

*In the matter of the Public Inquiries Act, 2009, S.O. 2009, c 33, Sch 6*

*And in the matter of the Resolution of the Council of the City of Hamilton dated April 24, 2019, establishing the Red Hill Valley Parkway Inquiry pursuant to section 274 of the Municipal Act, 2001, S.O. 2001, c 25*

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## **PART I - OVERVIEW**

1. On this motion, the City of Hamilton (the “**City**”) seeks a determination from the Designate of the Commissioner of the Red Hill Valley Parkway Inquiry (“**RHVPI**” or the “**Inquiry**”) on the City’s assertions of privilege over a total of 97 documents (56 of which are “unique”) (the “**Disputed Documents**”) that are otherwise responsive to the summons issued by the RHVPI. The City claims solicitor-client and/or litigation privilege in respect of the Disputed Documents.

2. The City has the onus of establishing that the test for privilege is met in respect of each of the Disputed Documents. It has not done so and instead makes blanket claims of privilege without even an examination of the individual documents and the purpose behind their creation.

3. In Commission Counsel’s submission, with some limited exceptions, the Disputed Documents are not protected by either solicitor-client or litigation privilege. To the extent that any privilege attaches, Commission Counsel submits that the City waived that privilege when it called the Inquiry and enacted broad Terms of Reference that require the Commissioner to examine the conduct of City staff, including to make findings of misconduct.

4. In particular, the focus of the Inquiry is the Tradewind Report, a report that was provided to the then Director of Engineering Services of the City in January 2014, which indicated that friction values on the Red Hill Valley Parkway (“**RHVP**”) were “below or well below” a particular standard. Notwithstanding that there was a disproportionate number of wet weather collisions on the RHVP over the years, which raised concerns

about the potential role of friction in those collisions, the Tradewind Report was not “discovered” by City staff until September 2018 and was not disclosed to Hamilton City Council (“**Council**”) until January/February 2019. The Terms of Reference empower the Commissioner to examine, among other things, whether “appropriate steps” were taken to disclose the Tradewind Report and whether there was “any negligence, malfeasance or misconduct in failing to disclose the Report” once it was discovered in 2018.<sup>1</sup>

5. The majority of the Disputed Documents fall within this September 2018 to January/February 2019 period. They show that, in December 2018, [REDACTED]

[REDACTED] The City’s lawyers [REDACTED]

[REDACTED] while at the same time instructing the City’s Public Works staff not to contact CIMA. [REDACTED]

6. [REDACTED]

[REDACTED] Without access to the documents in

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<sup>1</sup> See Terms of Reference, paras. 2(a)(viii) and (ix), [RHVPI Compendium, Tab 1, p. 5].

issue, the Commissioner will be missing an important piece of the puzzle. For the reasons set out below, Commission Counsel submits that the City has failed to satisfy its onus to establish that the documents are privileged. Even if they are privileged, any privilege has been waived by the City given the broad Terms of Reference and the principles of fairness and consistency, which require that they be disclosed.

## **PART II - FACTS**

### ***A. Background***

#### **1. The Red Hill Valley Parkway**

7. The RHVP is a municipal expressway in Hamilton, which, along with the adjoining Lincoln M. Alexander Parkway (“**LINC**”), connects Highway 403 to the Queen Elizabeth Way. It was opened to the public in November 2007. Even before the Tradewind Report was “discovered” in 2018, the RHVP has been the subject of controversy due to a number of serious collisions on the roadway since its opening.

#### **2. The City departments and staff**

8. The City is organized into five major departments, including **Public Works** and **Corporate Services**.<sup>2</sup>

9. Public Works is responsible for, among other things, the design and maintenance of the City’s road system. It had significant responsibility for the construction and

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<sup>2</sup> Overview Document 2, para. 19 [**RHVPI Compendium, Tab 2, p. 10**].

oversight of the RHVP.<sup>3</sup> The General Manager of Public Works from August 2016 to September 2021 was Dan McKinnon (“**McKinnon**”).<sup>4</sup>

10. Within Public Works, there are several divisions, including two which had responsibility for oversight of the RHVP at the relevant time:

- a) **Roads and Traffic**, which was responsible for the design, installation, inspection and maintenance of traffic signs, signals and roadway safety initiatives.<sup>5</sup> From July 2018 to February 2019, Edward Soldo (“**Soldo**”) was the Director of Roads and Traffic.
- b) **Engineering Services**, which comprised several sections, including construction, design, asset management and geomatics and corridor management. From 2009 to May 2018, Gary Moore (“**Moore**”) was the Director of Engineering Services. In June 2018, Gord McGuire (“**McGuire**”) assumed the role.<sup>6</sup> It was not until McGuire became Director of Engineering Services that the Tradewind Report was “discovered”.

11. Before Moore was Director of Engineering Services, he was Manager of Design of the RHVP. In that role, he was responsible for managing the consultant team developing the preliminary engineering and design blueprint for the RHVP, as well as

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<sup>3</sup> Overview Document 2, paras. 23-24 [**RHVPI Compendium, Tab 2, p. 11**].

<sup>4</sup> Overview Document 2, para. 26 [**RHVPI Compendium, Tab 2, p. 12**].

<sup>5</sup> Overview Document 2, paras. 36-40 [**RHVPI Compendium, Tab 2, pp. 13-14**]. The Roads and Traffic division was created following a restructuring of the Public Works department in 2018, combining the portfolios of the former Transportation division and Operations division.

<sup>6</sup> Overview Document 2, paras. 42-46, 52 [**RHVPI Compendium, Tab 2, pp. 15-16**].

overseeing the award of construction tenders and monitoring the progress of those contracts.<sup>7</sup>

12. The staff in the Public Works department reported to the City Manager, Mike Zegarac (“**Zegarac**”), who held this position on an interim basis from July or August 2018 to May 2019.

13. Corporate Services includes Legal and Risk Management Services (“**Legal**”). The City’s Legal staff at the relevant time included:

- a) Nicole Auty (“**Auty**”), City Solicitor, who held the highest legal position within the City;
- b) Ron Sabo (“**Sabo**”), Deputy City Solicitor, Dispute Resolution;
- c) Debbie Edwards (“**Edwards**”), Deputy City Solicitor, Commercial, Development and Policy; and
- d) Byrdena MacNeil (“**MacNeil**”), Solicitor, Legal Services.

14. At the relevant time, Auty, Sabo, Edwards and MacNeil were lawyers (MacNeil has since been appointed a judge of the Ontario Superior Court of Justice). Within Legal, Claims Administration and Risk Management (“**Risk Management**”) was the division responsible for administering the claims in which the City was named as a defendant, including claims in relation to motor vehicle accidents on the RHVP.

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<sup>7</sup> Overview Document 2, paras. 53-54, 56 [**RHVPI Compendium, Tab 2, pp. 16-17**].



### 3. The 2014 Golder Report and the Tradewind Report

15. In late September 2013, concerns were raised with City staff about issues on the RHVP due to heavy rain. Shortly thereafter, Moore (then Director of Engineering Services) retained Golder Associates (“**Golder**”), a pavement consultant, to arrange for skid testing of the RHVP.<sup>8</sup>

16. Golder subsequently arranged for Tradewind Scientific Inc. (“**Tradewind**”) to conduct friction testing on the RHVP and the LINC. Tradewind conducted friction testing on November 20, 2013 and provided its final report to Golder on January 26, 2014 (the “**Tradewind Report**”).<sup>9</sup>

17. On January 31, 2014, Golder provided Moore with a draft of its report (the “**2014 Golder Report**”), which appended the Tradewind Report.<sup>10</sup>

18. The Tradewind Report concluded that the overall friction averages on the LINC were “comparable to or above the UK Investigatory Level”. However, the friction averages on the RHVP were “below or well below” the same standard. According to the Tradewind Report:

However, the overall friction averages as measured by the GripTester on the designated lanes and sections of the Red Hill Valley Parkway were below or well below the same Investigatory Level 2. The overall low levels and the variability of friction values along the length of the Parkway indicate the need for a further examination of the pavement surface, composition and wear performance. It should be noted that, in addition to the overall low average Grip Number levels on this facility, there are some localized sections with quite low friction values, reaching 27-30 in several areas. We recommend that a more detailed investigation be conducted and possible remedial action be considered to

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enhance the surface texture and friction characteristics of the Red Hill Valley Parkway, based on the friction measurements recorded in the current survey.<sup>11</sup> [Emphasis added]

19. The Tradewind Report is the focus of the Inquiry because it was not until 2018 that the report was “discovered” and City staff took action to respond to its findings. As set out below, it was not until February 6, 2019 that the report was provided to Council and then released publicly.

20. The Ministry of Transportation (“**MTO**”) also performed friction testing on the RHVP:

- a) in October 2007, prior to the RHVP opening, the results of which were provided to the City shortly thereafter (the “**2007 MTO Friction Testing**”);<sup>12</sup> and
- b) each year from 2008 to 2012 and in 2014 (the “**2008-2014 MTO Friction Testing**”), the results of which were provided to the City and made public following disclosure of the Tradewind Report in February 2019.<sup>13</sup>

21. However, unlike the Tradewind Report, the MTO did not provide any conclusions about the results of its friction testing, including how the friction values on the RHVP compared to other roads or established standards.

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<sup>11</sup> Tradewind Report, p. 13 [**RHVPI Compendium, Tab 3, p. 30**].

<sup>12</sup> Overview Document 4, paras. 134 and 137-141 [**RHVPI Compendium, Tab 4, pp. 36-40**].

<sup>13</sup> Overview Document 10, paras. 221-229 [**RHVPI Compendium, Tab 5, pp. 41-43**]. 2019 CIMA MTO Friction Data Report [**RHVPI Compendium, Tab 6, pp. 44-49**].

#### 4. The City's safety consultant (CIMA)

22. Even before the discovery of the Tradewind Report in 2018, over the years, the City (through Public Works) had retained an engineering firm and safety consultant, **CIMA**, to prepare several reports regarding the RHVP:<sup>14</sup>

- a) In April 2013, the City engaged CIMA to conduct a safety review of a portion of the RHVP, which CIMA completed in December 2013.<sup>15</sup>
- b) In May 2015, the City engaged CIMA to conduct a safety analysis of the entire RHVP, which CIMA completed in November 2015 (the “**2015 CIMA Report**”).<sup>16</sup>
- c) In October 2017, the City engaged CIMA to conduct a speed study on the RHVP, which CIMA completed in October 2018.<sup>17</sup>
- d) In January 2018, the City engaged CIMA to prepare a memorandum comparing the collision rates of the LINC and RHVP with “other similar type roadways”, which CIMA completed in January 2018 (the “**2018 CIMA Collision Memorandum**”).<sup>18</sup>

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<sup>14</sup> For each of the reports listed below, it was the City's Public Works—not Legal—staff who retained CIMA: [REDACTED]

<sup>15</sup> [REDACTED] The CIMA report is dated October 2013, but it was actually completed in December 2013: see Overview Document 6, paras. 207-210 [**RHVPI Compendium, Tab 7, pp. 50-52**].

<sup>16</sup> [REDACTED]

<sup>17</sup> [REDACTED]

<sup>18</sup> 2018 CIMA Collision Memorandum [**RHVPI Compendium, Tab 8, pp. 53-60**].

- e) In April 2018, the City engaged CIMA to conduct an illumination study of the RHVP, which CIMA completed in January 2019.<sup>19</sup>

23. The impetus for the 2015 CIMA Report was a fatal collision on the RHVP in May 2015. Following the collision, members of the public reached out to City Council to express concerns. City Council directed Public Works staff to investigate additional safety measures for the RHVP and LINC. Public Works staff ultimately engaged CIMA to conduct a safety assessment.<sup>20</sup>

24. The 2015 CIMA Report, completed in November 2015, reviewed the collision history on the RHVP and found that wet surface collisions represented approximately 50% of all collisions, which was significantly higher than the provincial and City of Hamilton averages.<sup>21</sup> CIMA noted that “[t]he high proportion of wet surface related collisions observed in the study area may indicate a potential issue with pavement skid resistance.”<sup>22</sup> The 2015 CIMA Report recommended a number of potential countermeasures to reduce the overall collisions on the road. One of the recommendations was to perform friction testing of the road.<sup>23</sup> CIMA did not have the Tradewind Report when it completed its 2015 CIMA Report, but it did have an email summarizing the results of the 2007 MTO Friction Testing and the Tradewind testing.<sup>24</sup>

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<sup>19</sup> [REDACTED]

[REDACTED] see Overview Document 8, paras. 255-256 [RHVPI Compendium, Tab 9, pp. 61].

<sup>20</sup> Overview Document 7, paras. 4-42 [RHVPI Compendium, Tab 10, pp. 62-76].

<sup>21</sup> 2015 CIMA Report, November 2015, pp. 5-6, 17 [RHVPI Compendium, Tab 11, pp. 90-91, 102].

<sup>22</sup> 2015 CIMA Report, November 2015, p. 25 [RHVPI Compendium, Tab 11, p. 110].

<sup>23</sup> 2015 CIMA Report, November 2015, p. 34 [RHVPI Compendium, Tab 11, p. 119].

<sup>24</sup> See Email from Malone to McGuire, September 4, 2018 [RHVPI Compendium, Tab 12, p. 167].

The email also attached the results of the 2007 MTO Friction Testing (but did not attach the Tradewind Report).<sup>25</sup>

25. As set out below, in the fall of 2018 and early 2019, the City asked CIMA to prepare a number of additional reports:

- a) a Roadside Safety Assessment, which was requested by Public Works and completed in January 2019 (the “**2019 CIMA Roadside Safety Assessment**”);<sup>26</sup>
- b) an update to the 2018 CIMA Collision Memorandum, which was requested by Public Works and completed in January 2019;<sup>27</sup>
- c) a report on whether interim safety measures would be required for the RHVP in light of the Tradewind Report, which was [REDACTED] [REDACTED] completed on February 4, 2019 (the “**2019 CIMA Interim Measures Report**”); and
- d) a report on whether CIMA recommended friction testing or interim safety measures in light of the results and extrapolation of the 2008-2014 MTO Friction Testing, which was requested by Public Works and completed on February 26, 2019.<sup>28</sup>

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<sup>25</sup> Overview Document 7, paras. 106-107 [RHVPI Compendium, Tab 10, pp. 77-78].

<sup>26</sup> For evidence that the 2019 Roadside Safety Assessment was requested by Public Works: see [REDACTED]

<sup>27</sup> 2019 CIMA Collision Memorandum [RHVPI Compendium, Tab 13, pp. 170-178].

<sup>28</sup> 2019 CIMA MTO Friction Data Report [RHVPI Compendium, Tab 6, p. 44-49].

26. [REDACTED]

27. Brian Malone (“**Malone**”) was a Partner and Vice-President, Transportation at CIMA. He was the key CIMA contact for the City regarding the RHVP. As set out below, the City claims privilege over a number of documents involving CIMA and Malone from December 2018 to February 2019. For the reasons set out below, Commission Counsel submits that the documents involving CIMA are not privileged, and alternatively, any privilege was waived by the City with the calling of the Inquiry.

#### **5. Subsequent friction testing on the RHVP by Golder**

28. In December 2017, the City arranged for Golder to conduct friction related testing on the RHVP, which was performed overnight on December 6-7, 2017. On November 28, 2018, Golder sent an email to McGuire with some of the results from its tests (the “**November 2018 Golder Email**”). According to Golder in the email, the RHVP had a Polished Stone Value (“**PSV**”) of 45, which was average or medium, and a Measured Texture Depth (“**MTD**”) of 1.25 mm (measured using the Sand Patch Method), which was above the 1.0 mm standard for a pavement with good macrotexture.<sup>29</sup>

29. On December 17, 2018, Golder provided a draft report regarding its 2017 friction related testing results (the “**2018 Draft Golder Report**”) to the City. The report indicated that there were three types of tests done. The results of two of the tests (the PSV and MTD, described above) were “average/medium” or “good”. However, the results of a third test, using the British Pendulum Tester, were less conclusive. According to Golder,

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<sup>29</sup> Email from Uzarowski to McGuire, November 28, 2018 [**RHVPI Compendium, Tab 14, p. 179**].

while the average British Pendulum Number (“**BPN**”) was considered good, the test results were variable because six of the readings (20% of the locations tested) were considered to be a “low” rating. Golder noted, however, that the BPN numbers were not considered reliable because of the weather conditions at the time of testing.<sup>30</sup>

30. Golder also noted, with respect to potential interim solutions that the City might wish to consider:

As discussed with the City, if there is a concern with frictional characteristics of the SMA surface course on the RHVP, an immediate, effective solution would be to carry out shot blasting/skid abrading of areas of concern on the existing pavement surface. This treatment is quick and relatively low cost. It restores the skid resistance and improves frictional characteristics immediately. However, it does not address pavement cracking or bumps and dips in the pavement. Other solutions could be the application of microsurfacing; however, although this improves frictional characteristics, seals the cracks and can correct minor dips in a pavement, it is significantly more expensive than shot blasting. It also requires good weather conditions for successful application.<sup>31</sup>

31. [REDACTED]

[REDACTED]

[REDACTED]

## 6. Repaving the RHVP

32. In the spring of 2016, the City began considering rehabilitating the RHVP. Those discussions continued through the fall of 2018 and into the winter of 2019. The RHVP was ultimately repaved in the spring and summer of 2019.<sup>32</sup> The repaving of the road addressed any potential issues with friction on the RHVP’s original surface. A central

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<sup>30</sup> Draft Golder Report, December 17, 2018 [RHVPI Compendium, Tab 15, pp. 182-183].

<sup>31</sup> Draft Golder Report, December 17, 2018 [RHVPI Compendium, Tab 15, pp. 183-184].

