

# ELLIOT LAKE COMMISSION OF INQUIRY

WRITTEN SUBMISSIONS OF HALSALL ASSOCIATES, MICHAEL BUCKLEY AND ALBERT CELLI

**NORTON ROSE FULBRIGHT CANADA LLP**  
TD South Tower, Suite 2300  
Toronto-Dominion Centre  
79 Wellington Street West, P.O. Box 128  
Toronto, Ontario M5K 1H1 CANADA

**James A. Hodgson LSUC#: 12743P**  
Tel: +1 416.216.2989  
**John M. Picone LSUC#: 58406N**  
Tel: +1 416.216.1947  
Fax: +1 416.216.3930

Lawyers for Halsall Associates,  
Michael Buckley and Albert Celli

TO: The Honourable Paul R. Bélanger, Commissioner

AND TO: Commission Counsel

AND TO: All Participants

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## **PART I - OVERVIEW**

1. Construction of the Algo Centre Mall (the "Mall") in the City of Elliot Lake was completed in August 1980. Almost 32 years later, on June 23, 2012, the roof of the Mall partially collapsed.
2. A parking deck was located on the roof of the Mall. This roof began to leak almost immediately and leaked continuously for more than three decades. The failure was caused by corrosion of the structural steel which supported the portion of the roof that collapsed.
3. Dr. Saffarini testified that the collapse of an enclosed building due to corrosion of its steel structure is unprecedented. Neither he nor any other witness could provide an example of an occupied and enclosed structure that collapsed due to corrosion of the steel structure resulting from exposure to chloride-rainwater.
4. Algoma Central Properties ("ACP") was the original owner of the Mall. It knew that the roof was leaking substantially during the entire period of its ownership. In June 1999, Elliot Lake Retirement Living ("Retirement Living") purchased the Mall from ACP.
5. Prior to its purchase, Retirement Living retained Nicholls Yallowega Belanger ("NYB") to provide an assessment. NYB retained Halsall Associates ("Halsall") to conduct a structural evaluation. A representative of Halsall attended at the Mall in September 1998. Its November 12, 1998 Report advised that a more thorough inspection was necessary.
6. A representative of Halsall re-attended at the Mall in April 1999. Its May 10, 1999 Report presented two options for repairing the roof: (i) a rout and seal option at a

cost of \$433,000; and a membrane option at a cost of \$776,000. Additionally, Halsall inspected the structural steel, including connections, and reported accurately that the section loss was minimal.

7. Although Dr. Saffarini has speculated that Halsall's rout and seal option would not have been effective, three professional engineers have testified that the option was viable and, unlike Dr. Saffarini, two of these engineers studied the deck themselves in the months preceding delivery of Halsall's 1999 Report. In any event, the issue is academic since Retirement Living ignored Halsall's rout and seal recommendation – it was never attempted.

8. After receiving Halsall's 1999 Report, Retirement Living purchased the Mall but decided to continue with the same unsuccessful approach to roof maintenance as ACP, without professional supervision, appropriate materials or skilled trades. In fact, notwithstanding that ACP's team had failed to stop the leaks, Retirement Living engaged the very same people to perform the very same tasks.

9. Retirement Living knew that its approach was inconsistent with Halsall's 1999 Report. It understood that Halsall had suggested a solution which necessarily required, among other things, engineering specifications and qualified contractors. Halsall did not indicate a 'do-nothing' or 'continue as is' option.

10. Retirement Living was aware that it was not proceeding with either of the options presented by Halsall. It knew that its 'continue as is' repair scheme was ineffective because the roof continued to leak for the entire period of its ownership.

11. By continuing with ACP's approach to repair, Retirement Living was able to book the cost associated with roof maintenance as an operating expense and, therefore, recover this cost from its tenants on an annual basis. This allowed Retirement Living to recover most of the money spent on the roof from its tenants.

12. Had Retirement Living opted to make a capital expenditure (in other words, implement one of Halsall's recommendations), it would only have been able to pass a small percentage of the cost down to its tenants annually over the useful life of the repair. Since it would have taken Retirement Living at least a decade to recover the cost of the options presented by Halsall, it was in Retirement Living's economic interests to continue with the ad hoc approach developed by ACP.

13. Robert Nazarian became the third owner of the Mall in August 2005. In the years immediately preceding the collapse, not only did Mr. Nazarian fail or refuse to make the necessary repairs notwithstanding how obvious it had become that such repairs were necessary, he completely neglected the parking deck. Instead of attempting in earnest to stop the leaks, he used makeshift bladders to catch the water.

