

**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

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**SUBMISSIONS OF THE ELLIOT LAKE MALL ACTION  
COMMITTEE (ELMAC)**

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**August 8th, 2013**

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## **Final Submissions – Elliot Lake Inquiry, Phase 1**

### **Part I – General Overview / Summary**

#### **A. Introduction**

1. The partial roof collapse of the Algo Centre Mall (the “**Mall**”) on June 23, 2012 was a tragedy that has left a permanent mark on the people of Elliot Lake and has resonated throughout the country.

2. The deaths of two respected members of this small community will long be remembered and the physical and psychological effects will also be felt for a long time.

3. The loss of the Algo Centre Mall also impacted on the economy of a community that has been trying to overcome the financial loss of the mining industry.

4. Nevertheless, some good can be achieved if we can learn from this and create new measures to prevent similar tragedies from occurring in the future.

#### **B. The Commission’s Mandate**

5. The terms of reference for the Elliot Lake Inquiry require the Commission to:

- (a) Inquire into and report on events surrounding the collapse of the Mall, the deaths of Lucie Aylwin and Doloris Perizollo and the injuries to other individuals in attendance at the mall and the emergency management and response by responsible bodies and individuals subsequent to the collapse;
- (b) Review relevant legislation, regulations and by-laws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity and safety of the Mall;
- (c) Review relevant legislation, regulations and by-laws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the emergency management and response to the collapse of the Mall.

6. The Commission has divided its work into two phases: one, dealing with events prior to the collapse of the Mall on June 23, 2012 and the other dealing with events on and after that date.

7. ELMAC provides these submissions for the first phase of this Inquiry.

### **C. Executive Summary of the Events leading up to the Collapse**

8. The collapse of the Algo Centre Mall on June 23, 2012 was the result of a series of flawed economically driven decisions and inadequate regulatory oversight that allowed a poorly designed and constructed building to be erected, occupied and to deteriorate to the dangerous state that existed immediately prior to its failure.

9. During the design Algoma Central Properties (“**ACP**”), notwithstanding a lack of experience and expertise, acted as its own general contractor. It appointed an individual, Nicholas Hirt (“**Hirt**”), to supervise the project notwithstanding the fact that he lacked the appropriate skill and experience. His approach to the project was to stress cost cutting over safety. ACP employed the services of James W. Keywan (“**Keywan**”) and John Kadlec (“**Kadlec**”) who adopted Hirt's cost cutting approach and submitted to his design directions without exercising sound professional judgment.

10. In order to save construction costs in the rocky area where the mall was built they decided to install roof top parking over occupied areas of the mall. Having chosen the flat roof top parking structure they chose to use core slabs to save on the cost of poured concrete and structural steel. Rather use a heavier and more expensive waterproof membrane that was normally used, they chose the Peterson System. It was a system that was untested in conjunction with core slabs on an open parking deck. The Peterson System was known to perform poorly in snowy winter environments such as is found in Elliot Lake. While less expensive, the Peterson System was quickly shown to be unable to keep the roof of the mall in a watertight state as required by the applicable Code and By-laws. Despite this failure and the Peterson System’s maximum working life of 10 years, it was never restored or replaced by ACP or any subsequent owner.

11. ACP operated the mall and ignored advice to restrict traffic flow onto the roof top parking deck. Most importantly, ACP ignored the advice of Trow Consulting Engineers Ltd. (“**Trow**”) to permanently fix the leaking roof by retrofitting the deck with a waterproof membrane. Acting

directly contrary to Trow's advice, ACP opted instead for a less expensive (and far less effective) maintenance program, whose costs could be passed on to tenants as additional rent. This pattern of ignoring professional advice and sticking to the unsuccessful maintenance program was repeated by both subsequent owners, with ultimately disastrous results.

12.ACP wrote down half of its investment in the mall after deciding that the roof could not be repaired economically. It opted instead to sell the Mall to Elliot Lake Retirement Living ("**Retirement Living**") but chose not to disclose its conclusion that the leaking roof could not be repaired economically. In effect it passed off a ticking time bomb of its own creation to Retirement Living.

13.Retirement Living knew the roof leaked at the time it purchased the Mall. They hired Nicholls Yallowega Belanger ("**NYB**") and their engineers, Hallsal. Rather than spend \$1,000,000 for the recommended permanent fix to the leaks, Retirement Living opted to follow the approach of ACP: chase the leaks with a less expensive, but equally less effective maintenance program. Retirement Living may have been motivated by the loftier goal of preserving Elliot Lake as a viable retirement community in the wake of the closure of the mines. However, it chose to invest a million dollars in a golf course while again following ACP's approach to avoid spending a similar amount restoring the roof parking deck. It recovered its investment in the mall and passed this ticking time bomb off by selling to a new purchaser.

14.There is a conflict in the evidence about what Bob Nazarian ("**Nazarian**") knew or was told at the date the mall was purchased. We know that the initial purchase price, that was admitted to be a terrific investment, was reduced by \$2,000,000 because of improvements he wanted to make to the property and the parking deck and "suspicions" he had about the mall.

15.The evidence is clear that the mall was producing a very healthy return on investment. That return would have continued if the leaks had been stopped. Nazarian and Eastwood Inc. ("**Eastwood**") failure to spend the necessary \$980,000 to permanently fix the roof was driven by his desire to extract his money from the mall investment, funnel it into other projects for the benefit of himself and his family. All of his evidence about not having the money to fix the roof lacks credibility. He had the resources but he was only willing to spend other people's money for the permanent fix. He was determined not to invest any of his own money in the self-described

"black hole". If he had chosen to do so this tragedy could have been avoided and the mall would have continued to operate at a very healthy rate of return.

16. Instead Mr. Nazarian concentrated on trying to remortgage the property (to get out from under his personal guarantee to RBC) while trying to sell this time bomb to another purchaser. Unfortunately, time ran out!

17. While the three owners shoulder a significant portion of the responsibility for this disaster, others must share in that responsibility.

18. This disaster marks a failure of the engineering profession to adequately protect the public interest. This mall was inspected by many engineers. There was no sharing of information, and no engineer raised the alarm with the city or others in power. Most disgracefully, in the months before the collapse, a report pronouncing the mall structurally sound was produced by an engineer who had already lost his license.

19. The Ministry of Labour (“**MOL**”) failed the workers in the Mall, including the late Lucie Aylwin. The MOL offices were in the leaking mall for a long time, and yet they took no action to conduct a proper investigation or to call in their own engineering staff. No order was ever made by the MOL to stop the leaking despite multiple complaints, until it was too late.

20. The City of Elliot Lake (the “**City**”) is responsible for enforcing the Ontario Building Code and its own by-laws. It allowed the mall to be occupied despite the leaky roof. It finally issued an order to stop the leaks in 2006, but then never followed up effectively. When the City was confronted with the dramatic evidence of dangerous decay at Hungry Jack’s in 2011, it declined to take action for fear it might result in the closure of the mall. The City’s misguided efforts to protect the mall not only ruined lives, they resulted in the kind of economic catastrophe the City had been trying to avoid.

## **Part II – Chronology and Findings of Causes**

### **A. Design and Construction of the Algo Centre Mall**

21. The Algo Centre Mall disaster could have happened anywhere in Ontario. However, there are some important aspects of the context of this incident that set the stage for this particular tragedy.

22. Elliot Lake was established during the Cold War as a result of the discovery of a large uranium deposit. The community “boomed” and “busted” along with the demand for uranium. The population has varied between a low of 6,000 and a high of 25,000. The bust of the sixties was followed by growth in the seventies and an anticipated boom in the eighties.

#### **Exhibit 7**

23. Improvement of the aging commercial centre of Elliot Lake was part of the plans for the boom in the eighties that projected a population of 25,000. At the time, the creation of Elliot Lake’s first modern enclosed shopping centre was touted as the city’s “crowning achievement” and a “symbol of prosperity.” But, as a result of the subsequent closure of the mines in the early nineties, the population fell to about 11,500 and has remained around that level. Elliot Lake stabilized itself by promoting the city as a retirement community.

#### **Exhibit 7**

24. Despite its inexperience in building commercial shopping centres, ACP did not hire a general contractor to oversee the project and instead chose to act as its own general contractor.

25. Several errors were made during the design and construction phase of the Algo Centre Mall which would ultimately lead to a severe and persistent leaking problem affecting the structural integrity of the mall. These errors can be summarized as follows:

- (a) ACP decided to change the original design and to place a substantial open parking deck on the roof over occupied space in order to save the cost of building an additional ground level parking lot. The architectural and structural designers

were both uncomfortable with the decision to put a parking deck over occupied space with no covering to protect the parking deck's surface from the elements, but did not take steps to ensure that their concerns were met;

- (b) Hollow concrete slabs were chosen for the roof deck in order to save money. However, the concrete slabs used did not meet the project specifications. In the alternative, the concrete supplier provided inconsistent advice to the Mall owners with respect to the load bearing capacity of the concrete slabs;
- (c) The architectural designer had no role in selecting or reviewing the waterproofing system chosen by ACP;
- (d) The unusual waterproofing system was chosen to save money on the cost of the system and structural steel. As designed and installed by ACP, Keywan and the Harry S. Peterson Company (“**HSP**”), the waterproofing system was experimental. The system selected had never been used in connection with an exposed parking deck composed of hollow core slabs. It was unsuitable for the Elliot Lake winter climate and never proved effective at maintaining a watertight roof.
- (e) The parking deck never shed or drained water effectively; and
- (f) The structural engineer and architect confirmed substantial compliance of the building with the Ontario Building Code without a site inspection and without any direct knowledge of the building's compliance. In particular, they had no direct knowledge whether the roof parking deck shed or drained water effectively.

26. Mr. Keywan was retained by ACP as the architectural designer of the Algo Centre. Hired by Keywan, Beta Engineering Group Ltd. (“**Beta**”) acted as the structural engineer in the design and construction of the Algo Centre. Beta was a company formed by Mr. Peter Kodeda (“**Kodeda**”) and Mr. Kadlec, both of whom worked on the structural design of the Mall.

**John Kadlec, transcript of March 6, 2013, p. 188, lines 17-20 and pp. 189-190, lines 11-13; and p. 194, lines 4-11**

27. Keywan testified that he was retained for the limited purpose of: (i) preparing the architectural drawings for approval by the Ontario Municipal Board; (ii) preparing the architectural drawings for construction; and (iii) hiring a structural engineer. Keywan testified that ACP entrusted the oversight and direction of the Mall project to its Vice President, Mr. Hirt, a civil engineer, and Mr. Ward Pinnell (“**Pinnell**”), the development manager, who, together called and reviewed the tenders, hired and coordinated the subcontractors, and pivotally, chose the waterproofing system.

**James Keywan, transcript of March 11, 2013, p. 912, lines 3-15; pp. 918-925, lines 6-3; p. 946, lines 10-14; pp. 962-963, lines 2-15; p. 969, lines 1-19**  
**Robert Leistner transcript of March 27, 2013, p. 3240, lines 13-15**

28. However, Keywan’s alleged limited mandate is brought into question by correspondence that suggests that Keywan was also involved in the coordination of subcontracts and his evidence that others involved in the construction may have thought of him as the prime consultant. Indeed, even Kadlec understood Keywan to be the prime consultant on this project.

29. However, Keywan was a professional architect and not a mere draughtsman. Where an architect is involved in a project of this size, the architect is normally the prime consultant. Keywan signed and sealed the certificate of completion above Kadlec’s signature and seal. The Commission should find that he was the prime consultant. This does not absolve ACP of responsibility for its bad design decisions, especially regarding the choice of waterproofing system. Regrettably, Mr. Hirt of ACP died before the hearings commenced, and no other witnesses from ACP who may have been involved in the design and construction of the Mall testified during the hearing.

**Exhibit 1977**

**Exhibit 1978**

**Exhibit 1979**

**Exhibit 1990**

**Exhibit 1993**

**James Keywan, transcript of March 11, 2013, pp. 955-956, lines 15-8; p. 969, lines 10-19; and p. 1030, lines 21-24**

**John Kadlec, transcript of March 6, 2013, p. 351, lines 13-16**

30. The design drawings indicate a steel framing structure over a poured-in-place concrete foundation. The floor and roof slabs are pre-cast concrete hollow core slab panels (“**HCS**”),

with the exception of the slab at the lower level which is a poured concrete slab on grade. The decision to use hollow core slabs was based on economic rather than safety considerations.

**Exhibit 1876,  
Exhibit 3007, p. 58  
David Monroe, transcript of March 8, p. 744, lines 17 to 21**

31. By the time the Algo Centre Mall was planned and built, it had become well known that concrete parking structures constructed in Canada were susceptible to premature deterioration due to cracks, leaks and the corrosive effects of water and salt. Membranes had been an available solution for twenty years.

**David Monroe, transcript of March 8, p. 689, lines 6 to 12, pp. 715-717, lines 3-13**

32. The roof slab of the mall was used for parking. As noted by Bob Nazarian, doors located at the rear of the Mall that opened on to “wilderness” suggest that the original concept for the necessary parking likely contemplated an additional ground level parking lot at the rear of the Mall. This would have required the purchase of additional land and the costly levelling of the steep, rocky, forested terrain that existed at the rear of the Mall. The decision to locate the parking deck on the roof was made by ACP and was motivated by cost savings. Both Keywan and Kadlec expressed discomfort about designing a parking deck over occupied space. It was an unusual and inherently risky design. However, their concerns did not prevent them from designing the Parking Deck on the roof of the Mall. Neither Keywan nor Kadlec did more than orally discuss their concerns with the owner. They did not design any “failsafe” mechanism for the beam that failed, relying on the weld alone to sustain the connection. It should have been apparent to ACP, Kadlec and Keywan knew or ought to have known that if that weld should ever fail in future that catastrophic consequences would be inevitable.

**Exhibit 590  
John Kadlec, transcript of March 6, 2013, pp. 202-204, lines 24-17  
James Keywan, transcript of March 11, 2013, pp. 959-966, lines 18-14  
Bob Nazarian transcript July 26, p. 18574 lines 7 to 25 – p. 875, lines 1 to 12**

**i. Precast Hollow Core Slabs**

33. The precast concrete system that was installed did not fulfill the design specifications. Kadlec and Beta Engineering included improper functional specifications while Coreslab Limited (“Coreslab”), the concrete supplier, misled the owner into believing that they had bought a system that fulfilled the project specifications when it would not.

**Exhibit 3007, pp. 39-40**

34. The structural design drawings specified 120 psf superimposed load, required to be supported by Hollow Core Slab panels. On structural drawings S3 and S4, these panels are noted as 8” deep. ACP was advised by PreCon Co. (“PreCon”), one of the hollow core slab suppliers bidding for the job, that such a system was not achievable. ACP hence awarded the job to Coreslab, the other bidder, on or about March 1979, presumably because Coreslab was perceived to comply with Kadlec’s specifications. However, Coreslab’s own 8” Imperial Load Table shows that 8” slabs with 7 – ½ diameter 270 ksi prestress strands cannot accommodate 120 psf superimposed load at centre to centre spans in excess of 27’ in length. The majority of the precast panels in the mall exceeded 27’ in length with a typical length of 30’.

**Exhibit 629****Exhibit 1876, pp. 41-42****Exhibit 3007, pp. 39-40 & 75-76**

35. The precast hollow core concrete specification stated that the roof deck has a waterproofing membrane, insulation and a concrete topping which were to be installed after the roof slabs had been erected. Coreslab agreed to these conditions in or about March 1979, before the Harry S. Peterson waterproofing system involving composite topping came into the picture.

**Exhibit 446****Exhibit 1792****Exhibit 2006, p. AGC\_P000006268**

36. Ms. Sonia Saari (“Saari”), an in-house structural engineer at Coreslab, provided evidence at this Inquiry that the hollow core slabs used for the Algo Centre were not over capacity and did not require the topping to act compositely to achieve the required strength and serviceability characteristics. However, even if Saari’s calculations are correct, they do not allow for any

degree of error because the demand forces match up exactly with the available load capacity. Moreover, Saari's calculations are inconsistent with the advice provided by Coreslab representatives to the owners of the Algo Centre and their respective consultants in 1992, 1995 and 2008, as set out in further detail below.

**Exhibit 5149**

**Exhibit 5150**

**Sonia Saari, transcript of May 28, 2013, pp. 12082-12083, lines 18-16**

**ii. The Experimental Waterproofing System**

37. The waterproofing design in the architectural drawings was not consistent throughout the drawings. For example, in Figure 4.1, details of the mall roof slab indicate the application of a "waterproofing sealer" to the top of the concrete topping. The waterproofing sealer is not described in any way within the drawings or specifications. The NORR Report provides, "Generally, relying on concrete sealers entirely to maintain the integrity of a building envelope is considered bad practice. Let alone having the material as a horizontal layer guaranteed to be covered in water and snow." Moreover, there are a number of sections in the architectural drawings where the roof is simply shown as four inches of concrete topping over eight inches of precast concrete roof slab; no indication of waterproofing materials show up whatsoever.

**Exhibit 3007, pp. 58-59 and 67**

**Chris Hughes, transcript of May 29, 2013, pp. 12237-12240, lines 21-22**

38. On or about April 23, 1979, HSP provided ACP with two options for a waterproofing system. The first option, a "sandwich slab system", was comprised of hot, rubberised asphalt membrane applied to the top surface of the precast panels covered by protection board followed by insulation and concrete wearing slab. The second, the composite system, consisted of strips of membrane at precast panel joints followed by a concrete wearing course topping (the "**Peterson System**"). The composite option depended on the success of a crack control method which involved saw-cutting the concrete topping at locations where cracks were predicted to occur and preparing these saw-cut joints with waterproof caulking material. The caulked saw-cut joints were paired with a Barrier penetrating concrete sealer applied to the top surface of the concrete topping. The composite option was promoted by the Peterson Company as innovative and cheaper despite the fact that it was known by them since at least 1975 to have performance

problems due to snow plough damage. The Peterson System was quoted as \$136,000 cheaper than the sandwich slab system. It was also attractive to ACP because it was lighter, reducing the cost of the required structural steel to support it.

**Exhibit 14**

**Exhibit 590**

**Exhibit 1863**

**Exhibit 1972,**

**David Monroe, transcript of March 8, 2013, p. 692, line 2; p. 708, line 15; p. 737 lines 11-23, p. 746 lines 3-14.**

39. Keywan testified that he had no role in selecting, reviewing or approving the waterproofing system for the Algo Centre Mall. Given that Mr. Keywan was the only architect known to be involved in the design and construction of this structure, the evidence suggests that no architect reviewed or approved the use of the Peterson Waterproofing System on this structure.

**James Keywan, transcript of March 11, 2013, p. 963, lines 8-22; p. 969, lines 1-9; and pp. 1049-1050, lines 23-24**

40. The core slabs and strip membrane over occupied space had never been used previously by the Peterson Company and was never used again. The Peterson Company did not know if their system would work in this configuration, so ACP could not have known either. ACP knew it was the first time this “economical” system was going to be used in North America, and that it would offer a variety of benefits to ACP - if it worked. This design was a reckless experiment by ACP, once again driven by the desire to achieve cost savings. Monroe now believes that the design using the Peterson System core slabs without any sheltering canopy or roof was the primary reason for the system failure. As Trow pointed out years later, “the design used for this roof slab is inappropriate in achieving a watertight condition over commercial areas.”

**Exhibit 40**

**Exhibit 590**

**David Monroe, transcript of March 8, 2013, p. 676, lines 19-25 and p. 733, lines 1-12**

41. Before deciding on the waterproofing system, ACP contacted A.E.J. Cunningham Consultants Ltd. (“**Cunningham**”) in May 1979 for their opinion regarding the Peterson System. Cunningham did not comment on the validity of the system but recommended that structural design should allow for the additional weight of a 3” concrete wearing slab and membrane to

allow for the future installation of a conventional membrane should the Peterson Waterproofing System fail in the future.

### **Exhibit 15**

42.ACP ignored the advice to ensure that the design contemplate “overbuilding”, with redundant additional load bearing capacity in case the experimental Peterson System failed to shed water effectively and it became necessary to replace it with a heavier conventional membrane system. ACP ultimately decided on the composite system, without implementing additional load-bearing capacity. This design was also driven by cost savings considerations. Unfortunately, as described in further detail below, the Peterson Waterproofing System was never effective in achieving a watertight roof. Ironically, “watertightness” was one of the necessary design elements of a “comprehensive waterproofing system for a roof top parking area” as stated in the Peterson Company’s proposal for the Algo Centre. ACP kept a copy of that report in its files and should have been aware that the waterproofing system that was installed on the Parking Deck might not satisfy its intended purpose. ACP made design decisions that maximized savings based on the pivotal premise that the Peterson System experimental design would succeed in Elliot Lake. ACP did not provide any contingencies for failure. The experiment failed.

### **Exhibit 1811**

#### **Exhibit 14, p. AGC\_P000011969**

#### **iii. Failure to shed or drain water effectively**

43.At the date on which the Algo Centre would have obtained a building permit, the *Ontario Building Code Act* (the “*Code*”) would have been the governing regulation for construction products. The selection of materials and assemblies in current buildings is based on meeting the performance-based criterion set out in the Code. Relevant to the integrity of the building envelope, the Code provides:

Subsection 4.8.1.3 Control of Wind and Rain Penetration

Paragraph (4): Roofing shall be installed so as to,

(a) Shed or drain water effectively;

...

***Building Code Act, 1974, O. Reg. 925/75***

**Exhibit 3007, p. 64**

44. As a result of the inadequate sloping design on the Parking Deck, rain water was not shed or drained effectively, as was required by the Code.

**Exhibit 3007, p. 65**

45. There are two methods that could have been used to ensure that the Parking Deck shed and drained water effectively. The first is that a waterproof material that prevented water infiltration could have been installed. The second is that the roof could have been sloped so that water was effectively channelled towards roof drain points.

**Exhibit 3007, pp. 63-64**

46. The Parking Deck is considered to be a flat roof. The slope present is so low that, if it were designed today, it should be detailed to essentially retain water for prolonged periods of time, until it either evaporated or migrated slowly to drains. Compounding the issue of negligible sloping is the presence of expansion joints. The collapse site of the roof specifically expected water to flow from the high point between gridline G and FX, in the collapsed area, across the expansion joint at grid F/Fx, on the east end of the collapsed area, to reach the drain at gridline E. However, the level of slope in the drawings between the high point and the drain at gridline E is shown to be only 0.5%. While water can move across that area, it will do so very slowly and will tend to pool around any joints that are in its trajectory. Based on numerous reports and photographic evidence, it is clear that standing water was present on the Parking Deck and could reasonably be expected to be present at the expansion joint F/Fx. This standing water may also be partly attributable to the fact that, because of the roof's use as a parking deck, the drains were prone to become clogged with sand and other debris. Mr. Hughes testified that he believed that the expansion joints were failing because of the effect of the water pooling against the expansion joints for a very long time.

**Exhibit 3007, p. 64**

**David Monroe, transcript of March 8, p. 759, lines 16-21**

**Chris Hughes, transcript of May 29, 2013, pp. 12227-12229, lines 25-4**

47. The NORR panel could not find any details in the design documents relating to the roof drains, how they were supposed to work, or how they were supposed to be mounted. Despite the

foregoing, the NORR Report provides that, “the roof drains would have served their purpose but they rely on water to make its way to them effectively.”

**Exhibit 3007, p. 67**

**Chris Hughes, transcript of May 29, 2013, pp. 12240-12243, lines 23-22**

#### **iv. Certificate of Substantial Completion**

48. On August 5, 1980, Keywan and Kadlec signed and stamped a letter to the Building Inspector at the City of Elliot Lake, which confirmed that the Algo Centre Mall was substantially complete in accordance with the architectural and structural designs (the “**Certificate of Substantial Completion**”).

**Exhibit 275**

49. Various engineers and architects that have provided evidence at this inquiry have generally described a Certificate of Substantial Completion to signify to the public and City that the building is ready and suitable for the use intended, and all the major systems have been verified and confirmed with the architect and all the sub-consultants that have an interest in the project.

**Dale Craig, transcript of March 5, 2013, pp. 132-133, lines 20-19**

**Michael Luciw, transcript of April 10, 2013, pp. 4787-4788, lines 23-21**

**Blaine Nicholls, transcript of April 30, 2013, pp. 7371-7372, lines 24-17**

50. The Certificate of Substantial Completion also signifies that the building is up to Code. In the present case, the roof of the mall should have been watertight.

**Exhibit 6-6, By-Law No. 79-15, s. 5.4(a)**

**James Keywan, transcript of March, p. 1014, lines 11-14**

51. Prior to signing the Certificate of Substantial Completion, Keywan did not conduct any inspection of the site himself or hire any other person to do such an inspection, and instead relied on information from Hirt that the building was substantially complete. The evidence suggests that if Keywan had taken the time to inspect the building prior to substantial completion, he would have discovered a “severe leakage” problem in the Woolco space, as described in the letter from ACP to Mr. Monroe of HSP on March 24, 1980, discussed below.

**Exhibit 573**

**James Keywan, transcript of March 11, 2013, pp. 980-981, lines 14-12 and pp. 1085-1086, lines 24-22**

52. Kadlec testified that he relied on reports from the testing company, Trow Group Limited, in order to sign and stamp the Certificate of Substantial Completion instead of inspecting the site himself. However, there is no evidence that Trow ever certified to him that the roof was watertight.

**John Kadlec, transcript of March 6, 2013, pp. 240-241, lines 7-13**

**53. Mr. Michael Luciw and Mr. Blaine Nicholls, both licensed architects in Ontario, testified that they would never sign a Certificate of Substantial Completion without visiting the site or having someone from their office visit the site. It is not appropriate to rely on information** obtained from an owner or developer who was acting as the prime consultant.

**Michael Luciw, transcript of April 10, 2013, pp. 4788-4789, lines 22-11**  
**Blaine Nicholls, transcript of April 30, 2013, pp. 7372-7373, lines 19-9**

54. The City of Elliot Lake issued a building permit for the project. The roof in the store first occupied by Woolco leaked from the time it was built. At the time the Certificate of Completion was presented to the City, the City had inspected the Woolco roof and knew or ought to have known it was still leaking. Despite this patent non-compliance with the Code, the City improperly permitted occupancy. The City should have refused occupancy until the roof shed water effectively in compliance with the Code.

### **Exhibit 293**

#### **v. Lack of Non-Moveable Vehicle Barriers**

55. In order to drive on to the Parking Deck, a car could either drive up a ramp at the North side or the South side of the building. Moveable barriers were installed at the bottom of the two ramps leading to the Parking Deck.

**Exhibit 3005**  
**Rod Caughill, transcript of March 13, pp. 1454-1456, lines 5-5**

56. The design of the deck contemplated passenger cars and trucks of similar weight only. All owners, beginning with ACP, failed to control heavy traffic on the deck. Throughout ACP's tenure as owners of the Mall, it received numerous warnings that heavy vehicles should be banned from the Parking Deck:

- (a) On April 29, 1980, ACP received a letter from HSP advising, "it is imperative that a physical barrier be constructed to keep trucks off the deck."
- (b) On July 12, 1982, ACP received a letter from the Chief Building Official stating, "...I have been advised that a few heavy trucks have been seen traversing over the area. I would welcome further action in remedying the problem as soon as possible, as the slab as I understand, has not been designed to carry such loads".
- (c) In October 1996, Paul Meyer included a warning in his engineering report to ACP that large heavy vehicles must be prevented from accessing the parking deck with permanent non-moveable barriers at the top of the ramps.

**Exhibit 65, p. AGC\_P000001670**

**Exhibit 569**

**Exhibit 1855**

**Kadlec transcript, March 6, p. 331 lines 10-25; p. 332, p. 333 lines 1- 13;**

57. Unfortunately, the recommendations that ACP received with respect to the installing a non-moveable barrier may have stayed with ACP as Mr. Robert Leistner ("**Leistner**"), the former General Manager and Vice President of ACP, does not recall advising anyone at Retirement Living about them.

**Robert Leistner, transcript of March 28, 2013, p. 3639, lines 7-16**

58. In 2003, Retirement Living spent \$2,676 to erect a steel barrier on the roof. However, this barrier was also moveable. It also appears to have been a single barrier, whereas there were two entrances to the roof.

**Exhibit 708**

**Richard Kennealy, transcript of April 18, 2013, p. 5629, lines 15-23**

59. According to Mr. Ralph Regan, a MOL inspector who inspected the Mall, the gates to the roof were moveable. They were not locked, and should have been locked into place. However, he was never concerned enough to issue an Order.

**Ralph Regan, transcript of June 5, 2013, pp. 13045-13046, lines 24-16**

60. Mr. Brian Cuthbertson, who worked at the Zellers store between February 14, 2007 to June 23, 2012 saw pay loaders on the roof.

**Brian Cuthbertson, transcript of May 1, 2013, p. 7849, lines 14-17**

61. The area of failure is located between the entrance to the mall and the entrance to the hotel tower. Common sense would indicate that persons parking on the roof, including heavy vehicles such as buses, would likely park close to these entrances whenever possible for ease of unloading. An additional risk factor in this area was the practice in winter of salting the area between the two entrances on a daily basis, in addition to any salt applied by snow plough operators. The significance of the failure of the Mall owners to prevent large vehicles from driving onto the parking deck is highlighted in the finding in the NORR report that it is likely that the failed connection could have been subject to a heavy localized load for a short duration, such as the wheel load of a loaded bus, and caused a partial failure some months before the final separation. After the first failure, it is estimated that the capacity of the connection that remained until June 2012 was approximately 13% of its nominal capacity when it was built. The load on the day of the collapse was not significantly higher than its usual level of service, but was nevertheless enough to take the connection over the threshold to sheer failure and cause the collapse.

