

In the Matter of the Elliot Lake Inquiry
The Honourable Paul R. Belanger, Commissioner

Non-Profit Retirement Residences of Elliot Lake Inc. (**Elliot Lake Retirement Living**)
and 1425164 Ontario Ltd. (**NorDev**)
Participants with Standing Part One

Written Submissions

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As set out in the preceding Table of Contents, we have decided to break down our written submissions into four sections:

1. Relevant Considerations;
2. Corollary Considerations;
3. Closing Comments;
4. Recommendations.

1. Relevant Considerations

1. This section will identify those considerations which we believe are relevant to the Inquiry's mandate.
2. NorDev purchased the Algo Centre Mall and Hotel on June 17, 1999, and sold the Mall on August 8, 2005.
3. We accept responsibility for the care of the mall structure during the period of time of our ownership, and acknowledge that questions relating to our knowledge of the leaking issues and our response thereto are legitimate concerns of the Inquiry and the citizens of Elliot Lake.

a. Nicholls, Yallowega, Belanger 1998 Report

4. In advance of making a formal offer for the property in early January 1999, we had the November 22, 1998 report of Nicholls, Yallowega, Belanger (NYB)(Exhibit 67). Although this report set out possible repair options, it acknowledged that it was incomplete:

At this time we are unable to provide an evaluation of the condition of the precast slabs and any potential repair costs until further inspection and testing procedures are carried out. The results of this additional inspection and testing could lead to conclusions that there might be significant additional costs associated with any repair and restoration requirements. We recommend that this additional work be conducted in order to more accurately assess the condition of the existing structure (.0013)

5. In the Halsall section of this report, the following is noted:

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. However, given the age of the structure, deterioration of the concrete slabs may begin now or in the near future. This could result in significant maintenance costs for the remainder of the building life.

We advise further studies be carried out to accurately assess the extent of the corrosion, if any, of the reinforcement in the precast slabs (.0036)

6. Halsall goes on to detail a six-point study. The first four points deal with the testing of the core slabs to see if the reinforcing steel therein has been corroded. The final two studies are described as follows:

Inspect condition of the supporting structural steel beam lateral restraint connections to the precast slabs.

Inspect condition of the beam and bracing connections.

7. Note that except for the reference to the connections, Halsall indicates that its concerns are with the precast slab, not the steel structure.

b. Halsall Report, 1999

i. The Structure

8. We authorized all of the studies recommended by Halsall and they provided a report dated May 10, 1999 (Exhibit 70).

9. Halsall summarizes its objectives for the report as follows:

Assess the current physical condition of the mall roof structure, specifically, that part comprising the upper parking deck and the pedestrian walkways.

Identify items requiring repair and determine the timing and approximate costs of the repair.

Minimize future repair costs by identifying defects that could affect the long term durability of the structure (.0005).

10. With respect to the structural integrity of the building, the report's conclusions are as follows:

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

The precast panel concrete is providing sufficient protection to the embedded prestressing tendons. Precast concrete is typically of high quality, limiting chloride penetration, moisture penetration and carbonation of the concrete (.0007)

11. The Observation section notes:

Some deterioration of the precast panels is present, including cracking of the top flange and webs between the cores of the slabs. These were observed at isolated locations and are not believed to present a concern at this time. Poor joint detailing, thermal movement of the panels, construction related damage or shrinkage of the panels are all likely causes. The observed deterioration is not structurally significant and further deterioration is unlikely (.0010).

12. The covering letter from Halsall to Nicholls Yallowega Belanger dated May 10, 1999 (Exhibit 71), summarized their findings as follows:

Though leakage through the parking deck has been an ongoing problem, we have found no evidence of structural deterioration compromising the integrity of the structure.

13. The report, in our view, confirmed that this structure, though leaking for almost 20 years, suffered minimal ill effect from the water penetration it had been subjected to.

ii. Trow and Meyer Reports

14. It is clear that no one from Nicholls Yallowega, Halsall or ELRL had seen any pre-existing engineering reports with respect to the structure - more particularly the Trow and Meyer Reports.
15. It is the submission of ELRL/NorDev that such information should have been made available to both their architect and engineer in advance of their reports, and that it was the obligation of these consultants to insist that (1) such reports were provided, if they existed, or (2) that it was clarified that no such reports existed or (3) that if such reports existed, and they were not produced, the reasons therefore.
16. ELRL/NorDev hired Nicholls, Yallowega, Belanger (NYB) as their consultant, both for the first report undertaken for the City and the second report for their purchase due diligence. We submit that we relied upon their expertise for what information needed to be provided for a complete report.
17. It is anticipated that the requests by Mr. Nicholls for "other pertinent reports or information" (Exhibit 874), will be used by NYB to show that they did request these engineering reports, and that the fault for not receiving them lies with ACP and ELRL/NorDev. Ms. Guertin gave evidence in this regard as follows:

A. *I would have called Mr. Leistner and read to him this paragraph. I don't know specifically what Mr. Luciw is looking for.*

Q. *Right.*

A. *I – you know, we rely on them to tell us what it is they are looking for. So when he says please get me these drawings and these other pertinent reports, that is what I would have asked Mr. Leistner for. Any, you know, even when we get to their report, I think they were discussing missing some engineering consumption reports and occupancy status reports. I did know what those were. You know, I would have relied upon Mr. Luciw to be specific about what it was he was looking for. (Day 29, Page 5898, L. 24 to 5899, L. 13).*

18. Please see Exhibit 67, Page .0007 that there is no reference to engineering reports when NYB comments:

It should be noted that all of the construction document sets that were provided for our review were incomplete and generally contained no information related to the roof deck parking structure. As well, there were no specification documents, “as-built drawings, post-occupancy inspections or maintenance and energy consumption records available for review by the consultants”.

19. As well, Exhibit 68, which is where NYB sets out the contract for the 1999 report, requests only “drawing for the buildings” for the engineers (Page 0065). No mention of the need for existing engineering reports is made.

20. Mr. Leistner describes a meeting with Mr. Kennealy in which he offers engineering reports, but Mr. Kennealy has no recollection of such a meeting and does not believe that it happened. He indicated that his nature was to ask for such information (Day 27, Page 5368, LL. 19 -25).

21. The failure of ACP to share its knowledge of the state of the parking deck can be seen to directly link to the collapse. In 1994 Trow had told them (Exhibit 611):

Iamonico does not believe that we have a structural problem yet but he cautions that the corrosion seen will accelerate exponentially if the leakage is not treated.

