

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS  
HEARD BEFORE THE HONOURABLE J. WILTON-SIEGEL  
held via Arbitration Place Virtual  
on Tuesday, May 31, 2022 at 9:31 a.m.

VOLUME 21

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For Dufferin Construction  
For Golder Associates Inc.

ALSO PRESENT:

Richard Provost

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1 Arbitration Place Virtual

2 --- Upon resuming on Tuesday, May 31, 2022

3 at 9:31 a.m.

4 JUSTICE WILTON-SIEGEL: Good  
5 morning.

6 MS. LAWRENCE: Good morning.  
7 Can you hear me?

8 JUSTICE WILTON-SIEGEL: Yes.

9 MS. LAWRENCE: Good. Thank  
10 you.

11 BRIAN MALONE; RESUMED

12 CONTINUED EXAMINATION BY MS. LAWRENCE:

13 Q. Mr. Malone, I'm going to  
14 continue with some questions. I'm turning now,  
15 Mr. Registrar, to OD 6, page 35, paragraph 75,  
16 please. Thank you.

17 So, we're in July of 2013,  
18 picking up from yesterday. Your colleague Mr.  
19 Applebee sent a copy of the PowerPoint  
20 presentations that we were discussing at the end  
21 of day yesterday and the minutes to individuals at  
22 the City, including Gary Kirchknopf. You're not  
23 copied on this message, but Mr. Applebee invited  
24 review and comment on the documents.

25 Registrar, can you close that

1 and call out paragraph 76, please.

2 Did you know Mr. Kirchknopf?

3 A. Yes.

4 Q. Did you know him through  
5 CIMA's retainers and projects for the City or in  
6 some other capacity?

7 A. I knew him when I worked  
8 at the City. He reported to Hart Solomon, so his  
9 work station was close to mine, and I'm not  
10 surprised he was connected to this project in some  
11 way. So, he was part of the traffic group.

12 Q. So, you'll see he  
13 responded to Mr. Applebee and if you can just take  
14 a moment to review his response, he is directing  
15 Mr. Applebee or he's inviting Mr. Applebee to  
16 contact Ludomir Uzarowski at Golder Associates  
17 directly, "should you require any additional  
18 information regarding weight in motion," quote,  
19 unquote, "or friction testing," quote, unquote,  
20 "on the main line."

21 You weren't copied on this  
22 message either. Did anyone at CIMA bring the  
23 information contained in Mr. Kirchknopf's e-mail  
24 to your attention?

25 A. No. I only became aware

1 of this e-mail upon review of materials provided  
2 for the inquiry.

3 Q. Did you know that the  
4 City had retained Golder Associates to, quote,  
5 "oversee all testing and monitoring of the  
6 specialized surface material," end quote, as  
7 Mr. Kirchknopf puts in his e-mail?

8 A. No.

9 Q. Did you have any contact  
10 with anyone at Golder Associates in 2013?

11 A. No, none at all.

12 Q. To the best of your  
13 knowledge, did anyone at CIMA have contact with  
14 Golder in 2013?

15 A. To the best of my  
16 knowledge, no.

17 Q. Did you have any  
18 discussions with Mr. Applebee about Golder  
19 Associates in 2013?

20 A. Sorry, could you repeat  
21 the question?

22 Q. Did you have any  
23 discussions with Mr. Applebee about Golder  
24 Associates in 2013?

25 A. About Golder, no, none at

1 all.

2 Q. Did you have any  
3 discussions with staff at the City about Golder  
4 doing friction testing?

5 A. No, none at all.

6 Q. Thank you. Registrar,  
7 can you close that call out and bring up  
8 paragraph 78, which is page 35 and 36. Thank you.

9 Mr. Malone, is that readable  
10 for you?

11 A. Yes, that's good.

12 Q. Great. So, this is still  
13 in July of 2013. This is after the PowerPoint  
14 presentation that we were discussing and  
15 Mr. Applebee writes to Mr. Cooper to see if the  
16 City has any comments on the proposed  
17 countermeasures or the minutes of that meeting on  
18 July 3, and indicates that he needs to do a final  
19 list of countermeasures to do the calculations  
20 required.

21 Now, those calculations,  
22 that's the benefit-cost calculations. Is that  
23 right?

24 A. Yes, seems so. Yes.

25 Q. Can you close out that



1 call out, Registrar, and bring up CIM8266. So,  
2 this is the e-mail that was just summarized in  
3 that paragraph we were just looking at, and you'll  
4 see that Mr. Applebee, in the third paragraph,  
5 says:

6 "Because the geometric  
7 changes are generally off  
8 the table, we don't need  
9 construction costs."

10 So, just to confirm, CIMA was  
11 not intending to do any benefit-cost analysis for  
12 geometric changes. Is that right?

13 A. Yeah. The paragraph  
14 sentence represents that geometric changes would  
15 be beyond the scope of the assignment. Similar to  
16 illumination that we discussed yesterday, the  
17 geometric alignment has been determined  
18 previously, approved through the environmental  
19 assessment process and was not something for which  
20 this report would be capable of providing changes  
21 to. That's common for a road safety assessment.

22 Q. Okay. So, you just  
23 referenced illumination. Just staying on  
24 geometric design for a moment, you and your  
25 colleagues at CIMA were quite clear that geometric

1 changes were outside the scope of this project.

2 Right?

3 A. Yes. The road had  
4 curvilinear alignment with horizontal and vertical  
5 curves, and potentially theoretically making the  
6 road straight would be a safety improvement, but  
7 that was beyond the scope of what could be done  
8 within the bounds of this assignment.

9 Q. Okay. In the second  
10 paragraph, it says:

11 "We need a determination  
12 of costs. We can utilize  
13 MTO costs. We will for  
14 illumination, as  
15 discussed."

16 So, at this point in the  
17 process, in mid-July 2013, Mr. Applebee and others  
18 within CIMA below Mr. Applebee, they are doing the  
19 benefit-cost analysis for illumination using MTO  
20 costs. Is that right?

21 A. That would be appear to  
22 be so, yes. And illumination was included. We  
23 were certainly analyzing illumination and dealing  
24 with the ramps.

25 Q. In the third paragraph at

1 the last line, it says:

2 "Mike also said he had  
3 something to provide on  
4 illumination that he was  
5 going to give to you to  
6 provide to us. Did you  
7 receive this from him?"

8 Do you know what Mr. Applebee  
9 is referring to there in respect of Mike providing  
10 something -- had something to provide on  
11 illumination?

12 A. No, I don't precisely.

13 No.

14 Q. Thank you. Registrar,  
15 can you pull up OD 6, page 36, paragraph 79. No,  
16 I think we're on the wrong place. Can you cancel  
17 that call out. OD 6, page 36, paragraph 79.

18 Thanks.

19 So, this is, as I reference  
20 here, the individuals, this is an internal CIMA  
21 e-mail and you'll see that Mr. Applebee is  
22 providing some background. The second paragraph,  
23 the bottom paragraph here:

24 "Also, they're not keen  
25 on any high-friction

1 pavement treatments on  
2 the main line but they  
3 are okay with it on the  
4 ramps, i.e., ramp 6, so  
5 we don't have to cost the  
6 main line high friction  
7 out either."

8 So, just stopping there, we  
9 spoke about high-friction application yesterday.  
10 Can you confirm whether skid abrading is a  
11 high-friction application that CIMA was  
12 considering?

13 A. That would not be what we  
14 would have been considering. We were considering  
15 more of an overlay material or some sort of  
16 material added on top instead of an attempt to  
17 retrofit to the existing materials.

18 Excuse me, I'm sorry, can you  
19 reduce the size of the call out a little bit?  
20 It's being blocked by the video on the side. Very  
21 good. Thank you.

22 Q. So, your thinking was to  
23 put something on top of the pavement, not to  
24 change the surface of the pavement to give it  
25 additional frictional qualities?

1                   A.     Well, the intent was to  
2     change the frictional properties, but not by  
3     modifying only the existing surface, but addition  
4     of other material. We had worked on other  
5     projects in the past where high-friction material  
6     had been added to an area for bike lanes, for  
7     example, but it was a slurry material with  
8     high-friction aggregate incorporated into it,  
9     which was added on to an existing asphalt, and  
10    that's roughly what we were contemplating.

11                   Q.     Thank you. Registrar,  
12    you can close that call out. If you can go to the  
13    next image and paragraph 82, please. So, here,  
14    this is just to reference the time. This is  
15    July 26. You provided comments on the draft  
16    report. This is before it's gone to the City,  
17    just to orient you in time, and I'm going to bring  
18    up the document now that you commented on.

19                   Registrar, it's CIM369 and I  
20    would like it in native form, please. Thank you.  
21    Registrar, can you scroll down to page 7 of this  
22    document, which is page, in the pagination,  
23    page 1. Sorry, one more page up. Perfect. Thank  
24    you.

25                   So, Mr. Malone, I'm just

1 taking you to this so that you can see a copy that  
2 has the comments in it. So, you'll see that  
3 there's text boxes, comment boxes, on one side  
4 from your colleague Dr. Hadayeghi, and then there  
5 are track changes within the document.

6 A. Sorry, I don't see any  
7 comments on the side.

8 Q. It may be the way that  
9 your Zoom is oriented.

10 A. I see a banner on the  
11 right side of the page, but there's no text.

12 JUSTICE WILTON-SIEGEL: If I  
13 can interject, I had the same problem but it's  
14 solved very quickly by going into the top under  
15 Review, going to All Markup, and if you get the  
16 top down menu, under the top down menu, All  
17 Markup, there's a box to click for all markup and  
18 it will appear.

19 MS. LAWRENCE: Registrar, can  
20 you complete that on the native version that you  
21 have up?

22 THE WITNESS: Yeah. I won't  
23 be able to do that on Zoom.

24 MS. LAWRENCE: Only the  
25 registrar can do that. I am seeing it on my

1 screen, so I think it actually might be a Zoom  
2 issue rather than an issue with the document.

3 BY MS. LAWRENCE:

4 Q. Mr. Malone, can you see  
5 in the left-hand side it says Navigation and it  
6 has --

7 A. There we go, okay.

8 Q. So, I think it might just  
9 be the way your Zoom is set up.

10 A. It's a size thing. If it  
11 could be reduced just slightly, they were hiding  
12 under the video on the side.

13 Q. There we go. Is that  
14 better?

15 A. Better. A little bit  
16 smaller would be even -- I can only read partial.

17 Q. Mr. Malone, you also may  
18 be able to go up to the top of your Zoom screen  
19 and change the view. This is just as a matter of  
20 Zoom. You can change it from whatever it's on to  
21 side by side and I think that that might change  
22 the issue with the tiles covering some of the  
23 document.

24 A. I think we're good now.  
25 I can read them now. Thank you.

1 Q. Great. Okay. So, this  
2 is the native version of this document and you'll  
3 see there's Dr. Hadayeghi's comments in the  
4 comment box on the stage and then there's track  
5 changes.

6 Registrar, can you hover over  
7 where it says "in safety" in the paragraph  
8 immediately before "two study objectives and  
9 limitations," the red track changes that say "in  
10 safety."

11 So, you'll see, I'm just  
12 bringing this to your attention, you're identified  
13 as the author of the track change "in safety" in  
14 red, so all of the track changes here in red are  
15 yours, and the blue are your colleagues?

16 A. Yes.

17 Q. Okay. Thank you.  
18 Registrar, can you turn up page 3, which is  
19 image 9. Apologies in advance for using the  
20 natives. I'm likely going to refer to the page  
21 numbers as well as the images. Perfect. Thank  
22 you. And if you could just go up. Perfect.

