

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

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

**AND IN THE MATTER OF EASTWOOD MALL INC., BOB NAZARIAN and
LEVON NAZARIAN**

**WRITTEN SUBMISSIONS OF
EASTWOOD MALL INC.
BOB NAZARIAN and LEVON NAZARIAN**

August 8, 2013

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TO: **THE HONOURABLE JUSTICE P.R. BELANGER**
Commissioner of the Elliot Lake Commission of Inquiry

I. Introduction

1. These submissions will address the major factual and legal issues arising from the evidence given at the Commission of Inquiry, from the perspective of Eastwood Mall Inc., Bob Nazarian and Levon Nazarian.
2. The evidence given at the Inquiry involved a broad exploration of municipal issues, enforcement issues, engineering issues, management issues, and the course of conduct of various parties.
3. We have borne in mind the mandate of the Commission of Inquiry which is as follows:
 - (1) Having regard to section 5 of the *Public Inquiries Act, 2009*, the Commission shall:
 - a. Inquire into and report on events surrounding the collapse of the Algo Centre Mall in Elliot Lake, Ontario, the deaths of Lucie Aylwin and Doloris Perizzolo 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 bylaws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity and safety of the Algo Centre Mall in Elliot Lake, Ontario;
 - c. Review relevant legislation, regulations and bylaws 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 Algo Centre Mall 111 Elliot Lake, Ontario.
 - (2) The Commission shall perform its duties without expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commission shall further ensure that the conduct of the inquiry does not in any way interfere or conflict with any ongoing investigation or proceeding related to these matters.

4. Therefore these submissions will be directed toward those areas of the evidence which are most pertinent to the Commission's mandate, with a view to illustrating the materiality of the evidence to the extent that it will advance that mandate. To the extent that fault is directed toward any party in the course of these submissions, it is not intended to amount to an allegation of liability, either civilly, criminally, or quasi-criminally, but is asserted only of necessity in order to make effective submissions to this Commission.
5. As a general proposition, we respectfully urge the Commission to apply a focused causation/prevention approach. This submission is asserted for the purpose of ensuring that unnecessary attribution of fault, irrelevant, indirect, or unnecessary reputational damage, or other unintended consequential damage, be avoided when the Commission's Report and findings are rendered.

II. Causes of the Collapse of the Algo Mall on June 23, 2012: Defective Design and Installation of Waterproofing System in 1979, Failure to take Effective Remedial Measures by Algocen and Nordev, Failure to Enforce the Building Code, Failure by Engineers to Detect Structurally Significant Corrosion of Steel

6. The Ministry of Labour report of Roger Jeffreys, Provincial Engineer is Exhibit 6227.
7. Mr. Jeffreys is the co-ordinator for all Regional Engineers in the Province of Ontario. He attended the scene of the collapse at the instructions of the Assistant Deputy Minister in the Ministry of Labour. Mr. Jeffreys' report was co-authored by Regional Engineer, Mr. Sanders, P. Eng.

8. The lead investigator was Mr. Jones, who was a Regional Engineer from Sault St. Marie. The report of Mr. Jeffreys and Mr. Sanders was a technical report which was intended to support the legal brief assembled by Mr. Jones.

Transcript p. 19280, lines 4-16

9. As a result of the Ministry of Labour investigation, Robert Wood, P. Eng. of MR Wright was charged with an offence pursuant to the Occupational Health and Safety Act. No other persons or corporations were charged, and the statutory one-year limitation period under the Occupational Health and Safety Act has expired.
10. One of the questions that Mr. Jeffreys was required by his mandate to answer, was what was the cause of the collapse. Mr. Jeffreys had reviewed the Norr Report. Mr. Jeffreys came to the conclusion that the cause of the collapse was “ the corrosion of a connection”. His conclusion was consistent with the conclusion reached in the Norr Report.

Transcript p. 19280-1, lines 21-9

11. Mr. Jeffreys testified that the root cause was the fact that the mall leaked from the time it was built, and ineffective measures were put in place to correct that situation over the period from its construction down to the time of the structural collapse, and the fact that this corrosion was not detected by various parties.

Transcript p. 19286-7, lines 21-1.

12. Mr. Robert Wood, P. Eng of M R Wright was identified by Mr. Jeffreys within the category of persons who did not detect the corrosion. He did several inspections of this

structure. In both inspections he failed to recognize that serious corrosion was taking place in the building and, therefore, did not raise a “red flag” to the owners and to others.

13. In addition, the City of Elliot Lake had some regulatory responsibility as far as the building code was concerned , and it was the Ministry of Labour’s conclusion that the mall, as constructed, did not meet the requirements of the Building Code (effective as of 1975), with respect to rain penetration.
14. The City of Elliot Lake was also an employer in the mall at the time of the collapse, (as operator of the Public Library), and so they had some responsibilities with respect to their employees in the mall.
15. They had the regulatory authority to enforce their own by-laws with respect to the condition of the building, and they had those powers. Those appear not to have been acted upon.