14. No guide for inspecting corrosion of structural steel has ever been prepared for enclosed occupied structures in Ontario. There is no evidence that Halsall's conduct, or that of its representatives, fell below the standard of practice for a professional engineer practising in Ontario in 1998 and 1999. NORR agreed that Halsall's inspection "*menu*" was reasonable.

15. Halsall's experience is that an owner simply does not allow the roof of its structure to leak continuously on its patrons. Halsall could not have reasonably

anticipated that successive owners of the Mall would not take (and would not be required to take) adequate steps to rectify the continuous leakage problem.

16. Other than with the benefit of hindsight, which is a standard of perfection informed by knowledge of future events, there is no basis for any criticism of the work done by Halsall or its representatives in 1998 and 1999. There is certainly no basis for any finding of misconduct against them.

## **PART II - THE QUALITY OF EVIDENCE**

17. Albert Celli, Michael Buckley and Jeff Truman testified before the Commission on April 5, 8 and 9, 2013, respectively. They are each experienced professional engineers. Mr. Celli and Mr. Truman conducted visual inspections of the parking deck themselves. Their recommendations were based upon direct and contemporaneous observations and their own professional judgment. There is no evidence to suggest that Halsall or its professionals deviated in any way from the standard of engineering practice in Ontario in 1998 and 1999.

18. Although the NORR Report appears to suggest that Halsall could have done some things differently, Dr. Saffarini testified as follows: *“not to give too much credit to NORR, we have more hindsight than -- than most others. We have the advantage of viewing the system in -- in its progress, and then its failings and so on.”*<sup>1</sup> With the benefit of hindsight, it is always possible to think of things that could have been done to prevent an accident. That is not the standard to be applied in making a finding of misconduct. Hindsight is a standard of perfection informed by knowledge of future events.

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<sup>1</sup> Saffarini – May 30, 2013, p. 12599: 10-13.

19. Nobody from NORR has purported to comment on the standard of engineering practice in Ontario in 1998 and 1999. This is not surprising given that, notwithstanding his education and experience, Dr. Saffarini was not practising engineering in Ontario in 1998 and 1999. He did not qualify as a professional engineer in Ontario until 2009.<sup>2</sup>

20. NORR was not retained to provide objective advice to the Commission. Rather, it was retained by the Ontario Provincial Police (“OPP”) when that police force was investigating the matter for potential criminal charges or other consequences arising from the collapse.<sup>3</sup>

21. NORR’s opinions are influenced by unsworn statements given to the OPP and other information not in evidence. Its representatives did not monitor, and were not aware of, evidence given before the Commission.<sup>4</sup> For example, although NORR was aware that STEM Engineering Group was retained during Retirement Living’s ownership of the Mall to investigate a perimeter parapet wall which had been damaged on the roof parking deck level, Dr. Saffarini was not aware of the existence of an e-mail from Randy Beltramin to Bruce Caughill dated September 8, 2003,<sup>5</sup> which says:

*I don’t know if you read Halsall’s last report, but they conducted a very detailed investigation of the parking deck. The resulting report pretty much reiterates what the first one recommended but with more detail. The only thing they 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 [...] Hopefully the areas of concern can be found and repaired before a failure occurs.<sup>6</sup>*

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<sup>2</sup> Saffarini – May 29, 2013, p. 12363: 15-23.

<sup>3</sup> Saffarini – May 30, 2013, p. 12552: 3-23.

<sup>4</sup> Saffarini – May 29, 2013, p. 12336: 3-9.

<sup>5</sup> Saffarini – May 29, 2013, pp. 12361: 12-25, 12362: 1-7.

<sup>6</sup> Exhibit 85, p. 3125.0196 (emphasis added).

22. This very significant document demonstrates that individuals retained by Retirement Living were aware that its approach to repair (i) was not what Halsall had recommended and (ii) could potentially result in deterioration of the structure.

23. It is respectfully submitted that the Commission cannot accept any of NORR's conclusions where they are not based upon evidence given before the Commission. This is especially true where NORR's assumptions are contrary to the evidence. An example is NORR's assumption that Mr. Truman did not inspect connections in 1999.<sup>7</sup> It is clear from the evidence that he did.<sup>8</sup> A further example is the statement in the NORR Report that Halsall was not in favour of the membrane and argued in favour of the rout and seal option.<sup>9</sup> Dr. Saffarini acknowledged in his evidence that Halsall only "suggested" this option – it did not argue for it.<sup>10</sup>

### **PART III - NO MISCONDUCT BY HALSALL**

#### **Halsall Inspected the Connections**

24. There is no basis for the assertion that Halsall did not inspect connections or specifically mention connections in its 1999 Report. The evidence is clear that Halsall did inspect connections per the recommendations set out in its 1998 Report<sup>11</sup> and the March 9, 1999 letter from Mr. Buckley to NYB.<sup>12</sup> It is equally clear that Halsall did not include specific reference to connections in its 1999 Report because there was nothing of significance to note.