22. The Trow report to ACP of November 6, 1995 (Exhibit 51), was blunt in its assessment of the seriousness of the problem:

If the debonded topping is not repaired, the core slabs will not be able to safely carry the dead load of the topping since the topping and cores slabs must be bonded. On going leakage through the joints in the topping and core slabs will continue to cause deterioration of the topping and core slabs due to freeze/thaw cycles and chloride contamination of the core slabs and subsequent corrosion of the prestress strands in the core slabs and the supporting steel beams. (Page 3).

23. None of this information was shared with ELRL/NorDev. It is now clear that as early as 1991, ACP was considering “abandoning” the property (Exhibit 492). By the time of the sale, ACP was desperate to unload the Mall, but that did not relieve it from being forthright about the condition of the building. It was a safety issue. They should have disclosed voluntarily all of the Trow reports.

iii. General - Completeness of Report

24. It is important to note that the purpose of the Halsall 1999 report was due diligence - information for the purchaser to make a decision about whether or not to buy the Mall. It is not the same situation as when ACP commissioned Trow to specifically deal with the leaking issue, and then ignored their recommendations.
25. It is similarly important to note that the Halsall 1999 contains all of the information given by Halsall to ELRL/NorDev (with the exception of the conversations described by Mr. Quinn with Mr. Truman, described below). Mr. Celli, responsible for the 1998 Halsall Report never had any discussions with anyone from Retirement Living (Day 21, Page 4334, L 10 - “*We had no direct conversations with Retirement Living*”). Mr. Buckley, responsible for both the 1998 and 1999 report answered No to the Question “*Did you at any point have any direct contact with Retirement Living or Algoma Central Properties*” (Day 22, Page 4369, L. 22).
26. Mr. Truman, after his site visit and conversations with Mr. Quinn says the following about explanation and follow up with ELRL/NorDev:
- Q. *Mr. Buckley told us yesterday that he’d never made any contact with anybody at Retirement Living or ACP. And did not recall any conversation with Nicholls Yallowega in which he discussed the findings of your report.*
Firstly, did you ever have any discussions with Nicholls Yallowega about the findings of your report?
- A. *No.*
- Q. *Secondly, did you at any time discuss the findings of your report with anyone from Retirement Living?*
- A. *No.*
- Q. *Specifically did you ever discuss with Retirement Living the details of what you were proposing in Options 1 and 2?*
- A. *No. (Day 23, Page 4654, LL. 8-24).*
27. We submit that this absence of contact is very important, as it means that the only information that ELRL/NorDev has is that which is contained in the reports. It is expected that Halsall will make submissions about facts and opinions outside of the report, but the report must speak for itself and the Commissioner will need to determine for himself what the most reasonable interpretations of the report are.

iv. The Repair Recommended

28. The report identifies one main item requiring repair:

Caulked joints in the concrete topping (original and repaired) and precast panels are poorly detailed. Vee-shaped joints in the topping and sealant poured directly onto the grout between the precast panels creates three sided adhesion of the sealant. This creates stress concentrations on the sealant, reducing its performance. Improper joint details have also resulted in "D" cracking of concrete adhering to some joints, providing access for moisture. While full-depth joints in the topping are not three-sided, their joint depth:width profile is typically 2:1 rather than the 1:2 profile typically required for effective sealant performance. (.0010)

29. To address this repair, the Report recommends (among other things) primarily the following as "Option 1":

Rout and seal all cracks and joints in the parking deck topping and walkway canopies, ensuring a proper joint profile and surface preparation prior to placing the sealant (.0008)

30. The report does set out five other items as part of Option 1, but Mr. Buckley in his Day 22 testimony indicated that only the first one was associated with keeping leaks out of the building (Page 4425, L. 7 to Page 4426, L. 19).

31. The report gives additional information about this procedure under the Heading 3-Sided Adhesion (Joint Profiles) in its Appendix A:

A properly installed caulk joint provides a 2:1 width:depth profile and does not permit adhesion of the caulk to the bottom of the joint. The 2:1 profile insures the sealant will fail within itself before damaging the concrete to which it is adhered. If the profile is 1:1 or greater, the sealant will be too stiff across its depth to stretch, transferring the tensile forces back to the concrete, which is weak in tension, and causes it to fail. If the sealant is bonded to the bottom of the joint, tensile forces in the sealant are concentrated near the top edge, rather than across its depth, causing it to fail. This is termed "three-sided adhesion" and is common in "vee" shaped joints or where a bond breaker (such as a backer rod) is not provided at the base of the joint (0026).

32. Mr. Quinn, the former property manager, also gave testimony that Mr. Truman of Halsall gave instructions to him and the maintenance crew on how to properly perform the repair on site:

A. You know, like Jeff would say, this is the proper way. Or this is, you know, you have to have the 2-to-1 ratio, you've have the backing rod in, you've gotta do this, you've gotta do that. And we said, the crew, you know, either agreed with him or, you know, asked questions. And it was a discussion on the proper way of doing it (Day 25, Page 4865, Lines 1-8).

v. Costing/Contractors

33. It is only under the headings "Summary of Costs" and the "Executive Summary" that the report refers to contractors:

Contractor's mobilization and site protection - \$30,000.00(.0009)

34. Although the report clearly identifies improper joint profiling, it does not state that existing staff, using the proper joint profile and site preparation, could not competently perform the rout and seal program recommended.
35. It was the evidence of Richard Quinn, property manager for ELRL, that with the information set out in the report, and his conversations with Jeff Truman, existing staff could perform the necessary ongoing repairs.
36. With respect to the hiring of contractors, Mr. Quinn said the following:
- Q. *... Did you hire a contractor to oversee the work?*
A. *No.*
Q. *And why not?*
A. *Because this was in my view well within the capabilities of the crew that was working at the time...
It's not rocket science. If it's properly administered this option is quite viable, which they said. And it can be done, you know, by the guys that had been doing it for ten years (Day 25, Page 4890, L 7 to Page 4891L 1)...*
A. *Routing and grouting and making sure that you have a vee formation on the crack that you're trying to fix is not difficult. Proper priming, and cleaning and making sure there is no dust, and the care that's taking in preparing the material to put into is a little more technical (Day 25, Page 4898, L 17-23).*

vi. Timing of Repair

37. One of the objectives of the Halsall Report was: "Identify items requiring repair and **determine the timing** and approximate costs of the repair (paragraph 10 above) However, on the topic of timing, the report itself says only "*If required, we could provide a phased repair approach for Option 1 tailored to your financial restraints*" (Exhibit 70, Page .0009).