23 So, you see under Scope and  
24 Study Area it says "study scope" and it has the  
25 list of the scope of this study, including the



1 review of various factors, collisions, signs,  
2 human factors, et cetera. It also says "review of  
3 illumination" and then "development of a list of  
4 viable potential countermeasures," you've added in  
5 "viable," and "assessment of countermeasures,  
6 cost-benefit analysis and recommendations." And  
7 that's similar to the tasks that we went through  
8 on the RFQ yesterday. Do you see that?

9 A. I do.

10 Q. Registrar, can you turn  
11 to page 16, internal page 16, of this document.  
12 Sorry, I know working with natives is a little  
13 more fiddley. We'll just give the registrar a  
14 moment.

15 JUSTICE WILTON-SIEGEL: Have  
16 we lost the registrar? No, there he is. Okay.

17 BY MS. LAWRENCE:

18 Q. Thank you. Registrar,  
19 and can you just make that a little smaller so  
20 that we can see that we're on page 16.

21 Mr. Malone, is that readable  
22 for you?

23 A. Yeah.

24 Q. There's some call outs,  
25 but --

1                   A.    The very bottom is cut  
2    off a little bit, but that's fine.  I can read it.

3                   Q.    Okay.  So, I'm just  
4    taking you to the Illumination Review section and  
5    you'll see your comment on the right-hand side.  
6    Mr. Registrar, can you click on the comment, just  
7    so he can see what the comment attaches to in the  
8    document.

9                   So, you'll see illumination is  
10   highlighted there, so that's what this comment is  
11   attached to.  And it says:

12                               "Must add limitations  
13                               that exist with respect  
14                               to lighting that we know  
15                               from EA approvals."

16                   You didn't have any of the  
17   actual EA approvals at the time that you made this  
18   comment.  Right?

19                   A.    I had been told the EA  
20   approvals by Mr. Moore.

21                   Q.    But you didn't have the  
22   approvals themselves, any documents about the EA?

23                   A.    We had virtually no  
24   documents relating to the design or approval of  
25   the freeway provided to us by the City for this

1 assignment.

2 Q. Okay. Registrar, can you  
3 go to the next page. Thank you. And, at the  
4 bottom, you'll see Illumination Results.  
5 Registrar, can you call out 4.4.2. Thank you.  
6 And scroll down. Thanks.

7 Here, it says:

8 "The full illumination  
9 justification was  
10 completed for three  
11 Interchanges, Dartnall  
12 Road, Mud Street,  
13 Greenhill, as well as for  
14 the entire study area."

15 And then if you could just  
16 scroll to the next page, Registrar. Thank you.  
17 That's perfect. And if you could click on  
18 Mr. Malone's comment, the first comment, and  
19 that's attached, you'll see, to an area is  
20 highlighted and you say:

21 "We can't conclude this  
22 if there are specific  
23 constraints on the study  
24 area which we previously  
25 acknowledged. At the

1 least, we must follow  
2 this conclusion with the  
3 recognition that  
4 achievement of the  
5 warrant does not mean  
6 they are being  
7 recommended. They need  
8 to be assessed in  
9 relation to the approval  
10 constraints."

11 At this point, had you  
12 discussed these comments with anyone at CIMA?

13 A. Sorry, discussed the  
14 comments?

15 Q. Discussed your commentary  
16 that's in these comments with anyone at CIMA?

17 A. Well, that comment in  
18 particular, as you can see from it, is a response  
19 to the comment from Dr. Hadayeghi. He said:

20 "Shouldn't we talk about  
21 the environmental  
22 constraints? Didn't we  
23 get a report that  
24 highlights that we cannot  
25 do full lighting?"

1                                   And then my response is:  
2                                    "Yes, we can't conclude."  
3                                   And so on and so forth, so  
4 it's a response to the input provided by  
5 Dr. Hadayeghi recognizing, understanding, that  
6 there's some environmental constraints that are in  
7 place with respect to illumination.

8                                   Q.    Thank you.  Let me  
9 rephrase my question.  Apart from the back and  
10 forth in written comments in this document, had  
11 you had oral discussions with your colleagues  
12 about this, before this back and forth in the  
13 document?

14                                  A.    Well, I think it's  
15 important to have some context of the document.  
16 This is, my understanding, this is version E00V01,  
17 so it is the very first draft of the report being  
18 prepared internally by CIMA.  Nothing has been  
19 distributed to the client yet, gone outside CIMA's  
20 doors.

21                                  For a report of this nature,  
22 the various components, the sections, are compiled  
23 by different authors.  So, as I think we discussed  
24 earlier, some people were looking at the collision  
25 information, others at illumination, others at

1 various volumes and speeds and such, so there were  
2 various authors that wrote individual sections and  
3 pieces, assembled them into this one piece and  
4 Mr. Applebee has put this together as the rough  
5 first draft.

6 I had had the discussion with  
7 Mr. Moore and I don't remember precisely who I  
8 spoke to. I'm pretty sure I did not speak to the  
9 entire team, every single person working on it,  
10 but it's pretty clear from the notes here that  
11 Dr. Hadayeghi was also aware of the same  
12 information that I was from the conversation with  
13 Mr. Moore, which we understood to be the direction  
14 from the City.

15 Q. Thank you. Do you know  
16 how Dr. Hadayeghi was aware of the same  
17 information that you were from your conversation  
18 with Mr. Moore?

19 A. I can't speak precisely  
20 how he became aware of it. I assume I spoke to  
21 him, but I don't really have a recollection of  
22 that. You can speak to him if he has a more clear  
23 recollection.

24 Q. Thank you. Registrar,  
25 can you go to image 42, which is internal page 36.

1 Thank you. Can you go up to the top of that page.

2 Apologies, Commissioner. Just  
3 give me a moment. I don't think I have the right  
4 page reference. Apologies, it was page 37. Thank  
5 you.

6 In the draft prepared or at  
7 least compiled by Mr. Applebee under 6.1.1, the  
8 draft that you were commenting on says:

9 "The outcome of the TAC  
10 illumination more  
11 indicated full  
12 illumination on the  
13 corridor and ramps is  
14 justified and that the  
15 cost-benefit ratio was  
16 4.27."

17 And there's an indication of  
18 the expected service life for this countermeasure  
19 as being over \$4 million. You provide two  
20 comments here. One is:

21 "We must balance this off  
22 with a clear  
23 understanding that we're  
24 not suggesting a  
25 consideration of full

1 illumination."

2 Now, why was that? Why were  
3 you suggesting or why were you commenting that  
4 we're not suggesting consideration of full  
5 illumination?

6 A. I think it's consistent  
7 with my explanation earlier, that my understanding  
8 from the direction provided by the project team to  
9 speak to Mr. Moore and the clarification provided  
10 by Mr. Moore was that illumination through the  
11 valley was not permitted under the environmental  
12 assessment rules or approvals, and so in my  
13 understanding was that illumination in the valley,  
14 which would be on the main line component of the  
15 roadway, was beyond the scope of the assignment.

16 And I think it's obvious that  
17 some internal staff at CIMA didn't have that full  
18 understanding, and in this first draft is when  
19 that disconnect between some staff and others and  
20 the clarity of the scope had not yet been  
21 finalized. That's the purpose of the review  
22 before we issue the report to the client, so  
23 that's the context of my comment.

24 Q. Okay. So, your view at  
25 this time was that the consideration of full



1 illumination was not in scope because it would not  
2 be feasible to actually be done because of the EA  
3 process. Is that correct?

4 A. Essentially, yes, similar  
5 to the comment earlier about geometry. There was  
6 no question that realignment of the freeway, of  
7 the highway, would be beyond scope, and the input  
8 that had been provided indicated that illumination  
9 of the main line portions of the highway through  
10 the valley was also not feasible because of the  
11 approvals that had been granted through the  
12 environmental assessment processes and, therefore,  
13 beyond scope.

14 So, that was clear to me at  
15 this point as I was undertaking the review. I'm  
16 not sure it was clear to all the staff that  
17 prepared the components going in, but again,  
18 that's the purpose of the review.

19 Q. Okay. So, let's just  
20 separate out scope, your process, from  
21 feasibility. If illumination was in scope and you  
22 completed your recommendations, wouldn't it be  
23 helpful to provide those recommendations to the  
24 City so that the City could assess feasibility?

25 A. No, I don't think so. I

1 think it would be similar to saying, you know,  
2 straightening the highway would be a  
3 recommendation and that is not feasible and not  
4 possible to be achieved. It would be an  
5 improvement from a safety perspective, but it's  
6 not a reasonable recommendation to make in a  
7 report. It's not feasible to be achieved and I  
8 think it would be irresponsible to include that in  
9 a report as a recommendation to the client. And I  
10 saw main line illumination in the same realm.

11 Q. Okay. Registrar, can you  
12 bring up CIM8129, please, and if you can call out  
13 Mr. Malone's -- apologies.

14 Just before we get to this,  
15 the version of CIM369 that we were just referring  
16 to is the native version. There is a PDF version  
17 that doesn't have the comments in the OD, but I  
18 think it would be prudent to mark the native  
19 version that does show those comments, and that  
20 would be the next exhibit, 59 by my count?

21 JUSTICE WILTON-SIEGEL: Okay.  
22 Thank you.

23 EXHIBIT NO. 59: Draft  
24 RHVP Safety Review with  
25 comments, CIM369.

1 BY MS. LAWRENCE:

2 Q. Thank you. Now turning  
3 to this, Registrar, can you call out Mr. Malone's  
4 July 26, 2:00 p.m., e-mail.

5 You sent an e-mail to your  
6 colleagues:

7 "We need to discuss the  
8 lighting. Is it in scope  
9 or not? As written, it's  
10 a hand grenade that will  
11 go off in the City's  
12 hands."

13 When you say "lighting" here,  
14 you mean main line lighting. Is that right?

15 A. I do, yes.

16 Q. You can close that call  
17 out, please, and if you can call out the first  
18 paragraph of Mr. Applebee's response. He responds  
19 on that point:

20 "I believe it is in  
21 scope. I don't recall  
22 receiving anything from  
23 Mike that would act as an  
24 out. Apparently there  
25 was a report. Maurice,

1                                   did you receive this?"

2                                   So, is this, in your evidence  
3   today, an indication of a miscommunication between  
4   you and Mr. Applebee?

5                                   A.    I think yes.  I think  
6   it's an evidence of the disconnect that we had  
7   with respect to the issue, yes.  I think the  
8   report itself is a reflection of the disconnect  
9   between the two understandings.

10                                  Q.    Why are you asking your  
11   colleagues if it is in scope or not at this point  
12   if you believe that it wasn't in scope?

13                                  A.    Frankly, I think it's a  
14   rhetorical question.  In my view, it was not in  
15   scope and the report as presented to me for review  
16   would suggest that others believe it is, was,  
17   within scope.  And so, in fact, that's why I asked  
18   the question.  I'm responding with my overall  
19   comments to the report, the version 1 that had  
20   been asked to review.  I had marked it up and I  
21   provide the attachment with the e-mail.  And  
22   Mr. Applebee responds saying that he did believe  
23   it was in scope, so we clearly had a  
24   misunderstanding.  So, I was trying to get some  
25   clarity as to where we resided on this matter.

1 Q. Okay. What did you mean  
2 when you said, as written, "it will be a hand  
3 grenade"?

4 A. Well, I think we were  
5 being contradictory in the report. There was some  
6 discussion in the report regarding the  
7 environmental constraints that existed in some  
8 areas, and then in others was recommendation for  
9 illumination on the main line. And my  
10 understanding was that, based on the environmental  
11 assessment constraints, the input provided by the  
12 City to us clarifying the scope that main line  
13 lighting was not within scope, and so it would be  
14 inappropriate and therefore "hand grenade" is  
15 probably not the best word, but there's a  
16 contradiction there provided for the City if the  
17 report went as it had been written.