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<sup>7</sup> Exhibit 3007 (the "NORR Report"), p. 45.

<sup>8</sup> Truman – April 9, 2013, pp. 4519: 13-21, 4557: 11-23, 4594: 1-17; Buckley – April 8, 2013, p. 4407: 1-18; Exhibit 121, pp. 3277.0292, 3277.0298, 3277.0299, 3277.0302.

<sup>9</sup> Exhibit 3007, p. 43.

<sup>10</sup> Saffarini – May 29, 2013, p. 12355: 1-22.

<sup>11</sup> Exhibit 66, Appendix 'A'.

<sup>12</sup> Exhibit 741, p. 1.



25. Dr. Saffarini acknowledged that the opinion expressed in the NORR Report is based upon the information that NORR had at the time its report was prepared: *“at least as far as the information that we have, we have no record of anybody who is looking at connections and reporting those connections.”*<sup>13</sup> No explanation was given as to why NORR did not simply ask Halsall if the connections had been inspected or at least ask for its field notes and photographs.<sup>14</sup>

26. Mr. Truman testified that he inspected connections;<sup>15</sup> there is a picture of a connection included in Halsall’s 1999 Report;<sup>16</sup> and there are numerous pictures of connections in Halsall’s files, which were produced to the OPP and marked as evidence before the Commission.<sup>17</sup> Mr. Buckley testified that he reviewed these pictures before the 1999 Report was finalized.<sup>18</sup>

### **Notification in Writing was Unnecessary**

27. There is no basis for any criticism that Halsall: (i) failed to notify the owner in writing that the continued infiltration of the chloride-containing water into the Mall would cause the structural steel to continue to deteriorate exponentially, potentially resulting in a failure; or (ii) failed to call for an inspection program to be carried out systematically until the leakage problem was resolved.

### Water Causes Steel to Rust

28. Halsall’s 1999 Report makes clear that there was deterioration at points of leakage. It was obvious that there was corrosion occurring wherever steel was exposed

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<sup>13</sup> Saffarini – May 30, 2013, p. 12479: 4-8.

<sup>14</sup> The numerous photographs of connections in Halsall’s files were provided to the OPP in August 2012. It is not clear why the OPP did not pass these documents along to their experts.

<sup>15</sup> Truman – April 9, 2013, pp. 4519: 13-21, 4557: 11-23, 4594: 1-17.

<sup>16</sup> Exhibit 70, p. 4645.0023; Truman – April 9, 2013, p. 4557: 11-23.

<sup>17</sup> Buckley – April 8, 2013, p. 4391: 17-19; Exhibit 121, pp. 3277.0292, 3277.0298, 3277.0299, 3277.0302.

<sup>18</sup> Buckley – April 8, 2013, p. 4407: 1-18.

to water. Halsall said that the roof needed to be fixed and provided two options to control the leakage and, ultimately, maintain the integrity of the structure.<sup>19</sup> A 'do nothing' option was not offered.<sup>20</sup>

29. Halsall's 1999 Report provides sufficient warning to the reader that the Mall is leaking and that the steel structure is therefore rusting. In the words of Halsall's client, the 1999 Report presented options that were "*pretty obvious to a sophisticated owner that you stop the leaks in the roofing, and there are a variety of other recommendations that were quite clear that they needed to do.*"<sup>21</sup>

30. Retirement Living's general manager, Richard Kennealy, admitted knowing that the leaks in the parking deck were causing the corrosion of the steel structure. He also admitted knowing that continuous leakage was causing, and would continue to cause, further corrosion:

(a) Mr. Kennealy admitted knowing that when steel is exposed to water it corrodes – he acknowledged that this fact is obvious;

(b) Mr. Kennealy admitted knowing that when steel is continuously exposed to water it continues to corrode – he acknowledged that this fact is obvious; and

(c) Mr. Kennealy admitted knowing that leaks in the roof were the source of the water that was causing corrosion of the steel structure.<sup>22</sup>

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<sup>19</sup> Buckley – April 8, 2013, p. 4406: 2-9; Exhibit 70.

<sup>20</sup> Truman – April 9, 2013, p. 4618: 1-24.

<sup>21</sup> Nicholls – April 30, 2013, p. 7335: 7-24.