38. Mr. Quinn said of the timing, as he understood it:

A. *We understood that this had to be – it had a time period of, you know, multiple years before it needed to be completed. I mean they talked about a phased in approach, and that’s what we took it as.*

vii. Extent of the Repair

39. The report talks about “*Rout and seal all joints and cracks*” (Exhibit 70, Page .0008).

40. It is our position that a report that allows for a “*phased repair approach*” should not be interpreted as calling for a one-time replacement of all sealant in joints and cracks, whether in good shape or not. When Mr. Jasskelainen of HSP described the problems they had with sealing joints and crack in the construction phase at end of 1979, and was asked why then didn’t just go back in the spring and do them over again:

A. *... Physically on the surface if you’ve got adhesion in the top quarter inch, you know, you can go and tug and pull at all of the joints until everything comes out, but some of the stuff is probably in good shape.
And, you know, better to be an idle fool than a busy one, I always say.*

Q. *So it might be a lot of work?*

A. *Yeah, you’re doing something for nothing... (Day 5, Page 899, L 24 to Page 900, L. 8.*

41. As well, although this was not in the knowledge of ELRL/NorDev at the time, please refer to the letter from Mr. Liataud to the Elliot Lake Library, dated May 7, 1991 in which he writes:

Due to the large number of leaks which occurred in the spring of 1990, we redid 100% of the joints over the entire mall area, which, needless to say, did not fix all of the leaks (Exhibit 273, Page 1562).

viii. Ongoing Leaks

42. It is important to note that the Halsall Report did not hold out either Option 1 or Option 2 to be a complete fix. There was going to be ongoing leaking or the potential for leaking with either options:

Option 1 will require annual ongoing maintenance of the seals with full sealant replacement in about 10 years. Option 2 will require routing and sealing of cracks in the asphalt as they develop over time. (Exhibit 70, Page .0003)

43. It is therefore submitted that ongoing leaks, post-purchase, would represent not a failure, but rather a shortcoming of the rout and seal approach. Leaks would occur. Ongoing maintenance was the key to minimizing damages therefrom. There would be cracks and joints that needed to be sealed. Regular traffic, snow removal and freeze and thaw cycles would inevitably lead to periodic breakdowns of the seals on the concrete topping, leading to leaks.

ix. NORR

44. The NORR report (Exhibit 3007) identifies shortcomings in the Halsall Report, and describes them on page 45:

In the period of 1998-1999, Halsall observed the corrosion which had likely progressed in the five years since Trow's inspection. Halsall measured a corrosion product of 3 mm and correlated that with less than 1 mm of section loss. This is again within the corrosion scenario that is hypothesized here. Halsall did not find the 1 mm loss of section as warranting more extensive inspection of steel and they did not inspect connections where corrosion would be more critical. Additionally, Halsall did not call for an inspection program to be carried out systematically until the leakage problem is resolved. They did not adequately provide a cautionary warning that future corrosion could potentially lead to the development of a critical condition if left untreated

45. With respect to the section loss, Mr. Jeffreys, Ministry of Labour engineer, gave evidence that

Well, if you have a 1 millimetre section loss on a heavy steel beam, you would probably have a 1 millimetre section loss on a lighter angle, and that then becomes more significant a section loss. So, it would be prudent for them to have recommended a further inspection of things like connections, yes. (Day 78, Page 155, LL. 15-21)

46. The reference to the inspection program and warnings brings to mind the Trow report to ACP of November 6, 1995 (Exhibit 51). With respect to the regularity of inspections, that report said on page 3:

Once the parking deck has been repaired and waterproofed, the Algo Centre maintenance personnel at this structure should carry out a visual inspection of the parking deck on a monthly basis. Record on logs any defects observed in the waterproofing system and any leaks which may develop on the underside of the slab. 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.

47. Halsall has responded to these last two comments (warning and inspection schedule) by maintaining that they thought the work was going to be done right away, and that deterioration of the structure through the leaks was just common sense and did not need to be commented upon.

48. Dr. Saffarini gave evidence in this regard on Day 52 of the inquiry:

Q. *All right. Well, the owner in this case got a report from Halsall, that although it said that the building was structurally sound, it did report that there was corrosion; correct?*

A. *Yes.*

Q. *And the Halsall Report indicated that the source of that corrosion was water that was leaking on the steel; correct?*

A. *Yes.*

Q. *And so I can understand your evidence - and correct me if I've got it wrong - your evidence is that even though someone knows that they've got rust on their structural steel because that was caused by water, it's asking too much of them, intellectually, to figure out that if you don't stop the water, the rust is going to continue; is that right?*

A. *I would disagree completely with that statement, if I may. I think that it has been established from the life of this building and the number of inspectors that have passed through the building, and many of them engineers, professional engineers and so on, that the problem which has, in fact, caused the collapse – I mean, this is an undisputed fact that the building had collapsed, and yet the problem went unobserved. So if you're kind of insinuating that it is obvious that anybody who would know that the building, is – a layman who would know that the building is leaking, that they would intuitively know that this would result in structural safety, I would say that this is not something that I would consider to be a layman's knowledge.*

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

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

49. As to whether or not the rout and seal approach was an appropriate recommendation, either with our without “qualified contractors” with engineering oversight, the following was the some evidence at the inquiry.

50. On day 12 of the Inquiry, Mr. Iamónico of Trow said of the rout and seal approach that it was *“just chasing cracks”* (Page 2478, L. 13), *“not a viable option”* (Page 2490, L. 6), *“not proper”* (Page 2493, L. 1), *“wasting your money”* (Page 2493, L. 15), and *“the wrong option”* (Page 2494, L. 24).
51. Halsall has maintained that the problem with the rout and seal approach was that ERL/NorDev did not follow their recommendation that it be done with qualified contractors and engineering oversight. The Commissioner will have to read their report to determine if that is what it, in fact, says, but even assuming that it does say that, Dr. Saffarini dealt specifically with this position on Day 52:
- A. *Yes, I’m trying to capture the relevance to the question. You are saying that Halsall recommended that this should be done in a professional way, unlike the way that it has been ongoing and that eventually it continued to proceed.*
- Q. *That’s correct. And that had it been done in the professional way described by Halsall - nobody ever knows what would have happened – but what I’m going to suggest to you is had it been done in a professional way, it certainly would have done a better job in preventing leaking, compared with what had been done in the past.*
- A. *A relative thing may be this statement would be, you can do a bit better if you do it this way or that way. However, just so that I’m – I can be fair in my response I think we are emphatically saying “No”, that would not be an appropriate means of waterproofing an inhabited building, so I’m not lessening the professionalism of Halsall or the fact that they would not have wanted the work to be done in less than a professional way, but I’m not, you know, agreeing with the concept that sealing the topping would have worked.*
- Q. *Well, let me ask you this: I mean, I think everyone accepts that an asphalt membrane would have been a better solution; I take it you agree with that?*
- A. *I would say it’s the only solution. (Page 12337, L. 1 to Page 12338, L. 13)*
52. Mr. Hughes, on day 53, is even more direct on the viability of a rout and seal solution:
- A. *In my opinion, routing and sealing of cracks and a sealer being applied to concrete is not an acceptable solution for waterproofing a roof.*
- Q. *Okay?*
- A. *I would not consider it to be usable in any sense. (Page 12601, LL. 4-10).*