<sup>32</sup> [REDACTED]

issue in the Inquiry, however, is whether appropriate steps were taken in response to the Tradewind Report following its discovery in 2018 but before the repaving.<sup>33</sup>

***B. Events following the discovery of the Tradewind Report (late 2018 to early 2019)***

33. In June 2018, McGuire assumed the role of Director of Engineering Services. It was only after he assumed the role that the Tradewind Report was “discovered”. In particular, the City’s position is that, on or about September 26, 2018, McGuire identified an email that attached the Tradewind Report in the City’s document management system, ProjectWise. Shortly thereafter, other members of the City and the Public Works leadership team were made aware of the report, including Soldo (Director of Roads and Traffic) and McKinnon (General Manager of Public Works).<sup>34</sup>

34. The evidence before the Inquiry indicates that, shortly after he discovered the Tradewind Report, McGuire also notified the Legal department. On October 4, 2018, he contacted Edwards (Deputy City Solicitor), and on October 5, 2018, he spoke with Edwards and Sabo (Deputy City Solicitor).<sup>35</sup>

**1. McGuire contacts CIMA regarding friction test results (August to September 2018)**

35. There is evidence that McGuire contacted CIMA about the friction testing results for the RHVP even before he discovered the Tradewind Report. On August 30, 2018, McGuire forwarded Malone (CIMA) an email from Golder to Moore, dated January 24,

<sup>33</sup> See Terms of Reference, para. 2(a)(viii), [RHVPI Compendium, Tab 1, p. 7].

<sup>34</sup> [REDACTED]

<sup>35</sup> See Email from Edwards to Auty, April 12, 2019 [RHVPI Compendium, Tab 16, pp. 88-89].



2014, which contained the results from the 2007 MTO Friction Testing, as well as the average results from the friction testing that Tradewind had completed in 2013. The email did not attach the Tradewind Report.<sup>36</sup>

36. On September 4, 2018, Malone responded to McGuire, noting that Moore had provided the MTO results to him before CIMA completed its 2015 report, but that the MTO results “failed to offer an ability to quantify any friction problem that may be a source of the collision performance”. Malone also wrote:

Perhaps I misunderstood you last Thursday when we talked, but I thought you said that additional testing had been done, either in 2014, or subsequent to the Nov 2015 CIMA report which recommended friction testing. If those exist, then a comparison of the two can be done. Additionally, if LINC testing data is available, from 2007 or more recently, then there is also a possible means for comparison.<sup>37</sup>

37. At the time, according to the City’s evidence, McGuire had not yet discovered the Tradewind Report. However, even after its discovery, and notwithstanding the communications that McGuire had with Malone at this time, McGuire did not send Malone the Tradewind Report, nor did he send Malone the results from Golder’s testing in December 2017 when they were received.

## **2. Public Works asks CIMA to conduct Roadside Safety Assessment (October 2018 to January 2019)**

38. In early October 2018, shortly after McGuire discovered the Tradewind Report, Public Works (Roads and Traffic) engaged CIMA to conduct a Roadside Safety Assessment of the RHVP. The purpose of the proposed assessment was “[t]o identify

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<sup>36</sup> Email from McGuire to Malone, August 30, 2018 [RHVPI Compendium, Tab 12, pp. 168-169].

<sup>37</sup> Email from Malone to McGuire, September 4, 2018 [RHVPI Compendium, Tab 12, pp. 167-168].

hazards and provide corrective measures to reduce collisions, injuries and fatalities”.<sup>38</sup> Neither the Tradewind Report nor information regarding Golder’s friction testing in December 2017 was provided to CIMA as part of this assessment.

39. On November 23, 2018, CIMA provided its draft Roadside Safety Assessment report to Roads and Traffic. The draft report indicated, among other things, that “[t]he proportion of wet surface condition is noticeably higher than what was found in the 2015 review (50%), which, on that study, had already been found to be significantly higher than the Provincial and City averages of 17.6% and 22%, respectively”.<sup>39</sup> Despite CIMA’s finding that wet weather collisions on the RHVP had increased since 2015, the Tradewind Report was not provided to CIMA at this time.

40. CIMA provided its final Roadside Safety Assessment report to Roads and Traffic on January 17, 2019. The final report confirmed the draft report’s findings with respect to wet weather collisions and concluded that the “findings suggest that inadequate skid resistance (surface polishing, bleeding, contamination) and excessive speeds may be contributing factors to collisions.”<sup>40</sup> It also recommended that the City study the potential need for median barriers at specific parts of the RHVP. Recognizing, however, that the RHVP would be repaved shortly, CIMA recommended that the City monitor cross median collisions post-repaving and re-evaluate the benefits of providing a median

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<sup>38</sup> Email from Ferguson to Malone, October 2, 2018 [RHVPI Compendium, Tab 17, pp. 190-191].

<sup>39</sup> Email from Salek to Ferguson, November 23, 2018, attaching Draft Roadside Safety Assessment, November 2018, p. 9 [RHVPI Compendium, Tab 18, pp. 192-193, 208]

<sup>40</sup> 2019 CIMA Roadside Safety Assessment, January 2019, p. 33 [RHVPI Compendium, Tab 19, p. 270].

barrier at that time.<sup>41</sup> CIMA was not provided with the Tradewind Report or a copy of the results of Golder's testing in December 2017 before CIMA completed its Roadside Safety Assessment.

41. [REDACTED]

[REDACTED] in December 2018, Legal staff specifically advised Public Works staff not to contact Malone [REDACTED]

[REDACTED] As set out below, Commission Counsel submits that the question of why it took City staff months to provide the City's safety consultant with the Tradewind Report falls squarely within the RHVPI's mandate.

**3. FOI Request (November 8, 2018)**

42. On November 8, 2018, the City received a Freedom of Information request for access to any reports, memos, drafts and correspondence about friction testing on the RHVP in the last five years and about asphalt and/or pavement testing in the last two years (the "FOI Request"). [REDACTED]

[REDACTED]<sup>42</sup>

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<sup>41</sup> 2019 CIMA Roadside Safety Assessment, January 2019, pp. 32-33 [RHVPI Compendium, Tab 19, pp. 269-270].

<sup>42</sup> [REDACTED]

43. Although McGuire had first contacted the City's Legal staff (Edwards) about the Tradewind Report on October 4, 2018, [REDACTED]

[REDACTED]<sup>43</sup>

4. [REDACTED] (late November to early December 2018)

44. Shortly after receipt of the FOI Request, in mid to late November 2018, the City's Legal staff sought to understand the scope of the existing litigation matters that might be impacted by the disclosure of the Tradewind Report. Risk Management staff identified four significant claims involving collisions on the RHVP that could theoretically be impacted by the FOI Request. The four claims were handled either by external counsel (Shillingtons) or internally, by City lawyers (Dana Lezau and Dan Bartley).<sup>44</sup>

45. Shillingtons was also retained by the City in connection with litigation involving a motor vehicle accident on the LINC (the "**LINC Action**"). The evidence before the Inquiry shows that, on August 15, 2017, the City's external counsel, Shillingtons, had a call with Moore (then Director of Engineering Services), in which they discussed the Tradewind Report, including that "[t]he report had not gone to council". Shortly after the call, Moore sent a copy of the Tradewind Report to Shillingtons.<sup>45</sup>

46. On May 4, 2018, Shillingtons advised Moore and Diana Swaby (Supervisor, Claims Administration, Risk Management) ("**Swaby**") that it would likely need to

<sup>43</sup> [REDACTED]

<sup>44</sup> Email from Swaby to McLennan, November 23, 2018 [RHVPI Compendium, Tab 20, p. 276].

See also [REDACTED]

<sup>45</sup> Email from Moore to Crawford, August 15, 2017 [RHVPI Compendium, Tab 21, p. 278]; Email from Crawford to Wilson, January 9, 2018 [RHVPI Compendium, Tab 22, p. 279].

produce the Tradewind Report in the City's draft affidavit of documents in the LINC Action, and asked if the report had previously been provided to Council. Moore responded that day that it had not.<sup>46</sup> By the fall of 2018, Shillingtons had included the Tradewind Report in a draft of the City's affidavit of documents, but it had not yet been served.<sup>47</sup>

47. On November 26, 2018, Swaby contacted Shillingtons about the FOI Request and stated that her understanding was that the "GM of Public Works, as well as the Director of Legal Services and John McLennan [...] do not want to release [the Tradewind Report]". The City's affidavit of documents in the LINC Action was not served at this time.<sup>48</sup>

48. Around this time, the City's Legal staff also discussed the retainer of separate external counsel, David Boghosian ("**Boghosian**" [REDACTED])

[REDACTED]<sup>49</sup> Internal emails indicate that Legal staff specifically contemplated having Boghosian provide advice because he was not retained as counsel in respect of any of the litigation matters in which the City was

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<sup>46</sup> Email from Moore to Crawford, May 4, 2018 [RHVPI Compendium, Tab 23, p. 282].

<sup>47</sup> Email from Crawford to Thompson, November 26, 2018 [RHVPI Compendium, Tab 24, p. 284].

<sup>48</sup> Emails between Shillington, Thompson, Crawford and Swaby, November 26, 2018 [RHVPI Compendium, Tab 25, p. 287].

<sup>49</sup> Email from Auty to Sabo, November 20, 2018 (SPE\_04289386\_0001) [Disputed Documents, Tab 3].

[REDACTED]

already named as a party.<sup>50</sup> The City claims privilege over documents relating to [REDACTED]

[REDACTED]

49. [REDACTED]

[REDACTED]<sup>51</sup> [REDACTED]

[REDACTED]<sup>52</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>53</sup>

50. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>54</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

<sup>50</sup> Email from Sabo to McLennan and Auty, November 21, 2018 [RHVPI Compendium, Tab 26, p. 291].

[REDACTED]

<sup>51</sup> [REDACTED]  
<sup>52</sup> [REDACTED]  
<sup>53</sup> [REDACTED]

<sup>54</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 55 [REDACTED]

51. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 56

52. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 57

53. [REDACTED]

[REDACTED]

[REDACTED]

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55 [REDACTED] (SPE\_0428885\_0001) [Disputed Documents, Tab 9].

56 [REDACTED]

57 [REDACTED]

[REDACTED] On December 7, 2018, MacNeil sent an email to McGuire asking about “the current scope of work that CIMA is undertaking for which we are going to be adding/updating them on the Tradewind Friction Testing Results” (emphasis added). MacNeil stated in the email that she required the information for a “retainer letter” that she was drafting.<sup>58</sup> [REDACTED]

[REDACTED]<sup>59</sup>

54. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]<sup>60</sup> [REDACTED]

55. [REDACTED]  
[REDACTED]

[REDACTED]<sup>61</sup>

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<sup>58</sup> Email from MacNeil to McGuire, December 7, 2018 [RHVPI Compendium, Tab 27, p. 293].

<sup>59</sup> [REDACTED]

<sup>60</sup> [REDACTED] December 7, 2018 (SPE\_04288940) [Disputed Documents, Tab 5].

<sup>61</sup> [REDACTED]



56. [REDACTED]  
[REDACTED]  
[REDACTED] 62

57. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] 63

58. [REDACTED]  
[REDACTED] 64  
[REDACTED]  
[REDACTED] 65  
[REDACTED]

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<sup>62</sup> Draft Boghosian Opinion, December 13, 2018 [REDACTED] (SPE\_04288799\_0001) [Disputed Documents, Tab 15].

<sup>63</sup> [REDACTED] (SPE\_04288885\_0001) [Disputed Documents, Tab 9].

<sup>64</sup> [REDACTED] (SPE\_04288885\_0001) [Disputed Documents, Tab 9].

<sup>65</sup> [REDACTED]

[REDACTED]

[REDACTED] 66

59. [REDACTED]

[REDACTED]

[REDACTED]

Significantly, as set out below, [REDACTED]

[REDACTED] Legal staff were telling Public Works staff that the latter should not contact CIMA.

5. [REDACTED]

60. [REDACTED]

[REDACTED]

[REDACTED]

61. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 67

62. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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66 [REDACTED]

67 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

63. [REDACTED]

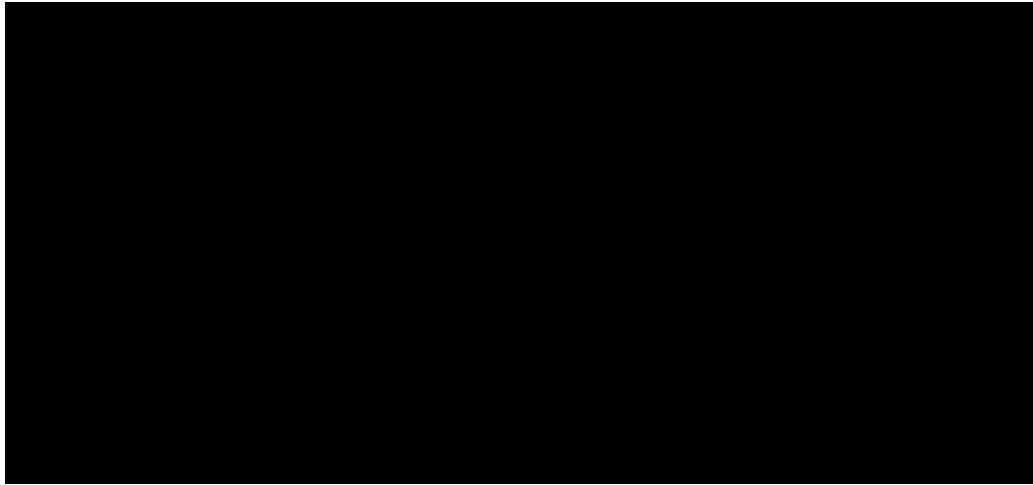
[REDACTED]

[REDACTED]

[REDACTED]

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<sup>68</sup> Draft Boghosian Opinion, December 13, 2018 [REDACTED] (SPE\_04288799\_0001) [Disputed Documents, Tab 15].



64. [Redacted]

[Redacted] <sup>70</sup> [Redacted]

[Redacted]

[Redacted]

[Redacted] <sup>71</sup> [Redacted]

[Redacted]

[Redacted]

[Redacted] <sup>72</sup>

65. [Redacted]

[Redacted]

[Redacted]

[Redacted]

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<sup>69</sup> Draft Boghosian Opinion, December 13, 2018 [Redacted] (SPE\_04288799\_0001) [Disputed Documents, Tab 15].

<sup>70</sup> Boghosian Notes, December 11, 2018 (SPE\_04317039) [Disputed Documents, Tab 87].

<sup>71</sup> [Redacted]

<sup>72</sup> Boghosian Notes, December 11, 2018 (SPE\_04317039) [Disputed Documents, Tab 87]; [Redacted]

[Redacted]

[REDACTED]

[REDACTED]

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

67. [REDACTED]

[REDACTED]

[REDACTED]<sup>76</sup> On December 12, 2018, Public Works provided this information to Boghosian.<sup>77</sup>

68. On December 13, 2018, Malone provided Boghosian with CIMA's draft Roadside Safety Assessment, which indicated that the wet weather collisions on the RHVP had increased since 2015.<sup>78</sup>

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73 [REDACTED]

74 [REDACTED]

75 [REDACTED]

76 [REDACTED]

77 [REDACTED]

77 [REDACTED] Emails between  
Auty and Boghosian, December 12-13, 2018 [RHVPI Compendium, Tab 28, p. 295]; see Appendix A to  
Report PW18008 [RHVPI Compendium, Tab 29, p. 297] [REDACTED]

78 Email from Malone to Boghosian, December 13, 2018 [RHVPI Compendium, Tab 30, p. 298];  
[REDACTED]

69. That day, on December 13, 2018, Boghosian provided his draft opinion letter to  
Auty, [REDACTED]

[REDACTED]<sup>9</sup> The City claims privilege over the draft opinion letter.

70. [REDACTED]

[REDACTED]<sup>80</sup> [REDACTED]

[REDACTED]<sup>1</sup> [REDACTED]

[REDACTED]<sup>82</sup>

**6. Legal advises Public Works not to communicate with Malone (CIMA)  
(mid December 2018)**

71. [REDACTED]

[REDACTED] the documents show that Public Works staff were under the impression that  
Legal would be reaching out to CIMA about “the safety report” and were told specifically  
that they (Public Works) should not do so.

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<sup>79</sup> Draft Boghosian Opinion, December 13, 2018 [REDACTED] (SPE\_04288799) [Disputed Documents, Tab 15].

<sup>80</sup> Draft Boghosian Opinion, December 13, 2018 [REDACTED] (SPE\_04288799) [Disputed Documents, Tab 15].

<sup>81</sup> Draft Boghosian Opinion, December 13, 2018 (SPE\_04288799) [Disputed documents, Tab 15];

<sup>82</sup> [REDACTED]

72. In particular, on December 8, 2018, McGuire sent an email to Malone in which McGuire asked, “Did our legal group get in touch with you on the safety report?” Malone responded that they had not. As a result, that day, McGuire sent an email to MacNeil to ask if she got a hold of the CIMA contact and “if so could [McGuire] talk to CIMA confidentially”. MacNeil’s response was no:

No, we have not contacted CIMA yet because we are still working on how we are going to put the request to them in order to best move forward from a legal perspective.

I would strongly advise that you not speak with CIMA about this matter until you have heard back from us/Nicole [Auty]. We should be able to update you this week (I hope by mid-week).<sup>83</sup> [Emphasis in original]

73. On December 11, 2018 [REDACTED] Auty sent an email to Soldo (Director of Roads and Traffic), in which she asked, “Was the contact Brian Malone?” Soldo responded the next morning, on December 12, 2018: “Yes, He is expecting your call.”<sup>84</sup> Malone’s notes on December 11, 2018 suggest that Soldo spoke with Malone about Auty that day: “Edward Soldo / Legal Dept Concern / Looking @ Reports / Safety Work? Changed Reports / Info / Nicole Auty --> Legal – Auditor”.<sup>85</sup>

74. On December 12, 2018, McGuire followed up with Auty and MacNeil about contacting Malone. Again, MacNeil responded that McGuire could not speak with Malone because she had not “received any direction on this yet”.<sup>86</sup>

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<sup>83</sup> Email from MacNeil to McGuire, December 10, 2018 [RHVPI Compendium, Tab 31, pp. 300-301].

<sup>84</sup> Emails between Auty and Soldo, December 11-12, 2018 [RHVPI Compendium, Tab 32, pp. 302-303].