18 And so, I was of the belief  
19 that we needed to rationalize the report to make  
20 sure it was consistent with our understanding of  
21 scope and the content of the report reflected that  
22 correctly.

23 Q. And Mr. Applebee here was  
24 looking to Mike Field to confirm the scope, not  
25 Mr. Moore. Right?

1                   A.     Well, he mentioned Mike  
2     Field in his note, correct.   And my reading of the  
3     materials provided for my review, my understanding  
4     is that Mike Field does precisely that, he  
5     comments that the City had provided material to  
6     CIMA.   I don't recall it, but he confirms  
7     essentially what's being asked here, even though  
8     apparently we can't find it or don't have the  
9     material.

10                  Q.     Okay.   Would you agree  
11     that to avoid the contradictions you said that  
12     were in the report, CIMA could have provided the  
13     reference to the warrants being justified, the  
14     benefit-cost analysis, those two paragraphs we  
15     just looked at, and then said the EA approvals say  
16     that there's a constraint and it may not be  
17     feasible to do this, but here is the information  
18     if the City wishes to go down the road of trying  
19     to change the environmental approvals that were  
20     put in place in the 1980s?   Do you agree that that  
21     would have been a way to deal with any  
22     contradictions that you saw in the report?

23                  A.     No.   In fact, I disagree  
24     completely.   I think that would enhance the  
25     contradictions and not provide clarity in the

1 report.

2 A road safety assessment  
3 report always has constraints as to what can  
4 potentially be included. We're not revisiting the  
5 design decisions for the roadway that's under  
6 investigation. Those decisions have been  
7 completed, they've been set. Similar to the  
8 geometric alignment, determinations had been made  
9 for the overall alignment of the roadway that  
10 included fairly curvilinear alignment, a  
11 significant number of horizontal curves.

12 We would not and did not make  
13 recommendations in that regard, and my  
14 understanding with respect to lighting,  
15 illumination, was similar. There had been  
16 decisions made in the design approval and design  
17 process that determined not to include lighting.  
18 Information provided by the City was very clear  
19 with respect to that and it would be, I think,  
20 completely inappropriate to suggest or recommend  
21 that lighting could be revisited given those  
22 constraints, because it would mean going back on  
23 original design decisions, which, at this point in  
24 time, I understood could not be changed.

25 Q. Okay. Just so I

1 understand your evidence, you viewed environmental  
2 approvals to be part of the design that couldn't  
3 be changed?

4 A. They're a factor in the  
5 process leading up to the completion of design and  
6 construction of the roadway, so you can't build  
7 the roadway unless you have the environmental  
8 assessment approvals in place, and if there are  
9 constraints or rules or restrictions that are  
10 connected to that, that's something that cannot be  
11 violated in construction of the roadway and,  
12 therefore, it's a fixed element in terms of what  
13 we are dealing with in our road safety review.

14 Q. Thank you. Registrar,  
15 can you bring up CIMA 8124, please.

16 So, the e-mail we were just  
17 looking at, I won't go back to it, but that was  
18 from the Friday and now we're at July 29, the  
19 following Monday. Mr. Applebee sends an e-mail to  
20 Mr. Nolet, one of your colleagues, and says:

21 "We're going to remove  
22 the overall lighting from  
23 the report."

24 What happened between Friday  
25 and Monday that caused CIMA to remove overall



1 lighting from the report, if anything?

2 A. The comments were made on  
3 the draft version of the report.

4 Q. Would you speak to anyone  
5 at the City over the weekend about the issue of  
6 illumination?

7 A. No. I didn't need to. I  
8 had what I felt was appropriate input from the  
9 City as we recently described.

10 Q. Did you speak to  
11 Mr. Applebee over the weekend or on the Friday  
12 after the e-mail that we just looked at?

13 A. I don't recall if there  
14 was a verbal discussion or not about the comments.

15 Q. Did you tell Mr. Applebee  
16 orally or otherwise to remove the recommendation  
17 from the report?

18 A. I don't recall. Same  
19 answer as the previous question.

20 Q. Okay.

21 A. I had made my comments  
22 clear in the report.

23 Q. Okay. Without the  
24 information that Mr. Moore provided to you on  
25 June 6, would CIMA have removed the illumination,

1 the overall lighting, I'll say, from this e-mail,  
2 the illumination of the main line, from its  
3 report?

4 A. I think Mr. Moore  
5 provided the confirmation. The initial indication  
6 that there were constraints were provided by the  
7 project team, Mr. Cooper and others that were  
8 present at the June 6 meeting. That's where the  
9 impetus came to speak to Mr. Moore, as he was a  
10 more knowledgeable authority with respect to the  
11 element of the environmental assessment approvals.  
12 So, certainly he was a component of it and he was,  
13 in my understanding, the most knowledgeable person  
14 at the City able to answer the question, but we  
15 were directed to him by the project team, so  
16 that's why I was comfortable with the position.

17 Q. Thank you. Registrar,  
18 can you bring up OD 6, page 43, paragraph 98,  
19 please. You mentioned earlier, Mr. Malone, that  
20 in your preparation you understood that Mr. Field  
21 had confirmed. This is an e-mail just a few days  
22 later and, in the third bullet he says:

23 "Illumination on the main  
24 line has been excluded.

25 This decision is based on

1 information we provided  
2 to CIMA."

3 Apart from your call with  
4 Mr. Moore, are you aware of any other information  
5 that the City provided to CIMA that played into  
6 the decision to exclude illumination of the main  
7 line?

8 A. Can I offer or provide  
9 some input as to the timing?

10 Q. Sure.

11 A. So, just to be clear, the  
12 reviews of a moment ago with E00V01 was the very  
13 initial version, draft version, of the report that  
14 CIMA was reviewing. That's where I made my  
15 initial comments and the very first version that  
16 had been prepared and the first version I had  
17 reviewed.

18 There were several internal  
19 versions that went back and forth before  
20 completion of a version E01, which was distributed  
21 to the client, and it is my understanding that  
22 Mr. Field on this date is now reviewing or  
23 commenting with respect to the version of the  
24 report that had been sent to the City on July 29.  
25 I just want the dates and the context to be clear.

1                   So, in response to your  
2 question, I don't recall any other specific  
3 material, but to me the input from the City was  
4 perfectly clear.

5                   Q.    You mean the input from  
6 Mr. Moore was perfectly clear?

7                   A.    Mr. Moore was the person  
8 to whom we were directed by the project team, so  
9 his input was provided and he acted on behalf of  
10 the City, as far as I understood.

11                  Q.    Thank you. I am going to  
12 take you -- and you're quite right that Mr. Field  
13 is commenting on a draft that has been finalized  
14 internal in CIMA and then sent to the City between  
15 July 29, which we were just looking at, and this  
16 e-mail of August 2.

17                  I'm going to take you now to  
18 that modified version of the report that CIMA then  
19 finalizes and sends out. It is CIM371 and I would  
20 like the native version, please.

21                  A.    And if you could assist  
22 me, if you're able to determine which CIMA  
23 version, E00, V00, those numbers. If we're able  
24 to determine that, that would help me understand  
25 the context.

1 Q. Sure. I can put that up.  
2 That will be on the first page. Right?

3 A. It should be, yeah, or in  
4 the file name if you're looking at the native  
5 version.

6 Q. Registrar, if you can  
7 just scroll down so that you show the bottom part  
8 of this first page.

9 Mr. Malone, does the file path  
10 at the bottom help you with your request around  
11 the version number?

12 A. Yeah. It says draft  
13 report E00V01, so this appears to be the same  
14 version on which I made my comments.

15 Q. Right. So, just for  
16 context, this is a version that Mr. Applebee has  
17 modified with track changes to reflect you and  
18 Dr. Hadayeghi's comments that we were just looking  
19 at?

20 A. I don't think so, based  
21 on the file number. This would be the version on  
22 which the comments are included, but it hasn't  
23 been modified yet because from your previous  
24 e-mail, when I sent the comment to Mr. Applebee, I  
25 had saved it as V02.

1 Q. So, I understand this is  
2 actually V04, so maybe that file path is just not  
3 updated. Is that more helpful?

4 A. If that's the case, then  
5 yes, it would be helpful.

6 Q. Okay. Registrar, can you  
7 go to internal page 1, which is image 9. No,  
8 that's page 9. Sorry. Internal page 1, which  
9 would be the ninth page of this document. Thank  
10 you. Thank you. Can you scroll down to page 3,  
11 in fact. I just wanted to show Mr. Malone that  
12 we're still dealing with a track changes version.  
13 There we go. Thank you.

14 So, in this version, green,  
15 your track changes are in green. Just going to  
16 Study Scope, it has:

17 "Review of illumination  
18 in specific areas only,  
19 i.e., not through the  
20 study area."

21 Pardon me, I misspoke. This  
22 is Mr. Applebee's track changes are in green.  
23 Apologies.

24 And so, does that better  
25 reflect what you understood the scope to be

1 following your conversation with Mr. Moore?

2 A. It makes sense in terms  
3 of the transition of the versions within CIMA and  
4 consistent with the input that I understood that  
5 illumination through the valley was prohibited in  
6 conjunction with the environmental assessment  
7 approvals, yes.

8 Q. Thank you. Can you,  
9 Registrar, go to internal page 21. Thank you.  
10 Can you scroll up one page, please. Thanks.  
11 That's perfect.

12 For the Illumination Review  
13 there is, at the very last paragraph you have or,  
14 pardon me, Mr. Applebee has added in:

15 "The understanding that  
16 the decision not to  
17 illuminate the entire  
18 RHVP section was  
19 inextricably linked to  
20 environmental concerns  
21 and approvals. A review  
22 of full illumination was  
23 not undertaken but  
24 restricted to spot  
25 locations."

1                   Is it accurate, in your view,  
2 Mr. Malone, to say that a review of full  
3 illumination was not undertaken, given the work  
4 that your colleagues had done in respect of full  
5 illumination?

6                   A.    I guess technically that  
7 might be not accurate. It was not included in the  
8 report, but as we discussed, some work had been  
9 done.

10                  Q.    Thank you. Registrar,  
11 can you pull up CIM811 -- my colleagues are  
12 reminding me that this native file that we were  
13 just looking at, CIM371, should also be marked in  
14 its native form as an exhibit, which would be  
15 Exhibit 60, please.

16                  JUSTICE WILTON-SIEGEL: Okay.

17                               EXHIBIT NO. 60: CIMA  
18                               draft report E00V04,  
19                               CIM371.

20                  MS. LAWRENCE: Thank you.

21                  BY MS. LAWRENCE:

22                  Q.    Registrar, can you pull  
23 up CIM8118.0001. Thank you. And if you can call  
24 out from where it says in the white text "City of  
25 Hamilton" through that picture to just before



1 where it says "CIMA" on the bottom. Perfect.

2 Mr. Malone, I'm not sure if  
3 this is helpful. So, this is a -- I haven't shown  
4 you the covering e-mail, but this is the July 29,  
5 2003 version that CIMA sent to the City.

6 This cover is a typical layout  
7 of CIMA reports, at least as it was in 2013. Is  
8 that right?

9 A. Yes, it was.

10 Q. Sorry, I misspoke before  
11 and said 2003. I meant 2013.

12 A. It was the cover used for  
13 this report. It's consistent with our format  
14 overall, yes.

15 Q. Thank you. And so, you  
16 have the client name at the top, the title of the  
17 report, it says it's in draft. And then what does  
18 V000325 represent?