<sup>22</sup> Kennealy – April 18, 2013, pp. 5769: 2-25, 5770: 1-6.

31. The e-mail from Randy Beltramin to Bruce Caughill dated September 8, 2003 explains the problem succinctly:

*I don't know if you read Halsall's last report, but they conducted a very detailed investigation of the parking deck. The resulting report pretty much reiterates what the first one recommended but with more detail. The only thing they 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 [...] Hopefully the areas of concern can be found and repaired before a failure occurs.<sup>23</sup>*

32. This is not a case where the owners of the Mall were unaware of the problem. NORR indicates rightly that *"there is ample evidence that flags had been raised by workers in the mall, patrons, City inspectors and tradesmen. These warnings were not dealt with duly and effectively."*<sup>24</sup> The Commission has received an abundance of evidence in this regard.

33. There is no evidence before the Commission that the standard of practice in Ontario in 1998 and 1999 was to provide a warning to the ultimate reader of an engineering report, in circumstances where only minimal corrosion has been detected and the structure was sound, that continued infiltration of chloride-containing water would cause the structural steel to continue to deteriorate, possibly resulting in a failure many years in the future. The tone of Halsall's 1998 and 1999 Reports accords with the information available to Halsall upon which they were based, the age of the building at the time and the condition of the building at the time.

34. In any event, it was not reasonably foreseeable to anyone that Retirement Living would be permitted simply to allow the roof to continue to leak for the entire period of its

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<sup>23</sup> Exhibit 85, p. 3125.0196 (emphasis added).

<sup>24</sup> Exhibit 3007, p. 129; see for example Exhibits 10-83 and 10-84.

ownership, and then sell the Mall to Mr. Nazarian who would also be permitted to allow the roof to continue to leak.

#### No Need to Call for an Inspection Program

35. Halsall's 1999 Report described the costs that a potential purchaser could expect to incur to fix the parking deck if they moved forward in purchasing the Mall.

36. It cannot be said that Halsall should have recommended an inspection program when it did not offer a 'continue as is' or 'do nothing' option. Halsall gave two options to repair the deck: "*fix it or fix it.*"<sup>25</sup> Moreover, in 1999, there was no reason to anticipate development of a critical condition.<sup>26</sup>

37. At the time, there was no need to call for an inspection program or report the condition of the Mall to local authorities. The gross neglect of the Mall by Retirement Living and Mr. Nazarian was entirely unforeseeable.

#### **Particular Vulnerability of Connections**

38. There is no basis for any criticism that Halsall failed to notify the owner that the connections at the beams and columns were more vulnerable to corrosion from continued infiltration of chloride-containing water and could potentially deteriorate faster than other parts of the structural steel, leading to a potential failure. There was no need to provide any such warning.

39. Although connections may be more susceptible to failure in a corrosive environment,<sup>27</sup> Halsall inspected the connections in 1999 and found that there was no

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<sup>25</sup> Truman – April 9, 2013, p. 4617: 21-25.

<sup>26</sup> Truman – April 9, 2013, p. 4677: 8-10, 15-17.

<sup>27</sup> Exhibit 3007, p. 44.

cause for concern. Its 1999 Report does not provide a warning that future corrosion could potentially lead to the development of a critical condition if left untreated because nothing was observed to warrant such a warning in 1999.<sup>28</sup> Halsall's 1999 Report concluded that:

*Corrosion of the steel support beams is minor, consisting of surface corrosion (removing the red oxide coating) or minor scaling (less than 1mm). Though thicker (3-5mm) scaling is present in some locations, this still only represents less than 1mm of original surface loss and is a relatively insignificant portion of the overall steel cross section.<sup>29</sup>*

40. There is no suggestion that the steel structure corroded uniformly. In the worst locations, Halsall observed less than 1mm of section loss.<sup>30</sup> Having directly observed which parts of the structure (including different sized beams and connections) had experienced minor scaling, Halsall determined that there was no need to "raise the alarm."<sup>31</sup> Dr. Saffarini testified that the section loss measured by Halsall was consistent with NORR's assessment.<sup>32</sup>

41. Of the many professionals who inspected the Mall, Trow and Halsall were the only firms that measured corrosion. Both Trow and Halsall concluded that section loss was negligible at the time of their respective inspections. Dr. Saffarini agreed that the section loss measured by Halsall was relatively insignificant<sup>33</sup> and endorsed these conclusions in the NORR Report.<sup>34</sup> Unfortunately, the engineering firms that inspected the Mall after 1999 did not measure and report on section loss.

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<sup>28</sup> Truman – April 9, 2013, p. 4677: 8-10, 15-17.