Transcript p. 19287-8, lines 2-25, lines 1-8

16. Mr. Jeffreys testified that the issue of concrete pieces that protruded through the ceiling tile at the premises of Elaine Quinte, Hungry Jack’s Restaurant, was not included in his report or findings, because it occurred in a different part of the structure and had no direct relationship to the collapse or the nature of the collapse.

Transcript p. 19373, lines 1-8

17. It can also be reasonably inferred from Mr. Jeffreys report and testimony that the damaged concrete at Hungry Jacks, was not a substantial warning sign of imminent

collapse, or else it would have been referred to in the Norr report as such, or in Mr. Jeffreys' Report.

18. The events leading up to the collapse involved a failure by responsible engineers to detect the severity of the corrosion of critical steel supporting members, when such should have been apparent, certainly with adequate testing, to a diligent engineer. The photographs taken by Norr, their findings, and the testimony of Dr. Saffarini, make this abundantly clear.
19. Mr. Chris Hughes, Architect with Norr, gave testimony that the coreslab premanufactured concrete product was not necessarily a greater challenge than a poured concrete slab for the purpose of waterproofing the structure. The Ontario Building Code effective in 1975 required that a structure be capable of shedding or draining water effectively. In subsequent building codes, a continuous membrane is required, but certainly as of 1979-80, it was common to install a continuous membrane as a waterproofing system. The original owner and contractor, Algocen, apparently selected a novel system, the Peterson system, which immediately failed to perform its function of shedding or draining water effectively. Mr. Chris Hughes indicated that if the system does not function properly, then it did not comply with the 1975 Ontario Building Code. The Code provisions were performance-based.

Transcript p. 12413-12415

20. Ostensibly, Algocen selected the Peterson system to reduce its costs of construction. The system had a 5 year warranty during which time Peterson serviced the system, but it was apparent that the system did not function effectively. Algocen, ostensibly did not replace

the system out of cost concerns. Failing to do so was a violation of the Ontario Building Code, but the building officials in the City of Elliot Lake took no action whatsoever. The design defect was noted in the Bregman and Hamman assessment report commissioned by Woolco in 1982 (Transcript P. 12415) cited in the Norr Report.

21. The successor owner Nordev, a “for-profit” division of Elliot Lake Retirement Living, a non-profit corporation organized for the purpose of promoting Elliot Lake as a retirement and recreational centre, also failed to replace the Peterson system despite having commissioned a complete engineering report from Halsall Engineering in 1999. Ostensibly this was also due to cost concerns.
22. Halsall gave questionable advice about a designed “rout and seal” option as a viable alternative to removal of topping and installation of a continuous membrane, but this less costly option required engineering specifications, a pre-qualified contractor, and engineering supervision with regard to installation and detailing. Nordev did not complete either option, due to its refusal to expend the funds to do so, despite it having ample access to the financial resources. It also had a community –based board of directors with a mandate to support and develop the Elliot Lake community for its long-term economic well-being.
23. It is remarkable that Nordev failed to responsibly remedy the long-standing leaking problem for the benefit and safety of the tenants, invitees, and employees of the Algo Mall, given its complete knowledge of the remedies available and its public service mandate. Instead, it sold the mall with knowledge of its defective waterproofing system without taking effective action. During the ownership of the Algo Mall by Nordev, the

building failed to comply with the Ontario Building Code, it continued to leak without effective measures to remedy the leaking, and the deterioration continued until 2005 for a total period of 25 years of leakage, but the City of Elliot Lake took no enforcement action whatsoever, despite its involvement (through the Public Library) as a tenant at the mall.

24. Both Algocen and Nordev admitted that they did not lack the financial resources to remedy the defective waterproofing system, but they elected not to do so in any event. It can be inferred, and it is submitted, that this failure to remedy the leakage, was contributed to by a failure by the City of Elliot Lake to enforce the Ontario Building Code provisions, throughout the entire period from 1979 to 2005, until a Notice of Violation was issued in 2006.
25. The Norr Report identified that by 2005, when Eastwood Mall Inc. acquired the property, the corrosion of steel supporting members was already at a critical point in the corrosion timeline, but no effective action had been taken by the 2 predecessor owners of the Algo Mall, or the building department of the City of Elliot Lake.
26. The Norr Report was critical of the a series of building assessment surveys , but these in particular were heavily relied upon by RBC as lender, Eastwood Mall Inc. as owner, the Chief Building Official of the City of Elliot Lake with regard to its 2009 Order to Comply, and BDC as lender :
 - a) Construction Control Inc. performed for RBC in 2005;
 - b) MR Wright performed for Eastwood Mall Inc. in October, 2009;
 - c) MR Wright performed for Eastwood Mall Inc. in May, 2012.