**Exhibit 3007, pp. 124 – 125**

**Rhonda Bear, transcript of June 12 2013, p. 14087, lines 6-25**

**A. The Leaks Start with ACP**

**i. Warranty Period on the Peterson Waterproofing System**

62. Complaints about leaks in the Mall began immediately after occupancy. The first tenant with major leakage was Woolco, located in the area that Zellers eventually took over. There

is correspondence as early as March 7, 1980, between ACP and Mr. Dave Monroe (“**Monroe**”), the former Vice President of HSP requesting that HSP “check out a major leak through the parking deck coreslab” and stating that it had been five weeks since this request was first made. The leaks were a reoccurring problem. Throughout the rest of the year, ACP continued to demand help from HSP. Unfortunately, HSP did not initially understand what the problem was and could not provide ACP with a solution.

**Exhibit 567**

**Exhibit 573**

**Exhibit 575**

**Dave Monroe, transcript of March 7, 2013, p. 634, lines 4-14**

**Barbara Cloughley, transcript of March 26, 2013, p. 3200, lines 23-25**

63. On November 18 1980, ACP agreed that the parking deck would be accepted as substantially complete with the reservation that they would continue to hold \$18,000 “until such time as the surfaces are made watertight”. As Monroe testified, HSP was willing to let ACP hold the \$18,000 so that the clock would start running on the 5 year warranty period.

**Exhibit 550**

**Dave Monroe, transcript of March 7, 2013, pp. 639-641, lines 17-4**

64. In the summer of 1981, Woolco hired Bregman and Hamann, Architects and Engineers (“**Bregman and Hamann**”) “to determine the cause of the numerous water entries into the ceiling areas” of their retail space. During their site inspection on July 23, 1981, water staining of acoustic tile was observed in approximately 38 locations. Water lay in the plastic lens of many fluorescent lights and the concrete slabs were found to be water-logged in many locations throughout the ceiling. Water stains were evidence on all structural steel beams and supports. They reported that the joints in the concrete topping did not align with the location of the joints in the hollow core precast panels which caused additional cracking observed in the concrete topping. Joints were observed to be poorly sealed and showed signs of repair. In order to repair the roofing, they suggested three different systems, all of which involved full coverage of the roof with a membrane. The Bregman and Hamann reported was found in ACP’s files. It was the NORR Panel’s opinion that this report provided ACP with an appropriate solution to the leaks as early as 1981.

**Exhibit 31****Exhibit 300****Exhibit 3007, pp. 13-14****Exhibit 3013, pp. F-141 - 183****NORR Panel, transcript of May 29, 2013, pp. 12255-12256, lines 17-2**

65. The leaks in Woolco continued throughout the five-year warranty period. Every time it rained and despite the efforts made by HSP, “Woolco and the expansion joints continued to be a problem.” HSP eventually came to the conclusion that that it was the experimental design of the Peterson Waterproofing System at the Mall that was the cause of the leaks, and not defects in the installation. In particular, HSP’s snow removal guidelines could not be followed in the circumstances that existed in Elliot Lake, and snow plough damage to the expansion joints was inevitable. The leaks could not be stopped by patching the cracks or by more effective repair of the Peterson System. The only way to put a stop to the leaks was to replace the entire water proofing system with a conventional membrane at great expense. Although Monroe may have been among the first to reach this conclusion, he would not be the last. Instead of disclosing this design flaw conclusion to ACP, the Peterson Company continued to patch and waited out the five year warranty period, failing to advise ACP that the Peterson System was not going to work. However, it is also important to bear in mind that regardless of this design flaw, the key components of the Peterson System had a working life expectancy of 5 to 10 years after which major renovation would be required. Although this working life expectancy information was given to ACP, they did not perform major renovations to the system after 10 years and did not pass on this information so subsequent owners. In fact, there is no evidence that subsequent owners knew that the Peterson System had been installed.

**Exhibit 530**

**David Monroe, transcript of March 8, 2013, pp. 670-671, lines 21-20; p. 793, lines 20-23; and p. 795, lines 7-21**

**Barbara Cloughley, transcript of March 26, 2013, p. 3179, lines 7-19**

66. The first documented connection between the leaking problem and the risk of structural damage arose during a meeting on August 11, 1981 with the management of ACP, including Mr. Hirt, the Vice President; Mr. Ward Pinnell, the development manager; Mr. Leistner, the

controller; and Mr. P. Pappoulas, the general manager of the mall; as well as Keywan, Monroe, and Mr. J. Stanton from Canadian Barrier:

“another area of concern to Algocen is the fact that if water is allowed into the cores of the precast slabs it freezes, it could cause severe structural damage”

**Exhibit 541**

**Dave Monroe, transcript of March 7, 2013, pp. 643-645, lines 17-1**

67. On some accounts, including that of Leistner, the leaking issues at the Mall appeared to have dissipated in the late eighties. However, Ms. Barbara Cloughley (“**Cloughley**”), a former employee of Woolco between 1983 and 1992 testified that she did not remember the leaks improving in any period of time during her tenure. In Woolco, there were two major leaks in the centre aisle of the shoe department and customer service area. It leaked occasionally in ladies’ wear and housewares. It also leaked in Cloughley’s office. The water ate through files and the paint on top of the filing cabinet. Staff put out buckets to catch falling water in housewares, and covered ladies’ ware and the shoe department with plastic. Cloughley also recalls seeing leaks in other parts of the mall, such as the kiosk area and the library. In any event, by the spring of 1990 the leaks worsened and the Mall “had a tremendous number of leaks as never seen before.”

**Exhibit 594, AGC\_P000006499**

**Robert Leistner, transcript of March 27, 2013, p. 3245, lines 12-21**

**Barbara Cloughley, transcript of March 26, 2013, pp. 3184-3186, lines 1-25; p. 3190, lines 15-20; and pp. 3194– 3195, lines 8-17**

**1991 Trow Condition Survey**

68. By the fall of 1990, ACP was “stumped” and sought the advice of various consultants with respect to the leaks in 1990, including, Mid North Caulking and Installation Ltd. in September 1990 and Daybue Contracting Limited in November 1990. It was decided that ACP would have to wait for spring to break the next year in order to do a reliable examination. The first comprehensive engineering investigation was undertaken by Trow.

**Exhibit 32**

**Exhibit 38**

**Exhibit 574**

**Exhibit 584**

**Exhibit 591**

**Exhibit 594, p. AGC\_P000006499**  
**Rod Caughill, transcript of March 13, p. 1497, lines 13-18**

69. It is clear from the correspondence between Trow and ACP which dealt with the scope of Trow's investigation that ACP was concerned in 1990 that there might be structural damage to the building as a result of the ingress of water.

**Exhibit 33**  
**Exhibit 1089**  
**Robert Leistner, transcript of March 27, 2013, pp. 3249-3253, lines 9-12**

70. Trow performed a condition survey of the structural components of the parking structure in April 1991. The report remarked upon evidence of a history of leakage problems at the Algo Centre:

- (a) "The soffit of the suspended roof slabs was general in good condition but indicated **evidence of excessive leakage** through the joints of the precast hollow core slabs above the mall. Some water stains were also noted on the soffit of the pedestrian walkway slabs. Metal pans and pails were noted above the false ceiling in the stores to divert the water leakage."
- (b) "We understand that the suspended parking slab has had **a history of leakage problems**".
- (c) "The fireproofing material on the steel beams at the majority of the leakage areas has become debonded or fallen off. (Note: many beams appeared not to contain any fireproofing...)"
- (d) "Many of the suspended ceiling panels and tracks are water and/or rust stained".
- (e) "Some electrical conduits have become corroded from the ingress of water and salt through the slab."

**Exhibit 35, pp. abstract, 1 & 9-10**

71. Trow was of the opinion that the design used for the roof slab was not appropriate in achieving a watertight condition over the commercial areas. A high level of chloride ion content was noted and the topping of the roof slab was observed to be in an initial state of deterioration. Trow warned that repairs should be carried out as soon as possible to maintain the structural integrity of the slab and to reduce the potential for further deterioration and leakage.

**Exhibit 35, pp. 13 and 16**

72. Trow suggested two possible options for repairing the parking deck. Option 1 was to remove broken or debonded concrete topping to expose the top surface of the precast slab, prepare the concrete surface, replace concrete topping and apply a waterproofing membrane and wearing course. Option 2 was to remove the topping layer completely to expose the top surface of the hollow core panels, prepare the concrete surface and waterproof the entire area. Following this, an asphalt surface would be installed with hot pour joints in the asphalt surface above all steel beams.

**Exhibit 35, p. 14**

73. On June 27, 1991, ACP asked Trow a number of questions, following the 1991 Trow Condition Survey. One question asked by ACP was whether ACP could continue to remove de-bonded concrete, replace it with a new bonded concrete, and then apply a sealer, a technique much like that which ACP had been using since at least 1986, and which had not worked. Trow responded on July 11, 1991, that replacing the de-bonded concrete topping with a bonded new concrete topping was only a partial repair and a waterproofing would still be required over the concrete topping, as per Option 1. Trow provided further a description of the asphalt wearing course and waterproofing system materials that was proposed in Option 2. ACP understood in 1991 that both options proposed by Trow included the installation of a waterproofing membrane.

**Exhibit 420, pp. AGC\_P000001774 and AGC\_P000001776**

**Exhibit 425**

**Rod Caughill, transcript of March 13, 2013, pp. 1556-1557, lines 1-7**

**Robert Leistner, transcript of March 27, 2012, pp. 3269-3270, lines 24-3**

74.ACP contacted Kadlec on August 14, 1991 to request design load capacity of the roof as well as the maximum allowable loads on the existing structure. ACP also requested information on how critical the components in the composite slab were; in particular they wanted to know whether de-bonding of the slab from the precast panels was adverse. Kadlec contacted Coreslab at some point after ACP's request with regards to the capacity of the Hollow Core Slabs.

**Exhibit 602**

75.In a letter dated June 29, 1992 from Mr. Shahid Shaikh (“**Shaikh**”) of Coreslab, it is stated that the parking deck was designed using a superimposed dead load of 45 psf which is consistent with Coreslab shop drawings of 1979. Shaikh further stated that for the slab to safely support this load, the three-inch concrete topping was placed to act compositely with the Hollow Core Slab. Shaikh's comments in this correspondence are in direct conflict with statements made by Coreslab representatives during the time of construction. In particular, he stated on February 4, 1980, that the 8” Hollow Core Slabs with a span of 30’ could support a superimposed dead and live load of 120 psf in the Upper and Lower Mall without the composite concrete topping.

**Exhibit 41**

**Exhibit 3007, p. 20**

76.Coinciding with the increase in leaks was the economic situation in Canada and in Elliot Lake in the early nineties. ACP was concerned about the effect of the national recession on the retail sector. At the same time, all of Elliot Lake's mines closed in the early to mid-1990s, because higher-grade uranium was found elsewhere and due to the cancellation of long-term contracts between local mines and Ontario Hydro. It was projected by economic development agencies that Elliot Lake's population would decline from 18,000 to 5,000 by 1996 if the lost jobs could not be replaced. In its first 11 years, the Mall had a net cumulative loss of over 9 million dollars. By September 1991, ACP began to consider selling or abandoning the Mall and those options continued to be on the table until the eventual sale to Retirement Living.

**Exhibit 7, p. OR\_E00000005.01 at para. 8**

**Exhibit 401**

**Exhibit 403**

**Exhibit 427**

**Exhibit 428**

**Robert Leistner, transcript of March 27, 2013, pp. 3271-3272, lines 11-10 and pp. 3276- 3279, lines 6-6**

**Fred Bauthus, transcript of March 25, p. 2881 lines 20-25, p. 2882 lines 1 -9**

77.If ACP had been willing to spend money required by the solutions Trow was suggesting for an effective waterproofing system, it had sufficient funds to do so. However, perhaps as a result of its economic concerns about the viability of the mall, ACP did not alter its method of dealing with the leaks after receiving the 1991 Trow Condition Survey, nor did they pursue the advice of any other professionals as to how to deal with the problem until 1994.

**Rod Caughill, transcript of March 13, 2013, pp. 1591-1592, lines 17-16 and pp. 1600-1601, lines 24-3**

**Robert Leistner, transcript of March 27, 2013, pp. 3270-3271, lines 12-10 and p. 3298, lines 3-7**

78.Instead, the Mall's maintenance crew were tasked with attempting to repair the leaking areas on the roof. Unfortunately, this would become a pattern with subsequent owners: the repairs would be found ineffective, professional advice would be sought, an effective million dollar solution would be proposed, the professional advice would then be ignored and cheap but ineffective "in house" repairs would be resumed. In addition to requiring lower financial outlays, this approach allowed all roof repair costs to be recouped promptly from tenants as additional rent (capital improvements could be recouped through additional rent, but would generally have had to have been amortized over ten years). The practice of having the unqualified maintenance crew attempt to repair the Parking Deck on a patch work basis without professional supervision or direction from an engineer seems to have continued throughout the Mall's existence. Mr. Ken Snow ("**Snow**"), who was the maintenance supervisor between 1989 and 2005, testified that the Mall maintenance crew learned how to repair the roof on the job. There was no engineer or anyone else with any technical knowledge on the matter of roofing to assist the maintenance crew with how to repair the roof, other than the suppliers of products they were using. Snow also testified that the techniques used to deal with the leaks on the roof did not change during the 16 years that he worked at the Mall: receive a complaint, try to trace the leak to a faulty joint or crack, pull

up the old sealant, grind down the sides, lay down new sealant and wait for the next complaint.

**Barbara Cloughley, transcript of March 26, 2013, p. 3204, lines 11-20**

**Ken Snow, transcript of April 3, 2013, p. 3950, lines 4-10 and pp. 3962-3963, lines 16-2; p. 3973, lines 19-22; and pp. 3988-3989, lines 19-16**

**Richard Kennealy, transcript of April 18, p. 5728, lines 12-25, p. 5729 lines 1-12**

**Ron McCowan, transcript of June 10, p. 13756, lines 1-23**

**1994-1995 Trow Detailed Condition Survey**

79. In April 1994, ACP requested an inspection of the structural components of the Algo Centre as a comparison to the 1991 Trow Condition Survey. The scope of work included: (i) determining the extent of degradation of the pre-stressed cables of the Hollow Core Slabs; (ii) removing cores over the structural members to determine the extent of the rusting and degradation; (iii) conducting a visual inspection of the structural members; and (iv) testing core samples for chloride ion content at the same locations tested in the 1991 report. It appears that ACP, having rejected Trow's advice on how to correct the problem effectively, now wanted Trow to assess the effectiveness of ACP's cheaper "in house" solution.

**Exhibit 1091**

**Rod Caughill, transcript of March 13, 2013, pp. 1601-1602, lines 23-17**

80. Trow performed a site inspection on August 23 and 24, 1994 which was documented by Mr. Rod Caughill ("**Caughill**"), who was the Development Supervisor for ACP at the time. Caughill notes that Mr. Remy Iamónico, an engineer with Trow, "does not believe that we have a structural problem yet but he cautions that the corrosion will accelerate exponentially if the leakage is not treated".

**Exhibit 611, p. AGC\_P000006591**

**Rod Caughill, transcript of March 13, 2013, p. 1609, lines 14-25**

81. The original report submitted by Trow was dated November 9, 1994 and a revised version was submitted January 31, 1995. A visual survey of the underside of the parking deck was performed and some of the false ceiling panels were removed to allow for this inspection. Excessive leakage was noted through the joints of the hollow slabs above mall

level. The steel beams were noted to be rusted at locations where evidence of leakage was observed. The choride ion content was generally higher than areas tested in 1991. It was reported that water and salt penetration through joints in the hollow core slabs would cause deterioration of the concrete, pre-stressed cables, steel beams, fireproofing, false ceiling tiles, and electrical conduits to increase. Trow recommended that a structural review and assessment be carried out as soon as possible to confirm whether the concrete topping needed to be bonded to the hollow core slabs or not. Based on these findings, recommendations for repair of the deck and installation of a suitable waterproofing system could be made.

**Exhibit 461, pp. AGC\_P000002976 and AGC\_P000002981-83**

82.Prior to receiving the final version of the Detailed Condition Survey, Leistner instructed Mr. Caughill, the contemporary development manager of ACP, to remove Trow's recommendation that a structural review and analysis be performed.

**Exhibit 45, p. EGI\_P000000160**

**Robert Leistner, transcript of March 27, 2013 pp. 3324-3325, lines 22-16**

**CP's Decision to Write Down the Value of the Mall without Repairs**

83.In fiscal year 1992, ACP wrote down the book value of the Algo Center Mall by \$5,102,000 to more accurately reflect what ACP felt was its actual value, given the problems with the parking deck. In October 1994, Leistner was asked to prepare a report for the audit committee of the board of ACP on the status of the Algo Center Mall to consider the possibility of writing it down even further. The draft report included 3 options: (i) do not increase the amount of the write-down; (ii) write the value of the Mall down to zero because there was uncertainty about whether it would last any period of time; or (iii) write down the value of the mall by \$3 million, an amount to cover the cost of the major repair that would be required within the useful life of the building. The latter option was not included in the final draft that went to the board. The audit committee decided not to recommend a further write down. In February 1995, ACP began making efforts to sell the Mall.

**Exhibit 380**

**Exhibit 429**

**Exhibit 784**

**Exhibit 1976**

**Exhibit 2075**

**Robert Leistner, transcript of March 27, 2013, pp. 3311-3313, lines 15-22; pp. 3352-3356, lines 7-3; and pp. 3358-3359, lines 16-17**

**1995 Trow and ATA Structural Investigation**

84. As a follow up to the 1994 Trow report, a structural investigation of the parking deck was performed. Alex Tobias Associates, Structural Engineers (“ATA”) was retained to provide the necessary structural engineering services. A report was issued on November 6, 1995 (the “**1995 Trow and ATA Structural Investigation**”), which set out answers to questions that ACP had asked Trow during the determination of the scope of work.

**Exhibit 51**

**Exhibit 1093**

**Exhibit 1123**

85. Trow and ATA met with Shaikh from Coreslab on September 22, 1995 to discuss the capacity and design intent of the Hollow Core Slab system. ATA noted in the 1995 Trow and ATA Structural Investigation that Shaikh stated that the concrete topping had to be fully bonded to the core slabs. Furthermore, in a letter to Trow sent on October 2, 1995, Shaikh stated that increasing the depth of the concrete topping would not increase the live load capacity of the slabs and that the dead load of the topping would cancel out the increased capacity.

**Exhibit 51**

**Exhibit 3024**

86. ATA conceded that the precast panels with a fully bonded topping could safely support 53 psf basic snow or rain load or 50 psf vehicle load, as well as 20 psf superimposed dead load and an additional 20 psf. It was suggested that based on this analysis, a waterproofing system weighing up to 20 psf could be installed over the concrete topping. Trow proposed two options. The first involved installing a new asphaltic based waterproofing system over the existing topping while the second only called for re-caulking of damaged joints. Both options included the installation of a canopy to relieve the parking slab of snow load near the

hotel where snow drifting allowance is mandated by Code. Trow favoured the first option, noting, “Option 1 assures complete repair to the parking structure facility” and “Option 2 only addresses a small percentage of the problem”.

**Exhibit 51, pp. 2-5**

**Remy Iamonaco, transcript of March 21, 2013, pp. 2491-2493, lines 12-19**

87.Option 1 in the 1995 Trow and ATA Structural Investigation was a viable “way out” of the Parking Deck problem. Had it been implemented, it likely would have been effective at stopping the leaks and the structural deterioration. It was made clear during the NORR Panels’ testimony, that in their view, an asphalt membrane was the only solution.

**NORR Panel, transcript of May 29, 2013, p. 12338, lines 8-13 and pp. 12405-12407, lines 25-17**

88.In addition to the waterproofing option recommended, the 1995 Trow and ATA Structural Investigation also recommended, in response to ACP’s question, “How often should the structure be investigated?” that an update survey of the parking deck be carried out in the Spring of 1996 in order to prepare repair specifications for the rehabilitation of the parking deck. Once the parking deck has been repaired and waterproofed, the Algo Centre maintenance personnel should carry out monthly visual inspections of the parking deck and keep logs of any defects observed and any leaks that may develop. An engineering company should be retained on an annual basis to carry out a visual inspection and random chain drag of the waterproofing system as well as reviewing Algo Centre’s monthly monitoring logs. By 1995, the deterioration of the structure had progressed to the point that, while it could be repaired, yearly engineering investigations would be required, at least in the first few years, to ensure that structure was safe.

**Exhibit 51, p. 3**

**Robert Leistner, transcript of March 27, 2013, p. 3383, lines 16-18**

**NORR Panel, transcript of May 30, 2013, pp. 12567-12568, lines 5-24**

89.By at least the end of 1994, if not earlier, ACP understood that:

- (a) The leaks had caused some concrete disintegration;
- (b) The leaks had caused some corrosion of steel members;

- (c) If the leaks were not stopped, the corrosion would continue, perhaps “exponentially”, which could pose a risk to the structural integrity of the building; and
- (d) Applying a waterproof membrane over the Parking Deck was the only effective solution to stop the leaks.

**Exhibit 429, p. AGC\_P000001868**

**Rod Caughill, transcript of March 18, 2013, pp. 1573-1574, lines 25-11**

**Rod Caughill, transcript of March 19, 2013, p. 1828, lines 8-13**

**Robert Leistner, transcript of March 27, 2013, p. 3322, lines 5-8**

**Robert Leistner, transcript of March 28, pp. 3558-3560, lines 3-17**

90.ACP had the financial resources to make the repairs suggested by Trow but chose not to. By March 27, 1996, ACP concluded that the financial risk of fixing the roof with a waterproof membrane was too great because of its subjective belief that Trow’s solution was not viable. ACP did not go back to Trow to ask for an explanation of the issue they had with Trow’s report, nor is there any evidence that another engineer was consulted on Trow’s recommendation. Instead, ACP continued with the same repair method of chasing leaks that had been used in the previous 15 years.

**Robert Leistner, transcript of March 27, 2013, p. 3298, lines 3-7; pp. 3385-3387, lines 4-14; and pp. 3405-3410, lines 11-4**

**Robert, Leistner, transcript of March 28, 2013, pp. 3587-3588, lines 1-9**

**1996 Meyer Report**

91.In or about February 1996, ACP learned that Kadlec’s professional engineering license had been suspended by the Association of Professional Engineers of Ontario (the “PEO”). ACP retained Paul Meyer to confirm that the building was designed in accordance with good engineering practices and standards at the time of its design. Meyer's report dated October 23, 1996, found that the structural steel framing was generally acceptable and in conformance with the Building Code in effect at the time of construction. He also pointed out that the existing composite topping could be removed, and that the parking deck roof could bear the load of a waterproofing membrane provided a suitable wearing surface could be obtained. Mr. Meyer also recommended that large heavy vehicles be prevented from accessing the parking deck with permanent non-moveable barriers at the top of the ramps.

Unfortunately, this was a recommendation that may have stayed with ACP as Leistner does not recall advising anyone at Retirement Living about it.

**Exhibit 65**

**Exhibit 430**

**Rod Caughill, transcript of March 14, 2013, pp. 1687-1690, lines 22-3**

**Robert Leistner, transcript of March 27, 2013, pp. 3423-3424, lines 15-3**

92. During Mr. Meyer's testimony, he was asked about the scope of his retainer. Although the condition of the building was not within the scope of his retainer, he understood that he had a professional responsibility to report any safety concerns:

A. ....And the third party of my proposal, which is showing up here, does say, you know if there is something that is deficient in design or construction then, you know, further work will be required.

Q. Right.

1. So you're keeping an eye open for something like that, but it's not part of the scope to necessarily do that.

**Paul Meyer, transcript of April 4, 2013, p. 4132, lines 14-22**

93. When Mr. Meyer performed his visual inspection, he looked at a sufficient number of connections to get a proper random sampling. It is likely that at the time of the Meyer report, the building had not deteriorated to the point that it had created a safety risk. Meyer testified that he was not aware, at the time of conducting his investigation, that the building had been leaking since its inception. Had he known, his report may have included a warning that the leaking had to be fixed in order to protect the integrity of the structural steel.

**Exhibit 65**

**Paul Meyer, transcript of April 4, 2013, pp. 4126-4127, lines 22-25 and p. 4135, lines 16-18**

**NORR Panel, transcript of May 30, 2013, pp. 12568-12569, lines 19-3 and pp. 12570-12571, lines 16-14**

94. That being said, Meyer's failure to warn ACP of the effect of leaks did not affect ACP's understanding that the leaks were posing a danger to the long term integrity of the building. At the end of 1998, Mr. Leistner continued to have concerns about the long-term structural integrity of the parking deck. However, he did not advise the City of his concerns and

testified that he was unaware of the property standards by-law requiring the mall be watertight.

**Robert Leistner, transcript of March 27, 2013, pp. 3431-3432, lines 7-13 Robert Leistner, transcript of March 28, 2013, pp. 3646-3648, lines 3-7**

### **Information Given to Retirement Living**

95. Leistner did not tell either Mr. Richard Kennealy (“**Kennealy**”), the general manager of Retirement Living or Ms. Rhona Guertin (“**Guertin**”), the comptroller at Retirement Living, of his concerns about the long-term structural issues and the effect of the leaks.

**Robert Leistner, transcript of March 27, 2013 pp. 3486, line 21 – 3487, line 6**

96. Following Trow’s November 16, 1995, report, ACP was aware that the leaks were not only compromising the structural steel but also that the structural steel had to be inspected monthly by its maintenance staff and annually by an engineering company. There is no evidence that ACP heeded Trow's caution and implemented such a schedule. More troubling, there is also no evidence that ACP notified Retirement Living of the necessity of the monthly and annual inspections or that ACP provided Retirement Living with a copy of the report or other important information. This omission deprived subsequent owners of the becoming aware of the course of action that likely would have alerted them to the rate of corrosion and eventually the necessity of reinforcing the steel structure and the urgency of finding a permanent solution. No information was provided to Retirement Living about the Peterson System, its maintenance requirements (such as the snow plough guidelines) or its expected working life.

**Richard Kennealy, transcript of April 18, pp, 5713-5718, lines 10-12**

97. According to Mr. Leistner, although he verbally offered previous engineering reports to Mr. Kennealy, he was never asked to produce them because Mr. Kennealy didn't need them. Although Michael Luciw of NYB wrote Rhona Guertin on July 30, 1998, requesting pertinent reports from Larry Liautaud (“**Liautaud**”), the Mall manager at the time. Mr. Leistner doesn't recall Ms. Guertin requesting them.

**Exhibit 874****Robert Leistner, transcript of March 27, 2013, pp. 3477-3479, lines 5-14 and pp. 3479-3480, lines 22-2**

98. Leistner equally does not recall ever being asked for permission to disclose either the Nicholls Yallowega Belanger or 1998 Halsall report to the City or Mayor George Farkouh, the former mayor (“**Farkouh**”).

**Robert Leistner, transcript of March 27, 2013, pp. 3472-3473, lines 10-22****C. The Leaks Continue and Spread During Elliot Lake Retirement Living Ownership with No Solution****i. The Purposes of Retirement Living**

99. Retirement Living was incorporated with several objects including "to provide and operate...commercial space or buildings appropriate primarily for senior citizens of low or modest income in a manner that provides improved quality of life and that supports the economic base of the City of Elliot Lake". Retirement Living has 12 board members, 2 of which must be approved by Council. Guertin understood that the city had 2 members on the board to understand what Retirement Living was up to. Each member of Retirement Living is a director. George Farkouh was one of the original 12 directors named in Retirement Living's application for letters patent. Retirement Living's board also governed NorDev (“**NorDev**”).

**Exhibit 2143****Richard Kennealy, transcript of April 18, 2013, p. 5744, lines 18-20**  
**Rhona Guertin, transcript of April 19, 2013, p. 5834, lines 5-19**

100. Richard Kennealy was the general manager of Elliot Lake Retirement Living from 1993. He reported to the board of directors of the corporation and operated Retirement Living. He is not an engineer, had no training in waterproofing systems and had no architects or engineers on staff.

**Richard Kennealy, transcript of April 16, 2013, pp. 5163-5164, lines 14-2; pp. 5208-5209, lines 23-4; and p. 5721 lines 7 to 20**

**ii. Strong Motives to Buy**

101.ACP was motivated to sell the mall, and Retirement Living was motivated to purchase it. For ACP, the mall was a money-losing venture. ACP decided to build the mall in 1978 based on an expected, large future demand for uranium and an expectation that Elliot Lake's population would grow to 31,000 by 1985. In the 1980's there were 5,000 workers in mining. By 1990, unemployment increased substantially because mines were closing. New retail tenants were hard to find because of the national recession, and with the expiry of the original ten-year leases, the national tenants negotiated lower rents. In 1992, additional layoffs dropped the number of workers at the mines to 500. Because of the economic changes, on December 31, 1992, ACP wrote down the net book value of the mall from \$11.6 million to \$6.5. Two years later it dropped to \$5.5 million. In June of 1994, Woolco closed and paid its minimum obligations under its lease until January 31, 2001. Zellers took over the space in October of 2001.