<sup>85</sup> Malone Note, December 11, 2018 (CIM0022413) [Disputed Documents, Tab 2]. This note is included in the Disputed Documents, but the City has not sought to redact the note. As a result, it has been made available to the Inquiry.

<sup>86</sup> Email from MacNeil to McGuire, December 12, 2018 [RHVPI Compendium, Tab 33, p. 304].

75. [REDACTED]  
[REDACTED]  
[REDACTED]<sup>7</sup>  
[REDACTED]<sup>88</sup>

76. There is also an internal City timeline produced by the City, which indicates that, on December 13, 2018, Soldo had suggested reaching out to another safety consultant “just to see if available”, but “Auty say not required to do so”.<sup>89</sup> [REDACTED]  
[REDACTED]<sup>90</sup>

77. On December 14, 2018, Auty had a meeting with Soldo, McGuire, McKinnon and Zegarac. [REDACTED]  
[REDACTED]<sup>91</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>2</sup>

78. [REDACTED]  
[REDACTED]

---

<sup>87</sup> [REDACTED]

<sup>88</sup> [REDACTED]

<sup>89</sup> Email from Cameron to Recine, May 22, 2019 attaching Timeline [RHVPI Compendium, Tab 34, pp. 305-315].

<sup>90</sup> [REDACTED]  
<sup>91</sup> [REDACTED]  
<sup>92</sup> [REDACTED]



[REDACTED] 93 [REDACTED]

[REDACTED] 94

79. [REDACTED]

[REDACTED] 95 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 96 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 7

80. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 8

81. [REDACTED]

[REDACTED]

---

<sup>93</sup> Auty Notes, December 14, 2018 (SPE\_04552171) [Disputed Documents, Tab 86].

<sup>94</sup> [REDACTED]

<sup>95</sup> Auty Notes, December 14, 2018 (SPE\_04552171) [Disputed Documents, Tab 86].

<sup>96</sup> [REDACTED]

<sup>97</sup> [REDACTED]

<sup>98</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9

82.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 00 [REDACTED]

[REDACTED]

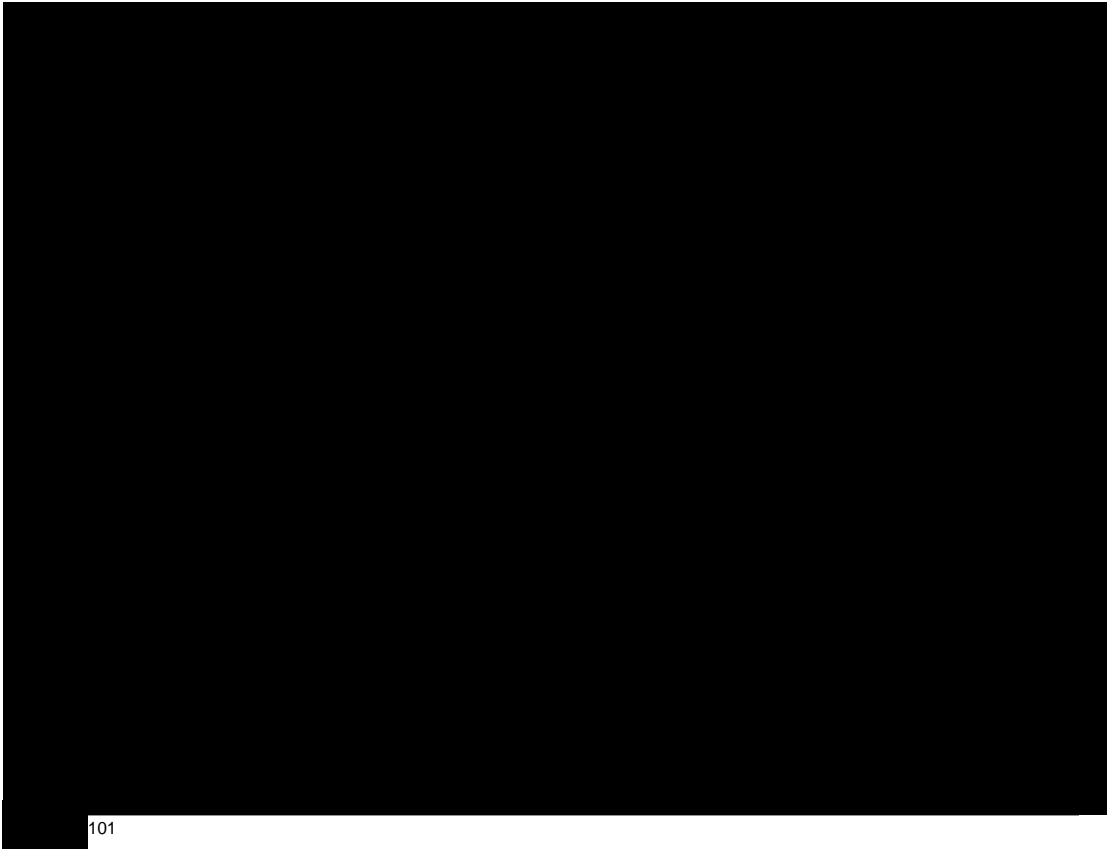
[REDACTED]

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99

10

[REDACTED]



101

83. [Redacted]
- [Redacted]
- [Redacted]

[Redacted] 102

84. [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

[Redacted] The question of who at the City, if anyone, was responsible for protecting

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101 [Redacted]

102 [Redacted]

public safety during this period falls in the Terms of Reference and must be explored in order for the Commissioner to fulfill his mandate.

**7. January 23, 2019 Council meeting**

85. On December 18, 2018, City staff (including Legal and Public Works) met with the Mayor. [REDACTED]

[REDACTED]

[REDACTED] 103

86. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 04 [REDACTED]

[REDACTED] 05 [REDACTED]

[REDACTED]

[REDACTED] 106

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103 [REDACTED]

<sup>104</sup> Boghosian Notes, January 8, 2019 (SPE\_04317041) [Disputed Documents, Tab 94]; [REDACTED]

105 [REDACTED]  
106 [REDACTED]

87. As set out above, on January 17, 2019, CIMA delivered its final Roadside Safety Assessment. [REDACTED] 107

88. Although the Tradewind Report was discovered in 2018 and Legal staff were involved since October 2018, it was not until January 23, 2019 that the issue was first raised with City Council.

89. At the January 23, 2019 Council meeting, Auty presented an *in camera* report, Potential Litigation Update (LS19007), to Council. [REDACTED]

[REDACTED]

[REDACTED] 108 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 109 [REDACTED]

[REDACTED] 110

90. [REDACTED]

[REDACTED] 111 [REDACTED]

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107 [REDACTED]

108 [REDACTED] Litigation Update (LS19007), January 23, 2019 [RHVPI Compendium, Tab 36, pp. 328-331].

109 [REDACTED]  
110 [REDACTED]  
111 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>12</sup>

**8. City obtains 2019 CIMA Interim Measures Report (late January to early February 2019)**

91. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

92. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>113</sup>

93. Later that day, on January 30, 2019, Boghosian, Auty, Sabo, Zegarac, Public Works staff and Malone had a call [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>112</sup> [REDACTED]

<sup>113</sup> Boghosian Notes, January 30, 2019 (SPE\_04317042) [Disputed Documents, Tab 96]; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 114

94. [REDACTED] on January 30, 2019, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 115

95. [REDACTED]

[REDACTED] <sup>17</sup> This was the first time that Malone received the Tradewind Report and the 2018 Draft Golder Report.<sup>118</sup> [REDACTED]

96. [REDACTED]

[REDACTED]

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<sup>114</sup> Boghosian Notes, January 30, 2019 (SPE\_04317043) [Disputed Documents, Tab 98]; [REDACTED]

<sup>115</sup> Email from Auty to Boghosian, January 30, 2019 (HAM0061817) [Disputed Documents, Tab 24].

<sup>116</sup> Email from Auty to Boghosian, January 30, 2019 (SPE\_04288129) [Disputed Documents, Tab 26].

<sup>117</sup> Email from Boghosian to Malone, January 30, 2019 (CIM0017212) [Disputed Documents, Tab 27].

[REDACTED]

<sup>118</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>119</sup>

97. On January 30, 2019, Malone was also provided with the 2014 Golder Report for the first time.<sup>120</sup>

98. On February 1, 2019, Boghosian, Auty, Sabo and Public Works staff had another call with Malone. [REDACTED]

[REDACTED]<sup>21</sup> [REDACTED]

99. On February 3, 2019, CIMA provided a draft of its report to Boghosian.

[REDACTED]<sup>122</sup> [REDACTED]

[REDACTED]

100. On February 4, 2019, CIMA provided Boghosian with its final report, in which CIMA answered the three questions as follows:

- a) With respect to whether changes are needed to the recommendations in the previous CIMA reports, CIMA noted that the 2015 CIMA Report had recommended friction testing, which was completed by Golder in 2017.

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<sup>119</sup> [REDACTED]

<sup>120</sup> [REDACTED] Emails between Malone and Boghosian, January 31, 2019 [RHVPI Compendium, Tab 37, p. 332]. The City originally claimed privilege over this document and it was included in the Disputed Documents Brief as Tab 100. However, it has since indicated that it is prepared to produce the entire document to the RHVPI, so the document no longer forms part of the privilege dispute.

<sup>121</sup> See Sabo Notes, February 1, 2019 (SPE\_04552154) [Disputed Documents, Tab 99].

<sup>122</sup> Draft Report from CIMA to Boghosian, February 3, 2019 (CIM0017171) [Disputed Documents, Tab 46].



CIMA also recommended against lowering the speed limit. According to the report:

Had the Golder report been provided to CIMA and reviewed prior to completing our report, we would appropriately have adjusted the friction testing recommendation to one that urged further investigation of the friction findings in the Golder report, relating to road design and operations. It is apparent that this action was, in fact, undertaken as CIMA has been informed that additional evaluations of the pavement were undertaken by Golder for the City in 2017.

CIMA did not recommend lowering the speed limit in our reports. We continue to not recommend lowering the limit after reviewing the Golder report. The Golder report confirms that the road friction meets the design requirements of the road. The design speed of 100 km/h used in the original design is capable of being provided by the road surface as measured by Golder. The posted speed limit of 90 km/h offers an additional safety factor.

I accept that lowering the speed limit could, theoretically, improve safety. However, that result is based on the premise that all drivers will adjust their speeds lower. Research has shown that drivers select an operating speed based on more than just the speed limit. If compliance with a lower limit is not achieved there can be negative consequences. The range of speeds may become wider, as some drivers comply with the new limit while others maintain their previous behaviour. Wider speed ranges can decrease safety. Negative outcomes from lowering the speed limit are possible. We would continue to recommend enforcement of the existing posted limit as the best option to improve safety.

- b) With respect to whether any additional safety measures were recommended, CIMA stated that the replacement of the pavement surface would address the recommendations from its earlier reports and it did not have any additional recommendations. However, it modified its previous recommendation from “regular” speed enforcement to “increased” or “enhanced” speed enforcement.
- c) With respect to whether the RHVP should be closed to vehicular traffic, CIMA recommended that it should not.<sup>123</sup>

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<sup>123</sup> Report from CIMA to Boghosian, February 4, 2019 [RHVPI Compendium, Tab 38, pp. 334-341].

101. Shortly thereafter, Boghosian asked CIMA to prepare a version of its report, addressed to the Mayor and Council, which CIMA did. This version of the 2019 CIMA Interim Measures Report was ultimately disclosed publicly.<sup>124</sup>

**9. Release of the Tradewind Report publicly and aftermath (February 6, 2019 and following)**

102. On February 6, 2019, City staff presented the Tradewind Report to Council during an *in camera* session of the General Issues Committee (“GIC”).<sup>125</sup> Boghosian attended the meeting [REDACTED]

[REDACTED]<sup>26</sup>

103. At the conclusion of the GIC meeting, Council directed the City’s Auditor General to begin an independent investigation of the City’s previous actions taken, internal processes, managerial systems and procedures regarding friction management in relation to the RHVP. Council also directed that staff release to the public the Tradewind Report and the 2019 CIMA Interim Measures Report, together with a press release in which staff apologized for the manner in which the matter was brought to Council’s attention.<sup>127</sup> [REDACTED]

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<sup>124</sup> Report from CIMA to Mayor and Council, February 4, 2019 [RHVPI Compendium, Tab 39, pp. 342-350].

<sup>125</sup> [REDACTED] Road Infrastructure Litigation Review and Assessment (LS19010) [RHVPI Compendium, Tab 40, pp. 351-355].

<sup>126</sup> [REDACTED]

<sup>127</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>28</sup>

104. On February 6, 2019, the City issued a media release, in which staff “apologize[d] to Council and the general public for how this matter has come to their attention”. The media release explained that “Committee received detailed information for the first time regarding” the Tradewind Report. It attached the Tradewind Report and the 2019 CIMA Interim Measures Report and announced that:

- a) The City was reducing the speed limit on the RHVP to 80 km per hour and expediting the resurfacing of the RHVP;
- b) Council had directed staff to request additional support from Hamilton Police Services as part of a targeted enforcement campaign for speed, aggressive driving and distracted driving; and
- c) The City’s Auditor General would “conduct an independent investigation of the City’s previous actions taken, internal processes, managerial systems and procedures regarding friction management in relation to the RHVP” and report back with recommendations to the GIC.<sup>129</sup>

105. This was the first time that the Tradewind Report was released publicly.

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<sup>128</sup> [REDACTED]

<sup>129</sup> Media Release, February 6, 2019 [RHVPI Compendium, Tab 41, pp. 356-357].

106. The release of the Tradewind Report resulted in public outcry. Two days later, on February 8, 2019, the Mayor released a statement in which he expressed his support for an “independent external investigation”.<sup>130</sup>

107. On February 13, 2019, recognizing that its earlier resolution to direct the City’s Auditor General to conduct an independent investigation may not be adequate to address public concern surrounding the release of the Tradewind Report, Council met and approved a motion that directed the Interim City Manager and City Solicitor to bring back to Council further information about the process to initiate an external investigation pursuant to the *Municipal Act* and the *Public Inquiries Act*.<sup>131</sup>

108. Around this time, on February 14, 2019, Soldo sent Auty an email asking if he could contact CIMA about the 2008-2014 MTO Friction Testing or if he was required to “go through the same process with the external lawyer”:

Nicole

The last memo from Brian was through your office and the external lawyer.

I would like to contact CIMA regarding the new friction data we have from MTO in order for them to review it in the same context and to extrapolate a degradation curve based on the data.

Do we through the same process with the external lawyer?<sup>132</sup>

109. Auty forwarded the request to Boghosian, asking, “are you comfortable with staff dealing with CIMA directly, or should it be through us?” Boghosian responded that

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<sup>130</sup> Media Release, February 8, 2019 [RHVPI Compendium, Tab 42, pp. 359-360].

<sup>131</sup> City Council Minutes, February 13-14, 2019, pp. 45-46 [RHVPI Compendium, Tab 43, pp. 361-362].

<sup>132</sup> Email from Soldo to Auty, February 14, 2019 [RHVPI Compendium, Tab 44, p. 364].

Soldo “should deal with CIMA directly”.<sup>133</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>134</sup>

110. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

### **10. Calling of the Inquiry (March 2019)**

111. The City obtained legal advice regarding the calling of a public inquiry. The legal opinion, from Lenczner Slaght, canvassed three potential options for Council: (1) an investigation conducted by the Auditor General; (2) an investigation conducted by the City’s Ombudsperson; and (3) a judicial inquiry pursuant to section 274 of the *Municipal Act*. The legal opinion noted the following with respect to the scope of a judicial inquiry:

Once a judge is appointed as commissioner of the inquiry, the municipality is stripped of its ability to control the inquiry process. For example, although the municipality sets the

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<sup>133</sup> Emails between Boghosian and Auty, February 15, 2019 [RHVPI Compendium, Tab 44, pp. 363-364].

<sup>134</sup> [REDACTED]

initial scope of the inquiry, the commissioner may, without consulting the municipality, expand the scope of the investigation where he or she deems it appropriate to do so.<sup>135</sup>

112. In the legal opinion, Lenczner Slaght recommended against a judicial inquiry.<sup>136</sup>

113. On March 20, 2019, Council met to discuss the three options. The City's lawyers, Lenczner Slaght, attended the meeting to answer questions from Council about their legal opinion. The meeting took place partly *in camera*. During the meeting, the Mayor and City Councillors made clear their view that "full transparency" and getting the "full picture" in order to restore public confidence were primary considerations.<sup>137</sup> Ultimately, and against the advice of its counsel, Council directed its legal counsel and Interim City Manager to prepare the necessary documents to initiate a judicial investigation in the RHVP report matter pursuant to the *Municipal Act* and the *Public Inquiries Act*.<sup>138</sup>

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<sup>135</sup> Report by Lenczner Slaght Royce Smith Griffin LLP for the City of Hamilton, March 13, 2019, p. 7 [**RHVPI Compendium, Tab 45, p. 371**]. At its meeting on March 20, 2019, Council voted to waive privilege over the opinion.

<sup>136</sup> Report by Lenczner Slaght Royce Smith Griffin LLP for the City of Hamilton, March 13, 2019, p. 14 [**RHVPI Compendium, Tab 45, p. 378**].

<sup>137</sup> See e.g., Transcript of Council Meeting, March 20, 2019, p. 65 (Councillor Whitehead: "[It's about trust and ability for this council to make right decisions based on the best information before them, and if it appears that is called into question, then we've lost the confidence of this community. So we have a role and responsibility. So this is grander than the investigation. This is about an open transparent process that enables the broader community to understand what actually took place.]); pp. 138-139 (Councillor Clark: "Going forward, I personally have a few priorities in how we move. I think we all want the truth, the complete truth that gives a full picture. I want full transparency."); p. 172 (Councillor Nann: "I've been spending a lot of time listening very, very carefully because I'm 100 percent committed with all of you around this table to ensure that we get the truth, that we are absolutely committed to transparency, and that we are all bound to our accountability as elected officials."); p. 193 (Mayor Eisenberger: "And so, how do we then make sure that we have as open and transparent a process possible to get to that issue and give the community at large the kind of confidence that they're going to need that will let them know that this council has not had their hands on this, that there's been a totally independent process attached to this, and that it had full vetting in terms of a public disclosure on all of that.") [**RHVPI Compendium, Tab 46, pp. 467, 540-541, 574, 595**].

