as librarian; correct?

(...)

Q. If you turn to tab 373, and that is Exhibit No. 3508.

(...)

Q. -- to the page that ends 137 on the bottom right-hand corner.

(...)

Q. So she resigned on August 7th, effective August 28th, right?

A. ·Yes.

Q. ·And that resignation we have been told was because she wasn't prepared to continue to work in the mall because of the leaks. · Were you told that?

A. ·No.

Rick Hamilton

July 9, 2013

Page 15256, Line 16

Q. ·I would suggest to you a 20-year lease in a 30-year-old mall is an odd beast. I wouldn't recommend a client enter into such a lease, would you?

A. ·Well, that seems rather odd since we are looking at a multi-year lease in the new shopping mall and it is in excess of 15, 20 years, so I would disagree with you, sir.

Q. ·There is a difference between a new mall and one that is 30 years old.

A. ·No, but I'm just addressing your question.

Q. ·Never mind. · I don't want to argue with you.

Rick Hamilton

July 9, 2013

Page 15275, Line 1

Q. ·And this is September the 24th, six days before the eviction notice, and the first time in the almost three years since the October '06 notices went out. · Did the date of raising this issue six days from the potential eviction date have anything to do with the potential eviction or the lease negotiations?

A. ·No, sir.

Q. ·They are completely unrelated?

A. ·Absolutely.

155. The issue of 'complaints' under the property standards by-law was raised several times with Mayor Hamilton. In the case of the document entitled "Health and Safety Issue", the City of Elliot Lake submits that it is not unreasonable to assume this particular complaint is not filed under the property standards by-law. Other 'complaints' that the City of Elliot Lake submits are not complaints under the Property Standards by-law include a new article in the Elliot Lake Standard. This type of complaining can be categorized as either reporting or opinion. The reporter who reported on the leak situation clearly knew what type of condition the mall was in, and could have done some investigative journalism to determine who to file a complaint with at City Hall. Even better, he or she could have reported on how to file a complaint under the Property Standards by-law and perhaps prompted an official complaint.

156. Though it was suggested that the City could proactively go into the mall and do an inspection, that is not the type of enforcement system the City of Elliot Lake employed. They employed a passive system in the enforcement of their property standards by-law, and thus, required a complaint. The City did not have the resources to enforce the property standards by-law proactively. The City also did not have the resources to build a stand-alone Library as the Library Board was

requesting. Alternatives were being explored, but an enormous cost could not be borne by the City. This was a fact the Library Board would not accept that, they do suggest in some of the evidence however that they know it is impractical to move the Library twice. This was one of the factors that dissuaded council from considering the Collins Hall or another venue when the multiplex was still on the table. At this time, Mayor Hamilton described the attitude as one of “confidence” that Elliot Lake would get the multiplex.

A. · Because I did not want to see the library move more than once.

Q. · Why not?

A. · Because there is costs associated with that and there is inconvenience associated with that and I was confident we were going to get the funding, so it made sense to me to stay where we were until such time as the multiplex was available at that time

Rick Hamilton

July 9, 2013

Page 15197, Line 1

157. Other aging infrastructure in the City that needs replacement is the civic pool and arena. These are all competing priorities on a tight budget. The City had to renegotiate the lease for the Library. The Library was not seeking to negotiate the lease on their own behalf. This meant that there was the risk of them being locked out when the lease expired

158. Not every witness is an engineer and should not be held up to the standard of a structural engineer. “Common sense” as commission counsel calls it, the City of Elliot Lake submits that it should not be up to a witness to make findings that even some engineers did not find.

159. It is incorrect to suggest that there is evidence showing a lack of “concrete steps”. The Building Department had issued an Order in July 2008. The owner was giving some, but not sufficient information to apply for a building permit. Surely these steps cannot be described as nothing. The Order can be found at **Exhibit 303**. **Exhibit 11-171** is also a note stating that the Mr. Bauthus would send a letter to the mall manager identifying work to be done. This is more evidence of steps being taken. **Exhibit 12-70** also shows that the Mayor and the CAO attended a mall merchants meeting and were told an engineer had stated that the repair priority was three major joints. This can clearly not be described as nothing being done. As Mayor Hamilton stated in his testimony:

Q. And under the heading "August 3, 2008", it says:

"Mall crew along with extra staff they hired started repairing mall leaks. New engineer came on site and based on his report."