<sup>29</sup> Exhibit 70, p. 4645.0007 (emphasis added).

<sup>30</sup> Buckley – April 8, 2013, p. 4451: 11-12.

<sup>31</sup> Truman – April 9, 2013, p. 4677: 16-17.

<sup>32</sup> Saffarini – May 29, 2013, p. 12334: 16-23.

<sup>33</sup> Saffarini – May 29, 2013, p. 12334: 3-14.

<sup>34</sup> Exhibit 3007, pp. vi, vii.

42. There is no evidence that Halsall's conduct in 1998 and 1999 was contrary to any engineering standard of practice. There is no evidence that an engineer who inspects a structurally sound building<sup>35</sup> should notify an owner or potential purchaser that some parts of the structure are more vulnerable to corrosion than other parts.

### **The Rout and Seal Option**

43. Halsall's rout and seal option was presented as follows:

Item	Description	Opinion of Cost
Option 1	Rout and Seal all Joints and Cracks	\$300,000
	Sub-Total (Excl. GST):	\$300,000
	Contractor's Mobilization & Site Protection	\$30,000
	Construction Contingencies, Permit and Testing Allowance	\$45,000
	Engineering Design and Project Management	\$30,000
	GST:	\$28,000
	Option 1 Total:	\$433,000

If required, we could prepare a phased repair approach for Option 1, tailored to your financial constraints.

There is no factual basis for any criticism of Halsall's suggestion that this option would appropriately address the problems with the parking deck. Nobody has explained why Halsall's rout and seal option would not have worked.

### Retirement Living Settled on the Status Quo before Receiving the 1999 Report

44. The evidence is that Mr. Kennealy and Ms. Guertin had decided prior to delivery of Halsall's 1999 Report that Retirement Living would follow the ACP approach to avoid additional expense with respect to repair of the roof. Accordingly, they simply ignored Halsall's recommendations.

45. Ms. Guertin represented to the Retirement Living board that Halsall's 1998 inspection determined that the building was structurally sound, including the parking deck, and was well maintained.<sup>36</sup> Ms. Guertin admitted under oath that this statement

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<sup>35</sup> Saffarini – May 29, 2013, pp. 12333: 24-25, 12334: 1-3.

<sup>36</sup> Exhibit 3276, p. 3133.

was false and that Halsall's 1998 Report did not come close to any such determinations.<sup>37</sup> Mr. Kennealy, who confirmed that Ms. Guertin's statement was completely inaccurate,<sup>38</sup> did not stop her from making this false statement at the time.<sup>39</sup>

46. Similarly, Ms. Guertin expressed Retirement Living's plans to a potential lender in the following terms: *"to continue with a maintenance program at this time with the hopes of undergoing a replacement program at some point in the distant future."*<sup>40</sup> This statement was made after reviewing Halsall's 1998 Report and with full knowledge of the problems with the roof.<sup>41</sup> Mr. Kennealy has admitted that this statement, made by Ms. Guertin in 1999 (before receipt of Halsall's 1999 Report), could fairly be interpreted to mean that Retirement Living had already decided not to invest any funds in the parking deck.<sup>42</sup>

#### Retirement Living Followed the Same Repair Program as ACP

47. Retirement Living ignored the recommendations in Halsall's 1999 Report, and continued with the same repair program previously used by ACP. It regarded both of Halsall's options as capital expenditures<sup>43</sup> and had no intention of making a capital expenditure with respect to the roof.<sup>44</sup>

48. Halsall's 1999 Report could not have led Retirement Living to believe that ACP's approach was appropriate or effective.<sup>45</sup> Nevertheless, according to Ken Snow, who

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<sup>37</sup> Guertin – April 19, 2013, p. 5942: 3-13.

<sup>38</sup> Kennealy – April 17, 2013, pp. 5460: 3-25, 5461: 1-9.

<sup>39</sup> Guertin – April 19, 2013, p. 5944: 5-12.

<sup>40</sup> Exhibit 2182, p. 215592\_02.

<sup>41</sup> Guertin – April 19, 2013, pp. 5923: 7-25, 5924: 1-3.

<sup>42</sup> Kennealy – April 17, 2013, p. 5514: 2-25; according to Mr. Collett, a Retirement Living board member, if the board had seen the Halsall's 1999 Report, he would have expected Retirement Living to spend the money on roof repairs rather than a golf course: see Collett – May 23, 2013, pp. 11090-11096.

<sup>43</sup> Guertin – April 19, 2013, p. 6007: 7-13.