27. Dr. Saffarini was asked in cross-examination by counsel for Eastwood Mall Inc.:

“What are the inadequacies in these kinds of reports?”

Dr. Saffarini:

“If an owner or a client asks for a building condition assessment, he has certain objectives, and regardless of the routine of how these assessments are carried out, the objective needs to be met with a fair degree of certainty.. so what these reports should include is a fair assessment of the risk and a fair assessment of the cost that would be involved to remedy or mitigate that risk. So if that is what is at the core of the objective, then how you meet that, in terms of doing exhaustive testing or going through reporting or analysis or whatever, that becomes the detail, but the report has to meet these main objectives... we found that, perhaps, these objectives were not consistently met and certainly, the issue of the structural safety ultimately was not served by the various inspections that were carried out”.

Transcript P. 12422, Line 3-9- P. 12423 Line 2

28. Further Dr. Saffarini stated in relation to the Algo Mall:

“..we do comment throughout and... make reference to 2005 ...as perhaps a date where the condition of the structure was certainly meriting attention, and intense attention of that type.... we further say that it probably would have been more obvious as time progressed, but by 2009, using our timeline for the rate of corrosion progression, we would have considered that by that time there must have been locations which were, perhaps, in severe and certainly in the medium stage”.

Transcript P. 12423-12424

29. As to the key findings that ought to have been made in an engineering assessment in 2009, Dr. Saffarini stated:

“ ... I think that the bulk of our findings indicate the kind of reporting that needed to be made, in terms of documenting the leakage, setting alarms and so on, as to what the consequences of the these leakages are, and so on...”

Transcript P. 12423-12424

30. On further questioning by counsel for Eastwood Mall Inc.:

“Given what you know, was a visual inspection appropriate in 2005?”

Dr. Saffarini stated:

“ Well, let’s put it this way: I mean, the visual inspection that would have been carried out, would have raised enough alarms to prompt a recommendation of further testing to be made, if this was not, say, the mandate of the building condition assessment firm at the time... If the scope is not adequate, if it needs to be a further and more extensive type of investigation, then you should call for these investigations, and the owner has to be made aware of the need for such investigations...indicators must have been available at the time, ...As long as leakage is progressing, that means there is an ongoing problem that merits further investigation”.

31. On further questioning by counsel for Eastwood Mall Inc.:

“Would you be in a position to say, from your corrosion timeline, from your observations, what tests ought to have been conducted in 2009 by an engineer?”

By Dr. Saffarini:

“ If you even visually, have a ladder and look closely, or even where the areas that are exposed and you look closely, ...yes there would have been the need to do further testing and more detailed inspection, but you would have first had to be alarmed, and you should have been alarmed that there is a corrosion problem and the corrosion problem merits a detailed investigation... this is how you go about quantifying the problem (ie testing) but first you have to identify the problem”.

Transcript P. 12424-12428

32. At page 96 of Mr. Jeffreys’ report, , Exhibit 6227 he stated as follows:

“The ongoing leakage and the deterioration of the structural capacity of the building are directly related. The fact that owners of the mall continued to use inappropriate solutions to address the leakage issues eventually led to the collapse and death of two people. **Early on in the history of the mall professional advice was given to apply a proper and long lasting solution (a waterproof**

membrane), but in an effort to save money, cheaper solutions were implemented.”

(Also at Transcript P. 19340 and 19341)

33. **When asked by counsel for Nordev:**

“ which professional advice are you referring to having been given here?”

Mr. Jeffreys responded :

“ Halsall Report of '98 and '99. There were previous reports before that, I believe, Trow Group.”

Transcript P. 19341, Lines 14-22

34. Mr. Jeffreys specifically alluded to Algocen and Nordev as the owners who, “ early on in the history of the mall” implemented cheaper solutions than those recommended by professional engineers, in an effort to save money. Mr. Jeffreys traced these “cheaper solutions” to the events which ultimately led to the collapse of the building and the death of two persons.

III. Failure to Implement Halsall Reports and Non-Disclosure of Halsall Reports by Nordev prior to sale to Eastwood Mall Inc.