And then going down about five more bullets, it says:

"\$980,000 estimated cost for the repairs. Three major joints are the priority this year, and the main problem."

Do you remember that being said by Ms. Laroue, the mall manager?

A. Yes.

Q. And did you take any comfort from that?

A. Well, sure I did.

Rick Hamilton

July 9, 2013

Page 15136, Line 22

160. The City also had difficulty dealing with the owner. The City was attempting to cooperate with Mr. Nazarian on the purchase of the land, this is proven by them declaring the land surplus, and the by-law and planning committee recommending that it in fact be declared surplus. However, the City could not give the land away between the City Hall and the Mall at less than fair market value because of restrictions in the Municipal Act. The difficulty in dealing with the owner extended to the obtaining of building permits and the renegotiation of the Library lease. Mr. Nazarian did not give the City the information they needed. He mixed issues to try to leverage his position as landlord to the benefit of his position as a potential land purchaser. This is seen in the letter at **Exhibit 11-191**. The City, meanwhile was negotiating both issues separately so as to not leverage its position as tenant with its position as seller.

161. The 'fact' that Ms. Morin resigned because of the leaks cannot be accepted as a fact in this inquiry because it is hearsay. Commission Counsel did not call Ms. Morin as a witness and thus, any suggestion as to why she resigned remains simply speculation. This is an improper question of this witness, it is information 3 times removed that is being put to him.

162. Unlike what was suggested above, the City had not agreed to a 20-year lease in a 30-year old mall. The mall was less than 10 years old when the City agreed to a 20 year lease. What the City in fact signed in 2009 (when the mall was nearly 30 years old) was a 5 year lease with the option to terminate after 3 years.

AL COLLETT: BIASED CURRENT COUNCILOR

A. · I believe we asked at one particular time Mr. Bauthus to look into the possibility of how we could do that, withhold rent, according to the terms of the lease, yes.

Q. · Yes, because the City was paying the rent?

A. · Yes.

Q. · Okay. · But that never happened, did it, to your knowledge?

A. · No, no.

Al Collett

May 24, 2013

Page 11331, Line 3

Q. · So this is an e-mail from Ms. Croxston to people that -- actually, the recipients of this e-mail are not disclosed in this. · It looks like they were blank copied, in which it is dated April 4th, 2008, and the subject is "Extremely Important". And you will see that in

this e-mail she addresses it to all her friends and she describes how the library is in extremely poor shape with mold and the lights problem, and then she invites people that she sent this to -- to write to the Mayor and City Hall to express their concerns about the library.

And she describes in there how, for example, there is going to be meetings being held about the library with respect to also the location, the future location of the library.

Did you receive that e-mail at the time, sir?

A. No, I didn't.

Al Collett

May 23, 2013

Page 11147, Line 10

Q. Are you aware of any such meetings that occurred that you were invited to?

A. Yes.

Q. Okay, and can you tell us what those meetings were about?

A. There are a few meetings that I am not invited to directly because my first term on Council this term, as a measure of saving taxpayers' money, I gave my BlackBerry back to the City. So my cell phone that I carry around, I do not have e-mail, so I'm not privileged to get invited to some of the meetings because they will not forward it to my personal e-mail and so I have to learn about it through other sources.

Al Collett

May 23, 2013

Page 11110, Line 20

163. The evidence given by Mr. Collett that the City did not withhold rent is simply untrue. This is evidenced by **Exhibit 11-28**, which clearly indicates that the City withheld rent from the owner of the mall on behalf of the library.

164. Though Mr. Collett did not receive this e-mail as a member of the Library Board, it appears clear from its contents that Ms. Croxston emailed an unknown number of people to get them to complain. Of that unknown number, four individuals complained. Up until this email went out urging complaints, the City had never received a written complaint from anyone other than the library.

165. The City of Elliot Lake submits that Mr. Collett is always notified of all meetings. It is through no fault of the City of Elliot Lake that Mr. Collett made a conscious decision to ignore emails sent to his the City email account. The weight given to Mr. Collett's evidence should be discounted. Mr. Collett admitted in his testimony that he flatly refuses to conduct the simple download to access council related emails from his home.