**Exhibit 429**

102.The physical condition of the mall also concerned ACP. At the end of 1998, Mr. Leistner had concerns about the long-term structural integrity of the parking deck. In 1994, he had been advised that if ACP did not make the necessary costly repairs, the deterioration of the building would increase exponentially. ACP considered a structural audit to determine if the useful life of the building had been compromised. Since May of 1991, Leistner knew that the parking deck's design was inappropriate for achieving a watertight condition and that further deterioration and leaks would continue if the slabs and expansion joints were not waterproofed.

**Exhibit 429**

**Robert Leistner, transcript of March 27, 2013, p. 3431, lines 7-12 and p. 3432 lines 18-21**

**Robert Leistner, transcript of March 28, 2013, pp. 3564-3565, lines 6-9 and pp. 3646-3647, lines 22-8**

103.According to Kennealy, ACP did not want to continue to operate a business that was losing money:

They also indicated that if they could not make progress with the hotel, that they would consider closing the hotel because they didn't want to continue running a losing venture....They also mentioned -- they didn't actually say they were going to tear it down, but what they did say was that they had already done work on having folks come in to look at the possibility of taking the structure down, which you would -- you know, that was their way of letting us know that they were looking hard at all of the options.

**Richard Kennealy, transcript of April 16, 2013 p. 5218, lines 5-16**

104. On March 11, 1999, the mall was valued at 5.8 million, a few hundred thousand less than what ACP was seeking for the mall but ACP was willing to accept 4 million.

**Exhibit 711**

**Exhibit 712**

**Richard Kennealy, transcript of April 17, 2013, p. 5488, lines 13-19 and p. 5520, lines 15-20**

105. Why would ACP agree to such a low amount? Mr. Leistner's testimony suggests that ACP was willing to accept less than the market value of approximately \$6 million because ACP was looking for a "responsible" buyer. However, it seems as likely that ACP was willing to take such a discount on the mall because they were facing the expensive repairs required to permanently fix the roof with a waterproof membrane and a wearing course and a quick sale to a highly motivated and well-resourced buyer was attractive.

**Robert Leistner, transcript of March 27, 2013, pp. 3444-3445, lines 19-9**

106. Retirement Living was motivated to purchase the mall. The mall was a marketing feature in promoting the desirability of Elliot Lake as retirement destination. Without an enclosed mall, Elliot Lake would be much less attractive to seniors. Retirement Living was the largest user of the hotel, as prospective residents were put up at the hotel by Retirement Living as part of their marketing efforts. The mall employed more than 200 people in a city with only 3,385 employed persons. Following the closure of the mines, it had become one of the city's largest employers. It was also a meeting place for the community especially its seniors, whose welfare was Retirement Living's concern. If the mall closed, Elliot Lake and Retirement Living would be hurt. Keeping the mall alive aligned with Retirement Living's *raison d'être*.

**Exhibit 7, at para. 18****Richard Kennealy, transcript of April 17, 2013, p. 5214 lines 19-15; p. 5215, lines 1-9; and p. 5483, lines 1-8**

107. Retirement Living's individual directors were also motivated to find a purchaser. Mayor Farkouh was "quite concerned" about ACP's plans, which Farkouh, Fred Bauthus ("Bauthus"), the former Chief Administration Officer, and Kennealy thought extended beyond the hotel.

Given what I know some of the concerns the Mayor and Fred would have had, and I guess in my case at that point to a lesser degree, they would be concerned with what ACP was going to do totally, okay, not just the hotel. They would have anxieties related to what they might be intending on doing in the future with the mall itself also.

Powerful individuals on City Council and Retirement Living's board believed the City's survival depended on the mall's survival.

**Richard Kennealy, transcript of April 16, 2013, p. 5221, lines 6-24 and p. 5237, lines 10-24**

108. Retirement Living incorporated NorDev, a for-profit corporation with share capital, to purchase the mall. Retirement Living was the sole shareholder, and the members of Retirement Living's board were members of NorDev's. Hereinafter, NorDev and Retirement Living will collectively be referred to as "**Retirement Living**".

**Richard Kennealy, transcript of April 16, 2013, pp. 5224-5225, lines 1-9**

109. Mr. Kennealy testified that Retirement Living was focused on purchasing primarily the hotel in October of 1997. In Retirement Living's pursuit of the hotel, and possibly the mall, Mr. Kennealy's objective was to gain as much information as possible.

**Richard Kennealy, transcript of April 16, 2013, p. 5228 lines 2-11 and p. 5254, lines 17-21**

110. As of December of 1997, Mr. Bauthus was communicating directly with Mr. Leistner of ACP about purchasing the mall even though Retirement Living would be the purchaser. Mr. Leistner wrote Mr. Bauthus on December 11, 1997, regarding a proposed study of the

financials and physical structure of the mall. In the letter, Mr. Leistner wrote "With respect to the part of the study which is specifically directed at the Algo Centre, as noted previously, confidentiality is utmost important". By January, the lead switched from Mr. Bauthus to Mr. Kennealy, who testified that he could not recall the reason for the change. This change is puzzling. To effect this change, Bauthus had to be told that he was no longer taking the lead. Kennealy had to be told that he would be taking the lead from Bauthus, and Leistner had to be told about the change. But there isn't a single document, letter, email or memo, relating to the change. There's no mention of a meeting in subsequent correspondence. There's just the change. ELMAC submits that the reason for the change was to accommodate the desire of Retirement Living to keep the deal confidential and to avoid the legislative transparency that applied to the City.

**Exhibit 3226**

**Richard Kennealy, transcript of April 16, 2013, p. 5261, lines 7-24**

111. Retirement Living asked the City to pay for the studies. Bauthus presented a March 6, 1998 report to seek council's approval to pay for the studies. The report makes no mention that a physical condition assessment would be completed. Kennealy had no explanation for this absence in the report. On March 9, 1998, Council passed resolution 79/98 and agreed to fund the studies.

**Richard Kennealy, transcript of April 17, 2013, p. 5336, lines 13-18**

112. It is unclear why the city paid for the studies when the city was not the purchaser. By the time council passed by-law 98-13 on March 23, 1998, authorizing Retirement Living to retain consultants to perform the retail mall study, it was evident from at least ACP's perspective that Retirement Living was the potential purchaser of the mall. Further, as Mr. Farkouh testified, it was never a consideration that the city would purchase the mall.

**Robert Leistner, transcript of March 27, 2013, p. 3433, lines 7-19**

**George Farkouh, transcript of May 2, 2013, p. 8135, lines 17-23**

**iii. The Non-Disclosure Agreement**

113. Directors of Retirement Living were expected to sign a non-disclosure agreement (“NDA”) requiring them not to share written materials, or comment on the voting of individual members, any issues dealing with employees or any negotiations by the board that have not come to a vote. Although directors entered NDAs, it was Mr. Kennealy's experience that board members did not always comply with their non-disclosure obligations:

A. There is the process and then there is the reality, I mean, and I need to speak to that. I mean, it is a small community. All of the folks coming to the Board table would talk to each other. They would talk about what we were doing, how we were doing it and what we were trying to do. We are certainly not Intel or Coke; we don't have any secret formulas or anything like that.

This was a good general practice. The reality is a lot of folks would talk to each other on a regular basis. It was not uncommon for me to walk into an office of the CAO of the City and see one of my business plans sitting on their desk. That was not uncommon.

**Exhibit 2145****Richard Kennealy, transcript of April 16, 2013, p. 5192, lines 6-20**

114. Retirement Living's purchase of the mall in 1998 was outside the ordinary course. It was the first time that Retirement Living had ever invested in an enterprise for profit and the first time it had ever made an investment in commercial property. It had never operated a mall, and had no one on its management team with such experience. Its assets were the 1,500 rental units purchased from Denison and Rio Algom, which it rented to retirees. Although it had experience maintaining residential properties, it had no one experienced in maintaining commercial structures of the size, complexity and age of the Mall. The local economy was now based on tourism, cottaging, retirement and health care.

**Exhibit 7, at para. 9****Richard Kennealy, transcript of April 16, 2013, p. 5208, lines 17-22**

115. Although the City had agreed to pay for and expected to receive a copy of the retail mall study, on May 15, 1998, Richard Kennealy personally entered an agreement (the “**May 1998 NDA**”) with ACP not to disclose material information about the financial and physical

condition of the mall with Retirement Living's board without ACP's prior consent. The NDA specifically prohibited disclosure of information to the mayor, George Farkouh.

**Exhibit 390**

116. Although ACP did not want the board members, in particular the two representatives of City council, passing on confidential information about the mall to the City or anyone else, Mr. Leistner testified that it was Mr. Kennealy who wanted to withhold information from certain board members. According to Mr. Leistner, Retirement Living, not ACP, was concerned that some of its board members were City councillors and could not comply with a confidentiality agreement. In contrast, Kennealy could not recall if he or Leistner had put forward the condition prohibiting Retirement Living from providing information about the financial health and physical condition of the building from certain board members. He admitted to having a concern that he would have to share information with the City. Given Kennealy's uncertainty about who put forward the condition and Leistner's certainty, the Commission should accept Leistner's evidence.

**Exhibit 390**

**Robert Leistner, transcript of March 27, 2013, pp. 3451-3456, lines 10-3; pp. 3459-3461, lines 10-8; pp. 3461-3462, lines 25-20; and p. 3486, lines 11-20**

**Richard Kennealy, transcript of April 17, 2013, pp. 5276-5277, lines 6-15 and p. 5279, lines 14-25**

117. The source of Kennealy's authority to enter such an agreement that would deprive board members of material information necessary to decide whether or not to make its first purchase of commercial property, the organization's single biggest purchase, is unknown. Nothing in the *Corporations Act*, Retirement Living's letters patent or supplementary letters patent empower any officer or employee of the corporation to withhold information from any member of the board. Douglas Kearns ("**Kearns**"), the corporate secretary and counsel for Retirement Living, drafted the "Report of the Corporate Secretary on the Organization of Elliot Lake Retirement Living" to provide the directors with a structure of the corporation. In the report, he described the powers and duties of the General Manager informed by Retirement Living's by-laws. None of the powers or duties described in the report empower the general manager to withhold information from any member of the board. Kennealy had

no authority to withhold information from the board of Retirement Living and should not have signed the NDA.

**Exhibit 2143**

**Exhibit 2146**

118. According to Mr. Kennealy's report of May 28, 1998, to Retirement Living's board, considerable time had been spent negotiating the confidentiality agreements with ACP and the City. At the time, the May 1998 NDA was the only confidentiality agreement with ACP. Kearns had been involved throughout the process to ensure Retirement Living was adequately protected and provided Kennealy with legal advice about the May 1998 NDA. It is unclear how Mr. Kearns could have advised Kennealy that it was appropriate or lawful to deprive board members of material information. As the corporate secretary, it would have been his duty to ensure all members of the board had all of the information necessary to make an informed decision.

**Exhibit 3234**

**Richard Kennealy, transcript of April 18, 2013, p. 5725, lines 1-4**

119. Despite signing the May 1998 NDA, Kennealy believes that he gave information about the financial and physical condition of the mall to the board without the written consent of ACP, but he acknowledges that there is no record that he did. Kennealy had no memory of telling anyone at the City about the terms of the May 1998 NDA, but believes that he would have mentioned it. Guertin never mentioned it. It is unlikely that Council would have passed resolution 98-13 effectively funding the financial and physical studies of the mall, if it had been aware of the May 1998 NDA.

**Richard Kennealy, transcript of April 18, 2013, pp. 5288-5289, lines 11-2 and pp. 5292-5295, lines 1-2**

**Rhona Guertin, transcript of April 19, 2013, pp. 5877-5878, lines 21-4**

120. Although the city paid for the NYB report and market value assessment, Retirement Living did not provide them to the City. Kennealy testified that it "is just inconceivable" that Retirement Living did not discuss these reports with the City. NYB retained Halsall to assess the mall's physical condition. NYB delivered a draft report on October 7, 1998. About the roof-top parking deck, the report states: "It is our understanding that the integrity

of the waterproofing ability of this structure has been a continuous maintenance issue,” and highlighted that there was no waterproofing membrane. Appended to the report, was Halsall’s September 30, 1998, report. Halsall also commented on the roof top parking structure: “At this time we cannot render an opinion as to what the true state of the deck is, nor what long term cost could be expected”. It observed some corrosion on the steel beams and columns but not evidence of structural distress or excessive deterioration. Halsall recommended further review and testing of the corrosion of the precast slabs.

**Exhibit 463, p. AGC\_P000003023**

**Exhibit 3284, p. AGC\_P000003036**

**Richard Kennealy, transcript of April 17, 2013, p. 5351, lines 14-16**

121. At a “caucus meeting” on October 13, 1998, Kennealy presented the retail study to Council, and advised that Retirement Living was looking to acquire the mall rather than just the hotel. He also informed Council that the hotel was losing money but had to be kept alive for the City’s sake. Council agreed. They did not discuss the results of Halsall’s building condition assessment.

**Exhibit 3234**

**Richard Kennealy, transcript of April 17, 2013, pp. 5433-5437, lines 6-19**

122. On November 23, 1998, NYB delivered its final report dated November 12. The report commented on the roof top parking deck. Halsall expressed concerns about the live loadings and structural capacities of the concrete slabs and recommended additional inspections and testing to assess the deterioration. Halsall provided two options: a rubberized membrane and asphaltic wearing surface over the composite topping or removal of the composite topping, a rubberized membrane over the concrete slabs, insulation and a concrete topping. The preliminary cost analysis for the first option was \$606,500 and \$1,806,500 for the second.

**Exhibit 66, pp. HA\_E000000031.0012-3, HA\_E000000031.0027,**

**HA\_E000000031.0031, and HA\_E000000031.0037**

123. Retirement Living’s board, including Mayor Farkouh, met on December 3, 1998, to discuss purchasing the mall. Kennealy presented a preliminary cost analysis and system upgrades. He did not show the board the portion of the NYB report dealing with the parking

deck structure or any portion of the Halsall report. Kennealy testified that he had advised the board that there were potential, serious concerns with the structure of the mall and that it was unknown if the mall was structurally sound. There is no evidence of such a conversation.

**Richard Kennealy, transcript of April 17, 2013, pp. 5454-5455, lines 9-1 and pp. 5473-5474, lines 20-7**

124. Kennealy also testified that he provided the board with NYB's preliminary cost analysis, an excerpt from the NYB report starting at page 24. It includes the costs for the two options to repair the roof. Ms. Guertin did not recall whether or not Kennealy provided the board with this excerpt. She testified that Kennealy advised the board of the costs of the remediation, though, again there is no record of such conversation. Farkouh did not recall ever being told of the amounts discussed in NYB's preliminary cost analysis or receiving a copy of the NYB excerpt. According to Farkouh, if he had received the NYB report, he would have asked that it be forwarded to the building department. The NYB report was not forwarded to anyone at the City during NorDev's tenure as mall owner.

**Exhibit 66, p. HA\_E000000031.0025-29**

**Richard Kennealy, transcript of April 17, 2013, pp. 5451-5453, lines 5-20**

**Rhona Guertin, transcript of April 19, 2013, pp. 5933-5938, lines 22-2**

**George Farkouh, transcript of May 2, 2013, pp. 8186-8190, lines 1-20**

125. Kennealy and Guertin's evidence on this issue is inconsistent with Farkouh's evidence and with other reports given to the board at the time that the purchase was being considered. In or around December 3, 1998, Guertin prepared reports for the Diversification, Community Issues and Finance Committees of Retirement Living, which Kennealy reviewed for accuracy. The purpose of the reports was to inform the members to take a position on whether to make an offer for the mall. The reports identify future, capital expenditures based on advice from NYB and Halsall, including \$157,500 for replacing the hotel roof, \$400,000 for replacing the HVAC system and \$40,000 for the replacing the water cooler, but excluded any expenditures relating to the roof top parking deck. The anticipated range of expenditure for the roof-top parking deck (\$606,500 to \$1,806,500) was the greatest expenditure in NYB's preliminary cost analysis. Why would this expenditure have been

excluded from the reports if Kennealy had provided the board with NYB's preliminary cost analysis? The expenditure was too large to forget or reasonably omit. Additionally, there is no evidence that Leistner did or would have objected to Kennealy providing this information to the board. They did not even ask for ACP's consent. It is more likely that the anticipated cost of repairing the roof top parking deck does not appear in the committee reports because Kennealy decided not to provide this information to the Board. If he did not provide this information to the board, then it is unlikely that he provided NYB's preliminary cost analysis to the board on December 3<sup>rd</sup>, 2008.

**Exhibit 2168, p. NPRR\_E000000446.008**

**Richard Kennealy, transcript of April 17, 2013, p. 5470, lines 3-10 and p. 5478, lines 18-22**

**Rhona Guertin, transcript of April 19, 2013, pp. 5952-5953, lines 21-22**

126. Returning to the reports prepared for the Diversification, Community Issues and Finance Committee, each report contains the same comments about the physical condition of the roof-top parking deck. Guertin summarized Halsall's conclusion about the roof-top parking deck's condition as "structurally sound" but requiring considerable maintenance. Guertin admitted that the NYB and Halsall reports point out that there was cause for concern and that a lot more investigations were required to determine the true state of the parking deck. Both Guertin and Kennealy acknowledged that Guertin's statement about the roof top parking deck being "structurally sound" was false. They tried to explain the statement as a bad choice of words. The committee reports also fail to identify the preliminary cost analysis for the first or second option to repair the roof that NYB had provided. The reports state that at the time of the building condition assessment neither Retirement Living nor ACP was considering a possible change in ownership of the mall. Kennealy acknowledged that this statement too is incorrect.

**Exhibit 2168**

**Richard Kennealy, transcript of April 17, 2013, pp. 5471-5472, lines 14-9; pp. 5460-5468, lines 7-9; and p. 5475, lines 7-15**

**Rhona Guertin, transcript of April 19, 2013, p. 5930, lines 7-15; pp. 5941-5942, lines 13-13; and p. 5943, lines 5-17**

127. In anticipation of the next board meeting, Guertin sent Leistner a fax to request ACP's consent to provide the board with a brief summary of NYB's building condition assessment report.

**Exhibit 2094**

128. On December 30, 1998, Retirement Living's board met to decide whether the organization should make an offer for the mall. The members had been given the reports prepared by Ms. Guertin, but not Halsall's report. The board voted unanimously in favour of making an offer for the mall. Mayor Farkouh was present.

**Exhibit 2168**

129. In summary, the reports to Retirement Living's three committees state the mall is structurally sound, but Kennealy claims he advised the board members that there were serious, potential concerns with the structure and that the engineers did not know if mall were structurally sound. Commission counsel asked Kennealy if the discrepancy were the result of Kennealy's desire to create a paper trail that said one thing while he said another. Kennealy denied the accusation. "You know, the history I have had with the folks here in terms of how I have dealt with my Board of Directors has always been a very open, give them as much information as we can, share it, have a good discussion and move forward".

**Richard Kennealy, transcript of April 17, 2013 pp. 5475-5476, lines 25-5**

130. Then what accounts for the discrepancy? Perhaps, Kennealy wanted to keep his board informed but didn't want to run afoul of the May 1998 NDA. But if that were the case, he would have given the board the complete NYB report to keep it fully informed. It seems more likely that Kennealy was being less than forthright with the board and the City. He believed that the mall was a cornerstone of Elliot Lake's economy and was concerned that news about structural issues with the mall migrating to the board, the city or both may delay or scuttle the deal.

**Exhibit 2168, p. NPRR\_E000000446.006**

**Richard Kennealy, transcript of April 17, 2013 pp. 5482-5483, lines 11-8**

131. It is likely that Kennealy saw the structural concerns as an impediment to the sale for both the board and a cause of concern for the city. The long history of leaks was notorious, and the assertion that there were not structural concerns would be reassuring. Disclosing the large cost of effective renovations might have soured the deal, while concealing this information would reinforce the impression that ACP had simply been unwilling to spend the money to patch the leaks properly. There was a significant risk that the board would have requested the inspections and testing to accurately determine the liabilities associated with the mall before deciding whether to pursue the purchase. This might explain why Kennealy failed to provide the board with a copy of NYB's complete report and failed to include in the committee reports the anticipated capital expenditure to repair the roof. It might also explain why Kennealy agreed to withhold information from the board in the May 1998 NDA, why he did not accept Leistner's offer of the existing engineering reports, and why Guertin failed to ensure Halsall's request for "any other reports" was satisfied.

**Rhona Guertin, transcript of April 19, 2013, pp. 5898-5900, lines 11-21**

132. There was a significant risk that the city would requested further investigations to find out if the deterioration posed a risk to the safety of the citizens. It could have been alerted to the need for future, on-going inspections to monitor the physical condition of the mall. And there was always the risk that further investigations may have caused the city to shut the mall down until appropriate repairs had been performed. Further investigations could have delayed or scuttled the sale. There was an urgency in getting the deal done. Keeping the reports and concerns about the structural integrity of the mall out of the board's and city's hands eliminated these risks.

133. On January 5, 1999, Retirement Living offered ACP \$2.5 million to purchase the mall. ACP made a counter-offer of \$4 million, and on January 26th, Retirement Living's board authorized Kennealy to offer \$4 million, subject to due diligence and financing. On February 23rd, Kennealy signed an agreement of purchase and sale to buy the mall as is for \$4 million.

**Exhibit 1525**

**Exhibit 3079, pp. NPRR\_P000003097 and NPRR\_P000003100**

**Exhibit 3246, pp. NPRR\_E000000413.61-3**

134. In March of 1999, Retirement Living prepared a business plan to secure financing for the purchase. The business plan also described the mall as structurally sound and identified future, capital expenditures based on advice from NYB and Halsall, including \$157,500 for replacing the hotel roof, \$400,000 for replacing the HVAC system and \$40,000 for replacing the water cooler, but excluding any expenditures for renovating the roof top parking deck. It also fails to mention the absence of a waterproofing membrane. Commission counsel suggested that there was no reference to the recommended expenditure for the roof top parking deck because at the time that Retirement Living was seeking financing, it had decided not to renovate the parking deck. Kennealy denied the suggestion. As the board still did not know the results of Halsall's additional investigations, it seems somewhat unlikely that the board made a decision at that point not to spend money to renovate the roof for Halsall could have called for the waterproofing membrane on an urgent basis and as the only option. Alternatively, it seems more likely that Kennealy was trying to maintain a consistent message after advising the board that the mall was structurally sound and failing to advise of NYB's estimate for repairing the parking deck.

**Exhibit 7-2, p. NPRR\_P000003618**

**Richard Kennealy, transcript of April 17, 2013, p. 5502, lines 13-20; p. 5507, lines 10-16; and pp. 5955-5956, lines 15-9**

135. On April 14, 1999, Guertin faxed TD Bank in an attempt to secure financing. Like the business plan, the fax identified \$720,500 in anticipated mandatory and discretionary expenditures. It did not include any expenditure for the roof-top parking deck. The fax also states that Retirement Living had elected to continue with a maintenance program, but it had no way of knowing that would be an option offered by Halsall, unless Halsall had discussed that option with Guertin before issuing its draft report.

**Exhibit 2182, pp. OPP\_E000215592\_02-03**

**Richard Kennealy, transcript of April 17, 2013, p. 5510, lines 10-18**

136. Halsall delivered its draft report to Guertin on April 22, 1999. It concluded that the existing approach to dealing with the leaks was inadequate and listed the major deterioration as follows: leakage through cracks and construction joints, corrosion of steel beams and

suspended ceiling hangers, and debonded or freeze-thaw damaged concrete topping along the joints. On steel support beams, Halsall found scaling of between 1-5 mm. The most severe corrosion represented about 1mm of original surface loss, “a relatively insignificant portion”. It cautioned that many of the leaks remain undetected because insulation and fireproofing were trapping moisture.

**Exhibit 1466, pp. HA\_E000000032\_0045 & HA\_E000000032\_0050-  
HA\_E000000032\_0051**

137.Halsall offered two options but recommended the first. The first option was a modification of ACP’s then approach: rout and seal all joints and cracks in the parking deck topping and walkway canopies, ensuring a proper joint profile and surface preparation, and five additional measures, all to be done by qualified contractors working with an engineer. This approach could be phased in over 2 years. The second option was to install a bonded membrane system with asphalt overlay. The first option would cost \$433,000, the second, \$776,000. Halsall also recommended posting signs showing the maximum allowable weight of vehicles and using the height restrictors at the access ramps to block oversized vehicles, a recommendation that indicates the problem of oversized vehicles using the deck was continuing.

**Exhibit 70**

**Exhibit 1466, pp. HA\_E000000032\_0045 & HA\_E000000032\_0050-  
HA\_E000000032\_0051**

**Richard Kennealy, transcript of April 17, 2013 p. 5523, lines 3-22**

**Jeff Truman, transcript of April 9, p. 4600, lines 5-24**

138.Halsall should not have offered option 1. . It is the unanimous conclusion of all the experts (perhaps apart from Halsall) that the rout and seal process would not prevent the leaks. It is likely that Halsall suggested Option 1 because if had concerns that option 2 would be rejected as too costly. Halsall was probably offering Option 1 as an economical solution so it had some hope of being accepted. Halsall spoke of phasing in the project in light of any financial constraints, believing that \$433,000 was then considered “a fairly large number.” In fact, Retirement Living even found the cheaper option 1 too costly and decided to continue with “business as usual”. Halsall did not and would not have supported this “do it yourself” solution because the work was not being done properly and had been ineffective.

While it might have been preferable for Halsall to warn Retirement Living of the consequences of inaction, Halsall had no reason to believe a responsible owner would continue to fail to fix the leaks.

**Exhibit 70**

**Jeff Truman transcript of April 9, p. 4561, lines 1-18; p. 4564 lines 3-8; p. 4604 lines 5-16; and pp. 4614-4614, lines 24-11**

139. When Kennealy received the report, he was relieved that Halsall had concluded the building was structurally sound and had endorsed the “rout and seal process” with minor modifications to ensure a proper joint profile. Kennealy relied on Quinn for advice as to how to implement the Halsall report, that is, to do it in house rather than using a qualified contractor. Quinn is not an engineer. Apart from his failed effort on the Algo Centre Mall roof, he had no experience with repairs and renovations to commercial roofs. He chose to interpret Halsall’s Option 1 as an endorsement of the approach he was taking at the time without asking Truman. He viewed the recommendations for “qualified contractors” and engineering supervision of repairs as unnecessary and a money grab. Quinn instead relied on the advice of his untrained maintenance staff who said that they were able to perform the “rout and seal” process without engineering supervision. . Accordingly, Retirement Living ultimately rejected a professional engineer’s advice in favour of the opinion of an untrained maintenance man. Once again, the cheapest solution prevailed even though it had proven to be ineffective. The patching process did not change at all after May of 1999, and not all of the work called for by Halsall was done.

**Exhibit 70,**

**Richard Kennealy, transcript of April 17, 2013 pp. 5527-5530, lines 17-8 and pp. 5545-5546, lines 22-3**

**Richard Quinn, transcript of April 16, p. 5074, lines 7 to 15 and lines 24 -25 and pp. 5075-5080**

140. The final report is dated May 10, 1999. According to Kennealy, the finance committee received the November 1998 report, and the Halsall structural reports of November 1998 and May 1999. Kennealy testified that both reports were discussed at the May 20, 1999, finance committee meeting. As a member of the committee, Speck was present.

**Exhibit 70**

**Richard Kennealy, transcript of April 18, 2013, pp. 5564-5567, lines 6-6**  
**Rhona Guertin, transcript of April 19, 2013, pp. 5872-5874, lines 25-7**

141. According to Kennealy, he provided the board with the May 1999 Halsall report at the June 3, 1999, board meeting, and they discussed the report.

**Richard Kennealy, transcript of April 18, 2013 pp. 5570-5572, lines 25-5**

142. ACP transferred the deed to the mall to NorDev on June 18, 1999.

#### **Exhibit 8-4**

143. As of August 16, 1999, Council was not aware of the status of the sale of the mall and requested an update from Kennealy. Kennealy doesn't recall if he ever provided one. Nor does Kennealy recall if he ever gave a copy of the May 1999 Halsall report to anyone from the city except councillors Croteau and Speck. He does not recall discussing the contents of the November 1998 NYB report, November 1998 or May 1999 Halsall reports with anyone from the city, except councillors Croteau and Speck. According to Guertin, the City never received the NYB or Halsall reports.

#### **Exhibit 909**

**Richard Kennealy, transcript of April 18, 2013, p. 5574, lines 1-4; pp. 5574-5575, lines 15-5**  
**Rhona Guertin, transcript of April 19, 2013, pp. 5872-5874, lines 25-7**

#### **iv. A History of Leaks**

144. Two or three complaints about leaks are all that Kennealy remembers receiving, and he viewed the leak situation as improving everywhere with the possible exception of the library. The leaks did not improve when Retirement Living took over the mall from ACP. Actually in just 2005 he received at least three complaints about leaks in the library alone. The library was located directly across from Retirement Living and the library interior could be seen through glass panels fronting the mall corridor. Before Retirement Living bought the mall from ACP it was put on notice that leaks in the library were an on-going problem. As part of the closing requirements, Retirement Living requested estoppel

certificates from the mall's tenants. In response to a request for a signed certificate, the chair of the public library board wrote a letter to ACP on June 3, 1999:

The Library has been a tenant in the mall for ten years. During this time, there have been severe problems with the leaky roof....Although the mall maintenance staff has cleaned up the water itself, the tile replacement and painting repairs costs have been left to the Library. The Library has paid for the replacement of 123 tiles to date in 1999.