<sup>138</sup> Minutes of Council Meeting, March 20, 2019 [**RHVPI Compendium, Tab 47, pp. 614-618**].

### 11. Litigation involving the RHVP

114. In May 2019, after the Inquiry was announced, a class action proceeding was commenced against the City.<sup>139</sup> The plaintiffs alleged failure to warn and negligence in respect of the design, engineering, construction and maintenance of the RHVP.<sup>140</sup> On June 20, 2022, Justice Edwards of the Ontario Superior Court of Justice denied the motion for certification of the class action.<sup>141</sup>

115. [REDACTED]

[REDACTED]

[REDACTED]<sup>42</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>143</sup> [REDACTED]

[REDACTED]

#### *C. The RHVPI Terms of Reference*

116. On April 24, 2019, the City passed a resolution pursuant to section 274 of the *Municipal Act*, requesting the Chief Justice of Ontario to appoint a Superior Court judge to investigate matters related to the disclosure of the Tradewind Report.<sup>144</sup>

117. The Terms of Reference that Council passed authorize the Commissioner to conduct the inquiry in two stages: (a) to “obtain, bearing in mind cost and the principles

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<sup>139</sup> [REDACTED]

<sup>140</sup> *Klassen v. City of Hamilton*, 2022 ONSC 3660 at para. 1 (“*Klassen*”) [BOA, Tab 1].

<sup>141</sup> *Klassen* [BOA, Tab 1].

<sup>142</sup> [REDACTED]

<sup>143</sup> [REDACTED]

<sup>144</sup> Terms of Reference [RHVPI Compendium, Tab 1].

of proportionality, all documents necessary to answer” a series of questions; and (b) “to hold a public hearing to answer” the specified questions.<sup>145</sup>

118. The Terms of Reference lay out 24 specific questions for the Commissioner to answer, covering the period from the receipt of the Tradewind Report by the City in January 2014 through to the steps taken by City staff following its discovery in 2018. Most relevant to this motion, the Terms of Reference include the following questions regarding the discovery of the Tradewind Report in 2018 and the obtaining of additional consultant reports:

- (vii) Identify all individuals who received a copy of the Report or were advised of the Report or the information and recommendations contained therein, in 2018;
- (viii) Were appropriate steps taken to disclose the Report, or the information and recommendations contained therein, once it was discovered in 2018?
- (ix) Was there any negligence, malfeasance or misconduct in failing to disclose the Report, or the information and recommendations contained therein, once the Report was discovered in 2018?
- (x) Were users of the RHVP put at risk as a result of the failure to disclose the Report’s findings?
- (xi) Did the Report contain findings or information that would have triggered Council to make safety changes to the roads or order further studies?
- [...]
- (xiii) Did anyone in the Public Works Office or Roads Department request, direct or conduct any other friction test, asphalt assessment, or general road safety reviews or assessments on the RHVP?
- (xiv) Did subsequent consultant reports provide additional support or rebuttal to the conclusions contained in the Report? <sup>146</sup> [Emphasis added]

119. The Terms of Reference confer broad authority to the Commissioner “to inquire into all aspects of the matters [listed in the Terms of Reference], their history and their

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<sup>145</sup> Terms of Reference, paras. 2(a), (b), [RHVPI Compendium, Tab 1, pp. 6-9].

<sup>146</sup> Terms of Reference, paras. 2(a)(vii)-(xi), [RHVPI Compendium, Tab 1, p. 7].



impact on the ratepayers of the City of Hamilton as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commission may deem appropriate and in the public interest as a result of the inquiry” (emphasis added).<sup>147</sup>

120. On May 3, 2019, the Chief Justice of the Superior Court of Justice appointed the Honourable Mr. Justice Herman Wilton-Siegel as Commissioner of the Inquiry.

***D. Status of the Inquiry***

121. In March 2020, the RHVPI issued a summons to the City to produce documents pursuant to section 33(3)(b) of the *Public Inquiries Act*.<sup>148</sup> The City has produced over 62,500 documents,<sup>149</sup> which have been disclosed to the participants of the Inquiry. It has expressly waived privilege over numerous documents. However, some documents remain in dispute.

122. Commission Counsel and the City’s counsel have worked together to narrow any potential privilege disputes, including through the use of redactions. Commission Counsel is not seeking privileged information specific to any litigation in which the City is a party, but rather is focused on the questions in the Terms of Reference. It has taken a targeted approach and has only requested those documents that it considers to be highly relevant to the RHVPI’s mandate. There remain 97 documents in dispute, some of which are duplicates or contain the same content (e.g., email chains that contain the

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<sup>147</sup> Terms of Reference, para. 3, [RHVPI Compendium, Tab 1, p. 9].

<sup>148</sup> Summons to Produce Documents, March 19, 2020, Exhibit B to Auty Affidavit [Motion Record, Tab 3B, p. 42].

<sup>149</sup> [REDACTED]

same allegedly privileged content). Of the 97 documents, 56 are “unique”.<sup>150</sup> The City has provided Commission Counsel with copies of all of the Disputed Documents as part of the privilege dispute process that was negotiated with the City; however, the Commissioner has not had access to any of them.

123. In the meantime, the public hearings of the Inquiry have begun. The public hearings have been divided into two phases:

- a) Phase 1 will focus on questions of fact relating to the construction of the RHVP, friction testing conducted by MTO, consultant and staff reports on the RHVP and the discovery and public release of the Tradewind Report; and
- b) Phase 2 will focus on expert evidence looking at how friction and other factors contributed to motor vehicle accidents on the RHVP, and policy and governance issues at the City that arise from the Terms of Reference.

124. The public hearings for Phase 1 began on April 25, 2022 and are ongoing. To date, witnesses have testified about events leading up to the discovery of the Tradewind Report. Many of the witnesses have not yet given evidence about any events following discovery of the report in the fall of 2018. The testimony of witnesses about post-discovery events is scheduled to commence on August 29, 2022. These witnesses were originally scheduled to testify in July and August, but Commission Counsel has delayed the hearing of their evidence pending the determination of the Commissioner’s

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<sup>150</sup> The City has provided a Brief of Unique Documents, which contains a subset of all of the Disputed Documents. The tab references in this factum are only to the “unique” documents.

Designate on the status of the Disputed Documents. The decision of the Commissioner's Designate on this motion will affect the scope of the evidence to be given in the balance of Phase 1 of the public hearings.

### **PART III - ISSUES AND ARGUMENT**

125. In its factum, the City relies on the Court of Appeal for Ontario's decision in *R. v. 1504413 Ontario Limited* as articulating the appropriate test to be applied on this motion. However, the case is wholly distinguishable and does not lay out the framework for determining if the Disputed Documents should be produced to the RHVPI.

126. In *1504413 Ontario Limited*, the appellant was charged with a violation of the municipality's *Building Code*. Counsel for the municipality served a summons on counsel for the appellant, requiring him to appear as a witness against his own client.<sup>151</sup> In that context, the Court of Appeal for Ontario found that "issuing a summons to counsel for the opposite party to testify against his or her client is virtually unheard of and it should not be done absent the most exceptional circumstances". According to the court, such circumstances would require, at a minimum, "a showing of high materiality and necessity (assuming the proposed evidence is otherwise admissible)".<sup>152</sup>

127. However, this test does not apply to the summonses that were issued by the Inquiry. Public inquiries are not subject to the same rules of evidence as the courts.

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<sup>151</sup> *R. v. 1504413 Ontario Limited*, [2008 ONCA 253](#) ("1504413 Ontario Limited") [BOA, Tab 2].

<sup>152</sup> [1504413 Ontario Limited](#) [BOA, Tab 2].

Instead, they are required to admit any evidence that is reasonably relevant to the subject of the inquiry subject only to the exclusionary rule of privilege.<sup>153</sup>

128. Section 33(3) of the *Public Inquiries Act* (the “**Act**”) gives the Inquiry the power to “require any person by summons [...] to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify, relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13).”<sup>154</sup>

129. Section 33(13) of the *Act* provides that the admissibility of evidence at the Inquiry is subject to claims of privilege:

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.<sup>155</sup>

130. The Disputed Documents were responsive to a summons issued by the RHVPI to the City (and in some cases to CIMA) for production of all documents that are arguably relevant to the subject matter of the Terms of Reference.<sup>156</sup> This is not the case where one party has summonsed counsel for an opposing party to testify against their own client in the context of an adversarial proceeding.

131. The test on this motion is therefore quite simple. The issues on this motion are whether, in respect of each of the Disputed Documents:

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<sup>153</sup> *Bortolotti v Ontario (Ministry of Housing)*, [1977 CanLii 1222](#), 1977 CarswellOnt 499, 15 O.R.(2d) 617 (ONCA) at [para. 19](#) and [para. 21](#). [**BOA, Tab 3**].

<sup>154</sup> *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sched. 6, [s. 33\(3\)](#).

<sup>155</sup> *Public Inquiries Act*, 2009, S.O. 2009, c. 33, Sched. 6, [s. 33\(13\)](#).

<sup>156</sup> Summons to Produce Documents to City, March 19, 2020, [REDACTED]

- a) the document is protected by solicitor-client and/or litigation privilege; and
- b) if so, whether the privilege has been waived such that it should be produced.

132. The general principles that govern the privilege dispute are set out below. Because each document needs to be reviewed and whether the document is protected by solicitor-client and/or litigation privilege will turn in large measure on the *purpose* behind the document or communication, Commission Counsel has classified the documents into 6 categories and has provided its submissions in respect of each category is provided below.

***A. General principles governing privilege***

133. Solicitor-client privilege and litigation privilege serve different purposes. In its factum, the City conflates the two and makes bald assertions that entire classes of documents are protected by one or both privileges, without any justification.<sup>157</sup> As set out below, making blanket claims of privilege in this manner is insufficient either to establish that the documents are privileged or to cloak the documents with privilege.

**1. Solicitor-client privilege**

134. Commission Counsel accepts that solicitor-client communication privilege is fundamental to the proper functioning of the legal system. It is a privilege that has acquired constitutional dimensions, both as a principle of fundamental justice and as

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<sup>157</sup> Schedule D to the City's Factum does not identify the privilege asserted in respect of each Disputed Document. However, the City has separately provided the RHVPI with a chart identifying which privilege is being asserted (i.e., solicitor-client and/or litigation privilege) in respect of which document. The chart at Schedule C to this Factum includes this information.

part of the client's right to privacy. Communications between solicitor and client are essential to the effective operation of the legal system.<sup>158</sup>

135. That said, the onus is on the City to demonstrate that each document over which it claims solicitor-client communication privilege meets the criteria for the privilege. The applicable test requires the City to demonstrate that each document was:

- a) a communication between solicitor and client;
- c) which entails the seeking or giving of legal advice; and
- d) which is intended to be confidential by the parties.<sup>159</sup>

136. If the City establishes that a communication is protected by solicitor-client privilege, that privilege is absolute in scope and permanent in duration. If a communication is protected by solicitor-client privilege it is protected for all times, and for all purposes, unless the City has waived the privilege.<sup>160</sup>

137. What is clear, however, is that a party cannot cloak notes, documents or communications with privilege merely by involving a lawyer.<sup>161</sup> The *purpose* behind the communication is central to determining if a communication is privileged. Not all


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<sup>158</sup> *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at [paras. 20, 26](#) [BOA, Tab 4].

<sup>159</sup> *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at [837](#) [BOA, Tab 5].

<sup>160</sup> *Blank v. Canada*, 2006 SCC 39 at [paras. 8, 37](#) ("*Blank*") [BOA, Tab 6].

<sup>161</sup> *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Company*, [2015 ONSC 4714](#) ("*Sky Solar*") [BOA, Tab 7].

 see *General Accident Assurance Company v. Chrusz*, [1999 CanLII 7320](#) (ONCA) at [para. 127](#) ("*Chrusz*") [BOA, Tab 8].

communications between a lawyer and client will be privileged; only those for the purposes of seeking or giving legal advice will be protected.<sup>162</sup>

138. Given the requirement of confidentiality, there is a separate test that governs whether solicitor-client privilege will attach to communications involving a third party. In *General Accident Assurance Co. v. Chrusz*, the Court of Appeal for Ontario made clear that solicitor-client privilege will only attach to such communications where:

- a) the third party “serves as a channel of communication between the client and solicitor”;<sup>163</sup> or
- b) the third party’s retainer “extends to a function which is essential to the existence or operation of the client-solicitor relationship”;<sup>164</sup> in other words, where the third party is “seen as standing in the shoes of the client for the purpose of communications”.<sup>165</sup>

139. As set out below, Commission Counsel submits that many of the Disputed Documents were not protected by solicitor-client privilege because they were not for the purpose of seeking or giving of legal advice and/or because they involve a third party (CIMA) and do not meet the test in *Chrusz*. In addition, as set out below, Commission Counsel submits that any privilege was implicitly waived by the City given the broad language in the Terms of Reference and the requirements of fairness and consistency.

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<sup>162</sup> *Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256 at [para. 14](#) [BOA, Tab 9].

<sup>163</sup> *Chrusz* at [para. 106](#) [BOA, Tab 8].

<sup>164</sup> *Chrusz* at [para. 120](#) [BOA, Tab 8].

<sup>165</sup> *Chrusz* at [para. 121](#) [BOA, Tab 8].

## 2. Litigation privilege

140. Litigation privilege protects communications and documents prepared when litigation was in reasonable contemplation, if and only if the dominant purpose for creating the document was preparation for litigation. Documents that are litigation privileged are exempt from disclosure, absent waiver. The purpose of litigation privilege is to ensure the efficacy of the adversarial process,<sup>166</sup> by creating a “zone of privacy” in relation to pending or apprehended litigation.<sup>167</sup> Unlike solicitor-client privilege, litigation privilege is neither absolute in scope nor permanent in duration. It ends when the litigation (or related litigation) ends.<sup>168</sup>

141. There is a two-part test for determining whether a document is protected by litigation privilege. In respect of each Disputed Document over which the City claims litigation privilege, the City must establish that:

- a) litigation was in the reasonable contemplation of the City at the time the document was created; and
- b) preparation for litigation was the dominant purpose for the creation of each document.<sup>169</sup>

142. Again, in assessing whether a document is protected by litigation privilege, the *purpose* behind the creation of the document is key. Litigation privilege only applies to a document if the “dominant purpose” for creating the document was preparation for

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<sup>166</sup> *Blank* at [para. 27](#) [BOA, Tab 6].

<sup>167</sup> *Blank* at [para. 34](#) [BOA, Tab 6].

<sup>168</sup> *Blank* at [paras. 24, 36-41](#) [BOA, Tab 6].

<sup>169</sup> *Sky Solar* at [para. 80](#) [BOA, Tab 7]; *Blank* at [paras. 38](#) and [59](#) [BOA, Tab 6].



litigation. Litigation privilege does not protect a document if litigation was only a “substantial purpose” for its creation.<sup>170</sup> Because the focus is on the purpose for which the document was created, the time to assess the dominant purpose is at the time it was created, not later.<sup>171</sup>

143. As set out below, Commission Counsel submits that, with some limited exceptions, the Disputed Documents are not protected by litigation privilege because they were not prepared for the dominant purpose of litigation. Moreover and in any event, Commission Counsel submits that the City has failed to establish that any litigation for which the documents may have been created remains ongoing (and that any litigation privilege therefore has not expired). Finally, Commission Counsel submits that any remaining privilege has been waived.

### **3. Onus and evidence required to establish privilege**

144. The onus is on the party asserting privilege to adduce evidence to support its claims. As the Ontario Superior Court of Justice has held, “Blanket claims of solicitor-client privilege and litigation privilege amounting to nothing more than bald assertions neither create nor clothe documents with either kind of privilege.”<sup>172</sup> Instead of bald assertions, the party claiming the privilege must establish the facts upon which the privilege is claimed.<sup>173</sup>

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<sup>170</sup> *Blank* at [para. 60](#) [BOA, Tab 6].

<sup>171</sup> *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2014 ABCA 244 at [para. 38](#). [BOA, Tab 10].

<sup>172</sup> *Sky Solar* at [para. 75](#) [BOA, Tab 7]. Bald statements in an affidavit that refer to a group of documents are insufficient to satisfy the privilege claimant’s onus: *XCG Consultants Inc v ABB Inc*, 2014 ONSC 1111 at [para. 63](#) [BOA, Tab 11].

<sup>173</sup> *Williamson v. Canada (Attorney General)*, 2002 FCT 1234 at [para. 9](#) [BOA, Tab 12].

145. General assertions that all documents created after litigation was reasonably anticipated were prepared for purposes of that litigation are not typically sufficient to meet a party's onus of proving litigation privilege. The evidence of the party claiming litigation privilege must be specific and speak to the content of each document.<sup>174</sup>

146. The City has not satisfied its onus. It has not provided a document-by-document analysis of its privilege claims, instead making blanket claims based merely on the fact that a lawyer was involved in the communication, at a time when the City was concerned generally about its potential liability. Nor has the City provided any evidence [REDACTED] that entire groups of documents were purportedly for the purposes of obtaining legal advice and/or the dominant purpose of litigation.<sup>175</sup> The City's claims should fail on this basis alone.

#### **4. Implied waiver of privilege**

147. As the Divisional Court held in *Roynat Capital Inc. v Repeatseat Ltd.*, a party may waive privilege "in the absence of an intention to waive, where fairness and consistency so require". In order to find implied or deemed waiver, there must be the "double elements" of "implied intention and the element of fairness and consistency". That is, there must be "some manifestation of a voluntary intention to waive the privilege at least

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<sup>174</sup> *Mamaca v. Coseco Insurance Company*, 2007 CanLII 9890 (ONSC) at [para. 15](#) [BOA, Tab 13].