DON DENLEY: BIASED FORMER COUNCILOR
--

Q. And did you believe that to be true?

A. I didn't pay any -- I didn't put any stock in it because, you know, I knew that he was not an engineer and -- or a scientist, or whatever, that he was in construction. So, I mean, you know you need to have the professionals come and look at it.

Q. And you didn't -- you did not bring that concern to Council?

A. No. Why would I? Everybody there knew the roof leaked.

Don Denley

June 4, 2013

Page 12867, Line 5

Q. So I take it from that that you didn't ask either the Building Department or the CAO or Council to refer it to the Building Department? And when I say "it", I'm sorry, I mean the issue of leaking in the mall.

A. You know, to answer that question, if you expect me to go to the Building Department, no, I didn't. But what's wrong with the rest of these folks who knew that the mall leaked and the mall leaked badly.

Q. When we're talking about the rest of these folks, I suppose you were in Elliot Lake in advance of being a Councilor?

A. Yes. Yes, approximately two years.

Q. And you did not file any written complaints during the time prior to being on Council?

A. Absolutely not. I was coaching baseball and soccer.

Q. Those are my questions thank you.

Don Denley

June 4, 2013

Page 12868, Line 3

Q. During caucus meetings, pardon me, I didn't specify in my question.

A. That's okay. The doors were locked, I mean, generally speaking.

Q. The door of the conference room or the door of the City Hall?

A. The front door of the City Hall. And I've seen them on some occasions lock the door to the actual conference room.

Don Denley

June 4, 2013

Page 12852, Line 23

166. Mr. Denley was an abrasive witness whose motive appeared to be criticizing the City. It is interesting to note that Mr. Denley noted that he was not an engineer and so he didn't even consider his own opinion to be worthwhile. As we've noted throughout these submissions, the City staff are generalists at best and even the CBO is a generalist. The engineering report of Bob Wood said the structure was sound in November 2009 and this was reiterated to Mr. Ewald in April 2012. Needless to say, Mr. Denley should have complained in writing to the City if he had any concern or put an issue on the Council agenda or brought a motion at a council meeting. He did none of these things.

167. It is the submission of the City of Elliot Lake that Mr. Denley's evidence should be looked at in the context of the fact that he was on council where he had the

opportunity to take real action, but only complained that no action was taken after the collapse. This, we submit, severely discredits Mr. Denley's testimony. Mr. Denley's answers were irrelevant to the point of being combative. His evidence was obviously crafted to attack the City that he and Mr. Collett both fall into the same category of witness: Hindsight Heroes.

168. On the issue of caucuses, it is worthwhile to note that everyone else who has testified about the caucus meetings has consistently said the meetings were not restrictive and nor were the doors locked or the window shades drawn. Again, Mr. Denley should have never been permitted to take the stand as a Phase I witness because many more integral potential witnesses were not called.

169. Somehow, Mr. Denley was permitted to, with hindsight crafted evidence, attack the City. It is incredible to think that Mr. Gagnon, Ms. Leddy, Ms. Williams, Ms. Morin and Ms. Croxston **were not called**, but Mr. Denley was called. It is the submission of the City of Elliot Lake that Mr. Denley was called to discuss the issue of caucus meetings, despite the fact that there is no evidence the caucus meetings at all contributed to the collapse of the mall roof.

LARRY BURLING: CLERK FROM July 1985 – February 1999
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A. Well pretty much as it was laid out in the bylaw, there is a process involved. But first of all the bylaw was passively enforced. Meaning there had to be a property filed written typically written complaint. Typically a complainant needs to understand the process that they are initiating. That in fact somewhere up to the road they may be called upon in legal proceedings to as a witness.

Larry Burling
April 2, 2013
Page 3794, Line 18

have to comply with certain standards such as the ones that I more or less just described. They should be in writing, the complainant -- it should be clear in their mind what -- that they are filing a complaint under the Property Standards bylaw.

Larry Burling
April 2, 2013
Page 3795, Line 9

At no time during my tenure did it ever occur to me that the water leaks would lead to structural failure.