**Exhibit 11-79**

**Barbara Fazekas, transcript of March 12, 2013 p. 1191, lines 19-23**

**Richard Kennealy, transcript of April 17, 2013 p. 5547, lines 1-6**

**Richard Kennealy, transcript of April 18, 2013 p. 5710, lines 6-16**

145.Kennealy does not recall seeing this letter; however, the library staff was persistent and repeatedly brought the leaks to Retirement Living's attention.

**Richard Kennealy, transcript of April 18, 2013 p. 5568, lines 8-12**

146.When the library board learned that ACP sold the mall to Retirement Living, Leddy wrote a letter to Retirement Living dated September 29, 1999. She enclosed memoranda and letters detailing the library board's concerns about on-going leaks. The enclosed documents included a checklist detailing water damage, a memorandum of July 14, 1999, describing how unchanged, repeated efforts to fix the leaks had proved ineffective, and a memorandum of December 9, 1998, stating the library is "constantly subject to water damage from the leaky roof."

**Exhibit 11-3**

147.Leaks did not just take place in the library but began to spread to new areas in the top floor of the mall. They were an on-going problem for several tenants throughout the top floor of the mall. In 1989, Judy McCulloch started working for the Bank of Nova Scotia as a bank teller, and was eventually promoted to Manager of Customer Service in 1998, which is when she began noticing the leaks for the first time.

**Judy McCulloch, transcript of June 13, 2013, p. 14341-14342, lines 6-7 and p. 14347, lines 2-11**

148.The roof leaked when it rained. It also leaked in the winter when the snow melted in the warm weather. She frequently saw buckets and tarps. When the buckets weren't big enough to capture the leaks, they used totes. Every tile in the branch had to be replaced. In the Bank of Nova Scotia, the only places where the ceiling did not leak were the bathroom and the vault.

**Judy McCulloch, transcript of June 13, 2013, p. 14358, lines 17-22; p. 14503, lines 17 – 25; p. 14360, lines 18-23; and p. 14359, lines 6-10**

149.Even Retirement Living had leaks. In 1999, NorDev hired the former personnel manager at Woolco, Ms. Cloughley, to work at the front desk where complaints were directed. She worked for NorDev until 2002. According to Ms. Cloughley, the leaks continued and seemed worse at the kiosk. Staff placed buckets on the floor to catch the water when it rained.

**Barbara Cloughley, transcript of March 26, 2013, p. 3198, lines 13-21**

150.Two years after Retirement Living bought the mall, the leaks continued. By October 6, 2001, Woolco left and Zellers took its place. Zellers occupied 56,000 square feet of the Mall. According to Ms. Cloughley the damage from the leaks was worse in Zellers than it had been in Woolco. More ceiling tiles were missing. Brian Cuthbertson, who would become the manager of Zellers in 2007, remembers seeing stained ceiling tiles in the Zellers just before its grand opening In October of 2001.

**Brian Cuthbertson, transcript of May 1, 2013, p. 7746, lines 14-21 and p. 7753, lines 21-25**

**Barbara Cloughley, transcript of March 26, 2013, p. 3201, lines 1-4**

151.A year later the library complained to Kennealy about ongoing leaks. On November 22, 2002, Fazekas wrote:

“The Library Board has asked me to write another letter of complaint regarding the deplorable condition of the ceiling over the Library space.  
...our site can never look attractive given the state of the ceiling and concomitantly, the look of the library with plastic covering over the book shelves, drip buckets in the aisles to protect the rug and gaps in the ceiling where tiles have become so water laden that they have fallen on the floor.

...

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

### **Exhibit 11-13**

Kennealy acknowledged that the leaks in the library were a “frustrating problem” that “came up a number of times”. (TRK 5613, 3-13) When confronted with the video evidence of the deplorable conditions in the library on a rainy day, Kennealy admitted it was “not good”. Despite the on-going leaks, Retirement Living never considered returning to the advice of Halsall and NYB of installing a waterproofing membrane.

### **Richard Kennealy, transcript of April 18, 2013, p. 5613, lines 3-13 and p. 5614, lines 12-22 and p. 5706, lines 5-8**

152. In 2003, all of the ceiling tiles again had to be replaced in the Bank of Nova Scotia (Exh. 13-4, TJM 39-40) And the leaks in the library continued. By letter dated June 30, 2003, a lawyer for the Buck or Two! store wrote Quinn complaining about on-going leaks. Quinn showed the letter to Kennealy:

*“We have been advising you about this ongoing problem regarding the roof leaks for several years now, both verbally and in writing. Now, not only has your lack of action had an impact on the sales of the store (as customers don’t like water dripping on their heads while they shop), this has also destroyed inventory in the store, as well as the ceiling tiles and now the electrical system.”*

### **Exhibit 13-4**

#### **Exhibit 677, p. NPRR\_P000004005**

**Richard Kennealy, transcript of April 18, 2013, pp. 5625-5628, lines 14-4**

**Judy McCulloch, transcript of June 13, 2013, p. 14360, lines 18-23**

153. The year 2004 was no better. When Cloughley left NorDev in 2002, she also left Elliot Lake, but returned in 2004. When she returned the mall still leaked especially around the kiosk:

A. ...you couldn't help but see it when you come up the escalator and you are walking toward it, it's right there.

Q. An what is it that you would see?

A. There was buckets and there was a tarp on top.

Q. Was there a hose going from the tarp to the bucket?

A. I believe at that point is when I think I started seeing hoses, yes.

**Barbara Cloughley, transcript of March 26, 2013, p. 3200, lines 9-19**

154. Retirement Living continued to receive leaks up until they sold the mall to Eastwood in 2005. On February 15, 2005, the branch manager for Scotiabank emailed Retirement Living to complain about a collapsed ceiling tile and stained carpet from a leak in the roof. Quinn handwrote on the email “When do we tell him that we have already gone above and beyond the service we need to give?”

**Exhibit 13-5**

155. On May 26, 2005, Kennealy reported to the NorDev board that he anticipated problems with the library because of leaks. He was right. On June 1, 2005, Speck, the CAO, wrote Kennealy about the ongoing, severe leaks at the library. He confirmed that Kennealy was aware that the library had experienced leaks since it moved into the mall and that the leaks were damaging books and preventing staff and patrons from using certain parts of the mall. He advised that mould testing in the library had revealed abundant mould growth in the drywall, some mould in the carpet and very sparse mould on some of the books. The mould was affecting a staff member. Speck also emphasized the risks of falling ceiling tiles and slip and falls to the public and the risks of corrosion to the electrical fixtures and ventilation system. To review the feasibility of resolving the leaks, Speck recommended a meeting.

**Exhibit 11-100****Exhibit 2295, p. NPRR\_E000000430.016****Richard Kennealy, transcript of April 18 2013, p. 5661, lines 2-18**

156. Two weeks later, on June 15, 2005, Kennealy met with Speck, Farkouh, and the library board. Kennealy highlighted a provision in the lease protecting the landlord against claims for compensation for water damage to property. He described the options Halsall had offered and advised that there were additional solutions that would be investigated. According to Speck’s notes of the meeting, Kennealy would consult an engineer in July or August to determine if installing eavestroughing would work. But by then, Retirement Living was already well advanced in selling the mall, having already agreed to a \$1 million reduction in the price of the mall in exchange for Nazarian waiving all conditions except financing. Like ACP before it, Retirement Living had decided to avoid the million dollar repair bill for the

deteriorating structure by selling the mall and its defectively designed roof to a new purchaser. Kennealy did not mention the possible sale during the meeting.

**Exhibit 11-18**

**Exhibit 11-103**

**Richard Kennealy, transcript of April 18 2013, p. 5665, lines 22-25 and pp. 5677-5678, lines 19-9**

157.Zellers too was still suffering from leaks. According to Kennealy, Roger Wake, a former manager of Zellers, “never really raised anything” with him “of any significance in terms of any kind of leak problems”. However, in an email dated July 22, 2005, to the Property and Market Research Manager of Zellers, Wake identified leaks as an on-going concern. He noted that the roof leaks when heavy rain falls and snow melts, and described this as an ongoing “problem which continually does damage to our ceiling tiles”. He also noted that it had been an on-going problem with the landlord.

**Exhibit 12-2, p. HBC\_E000000447\_063**

**Richard Kennealy, transcript of April 18 2013, p. 5616, lines 5-8**

**v. Engineering Reports**

158.Kennealy did not ask ACP for any prior engineering reports and does not believe Leistner offered any. Kennealy denies having seen Trow's May 1991, November 1994, November 6, 1995 report.

**Richard Kennealy, transcript of April 17 2013, p. 5368 lines 4-10; pp. 5368– 5369, lines 19-3; p. 5373, lines 15-23; p. 5380, lines 12-14; and p. 5383, lines 16-18**

159.In late June or early July of 2003, part of the perimeter wall on the parking deck failed. Bruce Caughill was hired to retain STEM to perform an assessment of the damage and determine the structural implications. On a July 7, 2003, memo to STEM, Caughill made the following handwritten note: “If this is a general problem what implications does this have on rest of structure”. A few months later on September 8, 2003, before STEM issued its report, Randy Beltramin of STEM shared concerns about the roof top parking deck with Caughill:

*The only thing they [Halsall] did not fully address was the ‘continue as Is’ scenario, which NorDev is doing. As you and I discussed this can have long term detrimental results as the structure slowly deteriorates. Some of the structural*

*repairs that you have already done and other visible areas of concern (precast cracks) will be an ongoing issue. **Hopefully the areas of concern can be found and repaired before a failure occurs*** [emphasis added].

**Exhibit 84**

**Exhibit 85**

160. There is no evidence that either Beltramin or Caughill expressed these concerns to Retirement Living. Furthermore, when Caughill was subsequently retained and in contact with Turner, there is no evidence that he informed Eastwood of the concerns expressed above.

**vi. Financial Ability to Repair the Roof**

161. Retirement Living had sufficient assets to repair the roof with a waterproof membrane and wearing surface.

- (a) *1999* - At the end of December 31, 1999, Retirement Living had derived a net income of \$147,000 from the mall. It was also able to negotiate a reduction in annual taxes of about \$200,000.

**Exhibit 2215**

**Richard Kennealy, transcript of April 18, 2013 p. 5593, lines 6-10 and pp. 5596-5597, lines 19-2**

- (b) *2000* - By the end of April 2000, the mall had made a profit of \$127,116. By the end of December, NorDev had retained earnings of \$322,000, and Retirement Living had nearly \$2.4 million in cash and liquidable investments. But capital expenditures for the mall in 2000 were \$788,630.

**Exhibit 680, p. NPRR\_P000001451**

**Exhibit 708, NPRR\_P000002569**

**Exhibit 1613, p. 1**

**Exhibit 2221, p. NPRR\_E000000421.055**

- (c) *2001* - In February 2001, NorDev made a capital investment of about \$900,000 relating to Zellers and SAAN TRK 5600-1,18-10. At the end of 2001, NorDev recorded an operating profit of \$442,199. Retirement Living had an excess of

revenue over expenses of \$1,002,830. In 2001, capital expenditures for the mall totalled \$1,513,521.

**Exhibit 708, p. NPRR\_P000002569**

**Exhibit 2257, p. NPRR\_E000000424.014**

**Exhibit 2262, p. NPRR\_E000000432.005**

**Richard Kennealy, transcript of April 18, 2013, pp. 5600-5601, lines 18-10**

- (d) 2002 - Retirement Living had an excess of revenue over expenses of \$612,860, and capital expenditures for the mall dropped to \$25,872.

**Exhibit 708, p. NPRR\_P000002569**

**Exhibit 2262, p. NPRR\_E000000432.005**

- (e) 2003 - Retirement Living was profitable and had considerable assets to fix the roof. It had an excess of revenue over expenses of \$999,814 and more than \$2.8 million in cash and liquid investments. NorDev achieved an operating profit of \$479,043. Capital expenditures for the mall were only \$100,190.

**Exhibit 708, p. NPRR\_P000002569**

**Exhibit 1599, pp. OPP\_E000081926.0680 and OPP\_E000081926.0679**

**Exhibit 2271, p. NPRR\_E000000427.008**

- (f) 2004 - NorDev's profits increased in excess of 36% in 2004 over 2003. As of November 30, 2004, NorDev achieved an operating profit of \$654,987 (Exh. 2280, NPRR\_E000000428.054) Retirement Living had an excess of revenue over expenses of \$1,084,668 (Exh. 688, NPRR\_P000001848) and capital expenditures for the mall were only \$40,974.

**Exhibit 688, p. NPRR\_P000001848**

**Exhibit 708, p. NPRR\_P000002569**

**Exhibit 2280, p. NPRR\_E000000428.054**

- (g) 2005 - By April 30, 2005, NorDev achieved an operating profit of \$124,285

**Exhibit 2295, p. NPRR\_E000000430.015**

162.As had occurred under ACP's management, the costs associated with Retirement Living's cheap "patch" process were charged back to tenants as additional rent for

“maintenance”. Retirement Living actually spent virtually none of its own considerable resources repairing the roof. Moreover, between 2001 and 2004, the only capital expenditure on the roof was \$2,676 for a steel barricade. By contrast, Retirement Living made a \$1.4 to 1.5 million capital investment in a new municipally owned golf course

**Exhibit 708, p. NPRR\_P000002569**

**Richard Kennealy, transcript of April 18, 2013, p. 5609, lines 17-23 and p. 5629, lines 15-23**

**vii. Repairs to the Roof**

163. When ACP owned the mall, the general maintenance staff--Ken Snow, Al Labreche, "repaired" the leaks. This continued when Retirement Living bought the mall. The process basically stayed the same: receive a complaint, try to trace the leak to a faulty joint or crack, pull up the old sealant, grind down the sides, lay down new sealant and wait for the next complaint. Overall Quinn was responsible for the maintenance of the building.

**Barbara Cloughley, transcript of March 26, 2013, p. 3204, lines 11-20**

164. Maintenance costs for the roof were about \$60,000 annually (TRK 5767-8, 24-9). Kennealy conceded that Retirement Living and NorDev made a conscious decision to continue routing and sealing the roof-top parking deck and not to install a waterproofing membrane and wearing surface. According to Kennealy, neither ACP nor the engineers who had previously worked on the mall advised him that the waterproofing system was defective or that it could not be repaired without great cost.

**Richard Kennealy, transcript of April 18, 2013, p. 5687, lines 8-17; pp. 5713-5717, lines 10-8; and pp. 5767-5768, lines 24-9**

165. When asked if Retirement Living ever sought advice from a professional about how to take a different approach to the leaks, Kennealy testified:

A. At that point, no, we did not.

Q. Did you ever?

A. I'm trying to think if we ever. I believe we just continued to work very hard at doing what we were doing.

**Richard Kennealy, transcript of April 18, 2013, p. 5620, lines 7-14**

166. In retrospect, experts opine that it was during Retirement Living's ownership of the mall that the last chance elapsed to repair the roof to effect a permanent solution to the ongoing leaks without reinforcing the steel structure

**NORR Panel, transcript of May 30, 2013, pp. 12571-12573, lines 15-25**

**D. EASTWOOD MALL INC.**

167. Robert Nazarian ("Bob"), through his wholly owned company, Eastwood Mall Inc. ("Eastwood"), bought the mall intending to run it for a few years, and then sell it for a profit. But because of severe leaks and the costly repairs required to fix them, Eastwood was unable to sell the mall, notwithstanding the elaborate and often dishonest efforts of Bob and his son Levon.

**i. EASTWOOD PURCHASES THE MALL FROM RETIREMENT LIVING**

168. The Nazarian family (Bob, his wife Irene, his other son Armen and Levon) was in the business of acquiring, developing, managing and selling residential, commercial and industrial properties through its companies (the "**Nazarian Family Companies**"), which presently include Eastwood Mall Inc. (wholly owned by Bob), Yorkdale Group Inc. (owned equally by Bob, Levon, Irene and Armen), and Yorkdale Centres Inc. (owned equally by Bob, Levon, Irene and Armen).

**Exhibit 6067**

**Transcript of Levon Nazarian, July 15, 2013, pp. 16159 - 16160, lines 6 - 21; pp. 16164 - 16174, lines 11 - 13**

Transcript of Robert Nazarian, July 23, 2013, p. 17430, lines 6 - 21

169. According to Kennealy, before Eastwood purchased the mall he and Bob met in both Elliot Lake and Toronto, and talked openly about the leaks in the parking deck; the fact that the leaks had been a problem since the mall was built; the two options offered in the May 1999 Halsall report; the necessity of using light trucks to plough snow in the winter; and the maintenance program. Guertin was present for a number of these discussions and testified that Bob was made aware of the leaking problem.

**Transcript of Richard Kennealy, April 18, 2013, pp. 5648-9, lines 1-12; pp. 5649, lines 17-19**

**Transcript of Rhona Guertin, April 19, 2013, p. 5995, lines 2-18**

170. However, Bob testified that despite asking for prior engineering reports from Kennealy and Guertin on numerous occasions both before the first offer and during the due diligence period, he was told that there were no prior engineering reports. In contrast, Kennealy testified that Retirement Living never gave Bob a copy of the NYB or Halsall report because Bob never asked for them.

**Transcript of Robert Nazarian, July 23, 2013, pp. 17576-17580, lines 1-23**

**Transcript of Richard Kennealy, April 18, 2013, p. 5651, lines 14-23; p. 5653, lines 18-23**

171. Foolishly, Eastwood failed to commission any type of building condition assessment before purchasing the mall. Bob testified that it was his practice to rely on the due diligence conducted by the banks financing his various properties. If the banks were sufficiently satisfied with the condition of the building to provide a loan, Bob was sufficiently satisfied to buy the building.

**Transcript of Robert Nazarian, July 23, 2013 p. 17581, lines 3-11**

172. Bob approached the Royal Bank of Canada (the “Royal Bank”) for financing. As part of its due diligence, the Royal Bank retained Construction Control Inc. (“**Construction Control**”) to prepare a building condition survey. In its report dated July 6, 2005, Construction Control found the building was in “generally fair to good condition throughout”. It noted that the parking surface was made up of a concrete topping over precast concrete slabs without a waterproofing membrane between them. It determined that repairs to the parking deck (routing and sealing cracks) were carried out as part of routine building maintenance and that water leakage had occurred previously. The report provided no detail about the history or extent of the leaks and did not comment on the potential effects of ongoing leaks on the concrete slabs or structural steel. Recommended repairs were limited to an allowance of \$35,000, which Construction Control advised should be provided at 5-year intervals for repairs to the concrete topping and associated joints. Construction Control did not have the benefit of the NYB or Halsall report because according to Guertin although she offered them, the Royal Bank did not want them.

**Exhibit 844, pp. 13, 21 and 54**  
**Transcript of Richard Kennealy, April 18, 2013, p. 5682, lines 4-10**  
**Transcript of Rhona Guertin, April 19, 2013, pp. 5994-5, lines 12-1**

173. Bob did not rely on Construction Control's report when purchasing the mall. He had not yet received a copy. Clearly, he understood enough about the condition of the mall, specifically the parking deck, to negotiate a reduction of the purchase price by \$2 million. During the due diligence period in June of 2005, the initial \$8.2 million price was negotiated down to \$7.2 million with a promise that Eastwood intended "to improve the condition of the property and the parking lot". Bob negotiated a further reduction to \$6.2 million on August 2, 2005, within days of the closing date because he was suspicious of the property.

**Exhibit 2323**  
**Exhibit 2296**  
**Transcript of Richard Kennealy, April 18, 2013, pp. 5651, lines 14-23; p. 5653, lines 18-23**  
**Transcript of Levon Nazarian, July 15, 2013, p. 16444, lines 10-17**  
**Transcript of Robert Nazarian, July 23, 2013, p. 17574, lines 7-20; pp. 17589-17597, lines 9-16**

174. Bob financed the purchase with his own capital and a loan from the Royal Bank. Kennealy testified that Bob said he had enough of his own free capital to complete the deal but wanted to hang onto the cash to fix the mall, including the parking deck. From time to time, the Nazarian Family Companies would loan money to each other as necessary. Before Bob Nazarian purchased the mall, he had a net worth of \$2.597 million, and after Eastwood purchased the mall it still had \$1.8 million in cash.

**Transcript of Richard Kennealy, April 18, 2013, pp. 5659-5660, lines 13-3**  
**Transcript of Robert Nazarian, July 23, 2013, p. 17431, lines 16-22; pp. 17475-6, lines 21-1; pp. 17574-17575, lines 25-25**

175. Eastwood took out a seventeen-year \$4.65 million mortgage from the Royal Bank and paid the balance of the \$6.2 million out of pocket, **as well as a reserve fund for RBC which was approximately \$300,000**. The mortgage terms included a prepayment penalty which was the greater of three months interest or the present value of all future interest payments. Transfers and liens on the property without the Royal Bank's approval would trigger the prepayment penalty. Robert Nazarian personally guaranteed the full amount of

the mortgage. These terms would later be obstacles hindering Eastwood's attempts to sell the mall.

**Exhibit 5362, p. 0285, 288 and 0291**

**Levon Nazarian, transcript of July 16, 2013, pp. 16465, line 6 - 16474, line 1**

**ii. A CONTINUED HISTORY OF LEAKS AND FAILURES TO REPAIR THEM**

176. Bob's success at negotiating a \$2 million reduction in the price of the mall illustrates his and Retirement Living's understanding of the roof's condition and what would be required to fix it. Evidence of the roof's condition was on display throughout the mall. It leaked in the Bank of Nova Scotia, Zellers, library, Dollar store, Bargain Shop, Hungary Jacks, Curves, food court and Northern Reflections. It leaked by the kiosk in front of the elevators, in front of Mum's restaurant, and along the corridor running from Zellers to the library.

**Transcript of Brian Cuthbertson, May 1, 2013, pp. 7772-4, lines 1-22**

**Transcript of Judy McCulloch, June 13, 2013, p. 14367, lines 4-17**

177. During the inquiry, we received detailed accounts of the on-going leaks in the library, Zellers and Bank of Nova Scotia. Judy McCulloch, worked at the Bank of Nova Scotia between 1989 and 2011, first as a teller, then as a manager. She was promoted to Manager of Customer Service in 1998, which is when she began noticing the leaks. The roof leaked when it rained and in the winter months when the snow melted in warm weather. There were leaks throughout the bank, over the tellers, in the management offices, in the janitor's room. Rust-coloured water leaked into the stationery and training rooms. Detailed accounts of the leaks are recorded in the monthly inspection reports of the bank's joint health and safety committee. The Commission of inquiry has received reports between 2009 and 2011 and nearly all of them mention leaks.

**Exhibit 13-1**

**Exhibit 750, PEC\_E000000037\_006 - PEC\_E000000037\_007**

**Transcript of Judy McCulloch, June 13, 2013, pp. 14341-2, lines 6-7; p. 14349, lines 11-20; pp. 14358-9, lines 11-9; pp. 14363-4, lines 22-8; p. 143470, lines 3-15**

178.To catch the water, they used buckets and tarps. When the buckets were not big enough to catch all of the water, they used totes. The ceiling tiles also caught water. Soaked and stained, every ceiling tile had to be replaced in the branch. Years of unabated leaks eventually led to mould.

**Transcript of Judy McCulloch, June 13, 2013, p. 14351, lines 19-25; p. 14360, lines 5-25**

179.In response to complaints about poor air quality, the bank retained Pinchin Environmental (“**Pinchin**”). On July 5, 2005, Pinchin performed a mould and air quality assessment. It found mould growth in the janitor's closet and stationery room. At the time of Pinchin’s assessment, Retirement Living still owned the mall.

**Transcript of Judy McCulloch, June 13, 2013, p. 14382, lines 2-9  
Exhibit 750**

180.If Robert Nazarian did not understand the extent of the ongoing leaking problem prior to purchasing the mall in 2005, he certainly did shortly after. When the leaks got bad, he discussed the leaks with his staff almost daily and was well aware of the issue. The Bank of Nova Scotia and other tenants informed him of how the leaks were affecting them, and he would learn how they would affect his ability to attract new tenants.

**Transcript of Tom Turner, June 4, 2013, p. 12691, lines 2-12; pp. 12705-6, line 1-7;  
pp. 12692-3, line 5-7; p. 12701, lines 12-16; p. 12762, lines 2-10**

181. Eastwood’s difficulties in keeping existing tenants happy and attracting new ones arose from its failure to satisfy basic obligations of any property owner in Elliot Lake, which were clearly set out in the city’s property standards by-law 03-29. First, maintain the mall in a structurally sound condition, a condition of being able to safely sustain its own weight and any load (like snow, rain or cars) that may normally be applied to it. Second, when the mall is damaged or shows signs of deterioration, fix it in a workmanlike manner. Third, make sure the roof is watertight to prevent water from leaking into the mall. And fourth, keep the floors, ceilings and walls free of moisture, dampness and mould.

**Property Standards By-Law 03-29, Schedule A, ss. 2, 5(1)(a), and 16**

182. According to NORR in 2005, signs of severe corrosion would likely have been present in the thinner members at the connections, and the capacity of those connections would have been depleted to the point of no return. The structure required a retrofit. It does not appear that Nazarian was aware of this fact when he bought the mall; however, it is also more likely than not that if Nazarian had retained suitable experts to perform a thorough assessment of the mall's condition, he would have discovered the dire state of the structural steel. {Shawn: repeat something similar to this section in Retirement Living }

**NORR report p. 44**

**Transcript of NORR panel, May 30, 2013, p. 12570-3, lines 18-22**

183. The roof was never watertight while Eastwood owned the mall. It continued ACP and Retirement Living's method of repairing the roof. Maintenance staff who were inexperienced in construction identified the source of the leak, removed the old caulking and replaced it with new caulking. Over the years, Bob consulted many professional engineers and architects about the ongoing leaks from the roof top parking deck but never followed through with any of their recommendations.

184. Perhaps it was because Bob believed he knew better than the advice he had been given. His son Levon testified that Bob had an extensive construction background. But it seems more likely that Bob did not repair the roof because he had no intention of spending the amount of money required to fix the roof.

**Levon Nazarian, transcript of July 17, 2013, p. 17006, lines 13-23**

**Transcript of Tom Turner, June 4, 2013, p. 12691, lines 2-12; pp. 12692-3, lines 5-7; p. 12701, lines 12-16; p. 12762, lines 2-10**

185. By the end of 2005, Eastwood had failed to satisfy any of its basic obligations under the city's property standards by-law as outlined above. Based on the evidence of Ms. McCullough, this included failing to keep the ceilings, walls and floors free of moisture and mould.

186. In 2006, failure of the mall's steel structure was six years away, and clues that should have alerted Eastwood to its condition were present. The roof still leaked, and the walls, floors and ceilings were still not free of moisture.

187. Although aware of the ongoing leaks, Eastwood did not change its approach to repairing the roof. Nor did it hire mall managers who were suitably trained or of sufficient experience to recognize that the mall's condition breached basic property standards by-laws. Between at least July 2006 and the day of the collapse, it failed to hire a single manager with any experience managing a mall. Even if the managers had had the benefit of training and experience, none of them would have been able to address the leaks. Bob gave the mall managers insufficient authority to repair the roof for the long term. They had authority to spend up to \$1,000, without Bob Nazarian's express approval.

**Transcript of Tom Turner, June 4, 2013, p. 12687, lines 20-22; pp. 12702-3, lines 5-7; p. 12796, lines 7-23**

**Transcript of Brian England, May 8, 2013, p. 8488, lines 6-9; p. 8490, lines 1-8; p. 8439, lines 3-23**

**Transcript of Henri Laroue, May 22, 2013, p. 10857, lines 2-6 and p. 11004, lines 15-18**

**Transcript of Rhonda Lendt, June 11, 2013, pp. 13884-5, lines 18-23**

188. In the summer of 2006, Eastwood hired Brian England, a former sales representative for Dow Corning, to oversee the installation of a Dow Corning silicone product on the roof by unskilled labourers. The silicone product was abandoned the following spring because Bob determined it was too expensive.

**Transcript of Tom Turner, June 4, 2013, pp. 12694-8, line 1-18**

**Transcript of Brian England, May 8, 2013, p. 8437, line 18-22; p. 8439, lines 3-23**

189. Following failed attempts to fix the leaks with silicone in the summer of 2006, the City finally issued its first notice of violation against the mall for the leaking roof on October 24, 2006. The notice of violation required Eastwood repair the roof to prevent leaks into the building; within 14 days, provide a written plan and timetable to repair the leaks; and provide the City a structural engineer's report certifying the structural soundness of the mall. A week later, on November 1, 2006, the Fire Department issued a Notice requiring Eastwood to replace the missing fireproofing on the mall's steel beams.

**Exhibits 164 & 11-23**

190. On the advice of England, Turner put together a plan to repair the roof using the silicone product. Eastwood submitted the plan to the City on November 13, 2006, just after the 14-

day deadline. The letter enclosing Eastwood's plan acknowledged that the leaks had been ongoing for 25-years. Therefore, it is reasonable to conclude that at least by the end of 2006, Eastwood was aware that the leaks had been ongoing since it opened.

**Transcript of Tom Turner, June 4, 2013, p. 12717, lines 4-12 and pp. 12720-1, lines 18-4  
Exhibit 11-24**

191.By the end of 2006, although the city had finally taken some action to address the ongoing leaks and positive steps to determine the mall's structural condition, Eastwood had not produced a structural engineer's report certifying the mall's structural soundness. The roof still was not watertight and so the mall's walls, ceilings and floors were not free of moisture or mould. The leaks continued and got worse in 2007 as described in the testimony of Brian Cuthbertson, the manager of Zellers.