<sup>44</sup> Kennealy – April 18, 2013, pp. 5563: 23-25, 5564: 1-5.

<sup>45</sup> Luciw – April 10, 2013, pp. 4780: 11-25, 4781: 1-3.

was in charge of parking deck repair and maintenance, Retirement Living did not follow Halsall's recommendations. Rather, it followed the same procedures as ACP with respect to attempting to control leaks.<sup>46</sup> This 'continue as is' approach was not proposed by Halsall.<sup>47</sup> Mr. Kennealy admitted under cross-examination that he was aware that Retirement Living had not followed Halsall's advice:<sup>48</sup>

*Q. All right. So can you explain to me then why, after you get advice from your professionals and you have no similarly qualified professionals working for you and you are not similarly a qualified professional yourself, why you would choose to disregard their advice and devise a third option that they had not recommended to follow with respect to the parking deck?*

*A. I had discussions with my property manager, Mr. Quinn. We had a number of things we went through, and we made the decision to rout and seal as we did.*

*Q. Which is exactly what Algoma Central Properties had been doing without any success for many years before?*

*A. Yes, we believed that we were doing it somewhat different in that we had taken the advice of the Halsall folks in terms of the way we were doing the profile and we followed that very strictly.*

*Q. But you did not follow their advice, did you? I mean, their advice was not to continue doing what Algoma Central Properties said. You paid them good money to give you professional advice, and you did exactly what Algoma Central Properties did; you disregarded the professional advice you paid for and did your own do-it-yourself solution, isn't that right?*

*A. We did not engage their services. We elected to do it with our own staff.*

*Q. Well, you didn't follow the advice that you had paid for? You thought you knew better than the professionals?*

[...]

*Q. I said you didn't actually follow their advice. They gave you two options --*

*A. We did not choose one of the two options, that is correct.*

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<sup>46</sup> Snow – April 3, 2013, pp. 3962: 24-25, 3963: 1-2.

<sup>47</sup> Truman – April 9, 2013, p. 4697: 23-25, 4698: 1; see also Exhibit 85, p. 3125.0196.

<sup>48</sup> Kennealy – April 18, 2013, p. 5721-24 (emphasis added).



49. Mr. Quinn, who was responsible for Mall maintenance, explained that Retirement Living's intention was to keep doing what ACP had done, but "properly".<sup>49</sup>

In Mr. Quinn's words:

*we were being optimists that we thought that, you know, given a really good valiant effort that, you know, we could do this. We could stop the water. Because we were there. I was there every day [...] if we do this really, really good and focus on keeping the water out of this we can do this [...] It was everybody's intent. It was Rhona Guertin's intent, it was Richard Kennealy's intent. It was my intent. It was the Mall maintenance staff's intent. It was everybody's intent to keep that water out of there as much as we possibly could. With the realization however that every spring, you know, after the snow removal; and the vehicle movement on there; the freeze-thaw cycles; the fact that it's concrete and the stupid stuff cracks; that every spring we would have to go back and ensure that we did it again and resealed those cracks [...] And maybe we were naïve, but we thought we could do it.<sup>50</sup>*

50. The evidence clearly shows that Retirement Living was aware of the extent of the leaks throughout the entire period of its ownership but continued with the same approach to repair and maintenance. The Commission has received an abundance of evidence regarding the extent of the leaks,<sup>51</sup> but the following examples are illustrative:

(a) In 2002, Retirement Living received a letter from a tenant describing the condition of the leaks in the library as "deplorable".<sup>52</sup> Mr. Kennealy recalls seeing this letter and does not doubt its veracity.<sup>53</sup> He admits that Retirement Living could not solve the problem for this tenant,<sup>54</sup> but nevertheless did not seek the assistance of professionals.<sup>55</sup>

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<sup>49</sup> Quinn – April 11, 2013, p. 4880, ll. 19-21.

<sup>50</sup> Quinn – April 11, 2013, p. 4881: 1-25.

<sup>51</sup> See for example Exhibit 11-46 and Exhibit 11-47.

<sup>52</sup> Exhibit 11-13, p. 3963.

<sup>53</sup> Kennealy – April 18, 2013, p. 5614: 4-5.

<sup>54</sup> Kennealy – April 18, 2013, p. 5620: 4-6.

<sup>55</sup> Kennealy – April 18, 2013, p. 5620: 7-14.