Larry Burling
April 2, 2013
Page 3918 – Line 25

Q. Would you agree that it was not uncommon from a municipal employee to wear several hats?

A. I agree to that, yes.

Larry Burling
April 2, 2013
Page 3908 – Line 14

Q. Okay. So the - it - I think you'll agree that one of its purposes is to ensure that buildings were safe for their intended use?

A. Well not in a pro-active sense, but generally, yes, I would agree with that statement.

Larry Burling
April 2, 2013
Page 3793 – Line 11

Q. If you would turn to tab 36, this is **Exhibit No. 35**. This is the TROW Engineering report that was generated as mentioned in the -- as a result of what was mentioned in the May 7th letter by Mr. Liautaud, as well as the handwritten written notation by Mr. Pigeau. If you could turn to page 13. And you can verify, Mr. Burling, that you never saw this document before? Sorry, you never saw this back in 1991?

A. That's correct.

Larry Burling
April 2, 2013
Page 3829, Line 23

There were two other reports that were done by TROW Engineering. One at tab 43 and that is **Exhibit No. 44**. This one is dated the 9th of November. You did not see this document prior?

A. No, I did not.

Q. Before becoming involved with this Inquiry?

A. That's correct.

Larry Burling
April 2, 2013
Page 3833, Line 19

Q. Okay. So between the initial meeting the 5th of December of 1997, until March of 1998, you had not been privy to any information concerning this initiative?

A. No I was not.

Larry Burling
April 2, 2013
Page 3847, Line 14

Q. And you would agree, would you not that these two pieces of information, that is the condition of the building and the fair market value would be of interest to someone who is considering buying the property?

A. Yes.

Larry Burling
April 2, 2013
Page 3850, Line 3

Q. And you can confirm for us, can you not that the City never received either of those reports?

A. Not during my tenure.

Larry Burling

April 2, 2013

Page 3857, Line 6

Do you have any recollection of a Council meeting taking place where Ms. Guerin lays out the facts as set out in the fax cover sheet?

A. I do not.

Larry Burling

April 2, 2013

Page 3871, Line 16

Q. Okay. And if you could go to the next page of the document it's **Exhibit No. 2091**. And this was a document that was attached and it was the information that she wished to share with Council. And you can confirm that this verbal report was never given to Council?

A. Not that I recall.

Larry Burling

April 2, 2013

Page 3871, Line 21

Q. And you'll confirm that the City, in your tenure never received that document?

A. That's correct.

Larry Burling

April 2, 2013

Page 3873, Line 5

Coupled with the fact that the City paid for the report do you not think that the City should have received the report?

A. That would be reasonable.

Larry Burling

April 2, 2013

Page 3873, Line 17

There is no doubt that where a complainant might be required as a witness in the future, it is necessary to tell them that. The City could not afford to take the risk of having a weak foundation to the complaint and being stuck with the costs of prosecuting as they didn't have the resources. In any event, very few complaints. The City could not risk seeing a problem, tackling it, then having it thrown out for issuing an order without a complaint. This whole discussion, however, is hypothetical and not the basis for a finding of misconduct because, as Mr. Burling testified, there was never once a prosecution under the Property Standards By-Law during his tenure as Clerk. This was emphasized by Mr. Burling during his testimony.

Q. Can you give us some idea of how many prosecutions took place when you were the Clerk or Deputy Clerk under the Property Standards by-law?

A. Zero.

Larry Burling

April 2, 2013

Page 3810, Line 23

There was no provincial requirement that said a complaint must be taken if anonymously given or that they must accept complaints that are not in writing. The City chose to accept complaints in writing, and that's their prerogative. There is nothing wrong with accepting complaints only if they are written. This was based on best practices. It is, in the City's submission, not unreasonable to tell the complainant that they may be required as a witness in the future. There is no policy against this. Plus, enforcement had happened in other bylaw enforcement proceedings where it proceeded to court, so Mr. Burling knew that it was best to get complainant to put their name to it.