192.Zellers occupied 56,000 of the Mall's 179,000 square feet of gross leasable space, nearly a third of the space occupied by tenants and customers. It was the mall's largest employer.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7753, lines 21-25; p. 7784, lines 4-6  
Exhibit 492**

193.Between February 14, 2007 and June 23, 2012, Brian Cuthbertson was the Zeller's store manager. On his first day, he noticed multiple leaks in the pet, hardware and footwear departments, and rusting on the T-bars suspending the ceiling tiles. There were 10 leaks originally.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7744, lines 18-22; p. 7753, lines 3-13; p. 7860, lines 9-11**

194.The major leaks spanned the area of six ceiling tiles. The cleaning department, menswear, ladies wear and the pharmacy all had major leaks. There were minor leaks in hardware, bed and bath, sporting goods, toys, and boys and girls. There were never fewer than 10 leaks.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7757, lines 1-16; 7758, lines 11-17; 7771, lines 15-21**

**Exhibit 12-4**

195.Zellers had an active Health and Safety Committee that kept minutes. The Commission received copies of the minutes for the period between 2007 and 2011. Almost all of the minutes describe leaks, wet floors and ceiling tiles, and some of them record injuries to customers. The minutes of September 13, 2007, record two falls, one at the entrance and the other on a wet floor in girls' fashion. On December 22, 2007, a 2 x 8 foot section of the ceiling fell at Zellers' entrance.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7777, lines 16-25  
Exhibits 1375 & 12-8**

196.Large, yellow tarps hung from the ceiling. Water ran through a hole in the tarp, down a hose, away from the merchandise. The tarps caught the majority of the water but not all of it. Buckets caught water and caution tape blocked customers and employees from certain parts of the store. According to Mr. Cuthbertson, if an inspector had visited the store, the buckets, missing ceiling tiles and yellow tarps would have been obvious. The yellow tarps would have been hard to miss. Above the ceiling tiles were bladders that drained down hoses into buckets below.

**Transcript of Brian Cuthbertson, May 1, 2013 p. 7767, lines 17-24; p. 7795, lines 6-25; pp. 7785-6, lines 25-9; p. 7795, lines 6-25 ; p. 7832 , lines 6-16  
Exhibits 12-40, 12-46 & 4060**

197.Turner quickly grew tired of making promises that he could not keep:

Q: What were you telling the tenants about this problem that wasn't going away? I mean they must have been pretty upset.

A: Well, by then [late 2007] I had learned not to say – include myself in the resolution of the problem by saying I'm working on this. I'm going to do that. By that time, I was saying, Bob says that this is what he's going to do to resolve your problem

Q: Why did you shift the approach?

A: Well, because I wanted to divorce myself from promises that I suspected weren't going to be kept.

**Transcript of Tom Turner, June 4, 2013, pp. 12754-5, lines 23-10**

198. Eastwood waited over three months to make any attempts to retain an engineer to certify the structural soundness of the mall. In February 2007, Mr. Bruce Caughill was retained to assist in acquiring the engineering report required by the Notice of Violation. He visited the site on February 20, 2007 and provided Turner with a copy of the May 1999 Halsall report, who in turn, provided it to the City. In an email dated February 22, 2007, Caughill advised the Chief Building Official and the Fire Chief that he would be working with Eastwood as they continued to repair the water leakage paths and any damaged members/components they come across. He promised that a report would be submitted within six months and that both would be advised immediately should the relationship with Eastwood change.

**Transcript of Bruce Caughill, May 10, 2013, pp. 9216-8, line 24-16  
Exhibits 162 & 819**

**Transcript of Tom Turner, June 4, 2013, pp. 12727-8, line 14-4; and p. 12733, lines 9-14**

199. Unfortunately, Caughill and Eastwood were never able to work out a retainer agreement. The missing fireproofing was not replaced and an engineering report certifying the structural soundness of the mall was never obtained. Had an inspection and report been done, a review of the connections would likely have been included. When Turner raised the issue of the engineering report with Robert Nazarian, he was told that it would be taken care of.

**Transcript of Bruce Caughill, May 10, 2013, p. 9224, lines 4-14**

**Transcript of Tom Turner, June 4, 2013, p. 12719, lines 6-16; p. 12732, lines 8-16;  
and pp. 12738-9, line 15-22**

200. During the second half of 2007, Turner realized that the Dow Corning silicone product was not going to be a permanent solution. As a result, Eastwood retained an architect named John Clinckett to investigate possible solutions to the leaks. Clinckett reviewed the construction drawings to assess the potential loading for the roof and had access to Halsall's May 1999 report.

**Exhibits 12-05, 12-106, 12-20 and 12-112**

**Transcript of Tom Turner, June 4, 2013, p. 12747-9, lines 21-16**

**Exhibits 92, 1355 & 1066, OPP\_E000003345.0064**

**Transcript of Brian England, May 8, 2013, pp. 8510-1, line 7-4; and pp. 8512-3, line 1-14**

**Transcript of John Clinckett, May 14, 2013, pp. 9552, 14-18; 9594, line 21 - 16**

201. In 2008, stained ceiling tiles, buckets, 12-square foot bladders and tarps were still common features in the mall. By August of 2008, the number of leaks in Zellers increased to 30. It still leaked during the winter, anytime the snow melted, and when it rained, especially during the spring with the rain and the melting snow. After the rain stopped, the leaks continued. Water that had saturated the insulation beneath the concrete slabs, continued to drip water for days.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7860, lines 9-11; 7756, lines 7-23 ; 7771, lines 15-21**

**Transcript of Andrew Holford, May 9, 2013, p. 8901, lines 10-19.**

**TJC, May 14, 2013, p. 9630, lines 16-20**

202. On December 27, 2008, there were 86 reported leaks in Zellers:

...I walk into a store that has ten leaks and I still have a store that has 33 leaks, you know, I am walking in the store every day and looking at tarps and seeing it fall apart around me, you know, it gets frustrating.

**Transcript of Brian Cuthbertson, May 1, 2013, 7877-8, lines 24-19; 7890, lines 9-13  
Exhibit 12-74**

203. The staff at the bank fared no better. The leaks continued unabated through to 2008 when the branch experienced some of the worst leaks. Stained ceiling tiles were still visible throughout the branch, and a significant number of tiles were missing. Staff and customers complained of a musty odour, in part from mould on boxes and drywall by the vault. A system of tarps and hoses was set up in the branch that evidently failed to collect all of the water as the carpet was often wet.

**Exhibits 13-12 & 4258**

204. On January 29, 2008, the bank hired Servicemaster, a contractor, to dry out the branch with large fans after significant leaks.

**Exhibit 1575**

205. On March 13, 2008, Pinchin performed another mould and air quality assessment in response to complaints from staff and customers about a musty odour. Pinchin found heavy

growth of mould on boxes and drywall in the vault and on drywall in the corridor by the coat closet, and more than thirty water-stained tiles. Pinchin recommended the landlord repair the leaky roof and remove the drywall.

**Exhibit 13-12**

206. On July 17th, Pinchin performed another assessment and found additional mould including a four square-foot patch behind a filing cabinet. Pinchin recommended stopping the leaks, and removing the drywall and stained ceiling tiles. Three days later, on July 21, 2008, Pinchin performed a follow-up mould and indoor air-quality assessment. Pinchin continued to recommend the roof be repaired. Because of excessive growth of mould, the branch was closed from August 14 to 22.

**Transcript of Judy McCulloch, June 13, 2013, p. 14410, lines 1-4  
Exhibits 13-93, 4239, 13-101 & 13-112**

207. As the leaks were ongoing, the bank decided not to replace the drywall believing the leaks would continue and the mould would return. Eastwood offered to reconstruct the branch; however, the bank was reluctant to proceed with reconstruction until there were at least three weeks without leaks following precipitation. Pinchin delivered a report dated October 6, 2008, assessing mould and indoor air quality at the branch. The report recommends ensuring the leaks are repaired before reinstating finishes in the branch.

**Transcript of Judy McCulloch, June 13, 2013, p. 14470-1, lines 12-3  
Exhibit 12-123 & 4240**

208. According to the bank, the leaks did not persist in the bank in 2008 contrary to the evidence of McCulloch and the reports of Pinchin. During the inquiry, Bob and Levon Nazarian testified about many issues and their testimony often conflicted with the testimony of other witnesses, documentary evidence and common sense. Where such conflicts exist, ELMAC submits that the commissioner ought to prefer sources of evidence other than the Nazarians.

**Transcript of Robert Nazarian, July 25, 2013, p. 171, lines 3-10**

209. Bob Nazarian assured the bank that the roof had been fixed, but having grown weary of Eastwood's promises, the bank advised him that it was retaining an engineer to review the

repairs. The bank hired Bruce Caughill. In his September 2008 report, Caughill concluded that the effectiveness of the repairs was doubtful. The same repairs that had been performed in the past and proven ineffective had been employed again. He also concluded that the water had caused corrosion damage to the steel structure, which should be investigated. Eastwood received a copy of Caughill's report, and thus was made aware that a structural engineer was raising concerns about the leaks effect on the mall's structure.

**Exhibits 13-114 & 13-118**

**Transcript of Judy McCulloch, June 13, 2013, pp. 14428-14434, lines 9-8**

210. Inspectors for the Royal Bank also expressed concerns about the mall's structure. In an inspection report dated July 17, 2008, Canadian Mortgage Rating Service Ltd. reported that the mall was in need of a \$3 million renovation, including in excess of \$1 million to fix the roof top parking deck. It reads "Many structural issues are present due to the water leakage issue and formal engineering study is required on the integrity of the structure". Bob Nazarian testified that he does not recall receiving a copy of the report even though his lawyer Paul Mand had received a copy. It seems highly unlikely that Mand would not have forwarded a copy of the report to Bob Nazarian.

**Transcript of Robert Nazarian, July 25, 2013, pp. 7-12, lines 14-22**

**Exhibit 1391, RBC\_P000002221-2**

211. Eastwood gave the bank additional reasons to be sceptical of its claims. To assuage concerns about mould and update tenants about the leaks, on September 15, 2008 Eastwood called a meeting. Cuthbertson and executives from HBC were present as were the other tenants, Mayor Hamilton, and Fred Bauthus. McCulloch and an executive from the bank were also there. None of the Nazarians attended. Henri Laroue was present on behalf of Eastwood.

**Transcript of Brian Cuthbertson, May 1, 2013, pp. 7865-7, line 1-9; pp. 7873-4, line 23-8**

**Exhibit 12-70**

**Transcript of Judy McCulloch, June 13, 2013 p. 14437, lines 4-10 and p. 14437, lines 17-22**

212. About mould, Laroue reported that testing for mould was done in different parts of the mall and came back normal. She failed to mention that mould had been found in the Bank of

Nova Scotia (Transcript of Brian Cuthbertson, May 1, 2013 7874, Transcript of Judy McCulloch, June 13, 2013 102-103). Laroue also claimed that Eastwood was in negotiations with 6 businesses to lease space possibly as soon as January 2009.

**Transcript of Brian Cuthbertson, May 1, 2013, pp. 7865-7, lines 1-9; pp. 7873-4, lines 23-8; and p. 7874, lines 1-8**

**Exhibit 12-70**

**Transcript of Judy McCulloch, June 13, 2013 p. 14437, lines 4-10 and 16-25**

213. She also announced that Eastwood had another plan to fix the leaks. The estimated cost of the repairs was \$980,000. McCulloch recalled the following about the meeting and the planned repairs to the roof:

I remember that they were telling us that there was no way that the roof would collapse, because that was one of the issues that was brought up and that the owner was going to be repairing the roof, spending a great deal of money to repair the roof and that the mall is open for business.

On October 18, 2008, the mall would host a "Hurray the Roof is Fixed Bash".

**Transcript of Brian Cuthbertson, May 1, 2013, pp. 7865-7, lines 1-9 and pp. 7873-4, lines 23-8**

**Exhibit 12-70**

**Transcript of Judy McCulloch, June 13, 2013, p. 14437, lines 4-10 & 17-22**

214. Laroue was not the only person on behalf of Eastwood promising that the roof would be fixed. Along with Alexander Sennett and Brian England, Bob Nazarian announced in the June issue of the Northern Business Journal that the roof was undergoing a \$1-million repair. The plan was to place three-inch layer of asphalt over a rubberized membrane--the Carlisle system.

**Exhibit 744**

215. Clinckett had proposed the plan earlier in the year on March 13, 2008, after advising Bob Nazarian that his plan of a roof over the roof top parking deck was not feasible. A company called C3 Harrell bid on the job for a total of \$903,241.50 and were awarded the contract on April 17, 2008. But, the contract, which specified that work would start on June 4, 2008, was never signed. Clinckett testified that Mr. Haromakio of C3 Harrell told him that the job fell through because Bob Nazarian wanted C3 Harrell to put up \$250,000 for the cost

of the waterproofing material. Because it could not secure Nazarian's credit rating, C3 Harrell refused.

**Exhibits 12-05, 12-106, 12-20, 12-112, 92, 1355 & 1066, OPP\_E000003345.0064**  
**Transcript of Tom Turner, June 4, 2013, pp. 12747-9, lines 21-16**  
**Transcript of Brian England, May 8, 2013, pp. 8510-1, lines 7-4; & pp. 8512-3, lines 1-14**  
**Transcript of John Clinckett, May 14, 2013, pp. 9594, lines 21-16**

216. In May of 2008, Bob Nazarian retained a structural engineer, Andrew Holdford, to look into the leaks and eventually the proposals considered to fix the roof, including the Carlisle system. By June 10, 2008, Eastwood began to doubt Clinckett's proposal. Through its counsel, Rene Fabris, Eastwood asked for a guarantee that the structure could support the weight of the membrane and asphalt layer, but Clinckett refused to provide it.

**Exhibits 1341, 1340, and 804**  
**Transcript of John Clinckett, May 14, 2013, pp. 9600-8, lines 9-10**  
**Transcript of Andrew Holford, May 10, 2013, pp. 9041-2, lines 20-3; & May 9, 2013, p. 8907, lines 14-19**

217. Despite Eastwood's doubts about Clinckett's plan, in June of 2008 it retained Peak Restoration to implement it. During the course of construction, a dispute arose between Peak Restoration and Nazarian over who would pay for the upfront cost of the Carlisle system. Bob Nazarian evidently did not want to pay for the repairs.

**Transcript of Andrew Holford, May 9, 2013, pp. 8931-2, line 23-6**  
**Exhibits 4363, PBR\_P000000358, 657 & 3985**  
**Transcript of Glen Day, May 9, 2013, pp. 8695-7, lines 17-19; and pp. 8734-6, lines 11-5**

218. On July 16, 2008, Holford advised Bob Nazarian that he had consulted with Coreslab and determined that the parking deck could not bear the load of a waterproofing membrane and asphalt wearing surface. Based on that belief, he advised Bob Nazarian that Clinckett's plan to make the roof watertight would not work.

**Exhibits 1591 & 95, p. 4**  
**Transcript of Andrew Holford, May 9, 2013, pp. 8922-3, lines 14 - 2**

219. But Peak Restoration was already implementing Clinckett's plan and had applied a temporary membrane, Blueskin, over the concrete to protect the open drains from the

infiltration of water. On July 17, 2008, it rained a lot in Elliot Lake. The Blueskin did not work. Water poured into the mall. The leaks were so severe that Cuthbertson was forced to close Zellers for nearly two days. Bob Nazarian fired Peak Restoration without paying for the balance of its fees for services rendered.

**Exhibit 3933**

**Transcript of Brian England, May 8, 2013, pp. 8544-5, line 11-10; pp. 8548, lines 1-12**

**Transcript of Brian Cuthbertson, May 1, 2013 p. 7841, lines 18-25**

**Transcript of Glen Day, May 9, 2013, p. 8779, lines 3-9**

220. Bob Nazarian asked Holford to find a viable solution to stop the leaks. He gave Bob Nazarian two options: (a) a thin traffic bearing system that would require annual maintenance, or (b) a thick system that would require removing the existing concrete topping. Robert Nazarian ruled out the latter option as being too expensive. Nazarian subsequently contacted Trow and engaged their services to help with a solution to the leaking issue. It was Holford's understanding that he was to prepare specifications for the thin traffic bearing system, in collaboration with Trow and that Brad Shaw from Fibron Insulation would be the general contractor.

**Transcript of Andrew Holford, May 9, 2013, p. 8931, lines 17-22; pp. 8961-2, line 15-5; pp. 8980-1, lines 1-5; p. 8981, lines 3-7**  
**Exhibits 1591, 1097 & 1098**

221. Although Holford considered it "a given" that if the leaks were not stopped the structural integrity of the mall could be compromised, at no point did Holford tell Bob Nazarian.

**Transcript of Andrew Holford, May 10, 2013, pp. 9042-3, lines 22-14**

222. Wanting to formalize its relationship with Eastwood Kleinfeldt submitted a proposal for the repair work on August 21, 2008. Shortly afterwards, Bob Nazarian left Holford a voicemail advising that Eastwood would not be going forward with the Kleinfeldt proposal.

**Exhibit 4314**

**Transcript of Andrew Holford, May 10, 2013, pp. 9039-40, lines 24-24**

223. Near the end of 2008, Eastwood had reportedly repaired all the seams above Zellers, but the roof was still leaking into the store. The leaks continued throughout the mall. Eastwood returned to its regime of identifying the leaks and replacing old caulking with new caulking.

**Transcript of Dimitri Yakimov, May 15, 2013, 9842, lines 2-11**  
**Transcript of Brian Cuthbertson, May 1, 2013, p. 7877, lines 1-5**  
**Exhibit 103**

224. To fund the repairs in 2008, Bob Nazarian had his IT consultant and “partner,” Alexander Sennett, create a shell company for the purposes of obtaining funding. Sennett had no experience in construction or roofing and willingly signed documents. If Sennett could find a buyer for the mall, Bob Nazarian promised to compensate him if the sale went through.

**Transcript of Alexander Sennett, May 14, 2013, pp. 9664, lines 3-12; 9675-7, 9-9; 9697, lines 12-21; 9709-10, lines 1-14**

225. Eastwood applied to ELNOS for funding. Unfortunately for Bob Nazarian, he sunk the deal with ELNOS before it got started when he suggested that he would finance part of the cost of the roof by stiffing the contractors for the cost of the materials:

226. He indicated that he could come up with \$200,000....and then my response was, "Well, 250 and 200, when I went to school, came to 450 which isn't a million." And he indicated that 450 was enough to have the contractors mobilize, get on site, and start working and then once they started working they wouldn't leave, and that at some point in the future he would figure out how he was going to pay for them.

227. Later Bob Nazarian provided William Elliott, ELNOS's general manager, with a contract between Eastwood and Empire Roofing and Restoration and several invoices for the work seemingly necessary to permanently fix the roof. The commission heard evidence that there were several issues with the invoices: they overcharged for the work to be performed and were replete with double billing.

**Transcript of Dimitri Yakimov, May 15, 2013, pp. 9939-47, lines 19-12**  
**Exhibit 00724**  
**Transcript of William Elliott, August 1, 2013, pp. 58-9, lines 16-4**

228. Elliott was suspicious of the documents, once forwarded by Sennett and a second time with a covering letter by Eastwood's lawyer, René Fabris. Elliott told Fabris "Right from the first meeting where your client asked us to participate in perpetrating a fraud on the contractors, this wasn't going to go anywhere". ELNOS did not provide Eastwood with funding, but it might have financed an honest plan to repair the roof. The invoices were "hogwash". Nazarian had no intention of spending his own money to fix the roof.

**Transcript of William Elliott, August 1, 2013, pp. 73-4, lines 10-12; p. 67, lines 10-17  
Transcript of Dimitri Yakimov, May 15, 2013, pp. 9939-47, lines 19-12**

229. In the summer of 2009, Dimitri Yakimov started working for Eastwood. Anticipating inspections from the City and the Ministry of Labour, Bob Nazarian asked Yakimov to walk the building to identify issues as a pre-inspection. Yakimov immediately noticed damage throughout the mall. On the balcony in front of the Zellers, he saw rust on the support beams. The staircase in front of the Foodland was so severely rusted that there were holes in the steps.

**Transcript Dimitri Yakimov, May 15, 2013, p. 9837, lines 12-19; pp. 9843-4 , lines 3-4; pp. 9845-9, lines 17-8;**

230. Rust was also visible inside the mall. In an open walkway along the west side of the mall, Yakimov saw severe rust of the structural beams and missing fireproofing. When cars drove over the site where the connection eventually failed, Yakimov noticed strange sounds and movement of the roof top parking deck. NORR suggests that Yakimov's observations are not likely the result of a partial failure of the connection between the roof level W24x110 beam on gridline 16 between gridlines Fx and G and the column at G-16. If they were attributable to a partial failure, NORR would have expected scratching on the steel plates, but no such scratching was observed.

**Transcript of Dimitri Yakimov, May 15, 2013, p. 9852-3, lines 7-20; 9860-2 , lines 3-25  
NORR Report, p. 123**

231. Inside the tenant's spaces (such as the bank), the leaks persisted. Pinchin returned to the bank on May 11, 2009, and found heavy mould growth in a wall and carpet tiles. They also found signs of leaks, such as water staining on ceiling tiles, fluorescent lights and drywall

throughout the bank. Because of moisture and mould, the entire carpet was removed from the branch in 2009. Pinchin suggested the leaks be repaired before reinstating finishes. Eastwood received a copy of the Pinchin report. Pinchin would return to the mall in June to perform a building condition assessment.

**Transcript of Judy McCulloch, June 13, 2013, p. 14459, lines 15-18; pp. 14460-1, lines 24-5  
Exhibits 13-29 & 5146**

232. In 2009, Pinchin, the City's inspectors and Robert Wood of MRW Consulting all assessed the condition of the mall and none of them detected the dire degree of deterioration of the structural steel connections. Pinchin prepared a preliminary building condition assessment report, dated June 17, 2009, for the Royal Bank. The report was signed by Jaime Hass, a construction engineer technologist, and Majid Milani-Nia, an engineer. The report concludes that the assessment did not reveal any major structural failures.

**Exhibit 101, RBC\_P000002405**

233. It is curious how Pinchin could provide such a broad opinion. The report is based on a visual assessment that included only one beam in Zellers and the columns supporting the walkway at the exterior of the building. In other words, Pinchin only inspected one structural member inside the building. Not a single connection inside the mall was inspected. Hass conceded that someone reviewing the report might interpret Pinchin as saying the building is structurally sound.

**Transcript of Jaime Hass June 14, 2013, pp. 14582, lines 10-18; 14592-3, lines 22-6; 14597, lines 6-17**

234. Pinchin did not follow its own guidelines in performing the assessment. Although Hass testified that the June 9, 2009 inspection that led to the report followed the ASTM guidelines, it clearly failed to meet those guidelines in several respects. First, it failed to review the previous Pinchin mould assessment reports, which commented on the mall's physical condition. Second, Hass acknowledged that the ASTM requires a field observer to interview tenants and that tenants often have the most information about the history, frequency, extent and repair of leaks, but there is no evidence that Pinchin interviewed a

single tenant. Third, Pinchin failed to note in its report that it had failed to determine the history of the leaks.

**Transcript of Jaime Hass p. 14575, lines 1-12; p. 14699, lines 5-10; 14700-14713, lines 1-17**

235. Unlike Pinchin, the City was aware of the mall's history of leaks. On September 24, 2009, Bruce Ewald, the chief building officer inspected the mall. Ewald saw evidence of water leakage above the food court, Dollarama, Bargain Shop and the service hall behind the Dollarama. He also noted rust on the steel stairway outside of Foodland. As part of the inspection, Ewald observed the beam that collapsed on June 23, 2012. He did not inspect the connection between the beam and column. As a result of his inspection, Ewald concluded that the structure of the entire building had to be inspected, including all connections. The Order to Remedy Violation noted roof's non-watertight condition as a deficiency.

**Transcript of Bruce Ewald, May 27, 2013, pp. 11584-90, lines 16-22  
Exhibit 1648, 1649, 1650, 102**

236. In satisfaction of the City's order, Eastwood retained Robert Wood, a structural engineer with MR Wright. Rene Fabris, Eastwood's lawyer retained Wood and wrote the following about the scope of work: "The Order To Remedy Violation includes the mall to have the mall inspected by a structural engineer, specifically the items located under deficiency". Fabris attached a copy of Ewald's inspection report and the Order to Remedy,

**Exhibit 102**

237. Before preparing his report, Wood read the Order to Remedy Violation. In his report of October 28, 2009, Wood concluded that the inspection revealed no visual structural concerns both in the structural steel and concrete slabs. While inspecting the mall, Wood relied on the mall's staff to show him where the deficiencies lay. He did not "look at every nook and cranny," but he should have looked at an adequate random sample. Wood assumed that the leaks were a new problem.

**Exhibit 102, NL\_E000000190.0012**

**Transcript of Robert Wood, June 6, 2013, p. 13296, lines 16-24; p. 13303, lines 4-12; p. 13307, lines 20-25; p. 13308, lines 14-19; p. 13275, lines 9-19; p. 13316, lines 3-17**

238. Wood claims to have walked the deck and looked at areas other than those specifically identified areas in the order. However, he would not have examined members behind pristine drywall because he inspects a building in areas where leakage has occurred or known to be occurring. Wood assumed that if a leak had been present, there would have been evidence of the leak in the materials below. Assuming there were no signs of a leak at the site of the failed connection, then we are left with two possibilities. First, Wood's assumption is incorrect. He provided no basis or authority for this assumption. Second, the material beneath the leak was repaired shortly before his inspection such that signs of the leak had yet to develop. Wood knew that the maintenance staff had repaired damage from the leaks. It was incumbent upon him as a matter of common sense to ask those staff where recent repairs had been performed. There is no evidence that he made those enquiries.

**Transcript of Robert Wood, June 6, 2013, p. 13306, lines 14-23; p. 13308, lines 14-19; p. 13309, lines 6-9; p. 13312-3, lines 24-1; and June 7, 2013, pp. 13486-8, lines 21-14**

239. During his testimony, Wood testified that most of the leakage is at the mid-span of structures because that is where the structure deflects. As a result, it is also where the water ponds and where it leaks primarily. But if Wood had this knowledge, he should have traced the flow of water from the mid-span to the source--in the present case the failing connection.

**Transcript of Robert Wood, June 6, 2013, p. 13311, lines 1-11**

240. Wood claims to have walked the deck and looked at areas other than those specifically identified areas in the order. However, he would not have examined members behind pristine drywall because he inspects a building in areas where leakage has occurred or known to be occurring.

**Transcript of Robert Wood, June 6, 2013, p. 13306, lines 14-23; p. 13309, lines 6-9; p. 13312-3, lines 24-1**

241. On the same day October 28, 2009, Nazarian fired Yakimov. Shortly after he was fired, Yakimov met with Paul Officer, the fire chief, and expressed his concerns about the condition of the mall.

**Transcript of Dimitri Yakimov, May 15, 2013, pp. 9911-2, lines 5-1**

242. In 2010, the collapse was two years away. The leaks continued in the bank. On September 16, 2010, Pinchin returned. It noted that staff reported leaks throughout the branch during heavy rain, and recommended the roof be repaired.

**Transcript of Judy McCulloch, June 13, 2013, 14480, 16-19  
Exhibit 13-51**

243. By letter dated October 4, 2010, René Fabris, lawyer for Eastwood, advised Kim McAllister of Scotiabank that Eastwood would not pay for the costs of additional testing for mould and suggested "hysteria is taking over your staff".

**Exhibit 13-53**

244. After these events, an inspector from the Electrical Safety Authority inspected the branch. McCulloch and the manager were present:

A. He said that he was doing us a favour by passing us.

Q. Did you inquire what he meant by doing us a favour?

A. Well, we told him that he wasn't doing us a favour. He was doing Bob Nazarian a favour. And Laurie asked him why don't you shut the place down? And he said it was far too political.

**Transcript of Judy McCulloch, June 13, 2013, p. 14492, lines 7-15**

245. Ms. McCulloch understood what the inspector said as "He didn't want to close the mall down because too many people would be out of work or it would be bad for the economy of Elliot Lake".

**Transcript of Judy McCulloch, June 13, 2013, p. 14504, lines 15-19**

246. Although the roof-top parking deck continued to leak in contravention of the city's property standards by-law, by letter dated February 11, 2010, Ewald advised Eastwood that it had complied with all conditions of the property standards order issued on September 25, 2009. According to Ewald, he may have written this letter because he may just have been trying to get that particular file off his desk.

**Exhibit 168**

**Transcript of Bruce Ewald, May 27, 2013, p. 11721-7, lines 7-14**

247. The end of 2010 brought a new engineer and a new proposal to permanently fix the roof. In November of 2010, the Nazarians contacted Read Jones Christoffersen (“RJC”).

248. During the penultimate year before the collapse, the risk of leaks at the bank changed from toxic mould to electrocution. In the electrical room, there was a bladder hanging from the ceiling to leaks. A hose ran from the bladder into a bucket perched on a ladder. This system was set up by the maintenance staff. In October of 2011, water leaked on the electrical panel. Water was on the floor. Maintenance staff caused the power to surge and shut off. The power returned, and they left. Staff at the branch smelled burning wires, called 911 and evacuated the branch.