53. We believe that it is therefore clear that the Halsall Report to ELRL/NorDev was fatally flawed both in what it said (rout and seal) and what it didn't say (there will be structural damage if you do not). Again, the conclusions of the Halsall Report are set out succinctly in Mr. Truman's letter of May 10, 1999 to NYB accompanying the 1999 Report (Exhibit 71):

Though leakage through the parking deck has been an ongoing problem, we have found no evidence of structural deterioration compromising the integrity of the structure. While waterproofing the parking deck is feasible, we suggest a program of joint re-sealing be effected instead, with consideration given to proper joint detailing. This approach, in our opinion, is the most cost-effective particularly where financial constraints exist.

54. It is perhaps worth mentioning three more paragraphs in this letter:

If required, we would be pleased to prepare specifications or provide construction review for the required work.

Also, we understand Retirement Living has many structures in its portfolio, including townhomes, high-rise apartments and parking garages. We believe our experience in structural design, condition assessments, repair, and capital cost/maintenance financial analysis and planning could provide Retirement Living with a cost-effective repair.

If you require further information, or would like a presentation in any area, please do not hesitate to call us at (416) 487-5256.

55. Only Halsall can answer the question of whether or not the failures of their report stem from the desire to establish ELRL/NorDev as a long term client.

c. NorDev's Treatment of the Deck - 1999- 2005

56. Whatever shortcomings exist in the Halsall Report, it was still NorDev's job to maintain the parking deck during their ownership. This section will look at what they did.
57. NorDev purchased the Mall in June 1999. What state were the leaks in then?
58. Mr. Rod Caughill of ACP, in his evidence on Day 10 of the Inquiry, said this:

Q. *Okay, By the time that you sold the mall, in 1999, two things: What was the state of the parking deck and the leaks and the necessary repairs in 1999?*

A. *To the best of my recollections, we had – we were on top of things.
We had – the most of it under control.*

We certainly did have areas that were perpetual problems, but our staff was pretty diligent in staying on top of things and I think we had it somewhat under control.

Q. *Would it be fair to say that in the history of the mall, perhaps 1999 was one of the better years for – for roof repair.*

A. *That's my recollection, yes. (Page 1941, LL. 5-20).*

59. We don't believe that any of the estoppel certificates provided by tenants for the 1999 purchase made any references to water problems.

60. Mr. Quinn (Day 25) gave the following evidence about the start up of the maintenance program:

Q. *Okay. So we're June of 1999. Describe to us exactly what you - or you and your maintenance team did to achieve the number one item here?*

A. *... the crew was new to me. There was an introduction period between me and the guys, and what our expectations were, and what Retirement Living was about, and what were trying to achieve, et cetera, et cetera.*

And it was – it was presented to them that this was one of – or this was the biggest task that we had. That this crew, them, would by the end of the summer have gone over this deck and we would have fixed every crack. We would expect that at the end of September, there would not be a drop of water enter the mall. (Page 4902, L. 19 to Page 4903, L. 3).

61. With respect to the annual maintenance program, Mr. Quinn said:

Q. *Okay. I just want to be clear for the record. Are you telling me that that process of routing and sealing the joints is something that you did on an annual basis starting in June and finishing in September?*

A. *Depending on the weather. End of May, June, July, August, yes.*

Q. *Okay. So that was – it wasn't kind of a one-time shot deal. We'll do it all and it will stick. We have to do it on an annual basis?*

A. *Yes.*

Q. *And did you rout and seal all of the joints every year?*

A. *Yes.*

Q. *All of them?*

A. *All of them. No all of the ones that leaked. All of the ones that were a problem. We did not take out the previous year's work and do it over again if that's what you are saying (Day 25, Page 4910, L 20 to Page 4911, L 13)*

62. Mr. Snow, the lead maintenance worker, said in answers to questions from Commission Counsel:

Q *And did you have a standard practice that you followed every spring?*

A. *Yes, we'd walk every joint. Well, I had map pretty much like that and I would mark what was priority one, two, three and just be a lot of red marks.*

Q. *And what was – how did you prioritize them?*

A. *Where they were leaking inside. The ones that were most visible and doing the most damage inside. High traffic areas inside.*

Q. *So you did that in the spring and then how did you proceed over the course of the summer. Did you simply go through and patch those areas in order of priority?*

A. *Pretty much.*

Q. *And that involved you following the same process that you just told us about. That is you tear up the joints, grind it out, prime, seal and put down the Tremco product?*

A. *Yes, sir. (Day 19, Page 3967, L. 17 to Page 3967, L. 12).*

63. Mr. Quinn and Mr. Snow both gave evidence that leaks continued, but each thought that progress was being made.

64. Mr. Snow stated:

Q. *... Did your crew get better at their job over the 16 years?*

A. *I think so.*

Q. *Did you see an improvement?*

A. *We got better at finding the leaks, that's for sure. We used to be able to go up and pinpoint them pretty fast on the roof.*

Q. *And did the leaks ever completely go away, sir?*

A. *For a short period of time, I think we were down to one leak maybe or – and that might be one that comes in 50 feet away and ran across insulation or something before it comes through. But for a time we were pretty good there.*

Q. *How long would that last?*

A. *Until the following winter, I guess, until the freeze-thaw and snowplow, and the spring of the following year you had more leaks.*

Q. *And was there any particular period of time – let me put it this way. When you say that you had it down to almost zero for a period of time, was that under which owner, Algoma or Retirement Living? Do you remember?*

A. *I think with both of them at some time we were pretty good with the leaks. (Page 3973, L. 24 to Page 3974, L 24)*

65. Richard Quinn stated:

A. *We continually got better results year after year after year. We left – when we left the mall or when the mall was not ours any more there were minimal leaks....
But did I feel good that there wasn't 53 buckets out there. You're darn right I did. I felt great, because we were actually getting somewhere. So when you say that this didn't work I don't agree. It did work, was working and we were getting somewhere. (Page 4951, L. 14 to Page 4952, L. 13)*

66. Mr. Kennealy gave the following evidence on Day 25:

A. *And I am trying to answer your question in terms of my perception was of how we were doing with the leaks and the parking deck, and I believe that we were doing very, very well. (Page 5617, L. 23 to Page 5618, L. 2)*

67. Ms. Quinte gave this evidence on Day 78.

Q. *From 2001 then to 2005, when Retirement Living was the owner of the mall while you were there.*

A. *Yes.*

Q. *Were they able to respond quickly and fairly effectively to a leak when it occurred?*

A. *They did.*

Q. *Did you – was there any change in the speed and effectiveness of response after Eastwood took over in 2005?*

A. *I would say there was.*

Q. *Okay. And was that troubling to you as a tenant?*

A. *It was. (Page 308, L. 20 to Page 309, L9).*

68. It is clear that issues continued to exist with respect to particularly the Library and others situated below high traffic areas and expansion joints, but we believe it is important to look at reports of the condition of the mall in 2005.