Mr. Warwick Perrin's expert testimony confirms there is no standard for what forms a complaint and that it is a municipal function to make the determination:

Q. Okay. And now going back you spoke about property standards being driven by complaints. What is your understanding of a complaint? Must a complaint be in writing for it to –

A. Generally speaking that's dependent upon the municipality. I know of municipalities that require complaints to be in writing, and I know municipalities that will accept anonymous complaints. That is really a municipal function. In Toronto at one time we would accept any complaint that wasn't anonymous but now we accept anonymous complaints.

Q. So it really varies from municipality to municipality?

A. Yes.

Q. There is no set standard for complaints?

A. No.

Warwick Perrin

April 2, 2013

Page 3712, Line 12

Mr. Perrin's expert testimony also confirms that Property Standards Officers can only act in the absence a complaint when there is a proactive enforcement system in place. The City's enforcement system is passive.

Q. And in order to act on a property standards issue can a property standards officer act in the absence of a complaint?

A. Oh yes, that would be considered to be pro-active.

Warwick Perrin

April 2, 2013

Page 3713, Line 6

In fact, without a complaint, the City was not properly authorized to act. The change of policy in 1995 from passive to active for commercial buildings that were 50% vacant or more was simply based on what municipality had already been doing, but that was unwritten. This was necessary, Mr. Burling explained in **Exhibit 6-8** because:

“the Courts, in the absence of formalized Council policy, have been taking a very hard line towards officials who -- when it comes to verifying that they acted properly and with proper authority.”

Larry Burling

April 2, 2013

Page 3806, Line 3

170. Mr. Burling’s view on a complainant coming to him was that he would write the complaint out for them so that it met the property standards bylaw complaint process if they came to him. This never happened. He was not the one who was equipped to receive complaints but would have written it out if he did. Mr. Burling would have written the complaint out, as he mentioned in his testimony, despite the fact that it was the Building Department’s role to accept complaints. Though there was no form that had to be filed for a complaint to be investigated, the City chose to accept complaints in writing so that it was clear that a person intended to file a complaint under the Property Standards By-Law. Mr. Burling stated it would be helpful, but did not state it was necessary that the complaint state specifically that is a complaint under the property standards by-law. This reference can be found at Larry Burling’s Testimony, April 2, 2013 – Page 3796, Line 9.

171. The City also did not have the resources to hire a separate property standards officer, bylaw enforcement office and CBO. The CBO was also the trailer-park manager, lottery licensing manager and animal control officer. In fact, the limited resources of the City were also the reason why the city did not proactively inspect buildings, which is why a complaint was required in writing. They would have needed many additional staff to proactively inspect.

172. Mr. Burling’s view on what was a property standard complaint differed with Mr. Pigeau’s view. Mr. Pigeau says that **Exhibit 11-12** is a Property Standards Bylaw complaint but the City of Elliot Lake submits that it is not the City administration’s responsibility to read between the lines of a person’s intentions to complain as that is an unworkable system. Even so, Mr. Burling still forwarded this concern to Mr. Pigeau, who was responsible for dealing with municipal facilities. After which, Mr. Pigeau dealt when he visited the library. **Exhibit 11-3, page ending 3976** is not a complaint; it was a request for an increase in the library’s budget, which they actually received.

173. The City was not advised of the many reports the mall owners got. The reports stating the “design use for this roof slab is inappropriate at achieving a watertight condition.” was not given to the City. The building condition assessment that the City

authorized was not given to the City. Neither the original owner nor Retirement Living provided the City the reports. In fact, a non disclosure agreement was signed between original owner and Retirement Living to ensure that it was specifically kept from the City, and if it was, original owner would reimburse Retirement Living for the costs of undertaking the report. NDA at **Exhibit 398**.

174. When Retirement Living got a building condition assessment that was paid for by the City, they reported to their board of directors, which included two councilors, a summary of the building condition assessment. That summary was a complete misrepresentation of what the real building condition assessment (done by Nichols Yallowega Belanger) actually said. The Summary provided to board members is at **Exhibit 3276**. The actual Nichols Yallowega Belanger report is **Exhibit 66**. Unfortunately, the City never received **Exhibit 66**. Obviously, the City was expecting the building condition assessment they paid for, but only received the retail study, and the two city councilors on the board received the fabricated summary building condition assessment that was given to the board. Obviously, if the City would have received these many reports, they wouldn't have waited until 2006 to issue a Notice of Violation.