19 A. That's the internal  
20 project number at CIMA of this particular  
21 assignment.

22 Q. Okay. And is it typical  
23 that you just include the month and the year and  
24 not a day when a version is delivered where it  
25 says July 2013?

1                   A.    It varies.  I wouldn't  
2    say it's typical, but it's not unusual.

3                   Q.    Okay.  And then the E01  
4    at the bottom, what does that represent within  
5    CIMA's numbering system, if anything?

6                   A.    As we've talked  
7    previously, the numbering system was an E with two  
8    digits following and a V with two digits following  
9    for internal reports.  When a report was issued to  
10   a client, the V numbers were dropped.  It's a way  
11   for CIMA to track versions of reports and  
12   documents that are being worked on internally and  
13   to crystallize the information and the knowledge  
14   of when a report went to a client.

15                  So, E01 indicates that this is  
16   the first version of this report for project V325  
17   that was delivered to a client.  It left the  
18   building.  It was an external delivery.

19                  Q.    Thank you.  Registrar,  
20   can you close that document.

21                  I'm not going to go through  
22   that, but to your knowledge, the commentary that  
23   we've gone through around full illumination being  
24   warranted, that was not included in the final  
25   version that went to the City.  Is that right?  In

1 respect of the main line.

2 A. There were  
3 recommendations with respect to illumination on  
4 the ramps. There was no recommendation for  
5 illumination on the main line, consistent with the  
6 direction that we had been provided regarding the  
7 scope of the assignment.

8 Q. Thank you. Registrar,  
9 can you bring up CIM22409, image 9, please.

10 So, this is a calendar entry  
11 from your date book. Is that right?

12 A. Yes, it is.

13 Q. Could you read that out  
14 for me, please?

15 A. "Golf, Gord McGuire &  
16 Gary Moore."

17 Q. And this is from Tuesday,  
18 August 20, 2013?

19 A. That's the date the entry  
20 is made, yes.

21 Q. Does that indicate to you  
22 that that's the date the event occurred?

23 A. I'm not sure. I don't  
24 know if it occurred that date. It might have been  
25 a notation at an event on another day.

1 Q. Okay. So, do you recall  
2 playing golf with Gord McGuire and Gary Moore on  
3 or about August 20?

4 A. I don't really. I had  
5 golfed with them on a couple of occasions,  
6 typically tournaments that are organized by  
7 professional associations or charities we would  
8 participate in, CIMA the company would, and we  
9 would invite clients to join us.

10 Q. Do you recall if this was  
11 a tournament or just a trio of the three of you  
12 golfing together?

13 A. To be honest, I don't  
14 recall.

15 Q. Okay. Do you recall who  
16 invited whom to this golfing outing?

17 A. Oh, I probably invited  
18 them.

19 Q. Is this the first time  
20 that you had golfed with Mr. McGuire?

21 A. I don't know. I'm not  
22 sure.

23 Q. Was it the first time you  
24 golfed with Mr. Moore?

25 A. Probably not. I probably

1 had golfed with him maybe once before, but it's  
2 hard to say. I can't really suggest the dates.  
3 We participated in five or six golf tournaments at  
4 that time, five or six golf tournaments a year,  
5 and would invite various clients if they wanted to  
6 be part of our foursome.

7 Q. Okay. Sitting here  
8 today, can you confirm if this was part of a golf  
9 tournament or just was a private golf outing?

10 A. I don't recall. I don't  
11 know whether this was the date of the golf or this  
12 was the notation of the invitation, the  
13 communication with them, or even just my note to  
14 potentially contact them to go golfing. I do  
15 recall golfing with them on at least one occasion,  
16 the two of them together, but I'm not sure exactly  
17 which event this relates to.

18 Q. Okay. Do you recall if  
19 you went golfing with them outside of a  
20 tournament, just three players going golfing  
21 together?

22 A. Could have at one point  
23 in time, yes.

24 Q. Did you talk about  
25 business during this golf trip?

1 A. Probably, yeah.

2 Q. Did Mr. Moore discuss the  
3 2013 CIMA report with you?

4 A. I could not recall.

5 Q. What about Mr. McGuire?

6 A. Could not recall. I  
7 doubt it, because at that time Mr. McGuire would  
8 not have been as closely connected to this  
9 particular subject matter.

10 Q. Do you recall if any of  
11 the conversations over golf with Mr. McGuire and  
12 Mr. Moore resulted in changes to the 2013 CIMA  
13 report from this point forward?

14 A. Sorry, with respect to  
15 this date, this entry?

16 Q. Yeah. Do you recall if  
17 any of the conversations that you had over golf  
18 with Mr. McGuire or Mr. Moore resulted in changes  
19 to the 2013 CIMA report?

20 A. I don't recall, but I  
21 certainly doubt it. This is dated August 20. The  
22 report had been just sent, on July 29.

23 Q. Okay. And there's  
24 subsequent drafts that go back and forth, and so  
25 my question is whether, in any of those subsequent

1 drafts, whether any of the conversations that you  
2 had with Mr. Moore or Mr. McGuire resulted in any  
3 changes to the 2013 CIMA report?

4 A. I don't recall any  
5 subsequent conversations with Mr. Moore nor  
6 Mr. McGuire regarding the 2013 report. The  
7 conversation with Mr. Moore that I do recall is  
8 the June 6 conversation. If the note says golf,  
9 I'm sure we golfed at some point in time, but I  
10 have no recollection of what the conversation may  
11 have been as we were proceeding through the  
12 course.

13 Q. Okay. Thank you.  
14 Registrar, can you pull up OD 6, page 45,  
15 paragraph 105, please. Thank you.

16 So, on August 23, Mr. Applebee  
17 and Mr. Cooper have a discussion about the now  
18 second draft that's gone to or that is going to  
19 the City and this e-mail. Do you recall whether  
20 you reviewed a second draft of the CIMA report  
21 before it went back to the City?

22 A. I'm not sure. I would  
23 have to look at the document itself, the Word  
24 document, and validate whether there were changes.  
25 I commented on E00V01, as we've discussed. I

1 would have to check the actual documents.

2 Q. Okay. Registrar, can you  
3 bring up OD 6, page 49, paragraph 119, please.

4 In September, this is an  
5 internal e-mail among CIMA colleagues advising  
6 that Mr. Applebee had completed updates to the  
7 draft report based on review by the City as well  
8 as our internal discussions.

9 Do you recall being involved  
10 in the internal discussions about the City's  
11 comments on the draft that CIMA had sent to the  
12 City?

13 A. I don't have a clear  
14 recollection of it. It wouldn't surprise me if I  
15 was, but I would have to check the version to see  
16 if I made any comments in the document.

17 Q. Okay. Did Mr. Moore  
18 contact you to discuss the draft report after CIMA  
19 sent it to the City?

20 A. Not to my recollection,  
21 no.

22 Q. Did you ever come to  
23 learn of his view -- what his views were, if any,  
24 on the draft report?

25 A. Through the materials I



1 reviewed for this inquiry, yes.

2 Q. In advance of 2019?

3 A. No.

4 Q. Pardon. Before 2019, had  
5 you learned of his views, before preparing for the  
6 inquiry?

7 A. I never received anything  
8 from Mr. Moore.

9 Q. Okay.

10 A. What I'm not sure is if  
11 any of his views were reflected in input provided  
12 by the project team.

13 Q. Registrar, can you go to  
14 OD 6, page 61, paragraph 155, please.

15 So, in October, Mr. Applebee  
16 sent an updated version of the report with changes  
17 in the wording, tables, et cetera. Were you  
18 involved in -- do you have a recollection of being  
19 involved in the changes at this point?

20 A. Similar answer. I don't  
21 have a clear recollection of being involved. It  
22 wouldn't surprise me that I would have seen these  
23 versions as they go out. Either Dr. Hadayeghi or  
24 myself would review the E01, 02, 0 whatever that  
25 was delivered to the client, and so it would be

1 either him or myself who would have undertaken a  
2 review. Again, I would have to double check to  
3 see if I was the reviewer and it's also possible  
4 both of us reviewed it.

5 Q. Okay. Did you have any  
6 involvement in the preparation of the report by  
7 City staff prepared for the Public Works committee  
8 in respect of the 2013 CIMA report?

9 A. Not directly. I recall  
10 that the City -- there was back and forth with the  
11 City about the format of tables in our report and  
12 they were wanting or going to use a similar format  
13 or perhaps vice versa. They had a format of a  
14 table that they wanted to use and were suggesting  
15 that our report could follow a similar format.

16 But no, absolutely no direct  
17 input on the preparation of the City report. We  
18 never have input it on preparation of the reports  
19 by the municipality to council.

20 Q. Thank you. Registrar,  
21 can you pull up OD 6, page 69, paragraph 175,  
22 please.

23 So, here, the final staff  
24 report, so this is the staff report, not your  
25 report, was finalized on October 25, 2013.

1                   And if you can close that,  
2 Registrar, and call out paragraph 177, please.

3                   So, a few days later, these  
4 are e-mails internal to the City with Mr. Lupton,  
5 Mr. White and Mr. Ferguson in respect of a  
6 conversation with Gary, and Mr. Lupton says in the  
7 third line:

8                   "I'm not asking to change  
9                   opinions, but to soften  
10                  and stage the report  
11                  similar to what we have  
12                  done with our info  
13                  report, i.e., do this  
14                  first and measure  
15                  results, et cetera.  
16                  Please sit down with CIMA  
17                  and make this happen."

18                  You can close that call out.  
19 Did you ever discuss modifying the CIMA report to  
20 reflect the report that staff were preparing,  
21 either with Mr. Ferguson or with Mr. Cooper?

22                  A. I recall there was some  
23 discussion around timing of some of the  
24 recommendations and I think illumination was part  
25 of that. I believe the City, there was some

1 discussion about whether it should be a short-term  
2 or a medium-term recommendation, and I know it  
3 went back and forth to some extent.

4                   When CIMA makes a  
5 recommendation, we try to give reasonable  
6 timelines as to when something can or should be  
7 done, but we don't have direct control over those  
8 decisions, determinations, and so the client  
9 ultimately has that decision to make as to whether  
10 they will accept recommendations and implement or  
11 not and the timeline for implementation or not.  
12 So, I do recall there was some discussion about  
13 elements of the report and I believe illumination  
14 was part of those with respect to timing.

15                   Q. In your view, is it  
16 appropriate for a client to ask you to soften and  
17 stage a report, if that doesn't involve changing  
18 CIMA's conclusions?

19                   A. Well, to be clear, I  
20 never received -- to the best of my knowledge,  
21 nobody at CIMA received any direction to soften  
22 and stage the report. The e-mail referenced in  
23 paragraph 177 is -- CIMA was not included.

24                   It's not uncommon for the  
25 clients to offer input with respect to the content

1 of reports, and I do recall that there was some  
2 expansion of clarity relating to various issues,  
3 including illumination, and the clarification of  
4 the constraints that existed with respect to  
5 environmental approvals regarding main line  
6 lighting.

7                                     So, I never received any  
8 direction to soften and stage and I would not  
9 agree to soften and stage in that explicit quote,  
10 but certainly would accept input from clients.  
11 That's why we provided them with versions of a  
12 report and we're prepared to listen to what their  
13 input would be, but no, we don't change our  
14 representations based upon client input. We will  
15 listen to their concerns and comments and react  
16 appropriately.

17                                     Q. Thank you. So, in terms  
18 of staging, Mr. Lupton says:

19   "Can we stage the report  
20   similar to what we have  
21   done in our info report,  
22   i.e., do this first and  
23   measure results?"