**Transcript of Judy McCulloch, June 13, 2013, pp. 14503-4, lines 14-19; p. 14489, lines 10-18**

249. The bank timed its departure from the mall perfectly as pieces of concrete started to fall from the roof. In May of 2011, Elaine Quinte, the owner of Hungary Jack’s, found a 24 to 30-inch long, jagged piece of concrete protruding through a ceiling tile. It was like a spearhead and weighed about 20 pounds. Quinte alerted the mall manager, Rhonda Lendt, who promised to inform Bob Nazarian and get an engineer to check it out. Lendt promised to report back to Quinte. Although Levon Nazarian testified that he had instructed Lendt to bring the incident to Wood’s attention, she denied receiving those instructions.

**Exhibit 2359**

**Transcript of Elaine Quinte, July 31, 2013, pp. 249-250, lines 25-8; pp. 241-2, lines 20-7; pp. 246-7, lines 23-3; and August 1, 2013, pp. 239-240, lines 16-7**

**Transcript of Rhonda Lendt, August 6, 2013, pp. 19610-1, lines 23-5; p. 19613, lines 2-8**

250. When Eastwood purchased the Mall on August 7, 2005, the Nazarians thought they had bought a cash cow, but ended up with a “white elephant”. As Levon testified, “We didn’t know what we were getting ourselves into”.

**Exhibit 707**

**Transcript of Levon Nazarian, July 18, 2013, p. 17408-9, lines 24-1**

251. Bob Nazarian wanted to be free of the mall but was trapped by the penalty in the mortgage and the guarantee that he had provided for the full value of the mortgage. To be free of the mall, Nazarian needed to find a way out of paying the penalty under its RBC mortgage and a buyer for the mall. If Bob Nazarian sold the mall, then he would have to pay the penalty, but if he refinanced the mortgage, RBC was willing to waive it. Two fortuitous events brought Nazarian closer to freedom. First, by letter dated July 18, 2011, the Business Development Bank of Canada (“BDC”) gave Bob Nazarian a way out. It offered him a loan of \$3.3 million and only required him to guarantee \$500,000. However the BDC also required an inspection report prepared by an engineering firm. Second, RBC waived the penalty for discharging the mortgage before the end of the 10-year term.

**Exhibit 5668, OPP\_E000038385\_002-005**

**Transcript of Robert Nazarian, July 29, 2013, p. 18684, lines 1-13; and July 30, 2013, p. 46, lines 10-14**

252. In the meantime, Eastwood continued to half-heartedly pursue permanent solutions to fix the roof. RJC’s solution was to restrict access to most of the roof top parking deck to avoid loading issues and apply a waterproof membrane and polyurethane sealing system. Where cars once parked solar panels would sit producing another source of revenue for Eastwood. Unfortunately City by-laws required the mall to have a certain number of available parking spots, so Eastwood would have to purchase land adjacent to the mall off of Hillside Drive.

**Transcript of Philip Sarvinis, June 5, 2013, pp. 12892, lines 18-25; 12903-5 , 1-12; 12910, 1-17**

**Exhibit 733**

253. When Eastwood failed to pay RJC’s outstanding account, it registered a lien on title in March of 2011. In June of 2011, RJC and Eastwood made a second attempt at working together to solve the leaking roof. Eastwood decided to eliminate most of the rooftop parking and pursue a relationship with Solar Energy Hub, and American company that rented roof space for its solar panels. As part of the agreement, Solar Hub would waterproof the roof.

**Transcript of Philip Sarvinis, June 5, 2013, p. 12915, lines 1-22; 12917-9 , lines 7-22; 12927, lines 10-13**

**Exhibit 734**

254.RJC did not investigate the mall's structure because the solar panels and waterproofing system would not exceed the roof top parking deck's capacity and Eastwood failed to advise RJC of the history of the leaks.

**Transcript of Philip Sarvinis, June 5, 2013, p. 12922-3, lines 4-20**

255.The deal with Solar Hub fell apart when the Nazarians insisted that Solar Hub also finance the construction of the parking lot. Solar Hub walked away from the deal.

**Transcript of Philip Sarvinis, June 5, 2013, p. 12930-1, lines 21-2**

256.To acquire the property for additional parking, Rhonda Bear, the new mall manager, made two presentations to the City, first to the By-law and Planning Committee on August 2, 2011, and then to City Council on August 8, 2011. The City required the appraisal value for the land, \$55,000, but Eastwood would only offer \$22,000 and seven parking spots at \$5,000 per spot. As Bob Nazarian was unwilling to spend an additional \$35,000 to get the land, the deal failed. And the last opportunity to permanently fix the roof fell apart.

**Transcript of Rob deBortoli, p. 14271-2, lines 24-3**

**Transcript of Rhonda Lendt, p. 14131, lines 2-7**

**Exhibit 155**

257.Over the five years that Mr. Cuthbertson managed the store, Zellers replaced about 3,000 ceiling tiles because of damage from leaks. The leaks had damaged the drywall and caused the paint to flake on four pillars in the store.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7765, lines 24-5; p. 7766, lines 18-25**

258.Zellers had a camera system that Mr. Cuthbertson had to adjust periodically. When he climbed the ladder to move the cables above the ceiling tiles, he could see significant damage to the steel beams in certain areas of the store.

**Transcript of Brian Cuthbertson, May 1, 2013, p. 7767, lines 15-24**

259. In 2012, Nazarian was close to being free of the mall. He had found a way around the prepayment penalty under his mortgage, but he still had to provide the BDC with an engineer's report. He would again call on Wood. He had also found a buyer. On March 9, 2012, he signed an agreement of purchase and sale for \$7 million.

**Exhibits 1255 & 1505**

260. To satisfy the BDC, Eastwood retained Wood to perform a structural condition assessment. The commission reviewed three versions of his May 3, 2012, report, which was also signed by Saunders as Wood was not a licensed engineer when he authored the reports. The additional two versions of the report arise from Nazarian's desire to remove unflattering pictures and delete words that arose suspicion. The first version of the report included the following on the first line of the fifth paragraph:

The **ongoing** leakage from the parking deck is **of particular concern** in the areas of Zellers, and the expansion joint located along the south wall of the Algo Inn, over the municipal library.  
[emphasis added]

**Exhibit 6174, NAZ\_E000014865**

261. It also included a photograph showing a heavily oxidized bottom flange of a parking deck beam in Zellers and picture of the yellow bladders and hoses hanging from the ceiling in the Zellers store.

**Exhibit 6174, NAZ\_E000014865\_05**

262. At Nazarian's request, Wood removed the photograph of the heavily oxidized beam from the second version.

**Exhibit 113****Robert Wood, transcript of June 7, 2013, pp. 46-7, lines 20-22**

263. The final version of the report also had significant changes. Again, at Nazarian's request, Wood altered the report. This time he altered the text. He omitted two important

details from the sentence on the first line of the fifth paragraph--first, that the leaks were on-going, and second, that the on-going leaks were particularly concerning:

The leakage through the parking deck has caused surface rusting of the structural steel in the areas of Zellers, and the expansion joint located along the south wall of the Algo Inn, over the municipal library.

264. Wood made these changes to the report without Saunders's permission.

**Transcript of Gregory Saunders, June 6, 2013, p. 13180, lines 12-20**

265. Just under two months before the collapse, Wood described the steel members structurally sound. It is unclear how he could make this determination without taking any specific measurements, removing drywall and/or fireproofing to examine connections or looking at an adequate random sample of the connections. Wood acknowledged that one would not have had to do too big a survey to run into a connection exhibiting medium or severe corrosion. Although he walked the perimeter of the building, he failed to inspect or comment on the exterior steel, which displayed severe signs of corrosion, including holes left by deteriorated steel. He also failed to speak with the tenants, who were in the best position to advise Wood about the history of the leaks.

**Exhibit 114, OPP\_E000003280.0044 Transcript of Robert Wood, June 7, 2013, p. 13380, lines 5-20; 13383, lines 4-9; 13385-6, lines 5-10**

Saunders should not have signed the report. To conclude that the members were structurally sound, he should have satisfied himself that Wood had observed and document a sufficient random sampling of columns, beams and connections. The absence of photographic evidence and detailed descriptions of the members observed should have been sufficient for Saunders to instruct Wood to return to the mall and perform a more rigorous inspection. Unfortunately, it appears that Saunders relied too much on Wood's reputation.

266. On June 22, 2012, RBC issued a discharge statement for the mortgage, which would be replaced by BDC's \$3.3 million loan.

**Exhibit 1251**

### **Eastwood Could Have Afforded to Pay for Repairs**

267. As of 2010, the Nazarian Family Companies had bought and sold 6 companies for a profit of approximately \$11 million dollars and had invested approximately \$3 million in properties which had not yet been sold. Neither Levon nor Bob Nazarian had any explanation of what happened to the \$8 million dollar profit.

#### **Exhibit 6067**

**Levon Nazarian, transcript of July 15, 2013, pp. 16159, line 6 – 16160, line 21; pp. 16164, line 11 – 16174, line 13**

**Robert Nazarian, transcript of July 23, 2013, pp. 17447-8, lines 21-1**

### **E. The City of Elliot Lake**

268. The City failed to ensure the mall was constructed to shed and drain water effectively. From the beginning, it failed to ensure the roof was watertight. And when it was clear that the roof was not watertight, it failed to order repairs to make it so before corrosion irreparably deteriorated the steel structure. When the steel structure was no longer able to bear the load of the building and expected superimposed loads because of corrosion, the City failed to order and ensure appropriate repairs. It also failed to investigate events that reasonably should have put the City on notice that the mall was corroding, and to take advantage of clear opportunities to prevent the collapse and shut down the mall before the roof collapsed on June 23, 2012.

### **9. The City's Statutory Obligations**

269. The *Municipal Act* empowered the mayor, councillors and various senior administrators of Elliot Lake to protect the interests and well-being of the citizens.

270. Under section 69 of the *Municipal Act*, RSO 1990, c M.45, which was in force until January 1, 2003, Mayor Farkouh was the head of council and the chief executive officer of the corporation. He was entrusted with particularly important duties:

- (a) to be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed;
- (b) to oversee the conduct of all subordinate officers in the government of it and, as far as practicable, cause all negligence, carelessness and violation of duty to be prosecuted and punished; and
- (c) to communicate to the council from time to time such information and recommend to it such measures as may tend to the improvement of the finances, health, security, cleanliness, comfort and ornament of the municipality.

***Municipal Act RSO 1990, c M.45, s. 70***

271. The Municipal Act RSO 1990 was replaced by the Municipal Act 2001, S.O. 2001, c 25. The wording of Mayor Farkouh, and later Mayor Hamiltons, duties changed but his responsibility for protecting the health, safety and well-being of the citizens remained.

***Municipal Act 2001, S.O. 2001, c 25, s. 225, 226.1, 2, 10***

272. The mayor wasn't the only member of the city responsible for protecting the citizens well-being. Council also and the municipal administrators, such as the chief administrative officer (the CAO), shared that responsibility. The CAO in particular, (Bauthus, Derreck, DeBortoli, and Speck) is responsible for the general control and management of the city's affairs to ensure the effective operation of the city. Through its by-laws, council protects and promotes the health and well-being of the citizens and the administration ensures the duties prescribed in the by-laws are fulfilled.

***Municipal Act 2001, S.O. 2001, c 25, ss. 224, 227, 229, 2, 10,***

273. On January 24, 1979, council passed by-law 79-15 to prescribe minimum standards (see section 2.1) for the maintenance and occupancy of property in Elliot Lake. Under section 4.3, no person shall occupy a building that does not conform to the standards set out in the by-law. The three key provisions of the by-law that are relevant to this inquiry are sections 5.1, 5.4 and 5.15. All buildings must be structurally sound and capable of supporting loads that may be applied to them and repaired when showing evidence of deterioration:

### 5.1 Structural Soundness

Every part of a building **shall be maintained in a structurally sound condition** and so as to be capable of **sustaining safely its own weight and any load to which it may normally be subjected**. Materials that have been damaged or show evidence of **dry rot or deterioration shall be repaired or replaced** in a workmanlike manner [emphasis added].

**Exhibit 6-6, pp. CEL\_P000000495, and CEL\_P000000499-500**

274. The roof of a building must be watertight. The City understood that “watertight” means the building does not leak:

### 5.4 Roofs

The roof of a building **shall be maintained in a watertight condition** so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings. The roof shall be free of loose or unsafe objects and materials and all other accident and fire hazards. The roof drainage system, where present, **shall be kept in good repair, watertight**, and free of health and accident hazards [emphasis added].

**Exhibit 6-6, p. CEL\_P000000501**

**Bruce Ewald, transcript of May 24, 2013, p. 11434, lines 23-25**

275. Floors ceilings and walls are to be free of moisture and fungus:

### 5.15 Dampness

The floors ceiling and walls of every building **shall be kept free of moisture, dampness and resulting fungus growth** [emphasis added].

**Exhibit 6-6, p. CEL\_P000000504**

276.To effect the purposes of these minimum requirements, sections 9.1-9.3 of by-law 79-15 empowered municipal officers to inspect property without a warrant to ensure property conforms with the standards set out in the municipal by-laws and to make orders describing the repairs required, indicating when they must be completed and giving notice that if the repair is not carried out when required, the city may repair the property at the owners expense.

**Exhibit 6-6, pp. CEL\_P000000516-517**

**See also: *Building Code Act, 1992, S.O. 1992, c. 23, ss. 15.2, 15.4***

277.Pursuant to section 9.9(d) and (e) of by-law 79-15, where the owner fails to comply with an order, the City is empowered to repair or demolish the property and may recover the expenses it incurs by action or in like manner as municipal taxes.

**Exhibit 6-6, pp. CEL\_P000000516-517**

**See also: *Building Code Act, 1992, S.O. 1992, c. 23, ss. 15.2, 15.4***

278.Since 1992, the *Building Code Act* has required the City to appoint a Chief Building Official and as many inspectors as necessary to enforce the Act.

***Building Code Act, 1992, S.O. 1992, c. 23, s. 3***

279.Effective June 17, 1998, the *Tenant Protection Act, 1997, S.O. 1997, c. 24, s. 224(8)*, made amendments to the *Building Code Act* to bring the enforcement of property standards under the authority of that act, instead of the *Planning Act*, where property standards were previously set out. The 1997 amendments effected three major changes to the enforcement of property standards. The first was that it eliminated the requirement of issuing a Notice of Violation prior to issuing an Order to Remedy Violation. The second was that it became much easier to collect the cost of repairs by putting them on the tax roll, and finally, the

inspection powers of an officer were defined under section 15.8. As of 1997, section 15.8 of the *Building Code Act*, entitled an officer to:

- (a) “require production for inspection of document or things, including drawings or specifications that may be relevant to the property”
- (b) “remove documents or things relevant to the property...for the purpose of making copies or extracts”.
- (c) “require information from any person concerning a matter related to a property of part thereof”, including property managers, engineers or architects that have previously been involved with the construction or inspection of a property;
- (d) be accompanied by a person with special or expert knowledge in relation to the building;
- (e) alone or in conjunction with a person possessing special or expert knowledge, make examinations or take tests, samples or photographs necessary for the purposes of inspection; and
- (f) order the owner of the property to take and supply at the owner’s expense such tests and samples as are specified in the order.

**Exhibit 2103**

**Warwick Perrin, transcript of April 2, 2013, pp. 3708-3709, lines 12-3; pp. 3753-3757, lines 20-9**

280. In 2003, City Council repealed by-law 79-15 and passed by-law 03-29 to bring the existing property standards by-law in line with amendments to the *Building Code Act*. The minimum requirements for maintenance and occupancy in the City of Elliot Lake did not change and are set out in Schedule A of by-law 39-29: section 2 of deals with structural soundness; section 5(1)(a) deals with roofs; and, section 16 deals with dampness.

**Exhibit 6-7, pp. CEL\_P00000528-529 and CEL\_P00000531**

***Building Code Act, 1992, S.O. 1992, c. 23, ss. 15.1, 3***

281. For over thirty years, several mayors, councillors and building officials failed to live up to the obligations set out above. Their individual and collective failures allowed a mall that never shed or drained water effectively, that was never watertight, to leak and deteriorate for over thirty years to the point of failure and to be occupied by the people who they were entrusted to protect.

**The City's Complaint-Driven Enforcement Policy**

282. The City failed to articulate critical details about its complaint-driven enforcement policy. This failure confused key players in office and on staff about what exactly was a "complaint". During the inquiry, the mayors, CAOs, and building officials offered inconsistent evidence about what form a complaint could take, to whom a complaint could be made, and what was the responsibility of the politician or staff member who received a complaint. These problems contributed to the City's repeated failures to enforce its property standards by-laws and prevent the collapse. The back doors of City Hall and the mall were just two parking lots apart

**Barbara Fazekas, transcript of March 12, 2013, p. 1289, lines 1-3**

283. In November 1995, the City adopted a complaint-driven enforcement policy for its property standards by-laws. Although all of the City's representatives, from enforcement officers to mayors, testified that there was a complaint-driven policy, the various representatives provided widely varying evidence about the form that a complaint must take and to whom a complaint must be made. Neither of these issues are addressed in the City's by-laws.

**Exhibit 6-8, pp. CEL\_P000000220 and CEL\_P000000227**

**Fred Bauthus, transcript of March 25, 2013, pp. 2895-2897, lines 5-5**

**George Farkouh, transcript of May 2, 2013, p. 7984, lines 4-10 and pp. 7943-7944, lines 13-7**

284. On June 23, 2006, the City's complaint-driven property standards policy was amended to require pro-active inspections on all vacant and multi-unit buildings having a vacancy of 50% or more in all commercial and multi-residential properties having more than 3 units. The pro-active inspections are limited to only some sections of the property standards by-law, including structural soundness and watertightness of roofs. It was believed that pro-active enforcement was only required in vacant buildings because in buildings which were occupied, enforcement would rely upon the tenants making complaints. This policy, of course, would require City officials to respond appropriately to the complaints of tenants when they were made.

**Exhibit 6-9, p. CEL\_E000000800\_04**

**Exhibit 3339**

**Exhibit 3349**

**Troy Speck, transcript of April 24, 2013, pp. 6678-6683, lines 24-13**

285. Warwick Perrin, the President of the Association of Property Standards Officers, provided the Commission with impartial evidence on the subject of property standards maintenance and the enforcement of property standards by-laws. He testified that a complaint driven policy requires a property standards officer to verify a complaint by at least entering the property which is the subject of the complaint. In the absence of a complaint, it was Perrin's opinion that a property standards officer could initiate a proactive inspection. As to what qualified as a complaint, the requirements vary according to the policies of the municipality.

**Warrick Perrin, transcript of April 2, 2013, pp. 3680-3681, lines 18-9; 3712-3713, lines 17-10; and p. 3733, lines 2-7**

286. Some City officials, including the former mayor, Farkouh, and the former Chief Building Official, Pigeau, testified that the City's complaint driven enforcement policy required a written complaint. Larry Burling, who was the City Clerk between 1985 and 1999, expressed the most extreme version of this view. Burling testified that in order for any action to be taken by the city under its Property Standards By-Law, a complainant had to: (i) make a complaint in writing; (ii) identify that it was a formal complaint under the Property Standards By-Law; (iii) express willingness to testify in court proceedings should it come to that; and (iv) would have been warned of the economic consequences of making a

complaint, being that the mall might close and the tenants and employees might be displaced. Not a single witness who shared this view could identify the source of these requirements. Indeed, when asked how many times by-law enforcement led to a court proceeding in the 20 years he was deputy clerk and then clerk, Burling answered “zero”.

**Roger Pigeau, transcript of March 22, 2013, p. 2551, lines 4-8**

**Larry Burling, transcript of April 2, 2013, pp. 3794-3795, lines 14-15; pp. 3798-3800, lines 14-1; pp. 3810-3811, lines 23-2; and pp. 3917-3918, lines 17-3**

**George Farkouh, transcript of May 2, 2013, pp. 7945-7946, lines 14-4**

**Troy Speck, transcript of April 24, 2013, p. 6653, lines 18-23**

287.Others, such as Chris Clouthier, a building inspector from September 7, 2004, to the present, and Bruce Ewald, the current Chief Building Official, testified that a complaint could be oral or written, and written complaints could take the form of an email. And it was common for a member of the City, politician or staff member, to forward complaints to the building department.

**Chris Clouthier, transcript of April 23, 2013, p. 6328, lines 10-22 and p. 6331, lines 6-10**

**Bruce Ewald, transcript of May 24, 2013, p. 11437, lines 10-18**

**Syl Allard, transcript of April 29, 2013, p. 6985, lines 2-7**

288.The City failed to have a clear policy requirement that all complaints relating to the condition of a building must be forwarded to the building department. The library’s experiences illustrate this point. The library’s board and staff expressed their concerns about the ongoing leaks to City Council, including the mayor, and the CAO several times over several years, orally and in writing, but their complaints rarely reached the building department. No one at the City ever advised the Chief Librarian, Barbara Fazekas, to direct her complaints to the building department. As Rick Hamilton, who was the Deputy Mayor, then Mayor, during most of the library’s time in the mall, testified, there was no formal process, just an informal one that did not work.

**Barbara Fazekas, transcript of March 12, 2013, p. 1192, lines 6-11**

**Rick Hamilton, transcript of July 9, 2013, pp. 15028-9, lines 8-3**

### **The Library Lease and Leaks**

289. Although the leaking roof at the Mall was a well-known fact within the community, was occasionally discussed between city staff, and endured for more than thirty years, the City only issued two orders to remedy to any of the mall's owners for not maintaining the roof in a watertight condition. No tenant complained to the City more about leaks than the library. Despite repeated complaints from its board and staff, and from members of the public, the City failed to exercise its extraordinary powers to ensure the roof above the library was ever watertight.

**Roger Pigeau, transcript of March 22, 2013, p. 2554, lines 18-22 and p. 2555, lines 18-25**

**Fred Bauthus, transcript of March 25, 2013, pp. 2907-2908, lines 23-7; p. 2910, lines 3 – 13**

**Larry Burling, transcript of April 2, 2013, pp. 3813-3814, lines 16-2 and p. 3815, lines 10-19**

**George Farkouh, transcript of May 2, 2013, pp. 7934-7935, lines 21-5**

290. In the fall of 1989, the City decided to move the library into the mall, under a 20-year lease, contrary to the wishes of the library board, who were aware of the mall's history of leaks. Mayor George Farkouh's supported the move because of its importance to the community:

for the community to have a closed mall that was sustainable and functional was a benefit to all the citizens for the shoppers in the community, the products and services that they would provide and they also represented a significant tax base to the community.

The Library was to be an anchor tenant, occupying 8500 square feet. It moved into the mall in October 1989 and opened to the public in November.

#### **Exhibit 345**

**Barbara Fazekas, transcript of March 11, 2013, pp. 1118-1120, lines 21-1 and p. 1126, lines 11-15**

**George Farkouh, transcript of May 2, 2013, pp. 7932-7933, lines 8-17**

291. The importance of the mall to the community of Elliot Lake increased in the 1990s when the mines announced their closure. Approximately 4,500 direct full-time employees and 4,000 secondary employees were put out of work. City taxes decreased as the mines

decommissioned. The City had to come up with some way of reviving the economy of Elliot Lake. It was from this problem that Retirement Living was created. The City would be rebranded as a retirement community and the mall would be a critical feature of the Retirement Living's plans and, by extension, the community's survival. As an anchor tenant, the Library was seen as critical to the mall's survival.

**Fred Bauthus, transcript of March 26, 2013, pp. 2947-2948, lines 3-14**  
**George Farkouh, transcript of May 2, 2013, pp. 7694-7967, lines 16-9 and p. 8167, lines 7-24**

292. The library's first written complaint found in the documents was made on April 25, 1991. Janet Taylor, the Chair of the Library Board, wrote Larry Liautaud, the mall manager, copying the mayor (Farkouh) and Council:

...Since the library opened in the mall, a major portion of the collection has had to be covered by plastic in order that the books are not damaged, the floor is littered with buckets, and many of the ceiling tiles are missing. The hoses which hang from the ceiling can be seen the whole length of the mall and negate any value which the art displays might contribute to the library's visual appeal....

We ask that this problem be rectified as soon as possible.

The letter was forwarded to Roger Pigeau, the Chief Building Official, by Burling, the City Clerk. On the bottom right hand side of the letter, Pigeau wrote, "Met with Larry Liautaud and he advised that an engineer has been hired to analyze problem and report was forthcoming."

**Exhibit 11-11<sup>6</sup>**  
**Roger Pigeau, transcript of March 22, 2013, pp. 2577-2578, lines 8-5**  
**Larry Burling, transcript of April 2, 2013, p. 3816, lines 20-23 and p. 3817, lines 10-24**

293. On May 7, 1991, Liautaud wrote to the Public Library, copying the Chief Building Official, the Mayor and Council and advised that there was a continuous leaking problem at the Mall from the time it was constructed until 1986. Liautaud also confirmed in writing his promise to Pigeau that an engineering company had been hired.

**Exhibit 273**

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<sup>6</sup> Note that in some parts of the transcripts of Ms. Fazekas and Pigeau, this exhibit is referred to as Exhibit 11-12.

**Roger Pigeau, transcript of March 22, 2013, pp. 2587-2589, lines 14-4**

294. Pigeau testified that he would consider the letter of April 25, 1991, a written complaint. He understood the standards required by Property Standards By-Laws and the powers it granted to him to enforce the same. Yet, he never received a copy of the engineering report that was “forthcoming” and he never initiated an inspection of the Mall. Pigeau testified that the leaks at the Algo Centre Mall appeared to be controlled by pails and repaired by ACP so as the Chief Building Official, Pigeau “felt very comfortable that the problem was being controlled and it was being repaired” and never investigated further. The city failed to ensure the roof was maintained in a watertight condition.

**Roger Pigeau, transcript of March 22, 2013, p. 2538, lines 15-18, pp. 2542-2545, lines 6-22; pp. 2556-2558, lines 1-24; p. 2561, lines 3-13; p. 2562, lines 11-15; and p. 2582, lines 13-17 and p. 2598, lines 2-5**

295. Unfortunately, senior City officials were equally inactive and provided no direction to the Chief Building Official on the issue. Mayor Farkouh, who was copied on the letters, “never connected the leaks with something [he] needed to be involved in.”

**George Farkouh, transcript of May 2, 2013, p. 8107, lines 1-16****Larry Burling, transcript of April 2, 2013, p. 3823, lines 14-16 and pp. 3828-3829, lines 18-12**

296. Three years later, on September 12, 1994, Ms. Barbara Fazekas, a librarian, wrote to the Chief Administrative Officer, Fred Bauthus, to advise that she had found several dangling ceiling tiles next to the wall as well as in the children’s area of the library, which had become loose as a result of moisture that weakened the glue holding the ceiling. She was concerned that the whole ceiling might be in jeopardy and states that she spoke to the Chief Building Official on the subject but that he did not share her concern.

**Exhibit 11-12<sup>7</sup>****Barbara Fazekas, transcript of March 12, 2013, pp. 1163-1164, lines 8-13**

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<sup>7</sup> Note that in some parts of the transcript of Ms. Fazekas, this exhibit is referred to as Exhibit 11-13.

297. Bauthus forwarded the letter to Pigeau. Eventually, ACP agreed to replace the ceiling tiles and re-glue the grid if the City, in return, agreed to lower a catch basin on ACP's property. Unfortunately, no further steps were taken to determine what was being done by the owner to stop the leaks, and they persisted.

**Exhibit 11-12<sup>8</sup>**

**Barbara Fazekas, transcript of March 12, 2013, p. 1165, lines 12-18**

**Roger Pigeau, transcript of March 22, pp. 2607-2608, lines 25-12 and pp. 2610-2612, lines 15-2**

**Fred Bauthus, transcript of March 26, 2013, p. 2939-2940, lines 18-25**

298. By letter dated December 30, 1998, Fazekas advised Burling, the city clerk, that the library board had passed a resolution concerning the leaky roof, and requested an appearance before council on January 11, 1999. The resolution included the following:

Whereas the Library is constantly subject to water damage from the leaky roof,  
Whereas this water affects the condition of the collection, presents health and safety problems and presents an unpleasant aesthetic appearance in a public building  
Whereas the Library Board has repeatedly approached the Landlord but has not received a positive response.

**Exhibit 11-3, p., NPRR\_P000003976**

299. The library board recommended the city withhold rent from the mall in protest, but the city did not. Water was pooling on the plastic covers of the light fixtures because of the leaks. As of November 4, 1998, numerous ceiling tiles, fluorescent lights and light covers were missing.

**Exhibit 11-3, p. NPRR\_P000003973**

**Exhibit 2041**

**Barbara Fazekas, transcript of March 12, 2013, p. 1175, lines 3-19 and pp. 1199-1200, lines 173**

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<sup>8</sup> Note that in some parts of the transcript of Ms. Fazekas, this exhibit is referred to as Exhibit 11-13.

300.Fazekas testified that the leaks did not improve when Retirement Living took over the mall in 1999.

**Barbara Fazekas, transcript of March 12, 2013, p. 1204, lines 15-20**

301.While Retirement Living still owned the mall, Council held an in camera meeting (caucus meeting) to discuss the leaks. From what Don Denley, a City councilor who attended the May 3, 2004, meeting, recalled he raised questions about fixing the leaks and another councilor advised that it was a sensitive issue. Unfortunately, we do not have a records of what was said during that meeting because it was Council's practice not to keep minutes of caucus meetings. The meeting did not result in the City taking any action to investigate the mall or enforce its property standards by-laws.