MINISTRY OF LABOUR FAILURES

Q. Okay. So did you go ahead and contact Mr. Reagan of MOL?

A. I did.

Q. Do you recall how many times Mr. Reagan would have come into the library to test the air, because this is the second report we are looking at now?

A. How many times? He would have been in just the twice that I know of.

Barb Fazekas

March 11-12

Page 1216, Line 25

Q. All right. Were you aware of any of the Ministry of Labor inspections that had taken place at the mall over the years?

A. Not that I can recall, no.

Richard Kennealy

April 18, 2013

Page 5719, Line 19

Q. Okay. If I could ask you to turn to tab 89, **Exhibit No. 11-88**. This is a form from the Ontario Ministry of Labour and it records a meeting with Barbara Fazekas and Mr. Reagan on the 3rd of May accompanied by a gentleman by the name of Tony Fontana, a hygienist from the Ministry of Labour, to indicate that some air monitoring was done and this was the result of the complaint to the Ministry of Labour, correct?

A. That's correct.

Troy Speck

April 25, 2013

Page 6792, Line 19

And, sir, if I could ask you to turn to tab 96. And this is a report -- oh, sorry, it's **Exhibit No. 11-31**. And this is a report from Mr. Tony Fontana, who is the hygiene consultant at the Ministry of Labour who had been called in to test for mold, right?

Troy Speck
April 25, 2013
Page 6830, Line 5

Q. Did any of your -- there were a number of inspections that were done of the Algo Mall before the collapse, by your inspectors; correct?

A. Yes.

Sophie Dennis
April 30, 2013
Page 7577, Line 13

Q. And would that resource be made available, for example, to the City of Elliot Lake if they were investigating a building and they said "We would like the assistance of the Ministry of Labour engineering department because our engineer doesn't know about structural engineering, would you be able to help us out?" Is that a type of situation that might arise?

A. Our engineers could provide some advice but it would be advice on the Occupational Health and Safety Act and its application.

In any of those inspections that were done, to your knowledge, Ms. Dennis, were the offices of the Provincial -- your Provincial Engineer or any of your local engineers ever engaged by your inspectors prior to the collapse?

A. There is no record that an engineer was involved in any of our inspections prior to the collapse."

Sophie Dennis
April 30, 2013
Page 7578, Line 16

Q. You are aware that your own inspector was working and had his office inside the mall; did you know that?

A. No.

Sophie Dennis
April 30, 2013
Page 7579, Line 19

Q. Well, Ms. Dennis, the reality is that although you issued orders with respect to scissor lifts and eye wash stations and other things, not once, not once did the Ministry of Labour issue an order with respect to the leaking roof in the entire history of the matter; is that not correct, Ms. Dennis?

A. It's true.

Q. And is it not true that the Building Department of the City of Elliot Lake has no authority to issue orders under the Occupational Health and Safety Act, only your officials have that power; correct?

A. Correct.

Q. And you said that you were not in the mall all the time but, in fact, the City of Elliot Lake, didn't have its building inspection department housed in the mall, did they?

A. I don't know whether they did or they didn't.

Sophie Dennis

April 30, 2013

Page 7588, Line 16

So what I'm talking about is an engagement whereby the Ministry of Labour would liaise with your ongoing investigations with the city building departments where issues come up, where maybe inspectors would be invited to come on your inspections, or certainly there would be a process to flow information that isn't going to get caught with a building permit process. Are you going to mandate that change?

Sophie Dennis

April 30, 2013

Page 7723, Line 2

Q. So, nobody from that office [MOL] ever said anything to you about the structure of the building?

A. Not to my knowledge.

Sophie Dennis

April 30, 2013

Page 8633, Line 19

175. MOL was much better equipped to respond to the leaks. MOL was located in the mall. MOL failed to stop leaks. MOL powers are much broader and more powerful than the City powers. MOL had conducted inspections of the library and did not issue orders. The City (via JHSC) would have been aware of the fact that MOL (specialist in inspecting air quality) did not issue an order. Keep in mind that MOL was located in the Algo Mall. Not only did the MOL not issue an order, as a tenant they did not complain to the landlord or the City under the Property Standards By-law. Certainly the MOL would have a better knowledge base when it comes to structural problems that might affect health and safety. While the MOL found mould in the mall, they never mentioned any structural problems. The fact that the MOL did not find any structural issue, and the fact that the City was not receiving any of the engineering reports from the mall owners meant the City was kept in the dark about the true state of the mall, either unintentionally in the case of the MOL, or intentionally in the case of the various mall owners.