24                                     So, I'm going to just provide  
25 a bit of extra facts there. If a client asked you

1 to change the timing of your recommendations,  
2 i.e., from short term to medium term or medium  
3 term to long term to reflect what Mr. Lupton says  
4 here, do some things, measure their results and  
5 then do other things, would you have a concern  
6 with that kind of request from a client?

7 A. Well, I don't see it as a  
8 request from a client. I see it as a client's  
9 explanation or description of how they are  
10 potentially going to respond to the inputs  
11 provided in the report. So, the client obviously  
12 has the choice to decide how they may wish to  
13 implement.

14 What does come to us from  
15 clients fairly regularly is the reality that, as  
16 the consultant, we're not fully familiar and  
17 certainly not in control of their budgeting  
18 processes, so where CIMA may identify something  
19 with a timeline for implementation, we are not  
20 necessarily fully versed on the budgetary and  
21 timeline constraints that exist within the City.

22 So, for example, if an  
23 item can be achieved using an operating budget,  
24 that typically would mean it can be done fairly  
25 quickly, but if something is larger expense and

1 would be considered a capital expenditure, that  
2 may require a significantly more detailed process  
3 to obtain funds and complete the work.

4 So, CIMA's input regarding  
5 timing, to be crude about it, may be ignorant on  
6 the capability of the client to achieve a  
7 particular timeline, so I think the client  
8 informing the consultant of the realities of  
9 budgetary and time constraint to achieve a certain  
10 outcome is reasonable to provide and appropriate  
11 adjustments would potentially be made.

12 I don't think it's appropriate  
13 to -- CIMA does not direct the municipality to do  
14 work. We provide options and suggestions for them  
15 to do and it's their decision if they will accept  
16 them and how they will undertake them.

17 Q. Okay. So, you said it's  
18 appropriate for a client to inform a consultant  
19 about the realities of budgetary and time  
20 constraints, and then you said appropriate  
21 adjustments would potentially be made. You mean  
22 CIMA would then adjust its report to reflect the  
23 budgetary and time constraints that the client has  
24 provided to you?

25 A. Potentially. If an

1 item had been listed in a time frame for which  
2 budgeting cannot be achieved because it required  
3 capital budgeting, for example, that needs to be  
4 programmed at some timeline duration to get there,  
5 I think we would recognize that reality and  
6 incorporate that into the report because I think  
7 it's -- it doesn't change the recommendation at  
8 all. It simply puts things in the appropriate  
9 context.

10                                       Again, we're undertaking a  
11 safety review here. We're not providing design  
12 for the highway. We're offering suggestions of  
13 various opportunities for safety improvement that  
14 could be achieved by or could be undertaken by the  
15 client. They will review those and they will  
16 provide some determination as to whether they will  
17 accept them and/or what that were timeline would  
18 be for installation.

19                                       We provided timelines within  
20 our report partly in recognition that some things  
21 are relatively minor, it can be done quickly, and  
22 also that others will take more time and need to  
23 be integrated. And if an implementation where one  
24 item potentially can be done before another  
25 item is also potentially the situation.



1 Q. Thank you. I'm going to  
2 turn now to OD 6, page 80 and 81, please, and if  
3 you can bring up -- we'll just leave it like this  
4 so you can see it.

5 In paragraph 207, Mr. Cooper  
6 responded to a message from Mr. Applebee to go  
7 ahead with wording changes and to make final  
8 copies, and Mr. Applebee asked, "Do you want the  
9 date to be changed?" So, this is in December.  
10 Actually, pardon me. I'm going to come back to  
11 this.

12 Can you close this down and  
13 open up HAM41871, please.

14 Before we go to December, I  
15 just want to show you, so this is version -- it's  
16 hard to read from here -- E05 and it's  
17 October 2013. If you can close that down.

18 It doesn't say draft on it  
19 anymore, like the earlier one. What does that  
20 mean in terms of whether this draft is final or  
21 not?

22 A. Well, any version without  
23 the -- any report numbered without the V numbers  
24 after the E numbers indicates it's been delivered  
25 to the client. My understanding at this stage

1 we're at here is that this was the last edition  
2 that was issued to the client, E05.

3 Q. Okay. So, do you -- when  
4 you deliver CIMA's final version, the version that  
5 CIMA views to be final, do you call it final or do  
6 you just take off the draft note?

7 A. Well, it depends on the  
8 projects. Some projects never go out with draft  
9 and never go out with final. It varies from  
10 project to project. Some clients like a version  
11 of the report that says final. Other clients  
12 don't care. Our record reflects the various  
13 editions that have been issued and the E05 is, my  
14 knowledge of this project, is the last version  
15 that went to them, so by definition it was the  
16 final version.

17 Q. Thank you. Registrar,  
18 can you go to image 5, please.

19 So, this is just in the  
20 executive summary. But just to see the overall  
21 study area countermeasures in a chart, you have a  
22 number of countermeasures: Friction testing,  
23 PMPR. Pardon me, PRPM. What's PRPM?

24 A. Permanent road pavement  
25 markers.

1 Q. So, those are markers?

2 A. Cat's eyes would be the  
3 colloquial.

4 Q. Cat's eyes. And then you  
5 have some other markings, slippery when wet signs,  
6 enforcement of travel speeds, trail blazer  
7 signage, removing other signs, exit signs, and in  
8 the right-hand side of this column you have ST and  
9 MT. Is that short term and medium term?

10 A. That was the intention,  
11 yes.

12 Q. Okay. So, that's for the  
13 overall study area. And then table 2, which is  
14 actually a few pages, starts with the road segment  
15 countermeasure, so that's on the particular  
16 segments that we talked about and there's  
17 additional countermeasures there. Is that right?

18 A. Yes.

19 Q. Registrar, can you go to  
20 the next image, please. Thank you.

21 And so, you have the list  
22 under the countermeasure. You have also signage,  
23 some maintenance, those sorts of things.

24 And then if you can go down,  
25 Registrar, to the next image.

1                   Then you have a table that has  
2 the ramp countermeasures, so you separated out  
3 overall study segment by segment and then the  
4 ramps. Is that right?

5                   A. Yes.

6                   Q. Having delivered E05,  
7 that version, to the City, did CIMA have any  
8 further obligation to the City to finalize this  
9 project?

10                  A. I'm not sure I understand  
11 the question, but no. Delivery of the final  
12 report is the completion of our assignment.

13                  Q. Did CIMA have any  
14 responsibility to take any steps to follow up as  
15 to whether the City had completed the recommended  
16 countermeasures?

17                  A. Can you define  
18 responsibilities?

19                  Q. Did you have any  
20 continuing project in which you were project  
21 managing the implementation of the  
22 countermeasures?

23                  A. No.

24                  Q. Thank you. Now I'm going  
25 to go to OD 6, page 80 and 81. So, here, in

1 paragraph 207, there's discussion with Mr. Cooper  
2 and Mr. Applebee about -- this is in December, so  
3 we were just looking in October. This is in  
4 December, a back and forth to go ahead and make  
5 wording changes and to provide final copies.

6 And you'll see in  
7 paragraph 208 Mr. Applebee then sent Mr. Cooper a  
8 PDF of what he described as the updated report.  
9 And 209 sets out the revised information. Do you  
10 see that?

11 A. I do.

12 Q. Were you aware of further  
13 discussions between the City and Mr. Applebee in  
14 December 2013?

15 A. I don't recall precisely.  
16 I suspect I would have been, but I don't remember.

17 Q. But you don't recall  
18 either way?

19 A. I don't recall a specific  
20 discussion, no.

21 Q. Okay. Do you recall  
22 being aware that Mr. Applebee was providing  
23 revisions to the report in December 2013?

24 A. Yeah. I think  
25 Mr. Applebee sent draft pieces or a selection of

1 parts of the report to Mr. Cooper with the  
2 proposed changes prior to this December 9 date.

3 Q. That's right. I'm asking  
4 about your awareness of that back and forth.

5 A. I would have to check the  
6 e-mail thread to see if I was included or not.

7 Q. Okay. I'm going to move  
8 on. I'm moving on now a couple of years to 2015.

9 Registrar, can you bring up  
10 HAM24096, please. Thank you. And can you call  
11 out the e-mail from Martin White at 9:23. It's  
12 the second e-mail. Thank you.

13 So, this is from Martin White  
14 to John Mater. You are not copied on this e-mail.  
15 John Mater -- pardon me. Martin White describes a  
16 conversation or at least he references your name.  
17 He says:

18 "Malone even told me he  
19 is charging us a bit  
20 extra due to Gary. He  
21 wants to be sure his  
22 recommendations are  
23 totally defensible. He  
24 asked me what he should  
25 say when Gary calls him.

1 I told CIMA to do the  
2 best analysis they can  
3 and give us the best  
4 technical options and to  
5 not worry about what Gary  
6 says to them."

7 Do you recall having a  
8 conversation like this with Mr. White?

9 A. I don't, no.

10 Q. You don't recall having  
11 any conversation in which you told Mr. White that  
12 CIMA was charging the City a bit extra because of  
13 Gary?

14 A. We would not charge the  
15 City a bit extra. The rates are set in accordance  
16 with the retainer process, roster process.  
17 There's no ability to charge extra. We were  
18 engaged in an assignment related to crossover  
19 collisions on the LINC, so certainly had been in  
20 communication with Mr. White regarding that  
21 assignment, but I don't recall this and -- no, I  
22 don't. It's not something that was ever relayed  
23 to me and I don't recall ever speaking to  
24 Mr. White in this manner.

25 Q. Would the potential for

1 Mr. Moore's involvement in a project affect the  
2 cost in any way from CIMA's perspective?

3 A. Not from the perspective  
4 that -- no, not from CIMA's. Our work is traffic  
5 safety reviews and Mr. Moore potentially, you  
6 know, could provide input and information, as he  
7 did in the 2013 report, based on his knowledge of  
8 the LINC and the Red Hill projects. But no, he  
9 wouldn't impact cost at all. It would be factored  
10 in as one of the information collection -- any  
11 communication with him or his office would be  
12 factored into the overall cost of the assignment.

13 Q. Did you find Mr. Moore  
14 difficult to work with?

15 A. I never really worked  
16 with Mr. Moore, so he was never a client of  
17 CIMA's, so I can't comment on whether he was  
18 difficult to work with or not. He did provide  
19 information on the 2013 report, he responded to my  
20 request, as I had been directed to speak to him,  
21 and he gave clear input that was useful and  
22 helpful.

23 Q. How would you describe  
24 Mr. Moore's communications style, when you did  
25 have interactions with him?



1 A. Straightforward.

2 Q. Blunt?

3 A. That could be a matter of  
4 opinion, but I would say straightforward.

5 Q. Did Mr. Moore's  
6 communication style ever interfere with the work  
7 that you were doing?

8 A. No, not at all.

9 Q. Did you see Mr. Moore  
10 socially?

11 A. Sorry?

12 Q. Did you see Mr. Moore  
13 socially?

14 A. Other than the golf  
15 tournament events I described previously, no.

16 Q. You had no other --

17 A. Sorry, I should correct  
18 that. I also had met him numerous times at  
19 various conventions, professional association  
20 conventions, but no personal relationship.

21 Q. Thank you. I'm going to  
22 turn now to the 2015 CIMA report. You can close  
23 that, Registrar. Thank you.

24 So, you mentioned just a  
25 moment ago that CIMA was doing some work in

1 respect of a safety review in respect of the LINC,  
2 and that was in 2014-2015. Is that right?

3 A. I don't remember the  
4 precise dates. I know we were engaged in that  
5 assignment. It was underway at the time we got  
6 the request to do what's being described in this  
7 inquiry as the 2015 report.

8 Q. Thank you. Okay. So, in  
9 May, May 5, 2015, a crossover collision on the Red  
10 Hill resulted in the deaths of two young women.  
11 Do you remember hearing about that crossover  
12 collision?