69. Exhibit 5630 is a commercial mortgage site inspection report done by the Royal Bank in July 2005. Mr. Chattaway identified all elements of the condition of the mall as either good or excellent, with the exception of curbs/sidewalks. He wrote *"Parking areas and mall very clean. Floors in mall are tile and "sparkle" showing high degree of maintenance"*. (Page 1) He did not identify any signs of leakage.
70. Exhibit 88 is the Construction Control Inc. building condition assessment also from July 2005. It identifies all elements of the building as being good, with the exception of the parking, paving and exterior stairs, and hotel finishes at fair (Page 0004 and 0005). They also saw no evidence of leakage.
71. We wish to refer the Commissioner to the overview documents for the Bank of Nova Scotia (Exhibit 12), Zellers (Exhibit 13), State of Disrepair (Exhibit 10) and the Library (Exhibit 11) to see how little material is contained therein for the period 1999-2005.
72. The money expended by NorDev on capital for the period 1999-2004 is set out in Exhibit 708, Page 2569. The annual amounts spent for parking deck maintenance for the years 1999-2004 are set out in Exhibit 2282 and total \$323,139.00 for the period. Both Mr. Quinn and Mr. Snow indicated that there was never a question of a shortage of resources to deal with the parking deck repair.
73. One of the issues that has been presented at the Inquiry is the sense of a linear deterioration. That is, that the mall deteriorated at the same rate for all three owners. We wish to challenge this assumption.
74. NORR (Exhibit 3007, Page vi) identifies a corrosion rate of .1 mm per year, and says *"There is no evidence or technical reason to suggest that the rate of corrosion suddenly accelerated..."*. When asked about this on Day 53, Mr. Dinovitzer said the following:

- Q. *I'd like to talk a bit about the rate of corrosion. I know Mr. Outerbridge touched on that earlier... but what I hear is that – what you are proposing is a linear line, that is increasing at... .1 millimetre per year.*
- A. *The – it is a simplification to – assume that it is going linear. It is just a way of picturing it; there – there are variations in this.
So we don't – we don't know all of the details to be able to say exactly the process, so it's, on average, 0.1 millimetres per year (Page 12582, LL. 1 to 16)...*

- Q. *What I am wondering is, though, in something like this, whether or not that average is reliable. Because what you have is water coming down, different times of the year.. in different amounts, different temperatures, different salinity.
How is it possible to take all of those variables and say: Lets supply a linear equation to that?*
- A. *Agreed. I – it is – in reality, we know it's not linear...
(Page 12585, LL. 1-12).*

75. We believe that the evidence supports a significant deterioration in the leaking, post-sale to Eastwood. At the start of Dr. Saffarini's evidence on Day 29 he showed a video (Exhibit 5158) of observations of leaking in the Dollarama Store on July 24, 2012. He confirmed on Day 30, (Page 12581) that the leaks showing were, in his opinion, not the result of the collapse:

- Q. *Would it be your evidence that that leakage was not based at all on the collapse?*
- A. *Yes.*
- Q. *So if the collapse had not occurred, you would have expected Dollarama to have been leaking like that?*
- A. *That would be my opinion, yes. (LL. 18-25).*

76. We ask the Commissioner to watch this video. It is shocking, and significantly different from any video or picture taken during the ownership of NorDev.

77. Exhibit 11-111 are minutes of a meeting of the Elliot Lake Mall Merchants Association on May 27, 2006, almost one year after our sale. On page three is written:

*Brian Knight, owner of Marlin Travel, doesn't like the condition of the mall, cleanliness wise. He says the mall has deteriorated since new ownership. The mall is now dirty compared to before.
All merchants who were at the meeting agreed, the mall has deteriorated since new ownership. The suggestion made by tenants was to write the landlord (Mr. Nazarian) and inform him of unhappy they all are. All agreed to write a letter.*

78. More importantly, Dan Bouffard, the mall manager, is quoted on page 4 as follows:

Dan explained that the roof has been neglected for over a year. It will cost big money and take a lot of time to bring it back to a state where our maintenance staff is capable of performing routine maintenance.

79. Henri Laroue on Day 42 says the following about conditions in the spring of 2008:

Q. *And why don't you describe for us what the effect of that rain was in terms of the leaking?*

A. *I heard two different versions on why. One I heard is that the silicone didn't adhere to the concrete the way they had expected it to, so the leaks were so bad that it was a hundred times worse than it had been.*

Q. *And this would be in what time frame?*

A. *From the year before.*

Q. *Okay, but now are you talking about the spring of 2008?*

A. *Yeah, sort of from May to July.*

Q. *Okay.*

A. *When the leaks were worse, the silicone, some people felt the silicone wasn't holding up, that it wasn't doing what it was supposed to have done. Other people, the maintenance guys, Al and Ray, who had been repairing the roof for, you know, 18, 19 years, or however long they had been there, felt that it was because in the past small amounts of repair work would have been done every season, whereas when Bob bought the mall, those repairs didn't happen for the first couple of years. So it sort of deteriorated to the point where now there were too many joints and seams to take out and fill and they felt that is why it leaked worse (Page 10743, L. 9 to Page 19744, L. 9)*

80. The description of the damage done during the Peak Restoration project, and Eastwood's failure to provide reliable information on amounts spent on the parking deck also support the submission that the deterioration leading to the collapse escalated during the Eastwood ownership.

81. What is clear is that, even after leaking since construction, in 1999 the building was still structurally sound. Dr. Saffarini had this exchange with Mr. Hodgson on Day 52:

Q. *Okay, you will agree with me, at the time that Halsall inspected the mall in 1999, it was structurally sound.*

A. *Yes, and we make that statement. (Page 12333, L. 24 to Page 12334, L. 3).*

82. NorDev continued with a rout and seal approach, and we submit that they certainly did no worse of a job at it than ACP did. If the linear approach is discounted, is it not likely then, that the mall was still structurally sound in 2005? We submit that the deterioration leading to the collapse occurred post sale.