<sup>175</sup> [REDACTED]

to a limited extent. The law then says that in fairness and consistency, it must be entirely waived.”<sup>176</sup>

148. According to the court, however, a deemed waiver “will be limited to circumstances where the relevance of the evidence in question is high, and the principles of fairness and consistency require disclosure”.<sup>177</sup>

149. In line with this reasoning, implied or deemed waiver has been found in adversarial proceedings where, for example, a litigant has asserted that they relied on legal advice or has made selective disclosure, which has the potential to create a misleading or incomplete record.<sup>178</sup>

150. Here, the parties are, of course, in a public inquiry, not an adversarial proceeding. The institution behind the public inquiry is important. As the Supreme Court of Canada noted in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, a public inquiry serves to build public confidence through its openness and the high public respect for the office of the commissioner:

Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but

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<sup>176</sup> *Roynat Capital Inc. v Repeatseat Ltd.*, 2015 ONSC 1108 at [para. 82](#), (“Roynat”), quoting McLachlin J. (as she then was) in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) [BOA, Tab 14].

<sup>177</sup> *Roynat* at [para. 84](#) [BOA, Tab 14].

<sup>178</sup> *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1995] O.J. No. 3886, 1995 CarswellOnt 1461 at [paras. 41-42](#) [BOA, Tab 15].

also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.<sup>179</sup> [Emphasis added]

151. Under the *Municipal Act*, where the municipality wishes to conduct a public inquiry, it passes a resolution and a judge of the Superior Court of Justice is appointed to conduct the inquiry.<sup>180</sup> As set out above, the City had several options available to it when considering how to investigate the discovery of the Tradewind Report and the steps taken in response. It chose to call a public inquiry and thus to lend the name of the Superior Court of Justice to the investigation. City Council's choice to do so and to forego an internal investigation (whether through the City's Auditor General or Ombudsperson) should not be taken lightly. This institution is undermined if the entity that calls the inquiry can withhold from the Commissioner documents necessary to complete his work.

152. In Commission Counsel's submission, the "double elements" required to show deemed or implied waiver are found here.

***a. Implied intention to waive through Terms of Reference***

153. Waiver of privilege may be inferred where a province or a municipality directs a commissioner to inquire into the response of a public institution, to assess who did what, and to draw conclusions regarding whether or not the staff of that entity engaged in misconduct. Where an entity passes such terms of reference, a commissioner must examine all of the documents necessary to fulfill these terms. In these circumstances, waiver may be inferred from how the terms of reference are drafted.

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<sup>179</sup> *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at [para. 62](#) [BOA, Tab 16].

<sup>180</sup> *Municipal Act, 2001*, S.O. 2001, c. 25, [s. 274](#).

154. In *British Columbia (Attorney General) v. Davies*, Justice Melnick of the British Columbia Supreme Court found that the Attorney General of British Columbia waived solicitor-client privilege and Crown immunity by signing the Order in Council establishing an inquiry into the death of Frank Paul.<sup>181</sup> The terms of reference directed the commissioner, among other things:

(b) to make findings of fact regarding circumstances relating to Mr. Paul's death, including findings of fact respecting the response of [...] the Criminal Justice Branch of the Ministry of Attorney General to the death of Mr. Paul;

[...]

(e) to examine the rules, policies and procedures of the [...] Criminal Justice Branch of the Ministry of the Attorney General related to the role and response of each of those offices where an individual dies in circumstances similar to the circumstances of Mr. Paul's death.<sup>182</sup>

155. The commissioner found that it was “incongruous” for the Crown to instruct him to inquire into the response of the Criminal Justice Branch and its staff, while also restricting his ability to examine parts of that process.<sup>183</sup>

156. On review, Justice Melnick agreed, holding that “the Terms of Reference constituted an effective waiver of Crown immunity and solicitor-client privilege.”<sup>184</sup> The terms of reference required the commissioner to look beyond mere policy, into “real things done by real people in the exercise of their office as prosecutors.”<sup>185</sup> Justice Melnick held that the circumstances in which an Attorney General will direct a waiver of privilege will be rare but, in some cases, the greater public good will be served by this

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<sup>181</sup> *British Columbia (Criminal Justice Branch) v. Davies*, [2008 BCSC 817](#) (“*Davies* (BCSC)”), aff'd 2009 BCCA 337 (“*Davies* (BCCA)”) [BOA, Tab 17].

<sup>182</sup> *Davies* (BCSC) at [para. 7](#) [BOA, Tab 17].

<sup>183</sup> *Davies* (BCSC) at [para. 50](#) [BOA, Tab 18].

<sup>184</sup> *Davies* (BCSC) at [para. 58](#) [BOA, Tab 17].

<sup>185</sup> *Davies* (BCSC) at [para. 52](#) [BOA, Tab 17].

waiver.<sup>186</sup> On appeal, the British Columbia Court of Appeal upheld the decision on other grounds and confirmed the common law principles governing waiver of privilege.<sup>187</sup>

157. The rationale from *Davies* applies equally here. While the City tries to distinguish the case on the basis of the language used in the terms of reference (which specifically references the Criminal Justice Branch of the Ministry of the Attorney General),<sup>188</sup> it ignores the broad manner in which the Terms of Reference were drafted in respect of this Inquiry.

158. What is telling is that, in its factum, the City refers to the preamble of the Terms of Reference in an attempt to narrow the scope of the Inquiry and to argue that City Council intended “to limit the scope of the Inquiry to the disclosure of the Tradewind Report”.<sup>189</sup> However, in doing so, the City ignores the plain language of the Terms of Reference, which direct the Commissioner to answer questions in respect of the disclosure of the Tradewind Report both in 2014, when it was first received, and in 2018, when it was “discovered”.

159. In respect of the latter period, the Terms of Reference specifically ask the Commissioner to identify “all individuals” who received the Tradewind Report in 2018 and examine their conduct, including to determine if “appropriate steps” were taken to disclose the report and if there was “any negligence, malfeasance or misconduct” in failing to disclose the report following its discovery:

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<sup>186</sup> *Davies* (BCSC) at [para. 57](#) [BOA, Tab 17].

<sup>187</sup> *Davies* (BCCA), at [para. 112](#) [BOA, Tab 18].

<sup>188</sup> City Factum, paras. 111-119.

<sup>189</sup> See City Factum, paras. 71-72.

(a) To obtain, bearing in mind cost and the principles of proportionality all documents necessary to answer the following questions:

[...]

- (vii) Identify all individuals who received a copy of the Report or were advised of the Report or the information and recommendations contained therein, in 2018;
- (viii) Were appropriate steps taken to disclose the Report, or the information and recommendations contained therein, once it was discovered in 2018?
- (ix) Was there any negligence, malfeasance or misconduct in failing to disclose the Report, or the information and recommendations contained therein, once the Report was discovered in 2018?
- (x) Were users of the RHVP put at risk as a result of the failure to disclose the Report's findings? [Emphasis added]

160. The Terms of Reference also require the Commissioner to examine the impact of the Tradewind Report on safety, as well as “subsequent consultant reports” (including those prepared by CIMA):

- (xi) Did the Report contain findings or information that would have triggered Council to make safety changes to the roads or order further studies?

[...]

- (xiii) Did anyone in the Public Works Office or Roads Department request, direct or conduct any other friction test, asphalt assessment, or general road safety reviews or assessments on the RHVP?
- (xiv) Did subsequent consultant reports provide additional support or rebuttal to the conclusions contained in the Report?<sup>190</sup>

161. The Terms of Reference further empower the Commissioner “to inquire into all aspects of the above matters [...] their history and their impact on the ratepayers of the City of Hamilton as they relate to the good government of the municipality, or the conduct of its public business, [...]” (emphasis added).<sup>191</sup>

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<sup>190</sup> Terms of Reference, paras. 2(a)(xi) and (xiii), [RHVPI Compendium, Tab 1, pp. 7-8].

<sup>191</sup> Terms of Reference, para. 3, [RHVPI Compendium, Tab 1, p. 9].

162. By passing the resolution in these terms, Council has manifested an implied intention to waive privilege over any document necessary to answer the questions it directed the Commissioner to answer. Similar to the terms of reference in *Davies*, City Council chose to pass Terms of Reference that require the Commissioner to look into “real things done by real people in the exercise of their office”,<sup>192</sup> including to decide whether or not they committed misconduct.

163. While the City attempts to narrow the Commissioner’s mandate to merely the issue of “disclosure” of the Tradewind Report,<sup>193</sup> the Terms of Reference require an examination of what City staff were doing during the four-month period from September 2018, when the report was discovered, to January/February 2019, when the report was first disclosed to Council. Put simply, the Commissioner cannot answer the question of whether “appropriate steps” were taken in respect of the disclosure of the report without an understanding of what staff were doing during that time and to whom they were or were not disclosing the report (and why).

164. Nowhere in the Terms of Reference is there any suggestion that the City’s Legal department and staff are exempt from this inquiry. Indeed, it would be anomalous to say that the Commissioner should identify “all individuals” who received the Tradewind Report, and examine whether “appropriate steps” were taken by such individuals upon discovery of the report, *except the lawyers*. This is a public inquiry designed to restore public confidence through an open and transparent examination of the events following the discovery of the Tradewind Report, in which findings of misconduct may be found in

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<sup>192</sup> *Davies* (BCSC) at [para. 52](#) [BOA, Tab 17].

<sup>193</sup> See City Factum, paras. 71-72.



respect of other non-lawyer individuals. Absent an express intention to exclude them from the Terms of Reference (which is not present here), the actions of the City's lawyers cannot be exempt from scrutiny simply because they are lawyers.

***b. Fairness and consistency require disclosure***

165. Fairness and consistency also require disclosure of the Disputed Documents. The record before the Commissioner is voluminous. It tells the story of what Public Works staff did following the discovery of the Tradewind Report. However, [REDACTED]

[REDACTED]  
[REDACTED] the publicly disclosed documents only tell part of the story.

166. It raises serious concerns if the Commissioner is asked to make findings of fact and misconduct without access to all relevant documents. The risk of error is material. For example, the work of the City's Public Works staff and its safety consultants following the discovery of the Tradewind Report in 2018 may be criticized in the Commissioner's final report. However, it is possible that they could be criticized unfairly in an Inquiry called by an entity that is withholding relevant documents that may cast their conduct in an entirely different light.

167. Commission Counsel's arguments in respect of implied waiver for each category of document, including why Commission Counsel takes the position that the impugned documents are highly relevant to its mandate, are provided in more detail below.<sup>194</sup>

### **5. In any event, facts are not protected by privilege**

168. Even though a document may be protected by litigation privilege, the underlying facts described in the document are not protected if they are otherwise discoverable.

According to the court in *Susan Hosiery Ltd. v. Minister of National Revenue*:

What is important to note about both of these rules [i.e. solicitor client privilege and litigation privilege] is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to, obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them.

In my view, it follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.<sup>195</sup> [Emphasis added]

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<sup>194</sup> Although Commission Counsel submits that the test articulated in [1504413 Ontario Limited](#) [BOA, Tab 1] (which requires a showing of a high degree of materiality and necessity) does not apply here, the issue of whether the documents are highly relevant to the subject matter of the Inquiry is relevant to the question of implied waiver.

<sup>195</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at [para. 10](#) (Can. Ex. Ct.) [BOA, Tab 19], quoted in *Shibish v. Honda of Canada Inc.*, 2010 ONSC 3770 at [para. 11](#) [BOA, Tab 20].

169. As a result, even in cases where the underlying documents are protected by privilege, the Ontario courts have held that the opposing party is entitled to “a summary of facts from the document or recording relevant to the issues in the case”.<sup>196</sup>

170. As set out below, even if some of the notes and documents in issue are found to be privileged and the privilege was not waived, Commission Counsel submits that the underlying facts reflected in the documents remain subject to disclosure.

### ***B. The Disputed Documents***

171. As set out above, the City’s privilege claims must be assessed on a document-by-document basis because the *purpose* behind the creation of the document is a central consideration in determining if the City has met the test for solicitor-client and/or litigation privilege. The City has not undertaken this analysis. It has broadly categorized the documents into [REDACTED]

[REDACTED] It submits baldly in its factum that the documents are covered by solicitor-client privilege and litigation privilege, without identifying which privilege is being asserted in respect of which document and why that is the case.<sup>197</sup>

172. By claiming a blanket privilege over these categories of documents, the City appears to simply assume that the Disputed Documents are protected by solicitor-client and/or litigation privilege, ignoring the fact that it bears the onus to lead sufficient evidence to ground each of its privilege claims. The City has not satisfied that onus.

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<sup>196</sup> *Tiller v. St. Andrew’s College*, 2009 CanLII 32274 (ON SC) at [paras. 8-14](#) [BOA, Tab 21]; see also *Pearson v. Inco Limited*, 2008 CanLII 46701 (ON SC) at [para. 21](#) [BOA, Tab 22].

<sup>197</sup> See City Factum, paras. 97-100. Schedule D to the City’s Factum does not identify the privilege asserted in respect of each Disputed Document. However, the City has separately provided the RHVPI with a chart identifying which privilege is being asserted (i.e., solicitor-client and/or litigation privilege) in respect of which document. The chart at Schedule C to this Factum includes this information

173. Commission Counsel has categorized the Disputed Documents functionally into 6 categories, having regard to the *purpose* behind the creation of the documents. Commission Counsel has also provided a chart at **Schedule C** to this factum, which addresses each of the Disputed Documents in greater detail.

**1. Category 1: Documents relating to [REDACTED]**

174. The City claims privilege over documents in late November and December 2018 regarding [REDACTED] see **Tab 3** (email [REDACTED] dated November 20, 2018); **Tab 5** ([REDACTED] dated December 7, 2018); **Tab 9** (emails [REDACTED] [REDACTED] **Tab 85** (Boghosian's notes of December 7, 2018).

***a. Documents not protected by solicitor-client or litigation privilege***

175. Commission Counsel agrees that the Category 1 documents are communications between the City's internal and external counsel and are documents that would be *prima facie* protected by solicitor-client privilege. To the extent these documents are for the purposes of seeking and giving legal advice, they may be protected by solicitor-client privileged. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

176. Nor are the documents protected by litigation privilege. They were not created for the dominant purpose of existing or contemplated litigation. [REDACTED]

[REDACTED]

177. However, litigation privilege does not attach to materials created at a time when liability is merely being assessed and the documents are not being prepared for the purposes of actual or contemplated litigation. In *McComb v. Jones*, for example, the British Columbia Superior Court held that materials sought and created by insurance adjusters for the purpose of investigating liability were not protected by litigation privilege.<sup>198</sup> According to the court, materials created during the liability investigation stage, even where the tentative liability investigation finding was 75/25, were not litigation privileged because the investigation was ongoing.<sup>199</sup> None of the material was created for the dominant purpose of litigation, as it was not to be used in aid of a potential defence to be put forward on behalf of the defendants.<sup>200</sup>

178. For the same reason, the Category 1 documents are not protected by litigation privilege. Nor has the City satisfied its onus of showing that any litigation that was ongoing or contemplated remains outstanding. Accordingly, any litigation privilege that may have once attached to the documents has expired in any event.

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<sup>198</sup> *McComb v. Jones*, 2008 BCSC 157 at [para. 24](#) (“*McComb*”) [BOA, Tab 23].

<sup>199</sup> *McComb* at [para. 26](#) [BOA, Tab 23].

<sup>200</sup> *McComb* at [para. 23](#) [BOA, Tab 23].

***b. In any event, any privilege over the documents was waived***

179. In any event, Commission Counsel submits that, by adopting the Terms of Reference, the City has implicitly waived privilege over the documents. The Category 1 documents are highly relevant to the questions of (a) who received the Tradewind Report, (b) whether “appropriate steps” were taken to disclose the Report, (c) whether there was any “negligence, malfeasance or misconduct in failing to disclose the Report”, and (d) whether “anyone in the Public Works Office or Roads Department request[ed], direct[ed] or [conducted] any other friction test, asphalt assessment or general road safety reviews or assessments on the RHVP” .<sup>201</sup>

180. [REDACTED]

181. [REDACTED]

182. Without the Category 1 documents, the Commissioner is left with an incomplete picture. The public documents include, for example:

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<sup>201</sup> Terms of Reference, paras. 2(a)(vii), (viii), (iv) and (xiii), [RHVPI Compendium, Tab 1, pp. 7-8].

- a) the email from MacNeil to McGuire on December 7, 2018, in which MacNeil asks McGuire about “the current scope of work that CIMA is undertaking for which we are going to be adding/updating them on the Tradewind Friction Testing Results”;<sup>202</sup>
- b) the email exchange between Auty and Soldo on December 11-12, 2018 in which Soldo indicated that Malone was expecting her call,<sup>203</sup> and Malone’s notes on December 11, 2018 that suggest that Soldo may have spoken with Malone about Auty;<sup>204</sup> and
- c) the emails between MacNeil and McGuire on December 10 and 12, 2018, in which MacNeil advises McGuire not to contact CIMA.<sup>205</sup>

183. Without the Category 1 documents, the Commissioner will not be able to understand important context for these communications, [REDACTED]

184. In that respect, it is possible that the Commissioner will criticize the City (including Public Works staff) for not disclosing the Tradewind Report to CIMA or another safety consultant to obtain an opinion on potential safety concerns until over four months after its discovery. [REDACTED]

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<sup>202</sup> Email from MacNeil to McGuire, December 7, 2018 [RHVPI Compendium, Tab 27, p. 293].

<sup>203</sup> Emails between Auty and Soldo, December 11-12, 2018 [RHVPI Compendium, Tab 32, pp. 302-303].

<sup>204</sup> Malone Note, December 11, 2018 (CIM0022413) [Disputed Documents, Tab 2]. This note is included in the Disputed Documents, but the City has not sought to redact the note. As a result, it has been made available to the Inquiry.

<sup>205</sup> Email from MacNeil to McGuire, December 10, 2018 [RHVPI Compendium, Tab 31, p. 300]; Email from MacNeil to McGuire, December 12, 2018 [RHVPI Compendium, Tab 33, p. 304].