13 A. I was aware of it. I  
14 think I heard it in the news or in the press.

15 Q. Are you a Hamiltonian  
16 yourself?

17 A. No. I live in Grimsby,  
18 Ontario.

19 Q. Registrar, can you bring  
20 up OD 7, page 9, paragraph 24, please.

21 THE REGISTRAR: Sorry,  
22 counsel. Do you mind just repeating the page?

23 MS. LAWRENCE: Sure. OD 7,  
24 page 9, paragraph 24. Thank you.

25 BY MS. LAWRENCE:

1 Q. So, on May 11, there's an  
2 e-mail in the OD that Mr. Ferguson e-mailed you  
3 about the possibility of CIMA conducting a review  
4 on the Red Hill for possible barriers. He's just  
5 asking here -- asking for a cost. I'm going to  
6 turn up now some notes of yours.

7 So, you can close that,  
8 Registrar, and if you can open CIM22418.  
9 Registrar, would you like me to repeat that?  
10 CIM22418.

11 THE REGISTRAR: Sorry,  
12 counsel. Is it under a different doc ID maybe?

13 MS. LAWRENCE: Maybe. Why  
14 don't we try 22410. And if you could go to  
15 image 6, please.

16 BY MS. LAWRENCE:

17 Q. So, this is not your  
18 notebooks that we've been looking at where the  
19 date is in the corner, but can you identify this  
20 as your handwriting in another notebook?

21 A. I switched notebooks, so  
22 this is my notebook and the date is on the top of  
23 the page.

24 Q. All right. And it says  
25 "Dave Ferguson." Can you read the rest?

1 A.

2 "David Ferguson, detailed  
3 analysis of RHVP as  
4 LINC."

5 New bullet:

6 "Also through in  
7 lighting."

8 New bullet:

9 "May 21 meeting."

10 Q. I read that as "also  
11 throw in lighting." Is that --

12 A. Could be.

13 Q. So, is it fair to say  
14 from this note on the 13th you had a discussion  
15 with David Ferguson about a detailed analysis  
16 following that e-mail that he sent you on the  
17 11th?

18 A. Yes, I'm assuming there  
19 was a discussion. The entry would likely have  
20 been a conversation with Mr. Ferguson.

21 Q. Okay. Registrar, can you  
22 bring up OD 7, page 12, paragraph 35, and can you  
23 bring that up with page 13 as well. Thanks.

24 So, you'll see at the  
25 bottom -- yeah, you can call that out, Registrar.

1 Thank you. That's fine. That's fine. We'll just  
2 start with this.

3 So, this is the first part of  
4 an e-mail that you send to members of your team  
5 summarizing a discussion that you had had earlier  
6 that day:

7 "I spoke to David  
8 Ferguson on this matter  
9 today."

10 Your last sentence:

11 "The review will be for  
12 the RHVP and would  
13 include the areas towards  
14 the escarpment where the  
15 lighting is absent,  
16 essentially a repeat of  
17 the previous work."

18 Stopping there, the previous  
19 work is the 2013 report?

20 A. Yes. The previous work  
21 started at the Dartnall interchange, which is the  
22 beginning of the Red Hill Valley Parkway, and this  
23 review, I understood to be the entire -- yeah.  
24 This review would include the entire.

25 There was some confusion in

1 the beginning as to what this assignment was going  
2 to be, whether it was going to begin where the  
3 2013 assignment ended, at Greenhill, and proceed  
4 to the north, or would go back all the way to  
5 Dartnall and cover the entire Red Hill. I don't  
6 recall at this moment whether that was clarified  
7 yet. I seem to recall there was some input from  
8 Mr. Worrone that confirmed that.

9 Q. Okay. But at the end of  
10 the day, the 2015 CIMA project was in fact for the  
11 entirety of the Red Hill. Is that right?

12 A. At the end of the day, it  
13 was, yes, from Dartnall all the way through to the  
14 QEW.

15 Q. Okay. I'm picking up  
16 where I had stopped there:

17 "With a recognition that  
18 the answer regarding  
19 lighting is not simply  
20 no, as it was  
21 previously."

22 What did you mean when you  
23 wrote "the answer regarding lighting is not simply  
24 no, as it was previously"?

25 A. I think I was reflecting

1 the input from Mr. Ferguson that what had been  
2 clear in the previous report and that the scope of  
3 the assignment had restricted illumination to the  
4 ramps and not to the main line. In this case,  
5 that we were being directed to ignore that.

6 Q. So, you understood that  
7 the scope for this project would include  
8 assessment of illumination on the main line?

9 A. That's what I believe it  
10 says in the note, yes.

11 Q. Okay. Registrar, can you  
12 go to OD 7, page 17, paragraph 43. Thank you.

13 So, the following week or so  
14 Mr. Ferguson copied two of his colleagues or sent  
15 an e-mail to two of his colleagues and copied you.  
16 One of the items that needed to be reviewed: Some  
17 type of barrier, is there a need for lighting and  
18 expected cost, analysis of types of collisions  
19 that are occurring, and this is related to the  
20 timing that the report needed to be completed in  
21 September.

22 You responded attaching a  
23 preliminary work plan. I'm going to bring that  
24 up. Registrar, it's HAM4660. Registrar, can you  
25 just scroll down to the next image.

1                   And so, you'll see there's a  
2 work plan and this work plan, to me, looks very  
3 much like the work plan that we went through in  
4 the request for quotation.

5                   Registrar, if you can just go  
6 down to the next page.

7                   So, you see it's a series of  
8 tasks, including collision review and other tasks.  
9 Is that fair, that this is the way that CIMA  
10 organizes its work plans?

11                  A. For significant safety  
12 reviews, this would be consistent with what we  
13 would provide, regardless who the client was.

14                  Q. Did you draft this  
15 document yourself?

16                  A. Probably not the original  
17 draft. I may have had input to it.

18                  Q. Would you have reviewed  
19 it before it went out?

20                  A. If I've signed it, I  
21 would have reviewed it, yes.

22                  Q. Okay. Do you recall was  
23 this an assignment from the City roster?

24                  A. My recollection is yes.

25                  Q. Do you recall receiving



1 any feedback on your interpretation of the City's  
2 requirements; that is, the work plan that's set  
3 out here?

4 A. Yeah. I think as you  
5 showed on the previous page, the physical limits  
6 of the beginning and end of the assignment were  
7 inconsistent with what the City was wanting, so  
8 there was some back and forth that clarified that.  
9 The scope in this document, yeah, that picture  
10 there, shows that it was to be -- essentially  
11 where the 2013 studied ended and proceed north up  
12 to the Barton Street rail bridge, the rail bridge  
13 just north of Barton Street, and there was  
14 clarification that followed this submission of the  
15 proposal to bring it all the way up to where the  
16 LINC study was ending instead of stopping where  
17 the 2013 Red Hill study had ended, if that makes  
18 sense.

19 Q. Okay. And apart from  
20 that feedback about the boundaries of the study  
21 area, did you receive any other feedback from the  
22 City?

23 A. I would have to go back  
24 and check the notes. I don't believe there was a  
25 second submission. The clarification may have

1 come just through e-mails.

2 Q. Okay. Registrar, can you  
3 go to OD 7, page 25, paragraph 67, please. Thank  
4 you.

5 So, we've just moved forward  
6 to July of 2015. There's a back and forth between  
7 you and Mr. Worrone, who is at the City, and you  
8 said:

9 "We're anxious to proceed  
10 with the review, but  
11 we've not received a  
12 green light."

13 Do you recall there being some  
14 delay in starting this project and therefore  
15 feeling like there was some pressure around  
16 timelines?

17 A. Well, there were  
18 definitely pressures around timelines. I recall  
19 that. But we need approval from the client to do  
20 an assignment. We prefer that that approval come  
21 in the form of a purchase order, because typically  
22 the client prefers that as well. Sometimes if  
23 there's a necessity to fast track work, we'll  
24 initiate on the handshake agreement that, you  
25 know, the approval is coming.

1 Q. Registrar, can you cancel  
2 that call out and call out paragraph 69, please,  
3 on the next image.

4 This is also in July.  
5 Mr. Worrton sends the purchase order, asks you to  
6 get started and says in the first bullet:

7 "Will you still be able  
8 to meet the proposed  
9 draft submission dated  
10 July 13?"

11 And this was on July 8.  
12 Registrar, if you can close that call out and call  
13 out 71. And you said:

14 "July 13 is going to be  
15 problematic."

16 Close that. Thank you. If  
17 you can go back, Registrar, to 67.

18 Just while you're doing that,  
19 this was going to be a significant project and you  
20 were going to need more than a week to complete  
21 it. Is that fair to say?

22 A. Well, we didn't even have  
23 data, so it was not going to be possible. I was  
24 trying to be polite in the response to Mr. Worrton.

25 Q. Just turning back to

1 this, the third paragraph, you say to Mr. Worrone:

2 "It was also suggested to  
3 me that we speak with the  
4 Public Works road  
5 maintenance staff, as  
6 they may have some  
7 insight about collision  
8 history that has involved  
9 infrastructure, guardrail  
10 damages, that may also  
11 assist in the review."

12 And you say:

13 "Most of what they can  
14 provide will be mirrored  
15 in the collision reports,  
16 but we would be pleased  
17 to meet with them."

18 It says "it was suggested to  
19 me." Who suggested that to you?

20 A. I'm not exactly sure. It  
21 could have been internal staff. Anecdotal  
22 information relating to collisions can potentially  
23 be useful and I know internally some people had  
24 commented that they had seen damage to the  
25 guardrail along the parkway. I drove the road

1 regularly. Others did as well. They thought  
2 there might be some information to be gained from  
3 the awareness that the City would likely have had  
4 about damage to guide rails. It would be  
5 anecdotal, but it would possibly be useful for  
6 understanding what's going on at the location.

7 Q. Okay. Registrar, can you  
8 close out this call out and go to the next  
9 image or I mean the next image after that and call  
10 out paragraph 72.

11 Just following on this, Betty  
12 Matthews-Malone e-mailed you and Sam Capostagno,  
13 district supervisor roads, under the subject line  
14 Red Hill Safety Review, and this is an e-mail that  
15 Ms. Matthews-Malone is sending primarily to her  
16 colleague introducing you as a consultant that  
17 will be undertaking a safety review.

18 Is this is the instruction to  
19 the road maintenance staff that you had suggested  
20 to Mr. Worrton?

21 A. I think the order might  
22 be different. I think what happened is we  
23 probably spoke to Mr. Worrton about the potential  
24 benefit of speaking to the maintenance staff and  
25 he goes, you know, Ms. Matthews-Malone is my wife.

1 We potentially had a discussion about it and, you  
2 know, she may have said, oh, I'll have Sam call  
3 you. I'll put you in touch with Sam, shortcutting  
4 the connection to the operations maintenance  
5 staff.

6 Q. Thank you. And  
7 Ms. Matthews-Malone, she at the time worked for  
8 the City. Right?

9 A. She did.

10 Q. Do you know what her role  
11 was at this time?

12 A. I believe her title was  
13 director of maintenance and operations, but you  
14 would have to confirm with her.

15 Q. Okay. But in essence,  
16 she was responsible, she was the director  
17 responsible, for the road maintenance crews?

18 A. She was the director  
19 responsible for road maintenance and operations,  
20 yes.

21 Q. Apart from this e-mail  
22 where she introduces you to the district  
23 supervisor, did Ms. Matthews-Malone play any role  
24 in CIMA's projects for the 2013 or 2015 CIMA  
25 reports?