**Don Denley, transcript of June 4, 2013, pp. 12840-3, lines 18-1**

**Rick Hamilton, transcript of July 8, 2013, p. 14928, lines 7-19**

302.On April 20, 2005, Fazekas showed Dan Gagnon, the assistant CAO, leaks from light rain on the 19th. Water was leaking in the bathroom, tech office and storage room. Three buckets in place to collect water lined one row. Gagnon advised her to write a letter expressing the library's concerns to the CAO or mayor. They did not want to involve NorDev at the time.

**Exhibit 11-81**

303.On April 27, 2005, Morin emailed Leddy requesting information about how to file a health and safety complaint because of the conditions in the library. That morning, library staff closed down half of the fiction area because of leaks. Morin wrote: "We had so many buckets in the aisles that we felt it was an accident waiting to happen. Many ceiling tiles were either removed or got so wet from the leaks that they have collapsed. Water pools into the light fixtures". She also noted that the bathroom floor was flooded with water twice in two weeks. Ms. Morin had been off work two days because of respiratory issues from the mould. Fazekas confirmed that Morin accurately described the events of April 27<sup>th</sup>.

**Exhibits 2018 & 2035****Barbara Fazekas, transcript of March 12, 2013, p. 1219, lines 2-18**

304. Minutes after her email to Leddy, Morin emailed the mayor and members of council about the recent leaks. She repeated much of what was in her previous email, urged them to reconsider renewing the lease in 4 years and invited them to view the library.

**Exhibit 11-82**

305. Rick Hamilton, then Deputy Mayor, conceded that the conditions described by Morin were not acceptable. However, none of the council members who received Morin's email, including Hamilton, bothered forwarding it to the Chief Building Official at the time, Syl Allard. If Allard had received the email, he would have considered it a complaint. He testified that it should have been forwarded to him.

**Syl Allard, transcript of April 29, 2013, pp. 7046-7051 , lines 22-20****Rick Hamilton, transcript of July 8, 2013, p. 15007-15010, lines 15-15**

306. In an email on the morning of April 27, 2005, to the library board, Fazekas described the scene at the library succinctly: "after this week's snowfall: bathroom floor flooded, plastic and buckets everywhere, moldy smell, water dripping on them as they work in the stacks, etc".

**Exhibit 11-83**

307. Later that day, McTaggart suggested to the Mayor, CAO and other councillors and staff that council discuss the leaks at the next caucus meeting on May 2nd. Speck replied to the recipients of McTaggart's email. He advised that Gagnon had requested a letter setting out the library's complaints and questioned the need for council's involvement.

**Exhibit 11-84**

308. On April 28, 2005, Fazekas responded:

Troy:

Dan was to advise me as to whom to address the letter: yourself or City Council. We have the letter with our concerns ready to go otherwise.

Dan was given a tour of the facility when he was here - my staff, with Ms. Morin in particular, just reach a point where they were fed up with water dripping down their necks from ceiling leaks when they were in the stacks, water on the floor in the bathroom, buckets everywhere and plastic sheets having to be placed over the stacks every night when rain is promised. I remember how water damage affected your staff last year when the roof leaked in City Hall. We've been working in this situation every year for the last 15.

**Exhibits 11-84, p. CEL\_P000004683 & 2034**

309. Speck responded tersely:

Barb:

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.

Troy.

**Exhibits 11-84, p. CEL\_P000004683**

310. Fazekas had several reasons to send the issue to Council. The library had been moved to the mall against the library board's desires to give the mall an anchor tenant. In 1989, the board advised Farkouh of its concern about leaks at the mall. In 1991 in a letter copied to the Farkouh and council, Ms. Taylor, the then chair of the library board, expressed the board's concerns with the ongoing leaks in the library and detailed the steps taken to protect the collection and avoid injury to staff and patrons. Still the leaks continued for 14 years despite the clear requirements of by-law 03-29 (and by law 79-15 before it) that the roof must be watertight and the floors, ceilings and walls must be kept free of moisture, dampness and

resulting fungus growth, and for 14 years the City failed to issue a single order to remedy obvious breaches of property standards by-law. Staff had proven itself ineffective in remedying the leaks.

**Exhibit, 11-11**

311. On May 3, 2005, a Ministry hygiene consultant performed an indoor air quality and mould assessment. His report dated May 10, 2005, noted sparse growth of mold in the carpet and abundant growth in the drywall. He recommended replacing the contaminated drywall and identifying and eliminating the source of the leaks. Fazekas gave a copy of the report to the city's health and safety committee.

**Exhibit 11-31, p. CEL\_P000004649**

**Barbara Fazekas, transcript of March 12, 2013, p. 1248, lines 5-8**

312. Robert Stirling also took samples for mould testing on May 3rd. The tests revealed sparse growth of mold in the carpet but abundant growth in the drywall. Fazekas also gave a copy of this report to the city's health and safety committee.

**Exhibit 11-91, p. CEL\_P000004664**

**Barbara Fazekas, transcript of March 12, 2013, p. 1249, lines 22-25**

313. By memorandum dated May 20, 2005, to Leddy, Gagnon and Morin, Fazekas attached laboratory analysis reports from EMC Scientific Incorporated for samples taken on May 12, 2005. The report noted very sparse mould growth in the tech office.

**Exhibit 2021**

314. Flooding in the library was such a frequent occurrence that on May 10, 2005, Leddy emailed Fazekas, Gagnon, Morin and Speck requesting a procedure be developed on what is

to be done when flooding occurs. At the time, Gagnon was the assistant CAO, and Speck was the CAO. As instructed, library staff developed a procedure.

**Exhibit 11-6**

**Exhibit 2020**

315. On May 11, 2005, Gagnon sent a memo to Fazekas. The memo identifies actions to be completed to remedy the mould. There was no mention of the efforts that the city would take to ensure the roof was watertight

**Exhibit 11-94**

316. In an email not produced during the inquiry, Speck sent Fazekas an email expressing his displeasure with the library staff's efforts to have the leaks addressed. He wrote: "This is not a goddamn strawberry social". The email was forwarded to the Mayor.

**Barbara Fazekas, transcript of March 12, 2013, pp. 1235-1236, lines 21-10 and p. 1236, lines 18-25**

317. A meeting amongst Fazekas, Kennealy, Speck, Farkouh, the library chair and vice-chair, and two board members was scheduled for June 15, 2005. Kennealy, who chaired the meeting, stressed the importance of written communication with the landlord in the future. He drew attention to a provision in the lease protecting the landlord against claims for compensation for water damage to property. He described the three options to deal with the roof: insert a waterproofing membrane between the concrete topping and concrete slabs, construct a structure over the roof or find a substance that seals the leaks. The third option was the preferred option. He also mentioned inserting a trough. The board members asked about a different location in the mall for the library, such as the bingo hall.

**Exhibit 11-18**

318. When Eastwood took over the mall in August 2005, the leaks did not improve.

**Barbara Fazekas, transcript of March 12, 2013, p. 1271, lines 12-16**

319. A year into Eastwood's ownership, a member of the library board, Kathy McTaggart, informed Allard of the problems the library was having and asked if it would be alright to forward some emails to him, but Allard did not consider this as a complaint, because she did not say that it was a complaint, did not say that she wanted the Building Department (who was responsible for investigating breaches of the property standards by-law and for enforcing its provisions) to take action, did not say that she expected a reply.

**Syl Allard, transcript of April 29, 2013, p. 7013, lines 13-25**

320. 2008 was a particularly bad year for leaks. On January 9 by email, Morin alerted Council that leaks were effecting the electrical system. Although Hamilton, who had by then become mayor, acknowledged that the complaints were getting worse, he took no steps to forward Morin's email to the Chief Building Officer.

**Exhibits 11-150 and 11-151**

**Rick Hamilton, transcript of July 9, 2013, p. 15074-7, lines 18-4**

321. On September 15, 2008, Bauthus wrote Eastwood about the ongoing problems with leaks. The letter was copied to the chief librarian Sue Morin and the mayor, Rick Hamilton. The letter was not copied to Ewald or anyone else at the building department, and there appears to be no good reason why. For the head of city staff should have understood the importance of forwarding a clear violation of the property standards by-laws to the building department. The Building Department is across the hall from the CAO's office and the mayor's office. Bauthus's failure to copy the building department may explain why Clouthier testified that he was not aware that the leaks continued in 2008.

**Exhibit 11-28**

**Chris Clouthier, transcript of April 23, 2013, p. 6442, lines 5-8 and p. 6467, lines 2-5**

322. Members of the public also complained about the ongoing leaks. Carolyn Davie emailed city councillor Ken Rastin about leaks in the library

**Exhibit 11-133\***

323. In April of 2008, another member of the public, Ms. S. Pomerleau, also emailed the City about the ongoing leaks in the library. Her email was forwarded to Mayor Hamilton, and Councillors Bray and Gagnon

**Exhibit 11-161**

324. Claire Diotte-Hart, another citizen, also emailed the City about the ongoing leaks at the library. Her email was also forwarded to the mayor and Bray, and to Gagnon. The email mentions the leaks and the tarps.

**Exhibit 11-162**

325. Cindy Britton-Foster emailed City council on April 7, 2008. She too complained about the leaks in the library, the effect they were having on the collection and the methods library staff were employing to protect the books.

**Exhibit 11-163**

326. The Building department was responsible for investigating breaches of the property standards by-law and enforcing it. When the mayor, staff and council failed to forward complaints to the building department, it took away the building department's ability to protect the citizens, to exercise its specialized knowledge and experience to deal with issues that it was alone qualified by specialized training and education and empowered to address. They also deprived the building department from establishing a clear paper record of complaints, one that could be reviewed and considered when determining whether or not to investigate the leaks, to retain a structural engineer, to issue an order to remedy or to communicate with its peers at the Ministry of Labour who could exercise powers under the Occupational Health and Safety Act.

327. Not having a clear internal policy at the City that required staff and councilors to forward copies of all building related complaints to the building department was an institutional failure. That being said, the building department's failure to enforce the property standards by-laws pertaining to maintaining the roof in a watertight condition when the ongoing problem of leaks was brought to its attention appears to demonstrate that even if Bauthus had copied the building department on his September 15, 2008, letter, the building department would have done nothing.

#### **10. To Protect the City You Had to Protect the Mall**

328. Protecting the mall was perceived by key individuals in the politics and business of Elliot Lake as tantamount to protecting the city. Council's reaction to Denley's efforts to discuss fixing the leaks and Ewald's reaction to deputy mayor Collett's report of falling concrete in the mall are evidence of how this belief affected the building office. It did not just affect Council or the building department's behaviour towards enforcing the property standards by-laws to affect the mall negatively, but also affected what citizens believed the City was willing to do to enforce its by-laws against the mall. The City's failures to act may have given the impression that the mall owners could operate with impunity.

329. It influenced Zellers's behaviour. When Cuthbertson was asked if he had ever reported the leaks to the City, he responded:

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 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.

Q. Is it fair to say that everyone knew it leaked --

A. Yes.

**Brian Cuthbertson, transcript of May 1, 2013 pp. 7808-7809, lines 21-4**

330. Eventually, it also affected the library's behaviour. The library did not report every leak to the city: "And based on past experience with the lack of action taken by the City, it just grew really frustrating that we -- there wasn't any point in reporting every incident".

**Barbara Fazekas, transcript of March 12, 2013 p. 1261, lines 21-25**

331. And at times, the City did allow the owners to act with impunity. On October 18, 2006, Tom Derreck, the new CAO, instructed Clouthier to inspect the library. He told Clouthier that the library "was a mess, there was [sic] lots of leaks. And they had [sic] a real problem over there and he wanted me to go investigate that". As Clouthier walked down the hallway towards the library, he could see the leaks, pails, white buckets, missing ceiling tiles and blue tarps over books. He could see that the roof was leaking in many places. The carpet was wet. Library staff showed him the damage.

**Chris Clouthier, transcript of April 23, 2013, p. 6372, lines 1-5; p. 6378, lines 2-6; pp. 6378-6379, lines 21-10; p. 6381, lines 1-4; and pp. 6384-6385, lines 22-1**

332. On October 19, 2006, Clouthier returned to the mall with the chief building official, Syl Allard. They saw leaks in the library, Zellers, Northern Reflections and possibly the Bank of Nova Scotia. The Zellers had a lot of leaks, missing ceiling tiles and buckets. The Northern Reflections was closed because of the leaks. There were buckets on the floor. There was water on the floor too. They made their observations from the floor. They didn't go above the tiles to look at the structure.

**Chris Clouthier, transcript of April 23, 2013, p. 6373, lines 2-16; p. 6389, lines 10-12; and pp. 6397-6398, lines 20-3****Syl Allard, transcript of April 29, 2013, p. 7132, lines 3-19**

333. After the inspection, Allard reported back to Derreck. Regarding the risk of leaks to the structure, Allard wrote "In any of the areas observed, there was nothing seen or mentioned that would lead us to believe the structure is in imminent danger of collapse or for that matter that it is anywhere close to this condition". According to Clouthier, Allard was not in a position to make such a conclusion:

I would think that it would not be enough of an area, or enough detail seen to make a determination. Like you couldn't -- he was looking at just a piece of beam, not connections and other -- a bigger area. There's a lot of steel beam going throughout the building. So he's just looking at one small little section.

And Allard conceded that he did not look at any connections, perform a widespread examination of the structural members or have the best vantage point.

**Chris Clouthier, transcript of April 23, 2013, p. 6402, lines 9-15**

**Syl Allard, transcript of April 29, 2013, pp. 7133-4, lines 24-10**

334. By letter dated October 30, 2006, Derreck delivered a notice of violation to Eastwood. The letter was copied to the Mayor, Morin, Officer and Allard. Clouthier testified that as far as he knows, all steps following the notice of violation were handled by Allard alone. Clouthier did not follow-up with the library because he believed that Allard was making sure that the owner was remediating the problem.

**Exhibit 6419**

**Chris Clouthier, transcript of April 23, 2013, p. 6428, lines 8-12 and p. 6429, lines 12-17**

335. After issuing the notice of violation, Allard did not visit the mall to ensure it was watertight. He merely “took it at face value” that Eastwood was remediating the roof to make it watertight. The City failed to follow up with the notice of violation.

**Syl Allard, transcript of April 29, 2013, pp. 7156-8, lines 5-19**

336. In February of 2008, the building department received a complaint about the parking lot vibrating. The complaint was assigned to Dale Swan, who contacted the mall manager, Brian England. Rather than investigate the complaint, Swan merely passed it along to England. If Clouthier had received this complaint, he might have brought it to the attention of the CBO.

**Exhibit 161**

**Chris Clouthier, transcript of April 23, 2013, p. 6450, lines 19-24**

337. On June 27, 2008, Clouthier issued an order to comply against Eastwood. It was an order compelling Eastwood to obtain a building permit before constructing or demolishing the roof deck.

**Exhibit 303**

338. The order to comply was sparked by a call to the Building Department. Work was being performed on top of the roof deck. Clouthier went to the mall to investigate. He saw large compressors with hoses and jackhammers and a crew of six to eight men working on the roof. He told England that Eastwood wasn't to carry out any work without first getting a permit, and that an engineering architect would have to be involved in the plans for the repair of the roof deck. This was another opportunity in which a properly qualified engineer or architect could have alerted the City to the significant damage from corrosion to the steel structure and to the significant risk of collapse. He gave Eastwood three days to apply for a building permit. Eastwood submitted an application. Swan received the application and alerted England that it was deficient. Ewald took over the file on July 7th and was briefed by Clouthier. On July 10th, Ewald spoke to John Clinckett.

**Exhibit 172****Exhibit 3422**

**Chris Clouthier, transcript of April 23, 2013 pp. 6453-6461, lines 19-7 and pp. 6464-6465, lines 20-4**

339. By July 21st, Eastwood still had not complied with Clouthier's order, and by October 1, 2008, it became clear that Eastwood had no intention of complying. Ms. McCleery wrote Bauthus on behalf of Nazarian and Eastwood advising that the repairs over the roof had been completed. Clouthier was not aware that the repairs continued despite the order to comply and Eastwood's failure to comply. There is no evidence that Bauthus forwarded this letter to the Building Department.

**Exhibit 11-30**

**Chris Clouthier, transcript of April 23, 2013, p. 6468, lines 7-11**

340. On September 24, 2009, Bauthus wrote to council, and copied Ewald, Officer and Virginia MacLean, the city solicitor. The purpose of the email was to notify Council that no one had followed up with the October 30, 2006, notice of violation issued to Eastwood. Bauthus offered that a reason for the city's failure to follow up on the notice was Derreck's arrangement to communicate directly with then mall manager Tom Turner and their

subsequent departures from their roles. He also advised council that Eastwood was repairing the roof without a permit or an engineering assessment. Finally, he advised that the city would be meeting with Eastwood to address the issues and ensure the Code was met. He assured council that the City would issue an order. Allard failed to inform Clouthier that he had not followed up on the October 30, 2006, notice of violation. Despite Bauthus's assurances, the City never ensured that the mall shed or drained water effectively. It never ensured the roof was watertight.

**Exhibit 357**

341. Bauthus's email followed a meeting amongst him, the mayor, Ewald, and MacLean on September 24. According to Ewald, at the meeting he came to the conclusion that it was time to issue an order to remedy against Eastwood. At that time, he did not know the full extent of what he was dealing with, but he knew that there were leaks.

**Bruce Ewald, transcript of May 24, 2013, pp. 11563-6, lines 10-25**

342. Later on September 24, Ewald inspected the mall. He saw evidence of water leakage above the food court, Dollarama, Bargain Shop and the service hall behind the Dollarama, and saw rust on the steel stairway outside of Foodland. As part of the inspection, Ewald observed the beam that collapsed on June 23, 2012. He did not inspect the connection between the beam and column. As a result of his inspection, Ewald concluded that the structure of the entire building had to be inspected, including all connections. The Order to Remedy Violation noted the roof's non-watertight condition as a deficiency.

**Bruce Ewald, transcript of May 27, 2013, pp. 11584-90, lines 16-22**

**Exhibits 1648, 1649, 1650, 102, 4374, & 4375**

343. Bob Wood performed the structural assessment. He concluded that the inspection revealed no visual structural concerns both in the structural steel and concrete slabs, but his opinion was not based on an inspection of the entire mall. Ewald was not aware of this because he did not see the scope of work that Eastwood had given to Wood.

**Exhibit 102, NL\_E000000190.0012****Bruce Ewald, transcript of May 27, 2013, p. 11584, lines 1-8**

344. Although Wood's structural assessment reported that the building was structurally sound, there were clear signs that it was not so. In May of 2011, a large piece of concrete fell from a deteriorated concrete slab into the kitchen at Hungary Jack's. The piece of concrete was 24 to 30 inches long and weighed about 20 pounds. It bore a long stain of rust along its length. The rust and the falling concrete were obvious signs of corrosion. Jack Quinte asked deputy mayor Al Collett to come to the restaurant to see the piece of concrete. After seeing it, Collett went to Ewald. Collett testified:

I went to Bruce Ewald, attended his office, told him what I saw and asked him the question what are we going to do about this, because this was not the first occasion of things like this. And his response to me was it is difficult, it would be very -- it would look very bad for the City to shut the mall down. My response to that, and I regret saying it now, was, What are we waiting for, somebody to die?

**Exhibit 2359**

**Elaine Quinte, transcript of July 31, 2013, pp. 249-250, lines 25-8; pp. 241-2, lines 20-7; pp. 246-7, lines 23-3; and August 1, 2013, pp. 239-240, lines 16-**

**Al Collett, transcript of May 23, 2013 pp. 11077-11079, lines 17-2**

345. Ewald recounted the events similarly:

Q. Did you say, sir, to Collett words now to the effect of "This is a difficult issue, it would look very bad for the City to shut the mall down."

A. I believe that's paraphrasing it, but, yes.

Q. Why did you tell him that?

A. What I had said was "What do you want me to do, Al, close down the mall?" It was a flippant remark on my part, but absolutely--I mean, it would have been economically detrimental to the City, I believe, to close down the mall down.

**Bruce Ewald, transcript of May 25, 2013 p. 11772, lines 9-20**

346. Ewald agreed the concrete that fell was part of a structural component of the mall, that it could suggest a structural problem, and that it caused him concern, but he did not investigate it. Nor did he deny that Collett asked if the City was waiting for someone to die.

**Al Collett, transcript of May 23, 2013, pp. 11077-11078, lines 12-10**

**Bruce Ewald, transcript of May 28, 2013, pp. 11768-11772, lines 17-23; pp. 11837-11838, lines 18-18; and pp. 11875-11876, lines 11-3**

347. That was the final, clear opportunity the City had to shut down the mall before the roof collapsed on June 23, 2012. By then the steel structure had corroded to such a degree that a retrofit was necessary, but the City was not aware of this because it had failed on more than one occasion to take the complaints of the library staff seriously and to suspend long enough their fear of what would happen if the mall closed to consider the growing danger of more than thirty years of leaks on a steel structure. In more than thirty years, every single politician and staff who moved through Elliot Lake failed to ensure the mall's ceilings, walls and floors were free of moisture and mould, the roof was maintained in a watertight condition and the mall was structurally sound.

## **F. Ministry of Labour**

### **i. The Ministry Shared Responsibility for the Health and Safety of the Mall's Workers**

348. The Ministry of Labour had a responsibility to protect the health and safety of the workers at the mall. The purpose of the *Occupational Health and Safety Act* is to keep workers safe. Responsibility for the health and safety of workers is a shared responsibility. Everyone in the workplace (employers, supervisors, workers) bears some responsibility for the health and safety of workers under the Internal Responsibility System.

**Sophie Dennis, transcript of April 30, 2013, p. 7469, lines 3-18 and p. 7477, lines 10-12**

349. The Ministry also has a responsibility as the party who administers and enforces the *Act*. Only the Ministry has broad statutory authority to investigate workplaces with the aid of experts, issue orders to address contraventions of the *Act*, ensure workplaces are compliant with the *Act*, and close a workplace, if necessary.

***Occupational Health and Safety Act, R.S.O. 1990, CHAPTER O.1, ss. 4.1, 54(1), 55, 55.1, 55.2, 57***

350.To ensure employers satisfy their obligations under the Act, the Ministry of Labour's inspectors perform pro-active and reactive visits to workplaces. Pro-active visits are unannounced and directed at looking for problems; reactive visits are responses to complaints. Inspectors are to notify their managers of complaints received in person and of what they intend to do about them.

**Sophie Dennis, transcript of April 30, 2013, pp. 7510-7511, lines 5-5 and p. 7517, lines 9-22**

**Ralph Regan, transcript of June 5 2013, p. 12980, lines 6-16**

351.During either type of visit, the Ministry expects its inspectors to speak with a representative of the health and safety committee, request committee meeting minutes, and ask the committee representative if there are any issues left unresolved. Inspectors are also expected to look for any contraventions or hazards and issue orders if required. All of these activities should be documented in the inspector's notebook.

**Sophie Dennis, transcript of April 30, 2013, pp. 7505-7506, lines 17-22 and p. 7554, lines 3-16**

352.The MOL had several opportunities to prevent the collapse of the roof but failed to take advantage of them because of individual and institutional failures. Between 1995 and 2011, the Ministry's inspectors visited the mall for both proactive and reactive visits several times. During those visits, inspectors Ralph Regan ("**Regan**") and Ed Hudson ("**Hudson**") failed to meet the Ministry's expectations when investigating leaks.

**ii. Missed Opportunities: the Ministry's Inspections and Investigations from 1995 to 2011**

353.The Ministry had several basic expectations of inspectors while visiting a site for reasons related to leaks. Sophie Dennis ("**Dennis**"), the Assistant Deputy Minister of the Ministry of Labour, testified that inspectors are expected to ask where the roof is leaking, to see if there are leaks at those locations and to determine the extent of them. Inspectors are also expected to get more information about the leaks from workers, who as a matter of time and exposure would have the most knowledge and experience of the leaks and their effects.

**Sophie Dennis, transcript of April 30, 2013, pp. 7537-7538, lines 23-12**

354.Regan inspected the library five times. On several of those visits, he was accompanied by a specialist. His report of September 22, 1995, describes his first inspection of the library. It was a reactive visit in response to complaints about nausea and tiredness from mould. He and Dr. Woychuck, a medical consultant from the Ministry, met with Barbara Fazekas (chief librarian), Phil Butler (co-chair of the City's health and safety management committee) and Debbie Quinn (a representative of the workers). There is no evidence in his report that he reviewed the health and safety committee meeting minutes.

**Exh. 3843, MOL\_P000000980**

**Exh. 3844, MOL\_P000001003**

355.Regan does not recall inspecting the library, but assumes that he did. Scant detail of the complaints and any signs of leaks suggest that Regan failed to ask basic questions to determine the nature and extent of the leaks: who can tell me about the leaks? when did they begin? when do they happen? where are the leaks? Are they restricted to the library? how have the leaks effected the library? the building? Why are the leaks ongoing? Hindsight is not what gives us the clarity and knowledge to ask such basic questions. It is the common experience and knowledge of what is required to get to the truth of any matter, including the condition of a building and the dangers posed to the health and safety of workers. Given the many detailed complaints that Fazekas and other library staff made to City officials during the period of Regan's inspections, it seems highly improbable that they would not have shared detailed information about the extent and nature of the leaks if Regan had made such inquiries.

**Exh. 3843, MOL\_P000000980**

**See a chronological account of Fazekas's complaints about leaks under the City of Elliot Lake, "A History of Leaks"**

356.These questions do not spring from the benefit of hindsight. It is evident that Dr. Woychuk considered them. He noted "contacts advise that, at different times of the year there is water leakage through the ceiling sufficient enough to warrant covering shelves of library books with plastic sheets, using containers as large as a plastic garbage can to catch the water running down from the ceiling, etc.". He also observed 47 stained ceiling tiles in the library; Regan does not recall seeing the same evidence of leaking. Although Fazekas

pointed out the stained ceiling tiles to Regan, he did not detail them in his report. Nor did he ask where the water was coming from. There is evidence that Regan failed to observe the signs of leaks because he was not present at the library long enough to observe them:

Q. Were you with Dr. Woychuck when he made his inspection?

A. No I wasn't.

Q. You did not accompany him?

A. No. I took him in 'and introduced him to people and that was it.

Q. And then you left --

A. I left doing something else, yes.

**Exhibit 3844, p. MOL\_P000001004**

**Ralph Regan, transcript of June 5, 2013, p. 13002, lines 3-5; p. 13004, lines 18-23; and p. 13006, lines 6-9**

357. In his report as part of his advice to the health and safety committee, Dr. Woychuck suggested that the source of water should be identified and corrected. Regan does not recall discussing this recommendation with him.

**Exhibit 3844, p. MOL\_P000001004**

**Ralph Regan, transcript of June 5, 2013 pp. 13007-13008, lines 24-2**

358. Regan's report of December 19, 1995, details his second inspection of the library. He was accompanied by Bob Wright, a hygienist retained by the Ministry of Labour, and they met Fazekas, Butler and Quinn. Again, his report fails to detail the signs of leaks. Although Regan does not recall discussing the leaks with the health and Safety committee or with Fazekas during this visit, Fazekas recollects that he spoke to the staff.

**Exhibit 1434**

**Barbara Fazekas, transcript of March 12, 2013, p. 1169, lines 1-3**

**Ralph Regan, transcript of June 5, 2013, p. 13009, lines 7-11**

359. On July 9, 1996, Regan met with Fazekas to discuss Wright's report. Regan does not recall that visit. Although he believes it would have been his practice to follow up with a recommendation like the one made by Dr. Woychuck in September of 1995, he has no recollection of following up with it. During this inspection, someone advised Regan that there was heavy rusting on steel beams. Regan made no mention of it in his report. He did not make any orders.

**Exhibit 1435****Exhibit 3845****Ralph Regan, transcript of June 5, 2013, pp. 13009-13011, lines 24-7 and pp. 13050-13051, lines 21-4**

360. Regan inspected other workplaces at the mall, for reasons related and unrelated to leaks. On March 29, 2001, he visited SAAN, which was located in the south-east corner of the mall, the end almost opposite to the library. During his visit, he observed stained ceiling tiles, and he ordered the store to check for mould. The order was prompted by his experience in the library. Still he failed to issue any orders or recommendations to find and eliminate the source of the leaks.

**Exhibit 3848, p. MOL\_P000000842****Ralph Regan, transcript of June 5, 2013 p. 13012, lines 4-25**

361. On December 21, 2001, he visited Zellers. Although his report indicates that there was a joint health and safety committee in place, nothing in his report indicates that he spoke with any of its members or a worker representative, or reviewed the committee's meeting minutes. A committee member should have been given the opportunity to accompany Regan during his inspection. Based on the testimony of Cuthbertson, it is likely that stained ceiling tiles were visible; however, Regan does not recall seeing any stained ceiling tiles or tarps or buckets on the floor. His report fails to mention any visible signs of water damage. He issued no orders.

**Occupational Health and Safety Act, R.S.O. 1990, CHAPTER O.1, 54(3)****Exhibit 12-2, p. HBC\_E000000447\_063****Exhibit 3849****Ralph Regan, transcript of June 5, 2013, p. 13014, lines 9-25**

362. On May 29, 2002, Regan performed a proactive inspection of the library. He again met with Fazekas. At that time, stained and missing ceiling tiles would likely have been visible. Plastic tarp sheets covering the books, buckets, stained carpets, missing fluorescent tubes, drip pans and hoses may have also been visible. Despite the history of leaks at the library, Regan did not ask Fazekas about them, and he does not recall following up on Dr. Woychuck's recommendation from 1995. However, he did issue an order to repair the light fixtures to prevent shadows. Based on Fazekas's testimony about the effect of the leaks on lighting, it is likely that the leaks were the cause of the lighting issues. Although it had been

nearly seven years since Regan's first visit to the library for reasons related to leaks, despite the recommendation of Dr. Woychuck, Regan failed to issue any order or make any recommendation to eliminate the source of leaks.