83. Halsall 1999 did also recommend *vehicles for snow removal should be limited to pick up trucks with plows. Signage should be posted indicating the maximum permissible weight of vehicles. The height restrictors at both access ramps should be employed to prevent access of oversize vehicles* (Exhibit 70, Page 0008)
84. The evidence that this recommendation was followed, came both from Mr. Quinn and Mr. Snow. On Day 19, Mr. Snow confirmed that the barriers had always been in place (Page 3984, LL. 17-24) and that vehicles larger than permitted may have been on the roof, but he was not aware of it and *"It might have happened once or twice, but as a rule, no"*(Page 3985, LL. 5-9). He also gave evidence that the snow was plowed by pick up trucks, with dump trucks staying on the ramp (Page 3985, LL. 10-20).
85. Mr. Quinn gave evidence on Day 26, (Page 5004, L. 14 to Page 5006, L. 16) with regard to the snowplowing and Day 26 (Page 5048, L. 5 to Page 5052, L. 15) with respect to the barriers, showing compliance with Halsall's recommendation.

d. Sale to Eastwood

86. By 2005, ELRL/NorDev were ready to sell the mall, and Mr. Nazarian appeared and bought it.
87. Mr. Nazarian, in his evidence, has taken the position that he was duped by NorDev and was refused relevant engineering information and not told that the mall leaked.
88. Ms. Guertin, in her evidence on Day 29, states:

Q. ... As far as his [Nazarian] due diligence was concerned, what role did you play in that?

A, I guess the best way to describe it is I was the go-to person for both he and his bank, so when they asked for information, for documents, or if they asked for explanations, then typically they would have called me.

Q. Did you ever offer to provide Mr. Nazarian with any of the engineering reports you had?

A. I offered to provide them to his bank.

Q. And what was the response you got?

A. The response I got from the bank was thank you, we need current information, we are going to get our own – they ended up getting their own Building Condition Assessment. (Page 5994, LL. 4 - 21).

89. This was in keeping with the bank's requirements of Mr. Nazarian, found at page 2350 of Exhibit 706:

Engineering report of the property prepared by an architect/engineer retained by the Lender and reporting a physical property condition acceptable to the Lender.

90. Ms. Guertin's evidence was that the issue of the leaks was discussed directly with Mr. Nazarian:

Q. *What about discussions concerning the condition of the roof deck? Were there any discussions about the fact that you had a leaking problem?*

A. *Mr. - yeah, Mr. Nazarian was aware of the leaking problem.*

Q. *And how was he aware?*

A. *It was something that came up in discussion probably several times...*

I know that Mr Kennealy talked to him. I was there during those discussions. I recall it being explained to him how key it was to have the employees still work for Mr. Nazarian because they had been working on the deck for years and they understood it and they know how to use... the material (Page 5995, LL. 2 - 18).

91. When the price was reduced from 8.2M to 7.2M, Mr. Nazarian's realtor wrote to Mr Kennealy (Exhibit 2296):

The purchase intends to improve the condition of the property and the parking lot in due time.

92. Mr. Kennealy gave this evidence on Day 28 about his conversation with Mr. Nazarian about the reduction in price from 7.2M to 6.2M:

Q. *Did you talk to Mr. Nazarian and say, why are you doing this two days before closing, dropping the price by a million dollars?*

A. *Yes, on this one we had a discussion...He had more than enough of his own free capital to complete the deal, but he wanted to hang on to the cash because he wanted to do additional work on the property and fix a bunch of things up. He did mention specifically the parking deck...*

... But on this occasion, he specifically mentioned that he wanted to look at doing some things on the parking deck, and I would have taken that to the Board and asked them what they wanted to do. (Page 5659, L. 4 to Page 5660, L. 3).

93. Mr. Nazarian is quoted in a local newspaper article from August 27, 2008 (Exhibit 10-00010), as follows:

Nazarian also says he was aware of the mall's leaky roof prior to the purchase and does not regret buying the building. "It is a beautiful mall and I would like to make it more prosperous".

94. The estoppel certificate from the Bank of Nova Scotia (Exhibit 1490, Page 00044), at the time of the sale to Eastwood, contains the following statement

There have been recurrent water leaks into the premises, and wherever this is the case, the occurrence of mould is a concern.

95. It is submitted that this evidence is conclusive that Mr. Nazarian knew of the leaks in advance of purchase, and, in fact, negotiated a 2M discount to assist with the costs of repairs.
96. His assertion that he demanded all engineering reports is contradicted by his disregard of those that he received. He received the Construction Control July 2005 report in September, 2005 in two separate emails, but he did not read it. In February of 2007, Mr. Tom Turner, mall manager, received the 1999 Halsall report from Mr. Bruce Caughill and sent it to Mr. Nazarian, but he denies receiving it (Day 54, Page 12736, L. 8). That he would be adamantly searching for this information from ELRL/NorDev is incredible.

2. Corollary Considerations

97. In the course of the Inquiry, some issues have arisen which do not appear to have a clear connection to the Commission's mandate. Much time was spent on the details leading up to the Board of ELRL's decision on June 3, 1999 to waive all conditions in the agreement of purchase and sale, and purchase the mall on June 17, 1999.
98. We believe that the path to this decision is clear in the evidence. Mr. Kennealy attended a meeting on December 5, 1997 with Bob Leistner, Fred Bauthus and George Farkouh, in which Mr. Leistner made clear ACP's plan to close and demolish the Algo Inn. See Exhibit 3224 being Mr. Leistner's notes of this meeting: "ACP would recommend closing Inn next year, if nothing changes".
99. For reasons that I am sure are clear to the Commissioner, such a decision would have drastic negative effects on Elliot Lake and ELRL which was the cornerstone of its economy.
100. ELRL then undertook, at the request of the City, the preparation of a report to include all necessary information on the mall and hotel, should the Inn or Mall close.