[REDACTED]

185. [REDACTED]

[REDACTED] is highly relevant to the Terms of Reference, including as they relate “to the good government of the municipality”.<sup>206</sup> [REDACTED]

**2. Category 2: Documents involving CIMA**

186. The Disputed Documents include communications [REDACTED]

- a) [REDACTED] Tab 2  
(Malone’s notes [REDACTED]); Tabs 15, 56, 57 and 75 (Boghosian’s draft

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<sup>206</sup> Terms of Reference, para. 3, [RHVPI Compendium, Tab 1, p. 9].



and final opinion letter [REDACTED] and **Tabs 86, 87 and 88** (Auty, Boghosian and Sabo's notes of calls [REDACTED]  
[REDACTED])

- a) [REDACTED]  
[REDACTED] see **Tab 19** (Malone's notes [REDACTED]  
[REDACTED] **Tab 26** (Auty and Boghosian emails dated January 30, 2019); **Tab 30** (Boghosian's email to Malone and internal CIMA email dated January 30, 2019); **Tab 46** [REDACTED] from CIMA to Boghosian dated February 3, 2019); **Tabs 56 and 57** (Boghosian's final opinion letter dated February 4, 2019 [REDACTED] **Tab 61** (emails between the City's lawyers dated February 5, 2019); and **Tabs 96, 97, 98, 99, 101** (Boghosian and Sabo's notes).

187. For the reasons set out below, Commission Counsel submits that the City has failed to satisfy its onus to show that the Category 2 documents are solicitor-client and/or litigation privileged, alternatively, that the City waived privilege over the documents, and in the further alternative, that, even if the documents and communications are protected by privilege, the facts identified in the documents are not privileged and should be disclosed.

***a. Documents not protected by solicitor-client privilege***

188. As set out above, in *Chrusz*, the Court of Appeal for Ontario established that, in order for communications with a third party to be protected by solicitor-client privilege, the third party must serve as a "channel of communication" between the client and

lawyer or the third party must be “seen as standing in the shoes of the client for the purpose of communications”.<sup>207</sup>

189. Applying this test, communications with third parties who are retained to perform an investigative function or who may provide information that is useful to the lawyer in providing their advice will not be protected by solicitor-client privilege.<sup>208</sup> For example:

- a) In *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)*, the British Columbia Court of Appeal found that communications between the College’s lawyers and experts were not protected by solicitor-client privilege because, “[w]hile the experts’ opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice”.<sup>209</sup>
- b) In *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, the Saskatchewan Court of Queen’s Bench found that communications with third party consulting experts were not protected by solicitor-client privilege because the third parties were not retained to seek

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<sup>207</sup> Chrusz at [para. 121](#) [BOA, Tab 8].

<sup>208</sup> *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership* 2010 SKQB 460 at [para. 26](#) (“Potash”), citing Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Toronto: LexisNexis, 2009) at page 249, para 14.106 [BOA, Tab 24].

<sup>209</sup> *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* 2002 BCCA 665 at [para. 51](#) [BOA, Tab 25].

or transmit legal advice on behalf of the client and their only purpose was to educate the lawyers.<sup>210</sup>

190. In *Chrusz*, the Court of Appeal for Ontario expressed concern about the danger of taking an overly expansive view to solicitor-client privilege in the context of third party communications that are merely “useful” to the lawyer:

Client-solicitor privilege is intended to allow the client and lawyer to communicate in confidence. It is not intended, as one author has suggested, to protect "... all communications or other material deemed useful by the lawyer to properly advise his client...": *Wilson, Privilege In Experts' Working Papers, supra*, at 371. While this generous view of client-solicitor privilege would create what clients might regard as an ideal environment of confidentiality, it would deny opposing parties and the courts access to much information which could be very important in determining where the truth lies in any given case.<sup>211</sup> [Emphasis added]

191. The documents and communications that were sent to, received from or created by CIMA do not satisfy the *Chrusz* test. Malone and CIMA did not serve as a “channel of communication” between lawyer and client, nor did they stand in the shoes of the client, the City, in any of their communications with Boghosian. [REDACTED]

[REDACTED]

[REDACTED] <sup>12</sup> [REDACTED]

[REDACTED]

[REDACTED]

192. [REDACTED]

[REDACTED] are similarly not protected by solicitor-client privilege because they were not for the purpose of seeking or giving legal advice. The

<sup>210</sup> *Potash* at [para. 24](#). [BOA, Tab 24].

<sup>211</sup> *Chrusz* at [para. 128](#). [BOA, Tab 8].

<sup>212</sup> [REDACTED]

City has not led any evidence to establish the purpose behind each of the communications. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

***b. Documents not protected by litigation privilege***

193. The Category 2 documents are also not protected by litigation privilege.

194. First, for the reasons set out above, the City has failed to establish that the documents [REDACTED] were for the dominant purpose of ongoing or contemplated litigation. [REDACTED]

[REDACTED]

[REDACTED] 13

195. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 214 [REDACTED]

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<sup>213</sup> See *McComb* [para. 23](#). [BOA, Tab 23].

<sup>214</sup> [REDACTED]

[REDACTED]

[REDACTED] 215

196. [REDACTED]

[REDACTED]

[REDACTED]

a)

[REDACTED]

[REDACTED] 216

b)

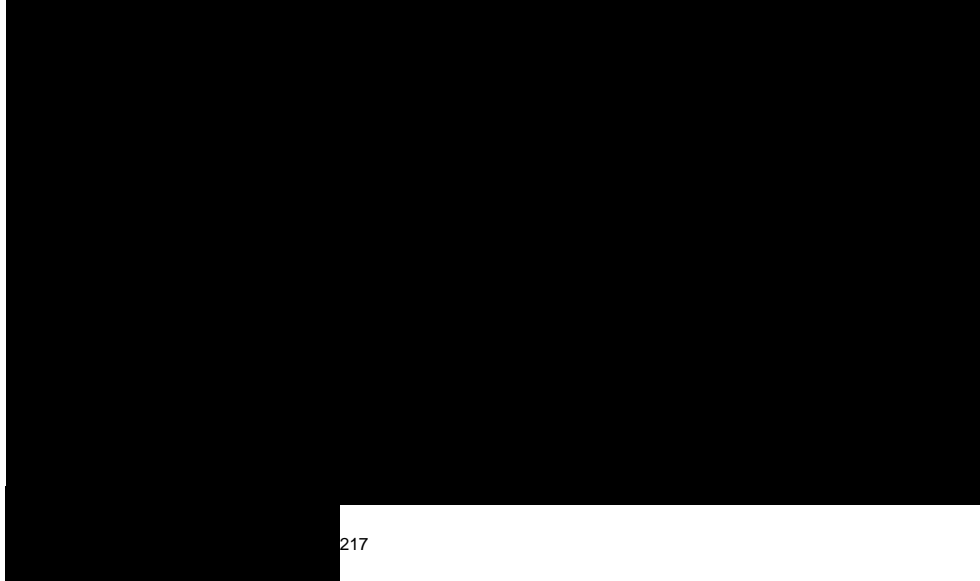
[REDACTED]

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215

216

[REDACTED]



197. In *Waugh v. British Railways Board*, the House of Lords decision that first enunciated the dominant purpose test for litigation privilege, the court found that an accident report prepared by the railway inspector for the purposes of obtaining legal advice in anticipated litigation as well as to further railway safety and operations, was not litigation privileged. Although litigation was a purpose, so too was railway operation and safety. Accordingly, the report was ordered to be produced.<sup>218</sup>

198. [REDACTED]

[REDACTED] Litigation privilege therefore does not attach to the documents. Moreover, as set out above, the City has also failed to establish that any litigation in respect of which the documents were created remains outstanding.

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<sup>217</sup> [REDACTED]

<sup>218</sup> *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (U.K. H.L.) [BOA, Tab 26].

***c. In any event, any privilege over the documents was waived***

199. In any event, the City has waived any privilege attaching to any documents relating to the communications involving CIMA. The Category 2 documents are critical to the mandate of the Inquiry in at least two important ways.

200. First, the documents [REDACTED] [REDACTED] are highly relevant to the questions of (a) whether “appropriate steps” were taken to disclose the Tradewind Report and (b) whether there was “any negligence, malfeasance or misconduct in failing to disclose the Report” once the report was discovered.<sup>219</sup> These questions require an examination of what happened from the discovery of the Tradewind Report in September 2018 until its disclosure to Council in January and February 2019.

201. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>219</sup> Terms of Reference, paras. 2(viii) and (ix), [RHVPI Compendium, Tab 1, p. 7].

202. Second, the Category 2 documents are highly relevant to the Inquiry's mandate to determine (a) if the Tradewind Report "contain[ed] findings or information that would have triggered Council to make safety changes to the roads or order further studies", (b) if "anyone in the Public Works Office or Roads Department request[ed], direct[ed] or conduct[ed] any other friction test, asphalt assessment, or general road safety reviews or assessments on the RHVP", and (c) if "subsequent consultant reports provide additional support or rebuttal to the conclusions contained in the [Tradewind] Report".<sup>220</sup>

203. The documents show that [REDACTED]  
[REDACTED] In addition, the results of that assessment, the 2019 CIMA Interim Measures Report, concluded that no additional safety measures were required (with the exception of modifying speed enforcement from "regular" to "increased" or "enhanced") notwithstanding the results in the Tradewind Report.<sup>221</sup>

[REDACTED]

[REDACTED]

- a) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] <sup>22</sup>

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<sup>220</sup> Terms of Reference, paras. 2(a)(xi), x(iii) and (xiv), [RHVPI Compendium, Tab 1, pp. 7-8].

<sup>221</sup> Report from CIMA to Boghosian, February 4, 2019 [RHVPI Compendium, Tab 38, pp. 334-341].

<sup>222</sup> [REDACTED]



b) [REDACTED] 23

c) [REDACTED]  
[REDACTED] 224 and

d) [REDACTED]  
[REDACTED] 225

204. [REDACTED]  
[REDACTED]  
[REDACTED] 226 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

205. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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223 [REDACTED]

224 [REDACTED]  
225 [REDACTED]

[REDACTED]  
226 [REDACTED]

[REDACTED]  
227 [REDACTED]

[REDACTED]

The Category 2 documents are highly relevant and fairness and consistency require their disclosure.

***d. In the alternative, the facts described in the documents are not privileged***

206. Even if the underlying documents, [REDACTED] [REDACTED] are privileged, the facts disclosed in those documents that are not otherwise privileged must be disclosed. [REDACTED]

[REDACTED] Accordingly, even if any of the Disputed Documents [REDACTED] is privileged, Commission Counsel submits that it is entitled to a summary of what was discussed [REDACTED] in any event.

**3. Category 3: Other correspondence/notes with external and internal counsel**

207. The City claims privilege over other documents involving communications among external and internal counsel (or other City staff):

a) *Boghosian draft and opinion letters: **Tabs 15 and 75** (draft opinion); **Tabs 56 and 57** (final opinion)<sup>228</sup>*

b) *Emails between Boghosian, Sabo and Auty [REDACTED] **Tab 23** [REDACTED]*

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<sup>228</sup> [REDACTED]

[REDACTED] **Tabs 25, 47, 48, 50, 51, 54, 55, 60, 62, 63, 64 66, 70, 71** [REDACTED]

[REDACTED] **Tabs 77, 78, 79**

(emails between Boghosian, Sabo and Auty [REDACTED])

[REDACTED]

- c) *Other emails between Boghosian and Auty: Tab 37* (emails between Auty and Boghosian dated January 31, 2019 [REDACTED] **Tab 80** (email from Boghosian dated February 12, 2019 [REDACTED]) [REDACTED]
  
- d) *Counsel's notes: Tab 89* (Sabo's notes, undated); **Tab 90** (Auty notes on draft Boghosian opinion letter); **Tab 91** (Sabo notes on draft Boghosian opinion letter); **Tab 93** (Sabo's notes, undated); **Tab 94** (Boghosian's notes dated January 8, 2019); **Tab 99** (Sabo notes on various dates)
  
- e) *Other notes: Tab 21* (Notes of Jasmine Graham on Crisis Communications Plan); **Tab 72** (Notes of Jasmine Graham, undated)<sup>229</sup>

208. [REDACTED]

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<sup>229</sup> Jasmine Graham was the Communications Officer at the City. Schedule D to the City's Factum identifies Auty as the author of the notes at Tab 72. However, this is a mistake. The City has confirmed that Jasmine Graham is the author. [REDACTED]

[REDACTED]

[REDACTED]

209. Commission Counsel submits that, in many cases, the City has failed to satisfy its onus to show that the Category 3 documents are protected by solicitor-client privilege. Indeed, there is no evidence about the purpose of many of the documents or communications, and others appear to be focused on the seeking or giving of communications—not legal—advice.

210. Nor has the City satisfied its onus to show that the documents are litigation privileged. [REDACTED]

[REDACTED] Nor is any specific ongoing or contemplated litigation discussed in any of the documents. For many documents, the City has not identified the purpose behind the document at all.

211. In any event, Commission Counsel submits that the City waived privilege over the Category 3 documents, which are highly relevant to the questions of (a) whether “appropriate steps” were taken to disclose the Tradewind Report and (b) whether there was “any negligence, malfeasance or misconduct in failing to disclose the Report” once the report was discovered.<sup>230</sup>

212. At a high level, the RHVPI must be empowered to examine what Legal and other staff were doing from the discovery of the Tradewind Report in September 2018 until its disclosure to Council in January/February 2019—this includes inquiring into the advice

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<sup>230</sup> Terms of Reference, paras. 2(viii) and (ix), [RHVPI Compendium, Tab 1, p. 7].

that was being sought and given. If, for example, the evidence ultimately reveals that the City was more preoccupied with potential liability than public safety during this critical time, that is a finding that would be within the Commissioner's mandate. The point is that the Commissioner must have the ability to make that assessment.

213. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

214. As a result, fairness and consistency require that any privilege over the Category 3 documents be found to have been waived.

**4. Category 4: Transcripts of examinations for discovery**

215. The City claims litigation privilege over documents relating to the transcripts of the examinations for discovery [REDACTED]  
[REDACTED] see **Tabs 6 and 84** (transcripts of examination for discovery [REDACTED] on December 7, 2018 and October 26, 2021); **Tab 83** (transcript of examination for discovery [REDACTED] on June 23, 2021); and **Tab 104** (reporting letter from Gowling WLG [REDACTED]  
[REDACTED]).

216. [REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]<sup>231</sup>

217. The City has not articulated the basis for its argument that the discovery transcripts are privileged except to say baldly that they “are protected by litigation privilege as they were prepared for the dominant purpose of the litigation”.<sup>232</sup>

218. However, the City’s submission demonstrates a fundamental misapprehension of the purpose served by litigation privilege, which is to “create a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate”.<sup>233</sup> In other words, the purpose is to protect certain documents that are not covered by solicitor-client privilege from the discovery process vis-à-vis the adverse party.

219. Put simply, litigation privilege cannot apply to documents created for or made available to the adverse party *as part of the discovery process*. For this reason, in *Juman v. Doucette*, the Supreme Court of Canada held that while discovery transcripts are protected by an implied undertaking, they are not themselves privileged.<sup>234</sup> Accordingly, no privilege attaches to the transcripts of the examinations for discovery of the City’s representative.

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<sup>231</sup> See e.g., [REDACTED] Discovery Transcript, December 7, 2018 (SPE\_04332689) [REDACTED] [Disputed Documents, Tab 6]; [REDACTED] Discovery Transcript, October 26, 2021 (SPE\_04332690) [REDACTED] [Disputed Documents, Tab 84]; [REDACTED] Discovery Transcripts, June 23, 2021 (SPE\_04552112) [REDACTED] [Disputed Documents, Tab 83].

<sup>232</sup> City Factum, para. 100.

<sup>233</sup> *Blank* at [para. 40](#), quoting Justice Sharpe “Claiming Privilege in the Discovery Process”, in *Special Lectures of the Law Society of Upper Canada*. Don Mills, Ont.: Richard De Boo Publishers, 1984, 163 [BOA, Tab 6].

<sup>234</sup> *Juman v Doucette*, 2008 SCC 8, [para. 56](#) [BOA, Tab 27].

220. To the extent that the City claims solicitor-client privilege over the reporting letter from Gowling WLG [REDACTED]

[REDACTED]<sup>235</sup> No privilege attaches because there is nothing to suggest that it was created for the purpose of seeking or giving legal advice. Moreover, and in any event, even if the letter itself is privileged, the facts described in the letter [REDACTED] is not and should be disclosed.<sup>236</sup>

221. Finally, to the extent necessary, the RHVPI also submits that fairness and consistency require production of the transcripts. The City has taken an inconsistent approach to the production of documents relating to the examinations for discovery of its representatives in RHVP-related litigation. It has already produced a summary of the examination for discovery of Oddi on December 7, 2018.<sup>237</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

##### **5. Category 5: Letter from Shillingtons**

222. The City claims privilege over a letter from the City's external lawyers, Shillingtons, to Swaby (Risk Management) dated January 31, 2018: see **Tab 1**.

223. Shillingtons served as the City's lawyers in respect of the LINC Action. As set out above, Shillingtons had received a copy of the Tradewind Report in August 2017 from

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<sup>235</sup> Gowling WLG Letter, November 9, 2020 (SPE\_04552290) [**Disputed Documents, Tab 104**].

<sup>236</sup> The RHVPI only seeks production of the reporting letter at Tab 104 if the transcript itself (at Tab 84) is not produced. The RHVPI is content to abandon its request for the letter at Tab 104 if the transcript at Tab 84 is produced.

<sup>237</sup> Legal Services Examinations Report, December 18, 2018 [**RHVPI Compendium, Tab 49, pp. 630-631**].

Moore in connection with the litigation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
238 [REDACTED]

224.

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>238</sup> Shillingtons Letter, January 31, 2018 [REDACTED] (SPE\_04332112) [Disputed Documents, Tab 1].



[REDACTED] <sup>39</sup>

225. Commission Counsel agree that the Shillingtons letter is protected by solicitor-client privilege because it was a communication between lawyer and client for the purpose of giving legal advice. However, it submits that privilege over the opinion letter was waived by the City.