1                   A.    No, not at all.  She  
2    wasn't employed at the City during the time of the  
3    2013 reports.  She had started her position, I  
4    think, in 2014, so she was there at the time of  
5    the 2015 report, but that department didn't have  
6    anything to do with our report.  So, other than  
7    this communication, which was an introduction to  
8    the appropriate staff, which I relayed to my staff  
9    at CIMA, there was no connection or discussion.

10                  Q.    Was she an instructing  
11    client for any aspect of the 2015 report?

12                  A.    No, not to my knowledge.

13                  Q.    Did you have any  
14    discussions with her about the work that CIMA was  
15    doing in the 2015 CIMA report?

16                  A.    I'm sure we talked about  
17    over the dinner table the fatality -- the  
18    collision involving the fatality of the two girls  
19    was a high-profile event.  It was very public and  
20    in the newspaper, so I'm sure that came up in  
21    conversation, and I no doubt relayed that we had  
22    been engaged to undertake a review following that  
23    incident, occurrence.

24                  Q.    Other than that, any  
25    other discussions with her about the review as it

1 was proceeding?

2 A. No. We typically didn't  
3 discuss work at the dinner table.

4 Q. Was CIMA aware, that is,  
5 your partners at CIMA, were they aware of your  
6 spousal relationship with Ms. Matthews-Malone?

7 A. Yes, fully. I had  
8 declared a conflict of interest statement and  
9 filed that with our company, which is in  
10 accordance with our internal policies, and I know  
11 my wife had done the same thing at the City as  
12 well.

13 Q. And CIMA was aware that  
14 Ms. Matthews-Malone had done the same thing at the  
15 City? Not just you, but your partners?

16 A. Well, they were not  
17 provided with her letter, but I had made them  
18 aware that she had informed them of the potential  
19 conflict of interest and I had done the same  
20 thing.

21 Q. And had CIMA assessed if  
22 there was any potential conflict in you doing work  
23 for the City, given your wife's position at the  
24 City?

25 A. I asked them to review



1 that and they confirmed for me that there was no  
2 conflict of interest in their assessment. CIMA  
3 had a very comprehensive process for confirming  
4 conflicts of interest and a process to document  
5 potential conflicts of interest, which I had done  
6 immediately upon her starting her position at the  
7 City, and I updated that when her position changed  
8 in 2018, I believe it was. She changed job  
9 titles. And so, we reviewed it regularly and I  
10 confirmed, checked, with my supervisor at CIMA  
11 specifically with respect to it. It was always  
12 something that we wanted to make sure was properly  
13 covered.

14 Q. Thank you. Registrar,  
15 can you close this call out and open up OD 7,  
16 page 35, paragraph 104, please. And you can call  
17 out. Thank you.

18 So, we're in August of 2015 at  
19 this point. We just went through in July you got  
20 the PO, so CIMA had started the work on the 2015  
21 safety review?

22 A. Yes. At this point, we  
23 were underway with the assignment.

24 Q. Okay. So, this is a note  
25 that you made in your notebook. It's an excerpt

1 from it, but it is from August 5, 2015. Can you  
2 take -- can you read out what's written here?

3 A. I can, but there's  
4 another note on August 6 --

5 Q. Yes.

6 A. I know that some of what  
7 is included in this note, which is dated August 5,  
8 was in fact from a conversation that occurred on  
9 August 6, so I think it's important to have the  
10 two of them side by side because they overlap.

11 Q. Fantastic. Let's do  
12 that. Hopefully you'll still be able to read it  
13 if we do two call outs.

14 A. It should be okay --

15 Q. Registrar, can you do a  
16 call out for the August 5 note that you just had  
17 called out, and then can you also call out the  
18 note which is on the next image right at the top  
19 of the page. Yeah.

20 Mr. Malone, if you can read it  
21 at this font, we don't have to do the call out?

22 A. It was fine before you  
23 did the call outs.

24 Q. You can cancel the call  
25 out, Registrar. Thank you.

1                    Maybe I'll just ask some  
2        questions given the context that you have just  
3        provided. So, there's these two notes, August 5  
4        and August 6. Do you think that the August 5  
5        notebook entry contains notations from an August 5  
6        meeting only?

7                    A.     No. I think -- I know it  
8        contains a hybrid of inputs from an August 5  
9        meeting, which occurred internal at CIMA, with the  
10       6th discussion, which occurred with Mr. Moore.  
11       Portions of what is shown on the August 5  
12       image are from the conversation with Mr. Moore,  
13       which occurred on the next day, August 6.

14                   Q.     Okay. So, why don't we  
15       look at the August 6 note first. Actually, no.  
16       Let's do it this way. Can you identify what notes  
17       are from your internal meeting with CIMA on  
18       August 5?

19                   A.     Yeah. I believe it's the  
20       top portion only, so the yellow highlighter, Red  
21       Hill parkway, B558, that's our project number, and  
22       my recollection is this was internal discussions  
23       that we were having at CIMA regarding aspects of  
24       the project. Asphalt has an asterisk or a star.  
25       Friction testing, asphalt, was listed. Drainage

1 with respect to centre line median and speed study  
2 and police ball-bank, adjacent. That is my  
3 recollection was what was in the August 5 meeting.  
4 And the question mark, Gary Moore, was just that,  
5 my notation to ask a question of Gary Moore  
6 regarding friction testing.

7 Q. Okay. Thank you. So, at  
8 this time, on August 5, what, if any, tentative  
9 conclusions had CIMA reached regarding  
10 recommendations for friction testing?

11 A. Well, at this point we  
12 had undertaken a fairly comprehensive analysis of  
13 the collision history for the roadway. We had  
14 received updated collision information for the  
15 portion of the roadway that had been covered in  
16 the 2013 study, and so we redid the collision  
17 analysis for the entire length of the roadway from  
18 the Dartnall interchange all the way through to  
19 the Queen Elizabeth highway interchange.

20 We had found a number of  
21 things. One of them was that there was a  
22 significant number of wet road collisions and some  
23 of those were specific to certain areas. And the  
24 other was that some speeds, some speed information  
25 which had also been reviewed, was relatively high.

1 So, a portion of that was consistent with what had  
2 been identified in the 2013 report because we were  
3 going over that Dartnall to Greenhill area again,  
4 albeit with updated information. And another  
5 portion was brand new. We had never looked at  
6 anything north of Greenhill before.

7 So, we had one set of findings  
8 which was consistent with what had been found in  
9 2013, potentially that a preponderance of wet road  
10 crashes might be something that would be  
11 indicative of a need for friction testing to  
12 understand the asphalt performance, so consistent  
13 with 2013. And the same finding was coming  
14 forward in the new data in the areas to the north  
15 of Greenhill.

16 So, it was partly repetition,  
17 if you like, update of the 2013 area, and partly  
18 brand new information based on new collision data  
19 for new section of the highway that had not been  
20 reviewed prior to this time.

21 Q. Thank you. And so, given  
22 that work that you had done and the analysis you  
23 were conducting for the entirety of the Red Hill,  
24 what conclusions had you reached particularly  
25 about doing friction testing on any aspect of the

1 Red Hill?

2 A. Well, my recollection  
3 from the meeting was that there was -- our  
4 internal discussion was essentially a question  
5 mark. We thought we had suggested that friction  
6 testing could be done on the portion of the  
7 roadway to the south, south of Greenhill, what was  
8 in the 2013 report. Friction testing was a  
9 recommendation included in that report.

10 And we had never been made  
11 aware as to whether or not that friction testing  
12 had been concluded, so we didn't know any results  
13 from that or what, if any, action the City had  
14 taken regarding friction improvement on the  
15 highway and/or friction testing in general, and we  
16 were finding that new portions of the roadway  
17 being investigated were also indicative of the  
18 potential need for assessment of the friction  
19 condition of the road surface given the  
20 preponderance of wet road collisions.

21 So, we had no friction data,  
22 we had nothing to go on, and to the best of our  
23 knowledge the City had not done any friction data,  
24 so the question was on the CIMA table as to what's  
25 the status of friction testing and, therefore, the

1 question mark, Gary Moore, was find out. He would  
2 have been the person, again, with his intimate  
3 knowledge of the Red Hill and the LINC, he would  
4 have been the person who would have been  
5 responsible for undertaking, as far as I  
6 understood.

7 Q. Okay. And before  
8 considering contacting Gary Moore, did you ask  
9 Mr. Worrton, Mr. Cooper or Mr. Ferguson for  
10 friction testing results from the recommendation  
11 in 2013?

12 A. Not to my recollection.  
13 This internal CIMA discussion occurred on  
14 August 5. To me, the most expedient route had  
15 been to go to Mr. Moore. He was the person with  
16 the most knowledge of the Red Hill in particular  
17 and it made the most sense to speak to him.

18 Jason Worrton was relatively  
19 new to the City. He wasn't there when the roadway  
20 was conducted. He didn't have any real knowledge  
21 of it, so he wouldn't have been the person. So,  
22 Gary Moore was the proper source and, as the notes  
23 indicate, I spoke to him the next day.

24 Q. Okay. And can you  
25 describe with reference to these notes your

1 discussion with Mr. Moore on August 6?

2                                   A.     So, I called Mr. Moore on  
3 August 6, the following day. The image on the  
4 right-hand side, page 36, is the beginning of my  
5 notes. Gary Moore, that 4867 was his telephone  
6 extension, and Hamilton Red Hill.

7                                   And then my recollection is we  
8 had a discussion and a conversation about friction  
9 testing and Mr. Moore provided a bunch of  
10 information regarding the nature of the roadway,  
11 you'll see notes related to perpetual pavement,  
12 resilience on top course, rich or mix bottom, SMA  
13 asphalt, stone mastic asphalt, was the  
14 clarification of what that was. Skid resistance,  
15 MTO did skid resistance test.

16                                  And then I also recall that I  
17 wrote notes on the bottom of the previous page,  
18 which was the August 5 entry, continuing to expand  
19 on the comments from Mr. Moore, high skid  
20 resistance, SMA, higher SMA, special aggregates,  
21 SMA, stone mastic asphalt, gap grade, quieter,  
22 drains, not a lot of fines, 260 thick, which  
23 referred to the thickness of the overall depth of  
24 pavement, 260 millimetres, and these were notes  
25 that I had marked down in conjunction with the



1 conversation that we had on August 6.

2 Q. In terms of stone mastic  
3 asphalt, was that term a new term for you arising  
4 out of this conversation with Mr. Moore?

5 A. It was, yes.

6 Q. What information, if any,  
7 did Mr. Moore convey to you about the skid  
8 resistance of SMA?

9 A. Well, the note I had  
10 scribbled was there's high skid resistance SMA,  
11 higher SMA, on the left -- sorry, yeah, the left  
12 side image. So, I think that's my notation that  
13 he was describing SMA asphalt as having higher  
14 skid resistance.

15 Q. A higher skid resistance  
16 than what comparator?

17 A. I don't believe he  
18 provided a comparator. I'm assuming he meant with  
19 regular asphalt pavement.

20 Q. Okay. And you referenced  
21 the note that said:

22 "MTO did skid resist  
23 test."

24 Did he --

25 A. My notation of his

1 conversation, his words.

2 Q. So, those were his -- he  
3 was conveying that information to you?

4 A. That's my recollection,  
5 yes.

6 Q. Did he tell you when MTO  
7 had conducted friction testing during this call?

8 A. Not at this time. There  
9 was subsequent information that provided clarity.

10 Q. Okay. And did he tell  
11 you that he was going to provide you with  
12 information during this call?

13 A. You know, I don't really  
14 remember that portion of the conversation, but I'm  
15 sure that's exactly what happened, because the  
16 follow-up note indicates here is the information  
17 essentially as per our discussion.