101. ELRL became involved because as set out in Mr. Bauthus's report to Council of March 6, 1998 (Exhibit 249):

Based on our experience in dealing with the retail sector in the past when we undertook the socio-economic study in 1991, we are aware that there is some reluctance to turn over information to the City related to business operations due to the desire to maintain confidentiality. In order to address this, the City has entered into discussions with Elliot Lake Retirement Living to act as the contractor on our behalf in dealing with the community and the gathering of information. This is particularly true related to the information related to the mall operations. (Page 0873)

102. ELRL moved forward with this study, which required entering into a non disclosure agreement with ACP (Exhibit 390). We submit that it is inherent in the confidentiality concern described in the paragraph above, that the City would not have immediate, unfettered access to the information. However the Non-Disclosure Agreement does have wording in it about City Councillors and others, which appears to some to be confusing. We suggest that this can best be explained as follows from Mr. Leistner's testimony of Day 17:

Q. *... The portion I think that causes a lot of confusion is where there's talk about the councillors and it being able to go to them. And I'm going to suggest to you that arises from a conversation that would have gone like this: Mr. Kennealy would have said to you, "Bob, I've got a problem with the blanket non-disclosure because we are going to be – the City is funding about \$20,000.00 worth of studies, and the agreement that you are asking me to sign says that even after we spend that \$20,000.00, we – you may say, "You can't show that study – those studies to anybody" Following me so are?*

A. *Yes.*

Q. *Okay. He goes on to say, "So I need to deal with that. Here's the way I'd like to deal with it. I'd like to deal with it by putting an exception with respect to these people so that you agree right now, that we will be able to show these people, under some circumstances, but always we're going to be able to show these people these two reports. I need the Non-Disclosure Agreement to allow me to show these people these reports."*

Are you following me so far?

A. *I concur, yes.*

Q. *Okay. Is that pretty much online so far?*

A. *Yes.*

Q. You say to him, "Richard, I can't pre-approve that for you, because the only person who could pre-approve that is somebody above me, and, frankly, I'm not prepared to take this arrangement that we have – because there isn't an agreement in place – to that person because I don't think that person's going to give it to me. So Richard, the best I can do for you is this, "If it turns out that I can't give you this information, we'll give you the \$20,000.00 back."

A. That's correct.

Q. And isn't that exactly what it says?

A. That's exactly the intent. I think it says it, but that's exactly the intent also. (Page 3546, L. 1 to Page 3547, L. 21)

103. In accordance with their contract with the City (Exhibit 3233), ELRL then began work on the project. ACP was under no legal obligation to provide any information to the City or ELRL, and set the terms under which it would co-operate out in the Non Disclosure Agreement (NDA). It was clear from Mr. Leistner's evidence that if he did not get the NDA he wanted, he would not co-operate. Mr. Kennealy was able to negotiate full compensation for the cost of reports if ACP refused to allow them to be distributed to those persons set out in the agreement. This would not be an issue for the ELRL Board, as this was not a study being done for them, but it was necessary for ELRL to perform its contract with the City. It was not an issue that would have required the consent of the City.

104. Of note as well is that ELRL received no information from ACP that it did not eventually share with their Board (and the City councillors on it). A dilemma may have occurred if ACP had produced the Trow reports and then told ELRL that they could not be shared, but no sensitive information like that was ever produced.

105. As set out in the notes of Mr. Nicholls from the meeting of July 23, 1998 (Exhibit 69, Page 0102):

*Ret Living looking to acquire the Hotel.
ACP will continue to operate mall with upgrading.*

99. At the ELRL meeting on September 24, 1998 (Exhibit 2157):

The General Manager is directed to explore opportunities related to the local ownership of the Algo Centre Mall and Hotel and report back at the next meeting without taking any action.

106. The Board resolved on December 30, 1999, to make an offer of \$2.5M for the Mall (Exhibit 2168), which was eventually increased to \$4M (Exhibit 2173) subject to financing and due diligence.

107. The Finance Committee met on May 20, 1999 after having reviewed the NYB 98 report, the Halsall 99 report (Exhibit 3251) and waived financing. It is clear from this Exhibit, Page .10, that the Finance Committee had the entire binder of information delivered to members on May 17, 1999. The binder contained all of the due diligence information (see Page .09) including the 1998 NYB Report and the 1999 Halsall report.
108. The entire Board met on June 3, 1999 and agreed to waive all other conditions and purchase the mall (Exhibit 3252). The only potential witnesses giving evidence at the Inquiry with respect to what the Board had before it on June 3, 1999, were Mr. Kennealy and Ms. Guertin. Mr. Kennealy on Day 28, Page 5570 answered Yes to the question *“Did you provide the members of the Board at this meeting or any other time with a complete copy of the Halsall Report of 1999?”* It does not appear that Ms. Guertin was asked about this.
109. Ms. Guertin was asked about a memo that she sent to the TD Bank (Exhibit 2182) dated April 14, 1999. It contained the sentence *“You will notice that the NYB Report presents options for replacing the parking deck to minimize annual maintenance. We have elected to continue with a maintenance program at this time with hopes of undergoing a replacement program at some point in the distant future”* (Page .02)
110. Ms. Guertin, in her evidence on Day 29, Page 5692, made clear that this memo was written in advance of receiving the Halsall 1999 report, and was subject to its recommendations. The NYB Report, although identifying only a membrane as an option for repair, did not give any warnings or timelines. The Halsall Report recommended the continuation of the maintenance program.
111. There seems to be an underlying suggestion that information was withheld from the ELRL Board in order to facilitate the purchase, but it is submitted that the evidence makes it clear that before making the decision on June 3, 1999 to purchase the Mall, the Board had all information, including all engineering reports, before it to consider.
112. Ms. Guertin did, in the preparatory material for the Board Meeting of December 30, 1998, state that building is “structurally sound”, which was not entirely supported by the NYB 1998 report. The Halsall section of the report said *“There is no evidence of structural distress or excessive deterioration of the structural steel framing observed at the time of the review”*(Exhibit 67, Page .0036).
113. However, of what importance is this when the Board, at its June 3, 1999 meeting to decide whether or not to buy the mall, had clear and unambiguous evidence in the Halsall Report 1999, that the Mall was indeed structurally sound? I repeat here Dr. Saffarini’s exchange with Mr. Hodgson on Day 52:

- Q. *Okay, you will agree with me, at the time that Halsall inspected the mall in 1999, it was structurally sound.*
- A. *Yes, and we make that statement. (Page 12333, L. 24 to Page 12334, L. 3).*

114. It is true that ELRL did not produce to the City the NYB Report (which the City paid for) or an Appraisal (for which they did not pay), which had been contracted for. The explanation is clear. The City undertook the study to be in a position of knowledge should ACP decide to close the Mall or Hotel. When ELRL decided to purchase the Algo Centre, the knowledge contained in these reports would not have been necessary. It appears that both parties simply forgot that these report should have been produced. This may sound naive, but what was there in the reports (production of the 1998 report would necessitate the production of the 1999 one) that ELRL would have wanted to hide from anyone?
115. The Halsall 1999 report was provided to the City in February of 2007 by Tom Turner, Mall Manager (see Paragraph 95 above). It does not appear to have played any role in their enforcement of their By-Laws, or any of their decision making.