**Exhibit 3850, p. MOL\_E000007861**

**Barbara Fazekas, transcript of March 12, 2013, pp. 1276-1280, lines 11-23**

**Ralph Regan, transcript of June 5, 2013, pp. 13015-13016, lines 9-3**

363. Regan returned to Zellers on November 6, 2003. All that Regan recalls observing is "the odd stained tile". He does not recall reviewing the health and Safety Committee meeting minutes. There is no evidence that Regan asked the committee representative if there were any unresolved issues or asked for any details about the leaks.

**Exhibit 3851**

**Ralph Regan, transcript of June 5, 2013, pp. 13016-13017, lines 16-25**

364. On April 27, 2005, half of the fiction area was closed to the public and staff because of leaks. As librarian, Suzanne Morin, detailed in an email:

We had so many buckets in the aisles that we felt it was an accident waiting to happen. Many ceiling tiles were either removed or got so wet from the leaks that they have collapsed. Water pools in the light fixtures.

**Exhibit 1145**

365. Regan spoke with Fazekas by telephone on April 28th. It seems highly probable that Fazekas would have relayed details of the leaks to Regan during the call.

**Exhibit 11-89, p. CEL\_P000004666**

**Exhibit 1145**

366. A few days later on May 3rd, Regan inspected the library for the fifth time. He does not recall the reason for the visit, but from a memorandum of Fazekas dated May 4, 2005, we can reasonably conclude that it was an inspection reactive to Fazekas's request for a check of the library's air quality. Regan was accompanied by Tony Fontana, a hygienist from the Ministry. Fazekas's concern remained mould from leaks.

**Exhibit 11-89**

**Exhibit 1436**

**Ralph Regan, transcript of June 5, 2013, p. 13022, lines 2-21**

367.Regan does not recall anyone describing the leaks during the May 3rd visit, or seeing missing ceiling tiles, tarps covering books or buckets to catch water. All that he recalls seeing were an unknown number of stained ceiling tiles.

**Ralph Regan, transcript of June 5, 2013 pp. 13025-13027, lines 11-3**

368.Fontana saw stains on many of the dropped ceiling tiles. He inferred they were evidence of previous water infiltration, and recommended identifying and eliminating the sources of the leaks. During his testimony, Regan acknowledged that Fontana's recommendation is remarkably similar to Dr. Woychuck's from ten years earlier.

**Exhibit 11-31**

**Exhibit 2023**

**Ralph Regan, transcript of June 5, 2013, p. 13030, lines 7-20 and p. 13039, lines 19-25**

369.After Regan retired, Ed Hudson took responsibility for Elliot Lake. Over nearly 5 years, Hudson was in the mall 25 days for field visits. He stayed at the Algo Inn maybe once or twice and grabbed a coffee or lunch at the food court a number of times. He visited Zellers twice, but only as a customer. He testified that he never saw an indication of leaks.

**Ed Hudson, transcript of July 8, 2013 p. 14769, lines 5-15; pp. 14770-14772, lines 1-10; and p. 14818, lines 6-12**

370.On January 11, 2012, Hudson performed a reactive visit to the mall in response to an anonymous complaint about leaks, mould and an unsafe escalator. After parking his car on the roof top deck, Hudson went down to the food court, and looked around in that area.

**Exhibit 155, p. CEL\_E000003132\_002**

**Exhibit 1438**

**Ed Hudson, transcript of July 8, 2013, pp. 14816-14819, lines 13-3**

373. He bought a lottery ticket at the kiosk. Only 20 feet from the kiosk, there was a large hole in the ceiling left by missing drywall, but Hudson does not recall seeing it, but concedes that he was very close to it. While he bought the ticket, he did not bother asking the person at the kiosk about the leaks.

**Ed Hudson, transcript of July 8, 2013, p. 14825, lines 15-19; pp. 14819-14822, lines 13-3; p. 14827, lines 11-19**

**Rhonda Lendt, transcript of June 12, 2013, pp. 14140-2, lines 8-10  
Exhibit 155, CEL\_E000003132\_002**

374. Although the complaint that brought him to the mall was a general complaint about leaks in the mall, he did not visit a single store to check for leaks. Instead, he met with Rhonda Bear, who confirmed that the mall leaked. The confirmation of the leaks did not cause Hudson to ask detailed questions about the leaks to find out how long they had been occurring, how extensive they were, how they had been dealt with in the past. It also did not cause him to visit any of the stores, including Zellers, which occupied just under a third of the leasable retail space in the mall.

**Ed Hudson, transcript of July 8, 2013, pp. 14819-14822, lines 13-3; p. 14825, lines 15-19; and p. 14827, lines 11-19**

375. In Zellers large, yellow tarps hung from the ceiling. Water would run through a hole in the tarp, down a hose, away from the merchandise, into buckets. According to Brian Cuthbertson, the manager of Zellers, if an inspector had visited the store, the buckets, missing ceiling tiles and yellow tarps would have been obvious. The yellow tarps would have been “hard to miss”.

**Exhibit 12-40**

**Exhibit 12-46**

**Exhibit 4060**

**Brian Cuthbertson, transcript of May 1, 2013, p. 7767, lines 17-24, p. 7786, lines 1-9; and p. 7795, lines 1-17**

376. Had Hudson visited Dollarama he may have seen a bucket balanced on boards above the suspended ceiling, stained ceiling tiles, rubber buckets and pails on top of shelves. Had he walked down the main corridor he may have seen plastic sheeting and a hose to catch water. Had he visited the library he would have seen water collection trays. The above were visible to NORR when they conducted their inspection after the roof collapse.

**Exhibit 3007, p. 90 and 110**

377. Hudson acknowledged that if he had reviewed the meeting minutes of the joint health and safety committee of Zellers and saw the missing and stained ceiling tiles and the yellow tarps and buckets in place to catch water, he would have asked several questions:

How long? How fast? What is the rate of flow? What are you doing? How are you protecting workers?

**Ed Hudson, transcript of July 8, 2013, p. 14782, lines 9-12**

In addition, he probably would have spoken with the mall owner and consulted a Ministry engineer to ensure there was no contravention. Dennis also acknowledged that an inspector upon seeing the tarps suspended from the ceiling in Zellers ought to make further inquiries about the extent of the leaks.

**Exhibit 12-95**

**Sophie Dennis, transcript of April 30, 2013 p. 7563, lines 17-21**

**Ed Hudson, transcript of July 8, 2013 p. 14782, lines 9-25**

378. Nor did he ask Bear where in the mall the leaks occurred. He explained his reasons for not doing so as follows:

I was very satisfied with what she was doing as a maintenance preventative program and what she was doing in terms of a plan.

**Ed Hudson, transcript of July 8, 2013 p. 14827, lines 14-19**

379. Hudson failed to inspect the mall because Bear assured him that she was looking into a solution for the ongoing leaks. Although it was his practice to speak with a worker representative and the Ministry's expectation, he did not ask to speak with one.

**Ed Hudson, transcript of July 8, 2013, p. 14738, lines 4-23; p. 14745, lines 17-19; p. 14746, lines 1-8; and p. 14828, lines 20-25**

380. They discussed her upcoming wedding and based upon his comfort in her confident demeanour, Hudson concluded that there was no issue requiring a further investigation or referral to a structural engineer or order to repair.

**Ed Hudson, transcript of July 8, 2013 pp. 14824-14827, lines 20-7 and p. 14833, lines 9-12**

381. Regarding the other two reasons for his field visit, he did not ask Bear if there was a problem with mould in the mall, or ask her any questions about the escalator.

**Ed Hudson, transcript of July 8, 2013 p. 14830, lines 6-9 and p. 14834, lines 8-11**

382. Hudson returned to the mall for visits on April 11 and May 24, 2012, but failed to follow up on what was being done to fix the leaks.

**Ed Hudson, transcript of July 8, 2013 pp. 14835-14836, lines 11-2**

383. Hudson's investigation into the leaks was inadequate. There is a reason why Hudson can claim not to have seen evidence of leaks. He failed to look for them. They were above his head at the lottery kiosk, down the main corridor, and in the stores, including the biggest one, by far, Zellers. If he had visited Zellers and either looked at the ceiling or spoken to a member of the joint health and safety committee, he could have learned about the mall's 30-year history of leaks, about the mall owner's previous, repeated, broken promises to repair the roof, about leaks in other workplaces, such as Dollarama, Northern Reflections, the library. He would have been suitably informed to regard Eastwood's promises to repair the roof with a suitable amount of skepticism. Hudson had no reasonable basis on which to be satisfied with Eastwood's approach to the leaks.

384. There is no evidence that either Regan or Hudson made any effort to visit the mall when it rained or when snow was melting. They made no mention of the weather conditions at the time of their investigations even though they should have.

385. Neither inspector ever consulted a structural engineer to learn more about the danger that ongoing leaks posed to the steel structure or to visit the mall.

**Sophie Dennis, transcript of May 1, 2013 p. 7730, lines 7-14**

**iii. Institutional Failures of the Ministry of Labour**

386. Regan and Hudson's inadequate investigations are the fruit borne of inadequate training, policies and procedures, and other institutional failures. Several institutional failures caused the Ministry to miss opportunities to identify and address the risk of corrosion to the mall's steel structure and to close the mall when the corrosion reached a critical stage:

1. its inspectors were inadequately trained;
2. it failed to have a system in place for inspectors to easily access previous, relevant reports for the same property;
3. it failed to have policies in place requiring inspectors to review previous reports;
4. it failed to provide its inspectors with appropriate oversight; and
5. it created a culture too ready to push responsibility for protecting employees' health and welfare on employers and employees and too reluctant to exercise its investigatory and enforcement powers under the *Act*.

**iv. Regan and Hudson were Inadequately Trained to Identify the Risk of Corrosion**

387. Dennis testified that inspectors receive six months of training in the *Occupational Health and Safety Act* and the Ministry's policies and procedures. This is to be followed by continuous training and re-training. Regan started working for the Ministry in 1981 as an environmental inspector. He could not recall receiving any formal training in the *Occupational Health and Safety Act* or its regulations when he started with the Ministry of Labour, nor could he recall receiving other training, except for WHIMS "and stuff like that". He simply applied the *Act* based on what he had read.

**Sophie Dennis, transcript of April 30, 2013 p. 7486, lines 10-13**

**Ralph Regan, transcript of June 5, 2013 p. 12969, lines 5-24 and pp. 12970-12971, lines 10-10**

388. In 1992 or 1993, he became an industrial inspector, responsible for retail spaces including the mall. When the Ministry designated him as an industrial inspector, it provided Regan with training relevant to logging, had him shadow an inspector in the logging industry and provided him with courses in chain saws and fork lifts. It provided him with no other significant training for his new responsibilities as an industrial inspector. Regan did not have "a whole lot" of insight or experience with rust and structures or receive any policies or training about structural inspections. Although he had powers relating to the *Building Code Act*, the Ministry failed to provide him with any training in the *Act*, and he lacked experience with it.

***Occupational Health and Safety Act, R.S.O. 1990, CHAPTER O.1, s. 54(1)(m)***

**Ralph Regan, transcript of June 5, 2013 p.12972, lines 19-23; p. 12973, lines 14-22; p. 12994, lines 3-5; pp. 13056-13057, lines 6-18; and p. 13059, lines 10-12**

389. After Regan's retirement, Hudson took over responsibility for Elliot Lake in the latter part of 2007. he started working for the Ministry on January 9, 1984, as an

industrial inspector. Between 1984 and 1986, he mainly inspected forestry related workplaces in the Thunder Bay district. He was transferred to Sault Ste. Marie in 1986.

**Ed Hudson, transcript of July 8, 2013 p. 14729, lines 17-23; pp. 14734-14735, lines 2-12; and p. 14762, lines 19-22**

390. He recalls receiving one-on-one initial training on the *Occupational Health and Safety Act* and its regulations. He also recalls shadowing seasoned inspectors over a period of six months. Most of what he learned about how to perform an inspection, he learned while shadowing these inspectors. He received “minimal” training on what kinds of notes he was supposed to take.

**Ed Hudson, transcript of July 8, 2013 pp. 14730-14731, lines 6-23 and pp. 14856-14857, lines 22-1**

391. Neither inspector received adequate or comprehensive training to perform competent industrial inspections, or received sufficient training to recognize the risks of corrosion. Although leaks may have a corrosive effect on a building's structure, the Ministry does not provide its inspectors with training on the *Building Code's* requirement that a building be designed to be watertight.

**Sophie Dennis, transcript of April 30 2013, p. 7488, lines 14-18**

392. The Ministry did not equip them to be alert to the risks of corrosion posed by leaks. Ms. Dennis could not identify any kind of training that the Ministry provides inspectors to assist them in dealing with structural integrity hazards. Although the Ministry provides its inspectors with a field visit module and the inspectors have the power to make orders relating to the structural soundness of a workplace, the module is silent on how to assess structural soundness.

**Exhibit 4122**

**Sophie Dennis, transcript of May 1 2013, pp. 7665-7666, lines 23-9 and p. 7678, lines 6-14**

393. Besides failing to observe obvious signs of ongoing leaks, Regan and Hudson failed to obtain sufficient information about the leaks to determine whether further

investigation was necessary or a structural assessment from a suitably qualified engineer should be obtained

394. Although the Ministry had a structural engineer in Sudbury available for consultation, the Ministry failed to train either Regan or Hudson about the dangers that leaks pose to the structural integrity of a building and the need to consult a structural engineer when presented with a building plagued by ongoing, widespread leaks. Both men failed to recognize the need to consult a structural engineer.

395. Regan acknowledged that he had no reason to believe the leaks had improved between 1995 and 2005, that water can corrode a building, including structural steel, that heavy rusting should be examined as a potential clue to a structural issue, and that he had the authority to make an order regarding the heavy rusting. But it never occurred to him that the structural integrity of the mall was at risk. He did not consult an engineer because despite seeing numerous signs of leaks in different parts of the mall he did not see any leaks at the time he was in the mall.

**Ralph Regan, transcript of June 5, 2013, pp. 13033-13034, lines 3-2; p. 13036, lines 8-17; p. 13053, lines 7-12; and p. 13060, lines 16-21**

396. On January 11, 2012, Hudson visited the mall to investigate a general complaint about leaks. Since the complaint was general, he did not know if it was in one store or several, if it was on the top floor or the bottom. Yet he failed to visit a single store or speak with a single worker. He failed to obtain information about the history and extent of the leaks and about how they had been repaired previously. He failed to ask basic, essential questions.

397. The Ministry should have formally trained them to pursue information about the nature and extent of the leaks until they obtained answers. It also should have formally trained them to consult a structural engineer when uncertain of the effects that leaks could pose to a structure. Had Regan or Hudson requested a structural engineer assess the mall, the Ministry may have discovered the corroded state of the steel structure, closed down the mall and ordered appropriate repairs. This was a missed opportunity.

**v. Failing to Review Previous, Relevant Reports**

398. At least until 2005, the Ministry failed to have a system in place for inspectors to easily access previous, relevant reports. It also failed to emphasize the importance of reviewing such historical documents and require them to do so. As Regan testified, he did not have access to previous reports:

Q. And on that point, Regan, when you were working as an inspector was there a filing system in place where before making a pro-active inspection you could look up the previous history of a workplace?

A. Not really, no, unless it was in Sault Ste. Marie or Sudbury maybe, but we didn't have one in Elliot Lake.

**Ralph Regan, transcript of June 5, 2013, pp. 12981-12982, lines 19-1**

399. Hudson testified that he had the ability to look up previous reports from Regan, but as a general practice, he did not look at earlier inspection reports or the minutes of the joint health and safety committee. He did not think it was required.

**Ed Hudson, transcript of July 8, 2013, p. 14747, lines 4-17; p. 14748, lines 18-25; and p. 14890, lines 4-10**

400. After Regan retired, Hudson was responsible for Elliot Lake. Regan did not brief Hudson about the conditions of any particular workplace, including the mall, in person or in writing. And Hudson made no inquiries, by looking through records or speaking with people, about workplaces in Elliot Lake that might need special attention.

**Ralph Regan, transcript of June 5, 2013 p. 13042, lines 4-24**

**Ed Hudson, transcript of July 8, 2013 p. 14765, lines 14-21**

401. In the absence of an outstanding order, there is no evidence that the Ministry had any policies or procedures in place to ensure that outgoing inspectors brief incoming inspectors about ongoing issues that could pose a risk to the health and welfare of employees within his or her jurisdiction.

**vi. Lack of Oversight and Review**

402. Dennis testified that the Ministry has "embarked on a quality journey that includes auditing the work of inspectors, attending with them in the field, providing them with feedback and identifying gaps in their training. The Ministry is attempting to adopt the National Quality Institute standards. Over the last five years, it has begun to review and supervise the quality of its inspectors field visits, but this system was not in place before Regan retired in 2005, and it failed to capture the inadequacies of Hudson's January 11, 2012, field visit. No one in a supervisory role ever attended a workplace with Regan to evaluate the quality of his inspections or reviewed the quality of his reports

Q. Was there follow-up from them on any of these reports with you? Did they review once a year or something?

A. No, we handled that pretty well ourselves.

**Sophie Dennis, transcript of April 30, 2013 pp. 7491-7492, lines 19-3**

**Ralph Regan, transcript of June 5, 2013 p. 13058, lines 13-21; p. 13065, lines 19-23; and p. 13066, lines 7-15**

403. To date, there still has been no independent review of the conduct of either Regan or Hudson. Assistant deputy minister Dennis advised the commission that she had not yet decided whether an outside agency, such as the federal ministry of labour or another provincial ministry of labour, should review the work performed by Regan and Hudson. In light of the inadequacies of Regan and Hudson's inspections it would only be fair and appropriate for the Ministry's inspectors to get as much attention and benefit from the review of their work as the various other non-governmental actors who will benefit from the review of the Ministry.

**Sophie Dennis, transcript of May 1, 2013, pp. 7614-7615, lines 13-13; p. 7663, lines 6-24; and pp. 7689-7690, lines 19-19**

## vii. **A Culture of Pushing Responsibility**

404. The Ministry created a culture too ready to push responsibility for protecting workers on employers and workers and too reluctant to exercise its exclusive investigatory and enforcement powers under the *Act*.

During her testimony, Assistant Deputy Minister Sophie Dennis stated:

The ultimate responsibility for the protection of workers at that work site, that store, that unit within the facility is the employer's responsibility.

**Sophie Dennis, transcript of April 30, 2013, p. 7480, lines 5-8**

405. ELMAC humbly submits that this is an overstatement. To be sure, the employer has primary responsibility for maintaining a safe work environment. However, in circumstances where the employer has repeatedly failed or is unable to provide a safe work environment, the Ministry through its broad investigatory and enforcement powers has the ultimate responsibility to protect the health and safety of workers.

406. This culture of being too ready to push the responsibility for protecting workers' health and safety on employers and workers while too reluctant to exercise its investigatory and enforcement powers under the *Act* was evident during the testimony of Dennis and Hudson. When asked about the Ministry's responsibility for protecting the health and safety of Ms. Aylwin, Dennis described the Ministry as a check on the system, as somehow outside of the system. We submit that the Ministry cannot be outside of a system it administers and enforces. She also pushed responsibility onto her employer.

**Sophie Dennis, transcript of May 1, 2013, p. 7585, lines 11-18**

407. When Hudson was asked if he had asked Bear where in the mall the leaks occurred, he deflected responsibility to the employees and employers: "Again, when we go to a workplace, we want their internal system to take over and solve their problems".

**Ed Hudson, transcript of July 8, 2013, p. 14827, lines 16-25**

408. The culture was also evident in the responses that Robert Comeau, an employee at Zellers, received in response to his complaints about leaks and mould. On June 4, 2012, he advised the Ministry that the leaks "kicked off" lights; that buckets to catch water were on shelves and floors in Zellers and throughout the mall; that he was concerned about the air quality; that the mall owner was aware of the problem, had promised to do

something for the last three years but had done nothing; and that he was concerned about his and his coworkers' health. The Ministry responded:

Testing for air quality is the responsibility of the employer or the building owner. If you have a safety concern that your employer (or the building owner) is unwilling to resolve, then you can call our Health and Safety contact centre at 1-877-202-0008 and complain.

**Exhibit 12-95**

409. After the collapse, Mr. Comeau again wrote the Ministry requesting a response to his complaint about water leaks and poor air quality. On June 25th, the Ministry responded:

If you want a safety inspector to investigate a complaint, you need to call the Health and Safety contact centre at 1-877-202-0008 and ask to speak to an inspector".

**Exhibit 12-95**

410. It was a common refrain during the testimony of Dennis that the employers and workers are responsible for the health and safety of the workplace. To be sure the health and safety of the workplace is the day-to-day responsibility of the employer and the worker. The Ministry cannot be everywhere, all of the time. But the Ministry has an important role too, especially in circumstances where employees have made detailed complaints to employers and employers have made complaints to various mall owners but no change is effected. The Ministry was one of the few parties with the power and opportunity to force the mall owners to perform the remedial work that they all refused to do. It is particularly in these circumstances where the Ministry must be vigilant to exercise its role to enforce workplace safety standards rather than rely on the common refrain that workplace safety is the responsibility of the worker and the employer.

**Part III – Recommendations**

**Engineering Recommendations:**

**(A) Design Stage Recommendations:**

- The definition of a “prime consultant” should be entrenched in the Ontario *Building Code Act*, 1992, (“the Code”) or its regulations and the roles and responsibilities of the prime consultant must be clearly defined. Any departure from the roles and responsibilities as defined in the Act or Regulations should require written confirmation of same to the owner.
- The Code should make clear that when a prime consultant such as an architect or engineer places their seal on the drawings, that the prime consultant is certifying that the drawings are in compliance with the Code.
- Codes of conduct for architects and engineers or anyone other professional body regulating prime consultants should make clear that ultimate responsibility for ensuring compliance by sub-trades rests with the prime consultant, and failure to exercise adequate care in doing so should be a disciplinary offence. A specific rule should be developed for engineers and architects about guarding against becoming dupes of their clients and compromising public safety. Mandatory continuing legal education should be required for all architects and engineers about the importance of this new rule.
- Any professional who is providing plans for a new structure to be occupied by people, or for significant changes to such a structure, should be required by the Code to provided evidence of third party liability insurance in an amount reflecting the damage which might arise due to negligence.
- Open parking decks should never be constructed over occupied areas in Ontario. Covered parking decks may be permitted over occupied areas, however, strict guidelines should be developed for their use, including adequate waterproofing, scheduled maintenance and failsafe features in the structure to guard against catastrophic failure.
- Ontario should notify the building departments of all municipalities that they should be alert to the dangers of any structures in their communities featuring parking decks over occupied space in light of the Elliot Lake tragedy. Such structures should be thoroughly

inspected by a qualified structure engineer with special attention to examining the strength of connections.

### **(B) Structural Inspections of Existing Buildings**

- The standard for the inspection of bridges is delineated in the OSIM guidelines (see NORR report).
- Similar guidelines should be developed and adopted by Ontario to establish a standard for the inspection of existing buildings. These guidelines should set out:
  - Best practices for establishing clear terminology to ensure that clients and regulators understand the scope of work, defining the scope of work expected in various types of inspections (for example, opening up concealed areas to examine connections or measuring corrosion) and ensuring that the engineer has sufficient resources, and a sufficient retainer, to be able to complete the required work;
  - Which documents should be reviewed prior to the inspection;
  - Which questions must be asked of the on-site owner representative, including a request for production of previous structural engineering reports;
  - Best practices for identifying the critical areas and determining the appropriate number of samples on which to draw credible conclusions;
  - Best practices for how to document the inspected areas, including photographs, measurements, samples and notes.

See: R. Koerth bulletin, “Structural Engineering Assessments of Existing Building”

### **(C) Engineering and Other Reports**

- Ontario should adopt guidelines to establish best practices for writing Engineering Reports, including ethical guidelines regarding making changes to a draft report based on

client feedback. Engineering reports on structural soundness must be objective and uninfluenced by the client's collateral interests. In addition, the following best practices should be considered:

- Engineering reports should be required to contain all aspects of the building that were inspected. Areas that were inspected should not be excluded from the report because they were in good condition.
- Any assumptions that are made in order to arrive at the conclusions should be clearly defined.
- If the report is commissioned for the purpose of finding a resolution to a structural problem, the report should include only viable options that will solve the problem.
- To the extent that a problem is noticed during the inspection, the report must include clear warnings of the consequences of ignoring the problem and must set out a time limit for remedying that problem.
- A minimum retention policy for engineering reports should be established. Files should be opened under the building address at each engineering firm and engineers should be required to look through its files prior to conducting an inspection on a building for any previous reports on the same building to identify trends and patterns.

**(D) Registry for Structural Engineering Reports of Commercial Buildings**

- A central registry for structural engineering reports on commercial buildings should be established in each jurisdiction;
- An engineer that conducts a structural inspection should be required to file the report in the registry under the building's address;
- An engineer conducting a structural inspection should be required to check the registry prior to conducting its inspection in order to identify trends and patterns set out in previous

reports on the building;

- The registry must be public and copies of the reports should be provided to the public for a reasonable copying fee.

## **Municipalities**

### **(A) Complaint-Driven Inspection Policy**

- Municipalities should document all oral and written complaints even if the person wants to remain anonymous. If a complaint is frivolous or poses no risk to human safety, a municipality should retain the discretion as whether or not to investigate it. However the reason for choosing not to investigate the complaint must also be documented.
- Periodic proactive inspection should be mandatory for large occupied commercial properties based on how many people use the property, age and use (example hospital versus warehouse). .
- Deficiencies must be carefully documented and necessary follow-up actions diarized.

### **(B) Online By-Law Violations Website**

- Online By-Law Violations History – all municipalities operating a website should be required to publish a record of building violations, at a minimum for occupied commercial buildings and large residential buildings. Including follow-up action taken by the municipality and remedial action taken by an owner or the municipality
- Municipalities should refuse to issue future building permits (except permits required to remedy a violation or violations) until the violations are remedied.
- The Municipal Act and the Code should make it clear that the paramount obligation

of every Chief Building official is public safety

- Clear guidelines should be established in the regulations governing the Chief Building Official in cases where public safety may be at risk based on the degree and imminence of the threat and the response of the owner, making it clear that in cases where an owner is either unwilling or unable to take steps necessary to avoid risks to human safety that (a) an order be promptly issued; (b) a clear period of time be allowed for compliance; (c) at the end of that time, the city must take further enforcement steps to prosecute, conduct the work at the owner's expense or to close and condemn the structure.
- Ontario should support the establishment of improved and mandatory training of all municipal building inspectors

#### **(D) City-Ordered Structural Engineering Reports**

- If a city requires a report from a structural engineer, the city should have the right to specify the engineer to be used and to specify a Certified Structural Engineer where appropriate.

### **Ministry of Labour**

#### **(A) Training**

- Ministry of Labour Inspectors must be trained to identify and react appropriately to complaints about leaks, mould, corrosion or other signs of structural failure. As part of this training, inspectors must be made aware of the availability of engineers employed by the MOL and encouraged to seek their assistance in circumstances where their expertise will assist in identifying a problem.
- Both the training and the legislation must make clear that the safety of a building housing workers remains an occupational health and safety concern and cannot be delegated to

municipal building officials. While it is appropriate for MOL officials to coordinate with municipal building officials in such cases, it is never appropriate for them to rely on such officials to protect the safety of workers.

- MOL regulations and guidelines should require MOL to take primary responsibility for structures where a workplace is occupied by multiple employers who may not exercise effective control over the building condition and in smaller municipalities that lack the engineering or other expertise necessary to adequately assess the safety of a structure occupied by workers.

**(B) Federal Review of Ministry's Conduct**

- An independent review of the Ontario Ministry of Labour's involvement in the Algo Centre should be conducted by an outside agency, such as the federal ministry of labour or another provincial ministry of labour.
- In the event that the independent investigator believes in any case that charges are warranted against MOL officials, that investigator should have the power to recommend such charges to the Attorney General. The normal time limit for charges under the Act should not apply to such cases.

**(C) Greater sharing of Information between MOL and Municipal Inspection Officers**

- Municipalities and the MOL must coordinate their activities and share information regarding structures, which are occupied by workers.. Orders made by either level of government against a building occupied by workers that could affect the safety of occupants should automatically be sent to the appropriate official at the other level of government. This will assist in flagging problem building. Where the municipality lacks its own engineering department, the MOL should advise the municipality that the MOL engineers are available to assist in evaluating the safety of a building used as a workplace.

**Owners**

- The Corporations Act should be amended to expressly prohibit officers and employees of not for profit corporations from entering into any agreement that requires them to withhold information from their Board of Directors.
- No occupancy permit should be issued unless a licensed professional has certified without ambiguity or condition that the structure is in compliance with the Code, and that a minimum amount of third party liability insurance is in place commensurate with place commensurate with the size of the commercial space and the number of occupants.

### **Victims**

- The province should mobilize additional psychiatric resources, in consultation with the Canadian Armed Forces and other experts in Post-Traumatic Stress Disorder, to ensure that the citizens of Elliot Lake have access to adequate psychiatric care in coping with this tragedy.