35. It is respectfully submitted that the failure by Nordev to implement the Halsall Report recommendations, and the failure by Nordev to disclose the 1998 and 1999 Halsall Reports to Eastwood Mall Inc. had the following impact:

- a) Eastwood Mall Inc. would not have acquired the building if the true condition of the building was disclosed to it, especially the fact that the engineering recommendations made by Halsall in 1999 were never complied with;
 - b) Alternatively, if the disclosure was made to Eastwood Mall Inc., and if financing was still available, (likely with a stipulated remediation program), then Eastwood Mall Inc. would have been in a position to implement an effective remediation program much sooner than it did, which was ultimately a program developed 6 years after the purchase, to terminate the rooftop parking and proceed with the Sarvinis engineering plan (see Exhibit 5661, Letter dated June 20, 2011 from Mr. Sarvinis to Levon Nazarian setting out a 2-phase engineering program which was accepted by Eastwood Mall Inc.).
36. In stark contrast to the two predecessor owners, it is respectfully submitted that the evidence relating to the Sarvinis program is convincing that as of June 20, 2011, Eastwood Mall Inc. was fully prepared to implement a solution to the failed waterproofing system, but Eastwood was determined to find a *permanent* solution given the substantial costs involved by that time. The financing, the engineering, and the purchase of the adjacent parcel from the City of Elliot Lake were in a position to go forward, immediately as of June 22, 2012, one day prior to the collapse, which was unfortunately too late to avoid the collapse and save the lives of two persons.
37. The penultimate harm of the non-disclosure by Nordev was years of delay that could have been avoided. It is respectfully submitted that the non-disclosure by Nordev was unlawful, egregious, and prejudicial, with serious consequences for the financial status of the mall, and the safety of the general public, who were employed in, and who frequented the mall.

38. In his examination in chief, counsel for Eastwood Mall Inc. asked Mr. Bob Nazarian :

“ In Spring of 2005, or on or about April 1, 2005 or after that, did anyone give you a copy of this report?”

Mr. Bob Nazarian stated:

“ No sir.”.

The May 10, 1999 Halsall Report is Exhibit 5348, Transcript Page 18559.

39. On further questioning, counsel asked:

“ at page 5 of the report, this lists two sets of scope of work for the roof deck. You didn't see that any time before the commencement of this Inquiry, is that correct?”

Bob Nazarian:

“That's right”

Counsel asked:

“ And now that you've seen it, what can you say about the impact it would have had on your purchase of the mall?”

Bob Nazarian:

“Definitely I would not buy the mall if I knew that the leaks were continuing from so long period, and there is no way that we can repair it soon”.

40. On further questioning:

“ And you can note from this that the date of the report being 1999, if the work was recommended in 1999 and not done for six years, would that have been a significant factor?

Bob Nazarian:

“Of course”.

Transcript Page 18562, Lines 9 – 24, and Page 18563, Line 9-13

41. On Questioning of Mr. Kenneally by counsel for Eastwood Mall Inc., Mr. Kenneally made the following admissions:

Q. And as you pointed out earlier, you therefore did not carry out either Option 1 or Option 2 at any of the time that Nordev owned the property from 1999 to 2005; is that correct?

A. As outlined here, yes

Transcript P. 5755, Lines 8-12

Q. And your evidence is, as you indicated to Mr. Elliott, that from 1999 when you purchased the property until 2005 when you sold it, you had not entered into any major capital expenditures in relation to the roof whatsoever, is that correct?

A. Yes

Transcript P. 5763, Line 7-13

Q. And from what I understood of your evidence, you and Ms. Guertin were involved in answering questions for purposes of the due diligence phase of the agreement, is that correct?

A. Yes.

Q. You were aware that Mr. Nazarian and his lender were conducting a building survey?

A. Yes.

Q. And did you indicate to Mr. Nazarian that you had received estimates of \$433,000, or possibly over \$700,000 to conduct concrete restoration and waterproof repairs to the roof?

A. I don't think we actually said a number. Like we told him of the maintenance program that we had, and we told him we had folks come in and look at it when we purchased it. I do not believe we gave him a number.

Transcript Page 5766 Lines 5-25

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

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

Q. Did you give Mr. Nazarian the impression that your maintenance was costing approximately \$50,000 a year?

A. We gave him—I believe we gave him our detailed financials which would show that I think.

Q. And that was the approximate number wasn't it?

A. I think it worked out to about 60,000, yes, on average, I would say about 60,000 on the deck about 60,000 yes.

Transcript Pages 5767 Line 3 to Page 5768 Line 10

42. The result of this exchange, and the non-disclosure of the 1998 and 1999 Halsall Reports by Nordev, was that Eastwood Mall Inc. did not have any satisfactory disclosure of the structural condition of the mall, or the failure of the waterproofing system which occurred at the outset of construction, the projected costs of repair, the engineering issues that needed to be dealt with, or the potential risk of a financial and physical calamity that ultimately occurred, which culminated in the catastrophic collapse of June 23, 2012.
43. It is submitted that an agreement of purchase and sale which provides for assets to be acquired “as is” does not constitute an answer to the plea of fraudulent misrepresentation in the context of a civil action. This was established by the Ontario Court of Appeal in *Davis v. Moranis*, 1949 CarswellOnt 282.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 8, 2013

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