3. Closing Comments

116. ELRL was not in the Mall business in 1997. In fact, they had just barely got profitably into the retirement accommodation business by then. On Day 26, Mr. Kennealy said:
- A. *When I arrived in 1993, to give you a sense, I arrived in August of '93 and spent three months really trying to get my mind around where the organization was. We had about \$60 to \$70,000 in the bank. We had payables of about 300 to \$400,000. We were in rough shape. But as we worked through the balance of the '90s, we were starting to make progress. (Page 5179, LL. 17 - 24)*
117. The closure and demolition of the Hotel would have been a psychological blow to all Elliot Lakers, and an economic disaster for the Retirement Living program, which was the cornerstone of the future for the City. Taking on the Algo Centre meant a significant increase in workload for all employees, particularly for Mr. Kennealy, Ms. Guertin and Mr. Quinn, but they still recommended to the Board that it made sense to go ahead with the purchase, and the Board agreed.
118. Once committed to fully explore the possibility of owning the Mall and Hotel, our submission is that we hired competent consultants, who let us down, in two ways:
- a. They gave the wrong advice;
 - b. They failed to give adequate warnings of the potential for structural deterioration.

119. The wrong advice was that the leaking roof could be managed by continuing a rout and seal approach. No membrane was necessary. This has been discussed in detail above.

120. With respect to the inadequate warnings, we refer you to this exchange with Dr. Saffarini on Day 53 of the Inquiry,

Q. ... I think was you're saying is, properly done, Halsall should have said something like: Guys, you need to know that if you buy this building, you're going to have to immediately spend a lot of money to put on a waterproofing system and a wear course, and if you don't do that, the building will continue to deteriorate. Is that the kind of alarm you would have expected to have got in a due diligence report from Halsall in 1999?

A. Yes. (Page 12591, LL. 3-14)

121. Sometimes at the Inquiry it has appeared as if there are two Halsall reports, one real, the other imaginary.

122. For there is no report that said that only a membrane will work. There was no report that warned of the dangers of inaction. There was no report that had to be hidden from the ELRL Board, the City or Eastwood Mall. In fact, the report could have been appended as a schedule to ELRL's "Motivation to Sell" document (Exhibit 706) it was so attractive a sales tool. It was offered to Mr. Nazarian's bank. Of course it would be. Everything is fine. Just keep doing what you're doing.

123. Much energy has been spent on local issues at the Inquiry: secret meetings, non disclosure agreements, imprecise wording in reports, failure to enforce by-laws. But, in our view, the genesis of the collapse is four-fold: (1) cost cutting in design, (2) failure to disclose engineering reports, (3) incorrect and incomplete engineering reports and (4) Eastwood's failure to commit resources.

124. The evidence is that the Peterson waterproofing system was chosen to save approximately \$153,000.00 (Exhibit 499) although Exhibit 486 shows an original budget savings of \$256,300.00 in a \$4M project.

125. The letter from A.E.J. Cunningham Consultants Ltd. of May 11, 1979 (Exhibit 15) is very telling. Mr. Cunningham writes:

Since roofs never last the life of a building, I would suggest that the roof structure be designed to carry a 3 inch concrete wearing slab and membrane in addition to the proposed system. This would allow structurally for a new roof to be applied over the top of the original one. This is a precaution against the failure of the original system years hence. In other words, over design the system for the additional load.

126. It is unfortunate that ACP did not follow this advise during construction as that would have the membrane repair possible.

127. The architect, Mr. Keywan gave evidence on Day 6 of the Inquiry that he had asked ACP to consider putting the parking underground or offsite, or in a parking garage or placing a roof over the deck. He also suggested overbuilding columns so that a roof could be placed on in the future (Page 1010). None of these suggestions were accepted.
128. The result was that the failure of the Peterson System, at least in ACP's minds, meant the failure of the structural integrity of the building. Nothing could work. In 1995, they received an engineering report from Trow recommending "a new asphaltic based waterproofing system on the entire deck" (Exhibit 51, Page 4), but they dismissed it out of hand, believing that it would not work. They appeared to give up. On Day 17 of the Inquiry, at Page 3566, Mr. Leistner said "*I think we considered exactly what Trow had recommended and determined that at this point in time, it was not viable*".
129. Mr. Rod Caughill, on Day 10, Page 1492, admitted:
- Q. *But at this particular period of time, the late 1990's, you are not actively pursuing a fix for the leaks that involves a major investment of funds.*
- A. *No. (LL.22 - 25)*
130. With respect to ACPs failure to provide full disclosure of their engineering reports, see paragraphs 21 to 23, above.
131. We will let others comment on the reports of Mr. Wood. But Halsall was the only report available for 10 years, from 1999 to 2009. They could have given proper advice that a membrane was the only solution, but they didn't.
132. And they could have given an adequate warning of the dangers of continued leaking, and again, this tragedy could have been averted. As Dr. Saffarini said on Day 53, Page 12596, L. 24: "*Well as you can see in retrospect, these reports last a lifetime*". They are relied upon not only by the persons paying for them, but often shared down the line. They need to be complete.
133. Mr. Clinkett, the architect, said of the Halsall report:
- A. *It was the only one I had.*
- Q. *How fresh is that report?... My friend Mr. Carr-Harris asked you about the time span, but here you have the Halsall Report from 1999. You're looking at the building in 2008. Was this fresh enough for your purposes?*
- A. *I believed so, yes. (Day 43, Page 9634, L. 21 to Page 9635, L. 2)...*

- Q. *And when you - we have had engineers and architects describe this report as providing warnings to the owner, and particularly the architect who was behind its commissioning indicated that the whole report was a warning.*
Did you see any warnings in this report when you read it as to the structural condition of the building?
- A. *No. (Day 43, Page 9636, L. 25 to Page 9637, L. 8).*

134. The final comment has to do with the failure by Eastwood to devote the necessary resources to the maintenance of the roof. They received a 2M discount on purchase that they could easily have applied to a permanent solution, as they said they would. Instead, they bled all of the money out of the mall to the point that when they needed to do something, the money, and the anchor tenants, were all gone.

4. **Recommendations**

135. With respect to recommendations, we can only comment as follows:

- A. We would have profited from having access to the Trow Reports;
- B. We would have profited from having been given a schedule for future inspections;
- C. We would have profited from a warning about the failure to take the appropriate action.
- D. We would have profited from the existence of a standard of review for steel structure buildings, perhaps making it clear what is an acceptable amount of section loss.

All of which is respectfully submitted:

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