(b) In 2003, Retirement Living received a letter from a tenant complaining about leaks and indicating that previous complaints had not been satisfactorily addressed. The letter pointed to Retirement Living's lack of action, bordering on gross negligence, which had led to damage.<sup>56</sup> Mr. Kennealy recalls seeing this letter,<sup>57</sup> but admits that Retirement Living did not respond by changing its approach to repair and maintenance.<sup>58</sup>

(c) In 2005, Retirement Living received a letter from a tenant indicating that it had been "*experiencing ongoing problems with severe leaks from the roof [...]*" and warning that "*unless something can be done [the leaks] will only continue in the future.*"<sup>59</sup> A meeting was held to discuss these problems, but a satisfactory result was not reached.

(d) In 2005, Retirement Living received an e-mail from another tenant identifying water in its premises.<sup>60</sup> The evidence is clear that the leaks in this tenant's premises became progressively worse when Retirement Living owned the Mall.<sup>61</sup> The Mall was sold to Mr. Nazarian shortly thereafter. This letter makes it clear that the problem of leaks was never addressed by Retirement Living.

51. In spite of these and other examples, Mr. Quinn, who supervised Mr. Snow's team but never did any of the repair work himself,<sup>62</sup> asks this Commission to accept his evidence that Retirement Living ignored Halsall's recommendations because he

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<sup>56</sup> Exhibit 677, p. 4005.

<sup>57</sup> Kennealy – April 18, 2013, p. 5626: 24-25.

<sup>58</sup> Kennealy – April 18, 2013, p. 5628: 8-15.

<sup>59</sup> Exhibit 11-100, pp. 1-2.

<sup>60</sup> Exhibit 13-5, p. 3906.

<sup>61</sup> McCulloch – June 13, 2013, p. 14346: 4-15; Kennealy – April 18, 2013, pp. 5711: 17-25, 5712: 1-8.

<sup>62</sup> Quinn – April 11, 2013, p. 4900: 6-8.

genuinely believed that his crew could do the work better than anybody else,<sup>63</sup> notwithstanding their track record of failure. He believed that Retirement Living was “*winning the battle*” in respect of the leaks<sup>64</sup> notwithstanding overwhelming evidence to the contrary.

52. In fairness to Mr. Quinn, he had no training in building design or waterproofing systems at all,<sup>65</sup> and was certainly not an expert in routing and sealing cracks.<sup>66</sup> He never even looked at the maintenance log.<sup>67</sup> He spoke with Mr. Caughill often about problems with the Mall, but never once thought to speak to him about the nature of the problems with the parking deck, which was the biggest problem.<sup>68</sup> Clearly Mr. Quinn was simply doing what he was told.

53. Retirement Living had more than enough money to fix the roof but chose to spend this money elsewhere. With respect to investing in the roof, Mr. Kennealy admitted under cross-examination as follows:<sup>69</sup>

*Q. And it appears from the figures we have heard this morning that you generated considerable revenue from the Mall as long as you owned it and you invested very little in it and you invested no capital in the roof, just like Algoma Central Properties; isn't that right?*

*A. We did not invest a great deal of capital in the roof, that is correct.*

*Q. You didn't invest any, as far as I can see. In fact, isn't it true that you actually didn't invest any of your money in the roof at all because the maintenance costs, once it was characterized as maintenance, you passed those costs on to your tenants, and so it was your tenants who paid for whatever was done to the roof, not you?*

*A. Some portion of it, yes.*

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<sup>63</sup> Quinn – April 16, 2013, p. 5148: 10-17.

<sup>64</sup> Quinn – April 11, 2013, p. 4952: 14-20.

<sup>65</sup> Quinn – April 16, 2013, p. 5083: 13-15.

<sup>66</sup> Quinn – April 16, 2013, p. 5136: 1-3.

<sup>67</sup> Quinn – April 16, 2013, p. 5138: 2-3.

<sup>68</sup> Quinn – April 16, 2013, pp. 5110-5113.

<sup>69</sup> Kennealy – April 18, 2013, pp. 5727-5730.

Q. All of it? Most of it? Most of it, at least?

A. I can't recall exactly how much the common area charges were, but there was a portion of it, yes.

Q. So you actually were spending virtually nothing on that roof; it was your tenants that were paying for it?

A. Part of it, yes.

Q. And then just like Algoma Central Properties, having not repaired the leaks, you decide -- and made lots of money over the years, after spending very little, you decided that the best solution was to turn around and sell it to someone else; isn't that right?

A. Well, we did decide that it was an appropriate thing at the point we did to look at selling the mall, yes.

54. This decision was likely influenced by the fact that maintenance expenses, as operating expenses, were charged back to most tenants.<sup>70</sup> Although capital expenses could also have been recovered in most cases, only the depreciation of the capital asset could be passed on to the tenants annually.<sup>71</sup> As such, it would have taken Retirement Living much longer to recover capital expenses, which is why it likely preferred to "lean toward"<sup>72</sup> operating expenses.