226. The letter is highly relevant to the Commissioner's mandate (a) to identify "all individuals" who received the Tradewind Report, (b) to determine whether "appropriate steps" were taken to disclose the Tradewind Report, and (c) to determine whether there was "any negligence, malfeasance or misconduct in failing to disclose the Report" once the report was discovered.<sup>240</sup>

227. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>41</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>239</sup> Shillingtons Letter, January 31, 2018 [REDACTED] (SPE\_04332112) [Disputed Documents, Tab 1].  
<sup>240</sup> Terms of Reference, paras. 2(vii), (viii) and (ix), [RHVPI Compendium, Tab 1, p. 7].  
<sup>241</sup> See Email from Moore to Crawford, May 4, 2018 [RHVPI Compendium, Tab 23, p. 282].

228. By enacting the Terms of Reference that ask the Commissioner to answer these questions, the City waived any privilege attaching to the letter. Fairness and consistency require its disclosure. If privilege is not waived, the Commissioner may well make findings that do not reflect the actual record. For example, the public documents reveal that Moore provided the Tradewind Report to Shillingtons in August 2017 and told Shillingtons that the report had not gone to Council, and that on May 4, 2018, Shillingtons emailed Moore and Swaby about the report.<sup>242</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>243</sup>

**6. Category 6: Documents relating to [REDACTED]**

229. The City claims privilege over two documents that relate to [REDACTED] [REDACTED] **Tab 73** (emails between Sabo and municipal prosecutor dated February 6-7, 2019); **Tab 76** (emails between municipal prosecutors dated February 7, 2019).

230. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>242</sup> Email from Crawford to Wilson, January 9, 2018 [RHVPI Compendium, Tab 22, p. 279] and Email from Crawford to Moore, May 4, 2018 [RHVPI Compendium, Tab 23, pp. 282-283]

<sup>243</sup> See email from Crawford to Moore, May 4, 2018 [RHVPI Compendium, Tab 23, pp. 282-283].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 244

231. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 245

232. In Commission Counsel's submission, the City has failed to establish that the Category 6 documents are protected by solicitor-client privilege or litigation privilege. The communications were exchanged between municipal prosecutors and Sabo. However, it is not clear from the documents that they were sent for the purposes of seeking or giving legal advice.

233. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>244</sup> Email from Tennant to Sabo, February 6, 2019 (SPE\_04312041) **[Disputed Documents, Tab 73]**.  
<sup>245</sup> Email from Clayton to Radoslav et al., February 7, 2019 (SPE\_04310089) **[Disputed Documents, Tab 76]**.

[REDACTED] The City has the onus to show that the test for litigation privilege is met; it has not done so in respect of these documents.

234. Moreover, and in any event, Commission Counsel submits that the City has waived any privilege that might otherwise attach to the documents. The documents are highly relevant to the questions of (a) who received the Tradewind Report or the information and recommendations contained therein and (b) whether “appropriate steps” were taken to disclose the Tradewind Report once the report was discovered.<sup>246</sup>

235. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**PART IV - RELIEF SOUGHT**

236. Commission Counsel requests that the Commissioner’s Designate find in respect of each Disputed Document that:

- a) The document is not protected by privilege;
- b) In the alternative, any privilege attaching to the document has been waived; and

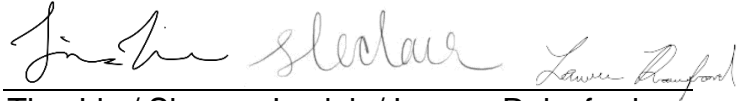
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<sup>246</sup> Terms of Reference, paras. 2(a)(xi) and x(iii), [RHVPI Compendium, Tab 1, pp. 7-8].

- c) In the further alternative, and to the extent that the facts disclosed in the document would not otherwise be privileged, the City is required to produce to the RHVPI a summary of those facts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 28, 2022



Tina Lie / Shawna Leclair / Lauren Rainsford

**Paliare Roland Rosenberg Rothstein LLP**

Commission Counsel

## SCHEDULE A – AUTHORITIES CITED

1. *Klassen v. City of Hamilton*, [2022 ONSC 3660](#)
2. *R. v. 1504413 Ontario Limited*, [2008 ONCA 253](#)
3. *Bortolotti v. Ontario (Ministry of Housing)*, [1977 CarswellOnt 499 \(ON CA\)](#)
4. *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016 SCC 53](#)
5. *Solosky v. The Queen*, [\[1980\] 1 S.C.R. 821](#)
6. *Blank v. Canada*, [2006 SCC 39](#)
7. *Sky Solar (Canada) Ltd. v Economical Mutual Insurance Company*, [2015 ONSC 4714](#)
8. *General Accident Assurance Company v. Chrusz*, [1999 CarswellOnt 2898 \(ON SC\)](#)
9. *Intact Insurance Co. v. 1367229 Ontario Inc.*, [2012 ONSC 5256](#)
10. *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, [2014 ABCA 244](#)
11. *XCG Consultants Inc v. ABB Inc*, [2014 ONSC 1111](#)
12. *Williamson v. Canada (Attorney General)*, [2002 FCT 1234](#)
13. *Mamaca v. Coseco Insurance Company*, [2007 CanLII 9890 \(ON SC\)](#)
14. *Roynat Capital Inc. v Repeatseat Ltd.*, [2015 ONSC 1108](#)
15. *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1995 CarswellOnt 1461 \(ON SC\)](#)
16. *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [\[1995\] 2 S.C.R. 97](#)
17. *British Columbia (Criminal Justice Branch) v. Davies*, [2008 BCSC 817](#)
18. *British Columbia (Criminal Justice Branch) v. Davies*, [2009 BCCA 337](#)
19. *Susan Hosiery Ltd. v. Minister of National Revenue*, [\[1969\] 2 Ex. C.R. 27](#)
20. *Shibish v. Honda of Canada Inc.*, [2010 ONSC 3770](#)
21. *Tiller v. St. Andrew's College*, [2009 CanLII 32274 \(ON SC\)](#)

22. *Pearson v. Inco Limited*, [2008 CanLII 46701 \(ON SC\)](#)
23. *McComb v. Jones*, [2008 BCSC 157](#)
24. *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* [2002 BCCA 665](#)
25. *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, [2010 SKQB 460](#)
26. *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (U.K. H.L.)
27. *Juman v Doucette*, [2008 SCC 8](#)

## SCHEDULE B – STATUTORY AUTHORITIES

### *Public Inquiries Act, 2009, [S.O. 2009, c. 33, Sched. 6](#)*

#### PROCEDURES UNDER OTHER ACTS

##### **Former Part II inquiries**

##### **Power to summon witnesses, papers, etc.**

**33** (3) The person or body conducting the inquiry may require any person by summons,

- (a) to give evidence on oath or affirmation at the inquiry; or
- (b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

##### **Privilege**

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 33 (13).

### *Municipal Act, 2001, [S.O. 2001, c. 25](#)*

#### JUDICIAL INVESTIGATION

##### **Investigation by judge**

**274** (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

- (a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;
- (b) inquire into any matter connected with the good government of the municipality;  
or



- (c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors. 2001, c. 25, s. 274 (1).

**Application of *Public Inquiries Act, 2009***

- (2) Section 33 of the *Public Inquiries Act, 2009* applies to the investigation or inquiry by the judge. 2009, c. 33, Sched. 6, s. 72 (5).

**Report**

- (3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable. 2001, c. 25, s. 274 (3).

**Counsel**

- (4) The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry. 2001, c. 25, s. 274 (4).

**Representation by counsel**

- (5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel. 2001, c. 25, s. 274 (5).

**Costs**

- (6) The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the municipality. 2001, c. 25, s. 274 (6).

## SCHEDULE C

Tab No.	Disputed Document ID	CC Assessed Date	Author	Recipient	Description	Unique Document (yes/no)	Corresponding Unique Document Tab No.	City's Privilege Assertion	Commission Counsel Category	Commission Counsel Argument
1	SPE_04332112_0001	1/31/2018	Thompson, David	Swaby, Diana	Fully Disputed - Jan. 31, 2018 Shillington opinion letter	yes	1	Solicitor-Client; Litigation	Category 5: Shillington opinion	1. Solicitor-client privileged. 2. Privilege waived [REDACTED] Document is highly relevant to TOR asking who received TW Report, if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report. [REDACTED]
2	CIM0022413	12/11/2018; 12/13/2018	Malone, Brian		Redacted - Malone's Notes, Dec. 11 & 13, 2018	yes	2	Solicitor-Client; Litigation	Category 2: CIMA Documents	1. No solicitor-client privilege: Document was prepared by a third party and test from Chrusz not met (Malone not serving as channel of communication or standing in shoes of client). 2. No litigation privilege: Dominant purpose [REDACTED] was not ongoing or contemplated litigation; [REDACTED] In any event, City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: [REDACTED] [REDACTED] Document is highly relevant to TOR asking who received TW Report in 2018, if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report. 4. In any event, summary of facts not privileged should be disclosed.
3	SPE_04289386_0001	11/20/2018	Auty, Nicole	Sabo, Ron; McLennan, John	Redacted - Email from Auty to Sabo, Nov. 20, 2018	yes	3	Solicitor-Client; Litigation	Category 1: [REDACTED]	1. No solicitor-client privilege: Document is an internal email among City staff, not a communication between lawyer and client for the purposes of seeking or obtaining legal advice. 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, including any decisions regarding to whom to disclose the TW Report and when).
4	SPE_04288943_0001	12/7/2018	Auty, Nicole	Boghosian, David	[REDACTED]	no	5	Solicitor-Client; Litigation	Category 1: [REDACTED]	See Tab 5.
5	SPE_04288940_0001	12/7/2018	Auty, Nicole	Boghosian, David	[REDACTED]	yes	5	Solicitor-Client; Litigation	Category 1: [REDACTED]	1. Solicitor-client privileged except portion regarding [REDACTED] [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, [REDACTED])
6	SPE_04332689_0001	12/7/2018			Fully Disputed [REDACTED] Examination Transcript	yes	6	Litigation	Category 4: Discovery Transcripts	No litigation privilege: Litigation privilege protects documents from disclosure to adverse party, not documents created as part of discovery process. In any event, no evidence litigation remains outstanding.
7	SPE_04288899_0001	12/11/2018	Auty, Nicole	MacNeil, Byrdena	[REDACTED]	no	9	Solicitor-Client; Litigation	Category 1: [REDACTED]	See Tab 9.
8	HAM0061811_0001	12/11/2018	Auty, Nicole	Boghosian, David	[REDACTED]	no	9	Solicitor-Client; Litigation	Category 1: [REDACTED]	See Tab 9.
9	SPE_04288885_0001	12/11/2018	Auty, Nicole	Sabo, Ron; MacNeil, Byrdena	[REDACTED]	yes	9	Solicitor-Client; Litigation	Category 1: [REDACTED]	1. Solicitor-client privileged except portions regarding [REDACTED] [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, [REDACTED])

10	SPE_0428884_0001	12/11/2018	Auty, Nicole	Boghosian, David	[REDACTED]	no	9	Solicitor-Client; Litigation	Category 1: [REDACTED]	See Tab 9.
11	HAM0053987_0001	1/31/2019	Ferguson, David	Pellegrini, Domenic	Redacted - Email from Boghosian to Malone, January 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
12	HAM0054008_0001	1/31/2019	Auty, Nicole	Zegarac, Mike; McKinnon, Dan	Redacted - Email from Boghosian to Malone, January 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
13	HAM0054063_0001	1/31/2019	Ferguson, David	Pellegrini, Domenic	Redacted - Email from Boghosian to Malone, January 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
14	HAM0054084_0001	1/31/2019	Auty, Nicole	Zegarac, Mike; McKinnon, Dan	Redacted - Email from Boghosian to Malone, January 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
15	SPE_04288799_0001	12/13/2018	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	yes	15	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: [REDACTED]	1. Partly solicitor-client privileged: Portions of letter [REDACTED] not solicitor-client privileged because communication with third party and test from Chrusz not met [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privileged waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, including any decisions regarding to whom to disclose the TW Report and when). 4. In any event, summary [REDACTED] not privileged and should be disclosed.
16	HAM0062315_0001	12/13/2018	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	no	15	Solicitor-Client; Litigation	Category 2: CIMA Documents/Category 3: Correspondence and Notes	See Tab 15.
17	SPE_01590347_0001	12/13/2018	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	no	15	Solicitor-Client; Litigation	Category 2: CIMA Documents/Category 3: Correspondence and Notes	See Tab 15.
18	SPE_01590408_0001	12/13/2018	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	no	15	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	See Tab 15.
19	CIM0022412	1/30/2019	Malone, Brian		Redacted - Malone's Notes [REDACTED]	yes	19	Solicitor-Client; Litigation	Category 2: CIMA Documents	1. No solicitor-client privilege: Document was prepared by a third party and test from Chrusz not met (Malone not serving as channel of communication or standing in shoes of client). 2. No litigation privilege: Dominant purpose [REDACTED] not litigation. [REDACTED] In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: [REDACTED] highly relevant to TOR asking if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report. 4. In any event, summary of facts not privileged and should be disclosed.
20	HAM0062043_0001	12/13/2018	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	no	15	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	See Tab 15.

21	HAM0061607_0001	1/16/2019	Graham, Jasmine		Redacted - Handwritten Notes	yes	21	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: Document was created by Graham (Communications). No evidence of purpose of note (including that it was for the purpose of seeking or giving legal advice). 2. No litigation privilege: No evidence that dominant purpose of creation of note was litigation (no discussion of specific ongoing or contemplated litigation). In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report (requires examination of what staff were doing/concerned about before disclosure of TW Report).
23	HAM0062071_0001	1/20/2019	Sabo, Ron	Boghosian, David; McGuire, Gord	Redacted - Email from Boghosian to Sabo, Jan. 19, 2019	yes	23	Solicitor-Client	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
24	HAM0061817_0001	1/30/2019	Auty, Nicole	Boghosian, David	Fully Disputed - Emails btwn. Auty and Boghosian, Jan. 30, 2019	no	26	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 26.
25	SPE_04312139_0001	1/30/2019	Sabo, Ron	Auty, Nicole	[REDACTED]	yes	25	Solicitor-Client	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
26	SPE_04288129_0001	1/30/2019	Auty, Nicole	Boghosian, David	Fully Disputed - Emails btwn. Auty and Boghosian, Jan. 30, 2019	yes	26	Solicitor-Client; Litigation	Category 2: CIMA Documents	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. No litigation privilege: Dominant purpose of email [REDACTED] not litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Communications [REDACTED] highly relevant to TOR asking who received TW Report, if "appropriate steps" were taken to disclose TW Report, if there was misconduct in failing to disclose Report, if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report.
27	CIM0017212	1/30/2019	Boghosian, David	Malone, Brian	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
28	HAM0054347_0001	1/30/2019	Auty, Nicole	Zegarac, Mike; McKinnon, Dan	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
29	HAM0054350_0001	1/30/2019	Auty, Nicole	Zegarac, Mike; McKinnon, Dan	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
30	CIM0017209	1/30/2019	Malone, Brian	Petzold, Geoff	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	yes	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	1. No solicitor-client privilege: Emails involve third party (CIMA) and test from Chrusz not met (CIMA/Malone not serving as channel of communication or standing in shoes of client). 2. No litigation privilege: Dominant purpose of email [REDACTED] not litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Communications [REDACTED] highly relevant to TOR asking who received TW Report, whether "appropriate steps" were taken to disclose TW Report, if there was misconduct in failing to disclose Report, if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report. 4. In any event, summary of facts not privileged and should be disclosed.
31	CIM0017208	1/30/2019	Malone, Brian	Boghosian, David	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
32	CIM0017207	1/30/2019	Boghosian, David	Malone, Brian	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
33	CIM0017206	1/30/2019	Malone, Brian	Boghosian, David	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.

34	CIM0017199	1/30/2019	Petzold, Geoff	Malone, Brian	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
35	CIM0017198	1/30/2019	Malone, Brian	Petzold, Geoff	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
36	CIM0017197	1/30/2019	Malone, Brian	Petzold, Geoff	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
37	SPE_04288119_0001	1/31/2019	Auty, Nicole	Boghosian, David	Redacted - Emails btwn. Auty and Boghosian, Jan. 30-31, 2019	yes	37	Solicitor-Client	Category 3: Correspondence and Notes	1. Partly solicitor-client privileged: [REDACTED] 2. Any privilege has been waived: Document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report. 3. In any event, summary of facts [REDACTED] not privileged and should be disclosed.
38	HAM0062117_0001	1/31/2019	McKinnon, Dan	Auty, Nicole	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
39	HAM0062120_0001	1/31/2019	McGuire, Gord	McKinnon, Dan; Auty, Nicole	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
40	CIM0017194	1/31/2019	Malone, Brian	Petzold, Geoff	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
41	CIM0017193	1/31/2019	Petzold, Geoff	Malone, Brian	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
42	CIM0017192	2/1/2019	Malone, Brian	Petzold, Geoff	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
43	CIM0017187	2/1/2019	Hadayeghi, Alireza	Malone, Brian	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
44	CIM0017178	2/1/2019	Malone, Brian	Hadayeghi, Alireza	Redacted - Email from Malone to Petzold, Jan. 31, 2019, Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.