176. None of the MOL's inspections revealed the potential for leaks to cause structural defects. They were not conducted by structural engineers, but even MOL, having its

own engineers on staff did not go the structural route - how can the City be expected to know it is a structural problem when this fact was hidden from them for 25 years (1980 to 2006).

177. The cavalier attitude of the Ministry of Labour throughout this hearing (suggesting that employers such as Shoppers were responsible for the health and safety of their employees when it comes to serious structural issues) clearly evidences how they treated the leaks at the mall prior to the collapse and how they've only turned their attention to protecting their own MOL interests after the collapse. Their evidence should be taken in the most unfavorable light by this Honourable Commission. The MOL should also be the key source for future maintenance/structural/inspection/report central repository when it comes to the health and safety of the public in all buildings in Ontario.
178. It should be mandate that MOL must work with the City by its side for MOL inspections or at the very least notify the City of the MOL inspection taking place. MOL are a massive organization with government funding as its source and numerous specialists in which to handle inspections of buildings in a wide variety of areas of engineering, health and safety or other.
179. MOL failed their mandate in regards to this Mall. MOL has the necessary expertise to investigate and report on these types of structural/safety/leak issues.

RECOMMENDATIONS

180. RECOMMENDATION: The City of Elliot Lake's unwritten complaint process should be codified in future statutory language and should require that municipality have a "Complaint Policy" outlining exactly what has to be done to complain about an issue to the City.
181. RECOMMENDATION: The Ministry of Labour has expertise in all areas of health and safety as well as engineers on staff from a variety of engineering fields. The Ministry of Labour should be responsible for the future safety and security of the public in commercial structures, whether that is leakage from maintenance issues, structural issues or health/safety legislation.
182. RECOMMENDATION: Recognizing that an issue seemingly related to maintenance may actually be compromising a building's structural integrity may well be outside of the knowledge of the members of a municipal staff in a community the size of Elliot Lake. Chief Building Officers and their staff are generalists. Another agency such as the Ministry of Labour should be involved in some greater capacity to ensure that safety issues are properly recognized.
183. RECOMMENDATION: The overlapping of Property Standards Bylaw and the Building Code Act creates inefficiencies and potential for oversight. There should be a clear agency to be in charge of building safety as it relates to the public - whether it

be the Ministry of Labour or a municipality-specific entity with the proper statutory powers and the proper training and resources in order to identify building safety issues.

184. **RECOMMENDATION:** Currently, an engineering firm that has become aware of a significant structural issue that may put the public at risk has no duty or requirement to either follow up or alert a municipal body. In the present facts, although TROW was aware that its recommendations were not at any time implemented, it had no duty to report the ensuing risk to the City. This was a perfect circumstance in that the same engineering firm provided three reports in close succession and clearly indicated in subsequent reports that if a permanent repair was not done, particularly within a 20 year period, the structure would deteriorate. Not only did the City have no knowledge of this fact but there were no positive steps taken by TROW by 2012 notwithstanding its knowledge that the problem existed; the repair was never performed; and a sufficient amount of time had lapse so as to create a dangerous situation.
185. An engineer should be obligated to alert a municipality of a serious structural or other safety problem and make his or her report and recommendations known.
186. **RECOMMENDATION:** Municipalities should not be put into the position of being an insurer of buildings. The present common law does not impose an obligation to inspect or enforce by-laws and to change that significantly would put the Municipality in the shoes of an insurer and would elevate the cost and risk of operating a municipality prohibitively. Building owners should be statutorily responsible for the structural integrity of their buildings. No one but the owner is in a better position to know and ascertain the true information about their building's condition.
187. **RECOMMENDATION:** Engineering reports about building structures or structural condition reports should be registered and made available to all inspecting authorities and potential purchasers. This is already done for automobiles and should be implemented for buildings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: August 8, 2013

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