#### The Rout and Seal Option Would Have Worked

55. Although Dr. Saffarini agrees that the first option set out in Halsall's 1999 Report represents a professional rout and seal methodology, as opposed to a makeshift approach,<sup>73</sup> he has speculated that it would not have been effective. Roger Jeffreys testified that Halsall's rout and seal option appeared to be a measure, with cost consequences, that was not a complete fix, but instead a continuous repair that involved very effectively and diligently catching every leak that occurred.<sup>74</sup> However, no

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<sup>70</sup> Guertin – April 19, 2013, p. 5987: 7-24.

<sup>71</sup> Guertin – April 19, 2013, p. 5989: 6-22.

<sup>72</sup> Guertin – April 19, 2013, p. 6007: 17-20.

<sup>73</sup> Saffarini – May 29, 2013, pp. 12335: 18-25, 12336: 1-2.

<sup>74</sup> Jeffreys – July 31, 2013, pp. 19342: 7-18, 19343: 13-19, 19344: 7-8.

evidence or engineering explanation has been offered to explain why it would not have been effective.

56. On the other hand, three professional engineers have testified that Halsall's rout and seal option would have been effective. Unlike Dr. Saffarini, these engineers had first-hand experience with the parking deck. In fact, two of them inspected the deck themselves in the months preceding presentation of Halsall's rout and seal option. There is absolutely no basis for the statement that Halsall's rout and seal option would not have been effective. In any event, it was simply never attempted.

57. In Mr. Buckley's professional opinion, Halsall's rout and seal option was a workable system which would have depended upon proper specifications, appropriate materials, and qualified individuals.<sup>75</sup> Under cross-examination by counsel for Retirement Living, Mr. Buckley testified that Halsall's rout and seal option "*was a viable option at a lower price.*"<sup>76</sup>

58. Similarly, Mr. Celli testified that if there was no insulation and the concrete was bonded, then a system of sealing the joints would be effective if managed by professionals and prequalified contractors.<sup>77</sup> Under cross-examination by counsel for Retirement Living, Mr. Celli testified that the rout and seal option would have kept the building dry "*if it was done with professionals and with qualified contractors. We do many buildings where we maintain joints in precast structures.*"<sup>78</sup>

59. Mr. Truman testified that if qualified contractors had been used, as recommended, the routing and sealing option set out in Halsall's 1999 Report was

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<sup>75</sup> Buckley – April 8, 2013, pp. 4399: 9-25, 4400: 1-7.

<sup>76</sup> Buckley – April 8, 2013, p. 4447: 2-3.

<sup>77</sup> Celli – April 5, 2013, p. 4278: 1-6.

<sup>78</sup> Celli – April 5, 2013, p. 4336: 4-10.

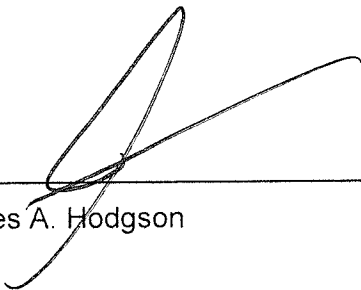
viable: "there's many structures that are sealed in that manner that are effective at resisting moisture penetration."<sup>79</sup>

60. Had Retirement Living decided to proceed with Halsall's rout and seal option, but the attempt proved unsuccessful, the roof would have continued to leak. It would then have been obvious to everyone that a membrane was the only way to solve the problem.

#### **PART IV - SUMMARY**

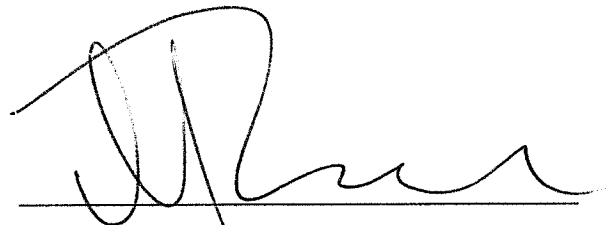
61. Other than with the benefit of hindsight, which is a standard of perfection informed by knowledge of future events, there is no basis for any criticism of the work done by Halsall or its representatives in 1998 and 1999. There is certainly no basis for any finding of misconduct against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of August, 2013.



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James A. Hodgson



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John M. Picone

**Norton Rose Fulbright Canada LLP**  
Lawyers for Halsall Associates,  
Michael Buckley and Albert Celli

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<sup>79</sup> Truman – April 9, 2013, pp. 4601: 9-11, 4602: 16-22.