45	SPE_04288053_0001	2/3/2019	Auty, Nicole	Boghosian, David	Fully Disputed - Emails btwn. Auty and Boghosian, Feb. 2-3, 2019	no	47	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	See Tab 47.
46	CIM0017171.0001	2/3/2019	Malone, Brian	Boghosian, David		yes	46	Solicitor-Client; Litigation	Category 2: CIMA Documents	1. Party solicitor-client privileged: [REDACTED] Document shared with third party (CIMA) and test from Chrusz not met (CIMA/Malone not serving as channel of communication or standing in shoes of client). 2. No litigation privilege: Dominant purpose of document [REDACTED] not litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Communications [REDACTED] highly relevant to TOR asking who received TW Report, if "appropriate steps" were taken to disclose TW Report, if there was misconduct in failing to disclose Report, if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report.
47	SPE_04315841_0001	2/3/2019	Boghosian, David	Auty, Nicole	Fully Disputed - Emails btwn. Auty and Boghosian, Feb. 2-4, 2019	yes	47	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
48	SPE_04310197_0001	2/3/2019				yes	48	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Document is highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
49	CIM0016338	2/4/2019	Malone, Brian	Boghosian, David		no	46	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 46.
50	SPE_04288032_0001	2/4/2019	Auty, Nicole	Sabo, Ron		yes	50	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: [REDACTED] No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation [REDACTED] In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: document is highly relevant to the TOR asking Commissioner to determine whether "appropriate steps" were taken to disclose Report and if there was misconduct in failing to disclose Report [REDACTED]
51	SPE_00468889_0001	2/4/2019	Auty, Nicole	Graham, Jasmine	Redacted - Email from Auty to Graham, Feb. 4, 2019	yes	51	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
52	CIM0017163	2/4/2019	Malone, Brian	Boghosian, David	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
53	CIM0017162	2/4/2019	Boghosian, David	Malone, Brian	Redacted- Email from Boghosian to Malone, Jan. 30, 2019	no	30	Solicitor-Client; Litigation	Category 2: CIMA Documents	See Tab 30.
54	SPE_04315831_0001	2/4/2019	Boghosian, David			yes	54	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. Solicitor-client privileged. 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]

55	SPE_04312098_0001	2/4/2019	Sabo, Ron	Auty, Nicole	Fully Disputed - February 4, 2019 Email from Sabo to Auty	yes	55	Solicitor-Client	Category 3: Correspondence and Notes	1. No solicitor-client privilege: [REDACTED] No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
56	SPE_04301891_0001	2/4/2019	Boghosian, David	Auty, Nicole	Fully Disputed -Email from Boghosian to Auty, Feb. 4, 2019	yes	56	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	1. Partly solicitor-client privileged: Portions of letter [REDACTED] not solicitor-client privileged because communication with third party and test from Chrusz not met [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privileged waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, [REDACTED] 4. In any event, summary [REDACTED] not privileged and should be disclosed.
57	SPE_04301892_0001	2/4/2019	Boghosian, David	Auty, Nicole	Fully Disputed - February 4, 2019 Boghosian Opinion	yes	57	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	1. Partly solicitor-client privileged: Portions [REDACTED] not solicitor-client privileged because communication with third party and test from Chrusz not met [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privileged waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, [REDACTED] 4. In any event, summary [REDACTED] not privileged and should be disclosed.
58	SPE_04310176_0001	2/4/2019	Auty, Nicole	Sabo, Ron	Fully Disputed - Emails btwn. Boghosian and Auty, Feb. 4, 2019	no	56	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	See Tab 56.
59	SPE_04310177_0001	2/4/2019	Boghosian, David	Auty, Nicole	Fully Disputed - February 4, 2019 Boghosian Opinion	no	57	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	See Tab 57.
60	SPE_04315822_0001	2/4/2019	Boghosian, David	Auty, Nicole	Redacted -Email from Boghosian to Auty, Feb. 4, 2019	yes	60	Solicitor-Client	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
61	SPE_04310168_0001	2/5/2019	Boghosian, David	Sabo, Ron	Redacted - Emails btwn. Sabo and Boghosian, Feb. 5, 2019	yes	61	Solicitor-Client	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. Any privilege has been waived: Document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report.
62	SPE_04312087_0001	2/5/2019	Sabo, Ron	Auty, Nicole	Redacted - Email from Sabo to Auty, Feb. 5, 2019	yes	62	Solicitor-Client	Category 3: Correspondence and Notes	1. Solicitor-client privileged. 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
63	SPE_04312086_0001	2/5/2019	Sabo, Ron	Auty, Nicole	Redacted - Email from Sabo to Auty, Feb. 5, 2019	yes	63	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. [REDACTED] 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]

64	SPE_04312085_0001	2/5/2019	Sabo, Ron	Auty, Nicole	Redacted - Email from Sabo to Auty, Feb. 5, 2019	yes	64	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. Solicitor-client privileged. 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
65	SPE_04287955_0001	2/5/2019	Auty, Nicole	Sabo, Ron; Boghosian, David	Redacted - Email from Auty to Sabo and Boghosian, Feb. 5, 2019	no	66	Solicitor-Client	Category 3: Correspondence and Notes	See Tab 66.
66	SPE_04310162_0001	2/5/2019	Boghosian, David	Auty, Nicole; Sabo, Ron	Redacted - Emails btwn. Auty, Sabo and Boghosian, Feb. 5, 2019	yes	66	Solicitor-Client	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice [REDACTED] 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
67	SPE_04287951_0001	2/5/2019	Auty, Nicole	Boghosian, David; Sabo, Ron	Redacted - Emails btwn. Auty, Sabo and Boghosian, Feb. 5, 2019	no	66	Solicitor-Client	Category 3: Correspondence and Notes	See Tab 66.
68	HAM0062202_0001	2/5/2019	Auty, Nicole	Recine, Jen; Graham, Jasmine; Hertel, John	Redacted - Emails btwn. Auty, Sabo and Boghosian, Feb. 5, 2019	no	66	Solicitor-Client	Category 3: Correspondence and Notes	See Tab 66.
69	HAM0062210_0001	2/5/2019	Recine, Jen	Auty, Nicole; Graham, Jasmine; Hertel, John	Redacted - Emails btwn. Auty, Sabo and Boghosian, Feb. 5, 2019	no	66	Solicitor-Client	Category 3: Correspondence and Notes	See Tab 66.
70	SPE_04315806_0001	2/5/2019	Boghosian, David	Auty, Nicole	Redacted - Email from Boghosian to Auty, Feb. 5, 2019	yes	70	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. Solicitor-client privileged. 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
71	SPE_04287914_0001	2/6/2019	Auty, Nicole	Boghosian, David	Redacted - Emails btwn. Boghosian and Auty, Feb. 6, 2019	yes	71	Solicitor-Client	Category 3: Correspondence and Notes	1. Solicitor-client privileged. 2. Any privilege has been waived: Documents [REDACTED] are highly relevant to the TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report [REDACTED]
72	SPE_04247468_0001	undated	Graham, Jasmine		Redacted - Jasmine Graham Notes	yes	72	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: Document was created by Graham (Communications). No evidence of purpose of note (including that it was for the purpose of seeking or giving legal advice). 2. No litigation privilege: No evidence that dominant purpose of creation of note was litigation (no discussion of specific ongoing or contemplated litigation). In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report.
73	SPE_04312041_0001	2/7/2019	Sabo, Ron	Tennant, Geoffrey	Fully Disputed - Emails btwn. Sabo and Tennant, Feb. 6-7, 2019	yes	73	Solicitor-Client; Litigation	Category 6: [REDACTED]	1. No solicitor-client privilege: [REDACTED] No evidence communications were for the purposes of seeking or giving legal advice. 2. No litigation privilege: While document appears to have been created for dominant purpose of litigation [REDACTED] no evidence to suggest that litigation remains ongoing. 3. Any privilege waived: Documents are highly relevant to TOR asking who received TW Report in 2018 and if "appropriate steps" were taken to disclose TW Report. [REDACTED]
74	HAM0054448_0001	2/7/2019	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	no	15	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	See Tab 15.



75	HAM0054450_0001	2/7/2019	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	yes	75	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	1. Partly solicitor-client privileged: Portions of letter ██████████ not solicitor-client privileged because communication with third party and test from Chrusz not met ██████████ ██████████ 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privileged waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, ██████████ 4. In any event, summary ██████████ not privileged and should be disclosed.
76	SPE_04310089_0001	2/7/2019	Clayton, Linda	Sabo, Ron	Fully Disputed -Emails btwn. Clayton, Sabo and ██████████ Feb. 7, 2019	yes	76	Solicitor-Client; Litigation	Category 6: ██████████	1. No solicitor-client privilege: No evidence communications were for the purposes of seeking or giving legal advice. 2. No litigation privilege: While document appears to have been created for dominant purpose of litigation ██████████ no evidence to suggest that litigation remains ongoing. Any litigation privilege expired. 3. Any privilege waived: Documents are highly relevant to TOR asking who received TW Report and if "appropriate steps" were taken to disclose TW Report. ██████████
77	SPE_04287842_0001	2/8/2019	Auty, Nicole	Boghosian, David	Redacted - Emails btwn. Boghosian and Auty, Feb. 8, 2019	yes	77	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. ██████████ 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Document is highly relevant to TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report.
78	HAM0061901_0001	2/8/2019	Sabo, Ron	Auty, Nicole	Redacted - Emails btwn. Sabo and Auty, Feb. 8, 2019	yes	78	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence that purpose of communication was seeking or giving legal advice. ██████████ 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Document is highly relevant to TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report.
79	SPE_04312031_0001	2/8/2019	Sabo, Ron	Boghosian, David	Redacted - Emails btwn. Sabo, Boghosian and Auty, Feb. 8, 2019	yes	79	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: no evidence purpose of communication was seeking or giving legal advice. ██████████ 2. No litigation privilege: no evidence about the purpose (no discussion of specific ongoing or contemplated litigation) 3. Any privilege has been waived: document is highly relevant to the TOR asking Commissioner to determine whether "appropriate steps" were taken to disclose Report and whether there was misconduct in failing to disclose Report.
80	SPE_04315898_0001	2/12/2019	Boghosian, David	Auty, Nicole; Sabo, Ron	Redacted - Email from Boghosian to Auty and Sabo, Feb., 12, 2019	yes	80	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. Solicitor-client privileged. 2. Any privilege has been waived: document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and whether there was misconduct in failing to disclose Report.
81	HAM0062262_0001	2/12/2019	Boghosian, David	Auty, Nicole	Fully Disputed - Boghosian Draft Opinion	no	15	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	See Tab 15.
83	SPE_04552112_0001	6/23/2021			Fully Disputed ██████████	yes	83	Litigation	Category 4: Discovery Transcripts	No litigation privilege: Litigation privilege protects documents from disclosure to adverse party, not documents created a part of discovery process. In any event, no evidence litigation remains ongoing so litigation privilege expired.
84	SPE_04332690_0001	10/26/2021			Fully Disputed ██████████ Examination Transcript	yes	84	Litigation	Category 4: Discovery Transcripts	No litigation privilege: Litigation privilege protects documents from disclosure to adverse party, not documents created a part of discovery process. In any event, no evidence litigation remains ongoing so litigation privilege expired.
85	SPE_04317040_0001	12/7/2018	Boghosian, David		Fully Disputed - Boghosian Notes, Dec. 7, 2018	yes	85	Solicitor-Client; Litigation	Category 1: Boghosian Retainer Documents	1. Solicitor-client privileged except ██████████ Attempt to have legal counsel reach out to third party in order to cloak communication in privilege. 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose report (which requires examination of what steps City staff were taking ██████████

86	SPE_04552171_0001	12/11/2018; 12/14/2018; undated	Auty, Nicole		Fully Disputed -Auty Notes, Dec. 11, 14, 2018 and undated	yes	86	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	<p>1. No solicitor-client privilege: No evidence purpose [REDACTED] was seeking or giving legal advice. [REDACTED]</p> <p>2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct (which requires examination of what steps City staff were taking and why, [REDACTED])</p>
87	SPE_04317039_0001	12/11/2018	Boghosian, David		Fully Disputed - Boghosian Notes, Dec. 11, 2018	yes	87	Solicitor-Client; Litigation	Category 2: CIMA Documents	<p>1. No solicitor-client privilege: [REDACTED] test from Chrusz not met [REDACTED]</p> <p>2. No litigation privilege: Dominant purpose [REDACTED] was not ongoing or contemplated litigation; [REDACTED] In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. In any event, any privilege has been waived: [REDACTED]</p> <p>[REDACTED] Document is highly relevant to TOR asking Commissioner to identify "all individuals" who received TW Report in 2018, whether "appropriate steps" were taken to disclose Report and whether there was misconduct in failing to disclose Report.</p> <p>4. In any event, summary of facts not privileged should be disclosed.</p>
88	SPE_04552141_0001	12/11/2018	Sabo, Ron		Fully Disputed -Sabo Notes, Dec. 11, 2018	yes	88	Solicitor-Client; Litigation	Category 2: CIMA Documents	<p>1. No solicitor-client privilege: No evidence purpose [REDACTED] was seeking or giving legal advice. [REDACTED]</p> <p>2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct (which requires examination of what steps City staff were taking and why, [REDACTED])</p>
89	SPE_04552166_0001	undated	Sabo, Ron		Redacted - Sabo's Undated Notes [REDACTED]	yes	89	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	<p>1. No solicitor-client privilege: No evidence purpose of communication was seeking or giving legal advice. [REDACTED]</p> <p>2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. Any privilege has been waived: document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose Tradewind Report and if there was misconduct in failing to disclose Report.</p>
90	SPE_04552169_0001	undated	Boghosian, David	Auty, Nicole	[REDACTED]	yes	90	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	<p>1. Partly solicitor-client privileged: Portions [REDACTED] not solicitor-client privileged because communication with third party and test from Chrusz not met [REDACTED]</p> <p>2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, including any decisions regarding to whom to disclose the TW Report and when). [REDACTED]</p> <p>4. In any event, summary [REDACTED] not privileged and should be disclosed.</p>
91	SPE_04552142_0001	undated	Boghosian, David	Auty, Nicole	[REDACTED]	yes	91	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	<p>1. Partly solicitor-client privileged: Portions [REDACTED] not solicitor-client privileged because communication with third party and test from Chrusz not met [REDACTED]</p> <p>2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. Any privilege waived: Document highly relevant to TOR asking if "appropriate steps" were taken to disclose the TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking and why, including any decisions regarding to whom to disclose the TW Report and when). [REDACTED]</p> <p>4. In any event, summary [REDACTED] not privileged and should be disclosed.</p>
93	SPE_04552163_0001	undated	Sabo, Ron		Fully Disputed - Sabo Note Undated	yes	93	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	<p>1. No solicitor-client privilege: No evidence purpose of communication was seeking or giving legal advice. [REDACTED]</p> <p>2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding.</p> <p>3. Any privilege has been waived: Document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking).</p>

94	SPE_04317041_0001	1/8/2019	Boghosian, David		Fully Disputed - Boghosian Notes, Jan. 8, 2019	yes	94	Solicitor-Client; Litigation	Category 3: Correspondence and Notes	1. No solicitor-client privilege: No evidence purpose of communication was seeking or giving legal advice. [REDACTED] 2. No litigation privilege: Document not created for the dominant purpose of existing or contemplated litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege has been waived: Document is highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report and if there was misconduct in failing to disclose Report (which requires examination of what steps City staff were taking).
96	SPE_04317042_0001	1/30/2019	Boghosian, David		Fully Disputed - Boghosian Notes, Jan. 30, 2019	yes	96	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	1. No solicitor-client privilege: Purpose of call was [REDACTED] not for purposes of seeking or giving legal advice. 2. No litigation privilege: Dominant purpose [REDACTED] not litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: [REDACTED] highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report, if there was misconduct in failing to disclose Report, if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report.
97	SPE_04552155_0001	30-Jan-19	Sabo, Ron		Fully Disputed -Sabo Notes Jan. 30, 2019	yes	97	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	1. No solicitor-client privilege: Purpose [REDACTED] not for purposes of seeking or giving legal advice. 2. No litigation privilege: Dominant purpose [REDACTED] not litigation. In any event, the City has not established that any litigation for which the document was created is outstanding. 3. Any privilege waived: [REDACTED] highly relevant to the TOR asking if "appropriate steps" were taken to disclose TW Report, if there was misconduct in failing to disclose Report, if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report.
98	SPE_04317043_0001	1/30/2019	Boghosian, David		Fully Disputed - Boghosian Notes, Jan. 30, 2019	yes	98	Solicitor-Client; Litigation	Category 2: CIMA Documents	1. No solicitor-client privilege: [REDACTED] Test from Chrusz not met [REDACTED] 2. No litigation privilege: Dominant purpose [REDACTED] not litigation. [REDACTED] In any event, any litigation privilege expired. 3. Any privilege waived: [REDACTED] highly relevant to TOR asking Commissioner if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report. 4. In any event, summary of facts not privileged should be disclosed.
99	SPE_04552154_0001	1/30/2019; 2/1/2019; 2/4/2019; 2/5/2019; 2/6/2019	Sabo, Ron		Fully Disputed -Sabo Notes	yes	99	Solicitor-Client; Litigation	Category 2: CIMA Documents Category 3: Correspondence and Notes	1. No solicitor-client privilege: [REDACTED] Test from Chrusz not met [REDACTED] 2. No litigation privilege: Dominant purpose [REDACTED] not litigation. [REDACTED] In any event, any litigation privilege expired. 3. Any privilege waived: [REDACTED] highly relevant to TOR asking Commissioner if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report. 4. In any event, summary of facts not privileged should be disclosed.
101	SPE_04552160_0001	undated	Sabo, Ron		Fully Disputed -Sabo Note	yes	101	Solicitor-Client	Category 2: CIMA Documents	1. No solicitor-client privilege: [REDACTED] No evidence [REDACTED] was for purposes of seeking or obtaining legal advice. 2. No litigation privilege: No evidence note was created for dominant purpose of litigation. In any event, any litigation privilege has expired. 3. Any privilege waived: [REDACTED] highly relevant to TOR asking Commissioner if anyone in PW directed any other safety reviews and if subsequent consultant reports provide additional support for conclusions in TW Report.
104	SPE_04552290_0001	9-Nov-21	Bain, Belinda	Swaby, Diana	Fully Disputed - Nov. 9, 2021 Gowling Letter	yes	104	Solicitor-Client; Litigation	Category 4: Discovery Transcripts	1. No solicitor-client privilege: [REDACTED] No evidence communication was for the purposes of seeking or giving legal advice. 2. No litigation privilege: litigation privilege protects documents from disclosure to adverse party, not documents created as part of discovery process. In any event, no evidence litigation remains ongoing so any litigation privilege expired. If Tab 84 is produced, CC does not require this document