18 Q. Okay. But sitting here  
19 today, you can't remember whether he said, oh, I'm  
20 going to provide you with some information?

21 A. I don't remember that  
22 level of the detail of the conversation.

23 Q. Okay. And then from  
24 that, I assume you also can't remember how he  
25 characterized the information he was going to send

1 to you? Like, how he identified what he was going  
2 to send to you?

3 A. Well, other than the note  
4 here that MTO did skid resist test.

5 Q. Okay. In the telephone  
6 call, do you recall whether or not Mr. Moore  
7 mentioned Tradewind or Golder Associates?

8 A. I have no recollection of  
9 that. I mean, I was calling Gary Moore because  
10 CIMA, as noted in the August 5 note, was  
11 contemplating the potential need for friction  
12 testing on portions of the highway north of  
13 Greenhill and I know that our 2013 report had  
14 recommended friction testing on portions of the  
15 Red Hill south of Greenhill, and so I was  
16 highlighting that to him because I didn't know  
17 what had happened with the original  
18 recommendations and I was trying to get an update.  
19 And so, his input about did MTO -- MTO did skid  
20 resistance was part of his response with respect  
21 to the question.

22 Q. Okay. So, recognizing  
23 you don't have a perfect recollection, is it your  
24 recollection today that Mr. Moore, in response to  
25 your question about whether the CIMA

1 recommendation in 2013 had been implemented to do  
2 friction testing, that Mr. Moore's response was  
3 MTO did friction testing or were those two  
4 divorced parts of the discussion?

5 A. Yeah. I think it was  
6 probably the latter. I don't think there was a  
7 direct connection between the recommendation and  
8 the 2013 report and an answer being that the MTO  
9 did skid testing. I think they were separate  
10 elements and he was telling me about the pavement,  
11 he was telling me about the material used, the  
12 SMA, and he was telling me that MTO did skid  
13 resistance, albeit in this time without any  
14 context of dates and times.

15 Q. Okay. And what  
16 impression were you left with coming out of that  
17 call about whether the City had completed friction  
18 testing in response to CIMA's recommendations?

19 A. My impression at the time  
20 was that the City had not done friction testing in  
21 conjunction with the 2013 recommendation.

22 Q. Did you convey to  
23 Mr. Moore your preliminary findings in the  
24 collision review?

25 A. I'm not sure in

1 conversation at what level of detail. I'm pretty  
2 sure I relayed to him that we were contemplating  
3 incorporating friction testing, the recommendation  
4 for friction testing, in the 2015 report and I  
5 highlighted to him that we had done so in the 2013  
6 report, which I would have understood he already  
7 knew, but I was reminding him of that.

8 Q. During that call, did  
9 Mr. Moore tell you his view on whether or not the  
10 Red Hill had good friction levels?

11 A. I think the notation on  
12 the August 5 page that says "high skid resistance,  
13 SMA, higher SMA," is an indication of what he  
14 believed was present on the road.

15 Q. Thank you. Commissioner,  
16 I see that it is 11:34. I'm going to continue a  
17 related topic, but I'm going to close out this  
18 call out. Would now be an appropriate time for  
19 our morning break?

20 JUSTICE WILTON-SIEGEL: Sorry,  
21 I just had to unmute there. Yes, why don't we  
22 take our morning break now. We'll return in  
23 15 minutes. That will take us to ten to.

24 --- Recess taken at 11:34 a.m.

25 --- Upon resuming at 11:51 a.m.

1 BY MS. LAWRENCE:

2 Q. Mr. Malone, just before  
3 the break we were talking about a call that you  
4 had with Mr. Moore, and you said he sent you some  
5 documents after that call.

6 Registrar, can you turn up  
7 CIM10018.

8 THE REGISTRAR: Apologies,  
9 counsel. I'm just having issues with OnCue.

10 MS. LAWRENCE: Okay.

11 THE REGISTRAR: Sorry, if you  
12 could just repeat the doc ID for me?

13 MS. LAWRENCE: CIM10018.

14 Thank you.

15 BY MS. LAWRENCE:

16 Q. Mr. Malone, is this the  
17 document or information that you were referring to  
18 that Mr. Moore sent you after your call?

19 A. Yes.

20 Q. Okay. So, at the top is  
21 an e-mail from Mr. Moore to you on August 7 and he  
22 says:

23 "Brian, here is the Red  
24 Hill friction testing  
25 summary, not for



1                   So, in that body of the e-mail  
2   that was forwarded to you, it says:

3                   "The surface asphalt on  
4                   the RHVP is stone mastic  
5                   asphalt. Immediately  
6                   following construction in  
7                   2007, the Ministry of  
8                   Transport conducted  
9                   friction testing on both  
10                  southbound lanes."

11                  And then there's a table.

12   There's also references in 2013 to friction  
13   numbers measured on the RHVP in both directions by  
14   Tradewind Scientific using a grip tester.

15                  Just stopping there, did you  
16   at the time -- were you familiar with the company  
17   Tradewind Scientific?

18                  A.    No.

19                  Q.    Were you familiar with  
20   the methods by which friction testing was  
21   conducted; that is, using a grip tester or other  
22   devices?

23                  A.    I knew there were, are, a  
24   variety of methods to measure friction. I wasn't  
25   necessarily familiar with the grip tester method



1 more intimately than any others.

2 Q. Okay. And there's also  
3 this reference to the paper that we just looked  
4 at.

5 Going now just back up to the  
6 first paragraph of that paragraph, it says:

7 "The complete testing  
8 results are attached."

9 Registrar, if you could go to  
10 CIM10018.0002. Do you remember receiving and  
11 reviewing these?

12 A. I thought the version I  
13 saw had colour in it, but --

14 Q. That might have been  
15 right. That might just be a photocopying or  
16 transmission error in the inquiry's process.

17 A. I don't recall this black  
18 and white document. If it's the same as the one  
19 that had colour and I think a green banner, then I  
20 would have opened, I did open, the attachment.

21 Q. I am just going to see if  
22 I can assist with that particular issue.

23 THE REGISTRAR: Sorry,  
24 counsel. I can open the native of it.

25 MS. LAWRENCE: That would be

1 great. Thank you. So, I think that this would be  
2 MTO2228.

3 THE REGISTRAR: I have it as  
4 this document as well, if that helps.

5 MS. LAWRENCE: If you can pull  
6 up the native that you have and reference the doc  
7 ID, please.

8 THE REGISTRAR: Okay, so this  
9 is CIM10018.2.

10 MS. LAWRENCE: Thank you.

11 BY MS. LAWRENCE:

12 Q. Is this, Mr. Malone, the  
13 format that you recall reviewing?

14 A. That's my recollection.  
15 It was an Excel spreadsheet and the colours are  
16 more familiar.

17 Q. Great. And just for the  
18 Commissioner's notes, these are documents that  
19 have previously been referred to and they are also  
20 MTO2228 and 2229, but we're using this doc ID  
21 because these were the ones that were sent to  
22 Mr. Malone.

23 So, looking at this, had you  
24 seen spreadsheets like this, that set out friction  
25 testing?

1                                   A.    No, not to my  
2    recollection.

3                                   Q.    Registrar, can you bring  
4    up the other native file, which would be  
5    10018.0003.  Thank you.

6                                   So, this is would be the other  
7    of the two attachments, the Excel attachments,  
8    that you received from Mr. Moore.  Is that right?

9                                   A.    I believe so, yes.

10                                  Q.    Okay.  Registrar, can you  
11   click on the bottom where it says chart.  Both of  
12   the Excel spreadsheets have a chart like this.  Do  
13   you remember if you looked at the charts as well?

14                                  A.    I don't recall precisely.  
15   I probably did, yes.

16                                  Q.    Okay.  Registrar you can  
17   close that.  Actually, sorry, if you can bring up  
18   the e-mail, which is 10018, CIM10018.  Perfect.

19                                  Were you able to interpret and  
20   understand the data in the e-mail that Mr. Moore  
21   forwarded to you?

22                                  A.    I didn't attempt to.

23                                  Q.    Based on your review of  
24   this message, who did you think conducted friction  
25   testing in 2007?

1                   A.     Well, it was clear that  
2     the -- according to the input from Gary and the  
3     notes from the August 6, that the MTO had  
4     conducted the friction testing, and I understood  
5     this note to verify that and this was MTO  
6     information, not City of Hamilton information.

7                   Q.     Based on your review of  
8     the message that Mr. Moore forwarded to you, who  
9     did you think conducted friction testing in 2013?

10                  A.     I wasn't sure, so I asked  
11     questions to Mr. Moore and there are subsequent  
12     e-mails to which he provided a response.

13                  Q.     Do you recall having  
14     conversations with -- having a conversation with  
15     Mr. Moore on August 6 about the use of the  
16     information he was going to provide to you; that  
17     is, what use you could make of it?

18                  A.     No.

19                  Q.     How did you interpret  
20     Mr. Moore's statement, "not for republication"?

21                  A.     That this information was  
22     the property of the Ministry of Transportation and  
23     not the City of Hamilton, so he wasn't and he was  
24     requesting that I not release it publicly.

25                  Q.     When you say "release it

1 publicly," what does publicly mean?

2 A. He was providing it to me  
3 for my information, but it was information that  
4 was the property of the Ministry of  
5 Transportation, so my understanding was he had  
6 asked for it not to be republished, presumably  
7 because that's what the Ministry had told him when  
8 and if he got access to it.

9 Q. Okay. And did you  
10 understand or interpret that this meant you  
11 couldn't publish it in any report prepared by  
12 CIMA?

13 A. Well, I would not have.  
14 If it had not been released by the MTO and  
15 Mr. Moore's note specifically indicates not for  
16 republication, so any inclusion in a CIMA report  
17 would be in violation of that property ownership  
18 that the Ministry has of the information.

19 Q. Okay. Registrar, can you  
20 go to OD 37, page 37, paragraph 109.

21 THE REGISTRAR: Sorry,  
22 counsel. I didn't catch which OD document.

23 MS. LAWRENCE: OD 7.

24 THE REGISTRAR: OD 7, okay.  
25 Thank you. Sorry, I put up 6.

1 MS. LAWRENCE: Thank you.

2 BY MS. LAWRENCE:

3 Q. So, you see in  
4 paragraph 9, if you could call that out,  
5 Registrar, so you respond on the same day and you  
6 ask some questions about where the data is coming  
7 from and about FN numbers. Why did you ask these  
8 questions?

9 A. Sorry, why did I ask the  
10 questions?

11 Q. Yeah.

12 A. I was trying to  
13 understand if the City had interpreted the data.

14 Q. You reference:  
15 "I've also read that FN  
16 numbers greater 35 (or  
17 higher) in a zone would  
18 suggest skid resistance  
19 is not an issue on the  
20 pavement."

21 Do you recall where you read  
22 that FN numbers greater 35 would suggest that skid  
23 resistance is not an issue?

24 A. I don't recall a precise  
25 publication, no.

1 Q. Did you understand how  
2 friction numbers are used in geotechnical design  
3 manuals?

4 A. Geometric design, you  
5 mean?

6 Q. Pardon me. Yes.

7 A. Yes.

8 Q. Did you, at this time,  
9 have any existing knowledge about friction levels  
10 and what they signify in those design manuals?

11 A. Yes.

12 Q. Can you explain those,  
13 what that knowledge was?

14 A. I understand how friction  
15 values are incorporated into geometric design,  
16 both for stopping sight distance design  
17 components, which would be longitudinal friction  
18 aspects, and for horizontal curve design, which  
19 would be for lateral friction components. I  
20 understood the fundamental parameters which are  
21 used in the prevailing geometric design guide for  
22 urban roads, which is the Transportation  
23 Association of Canada. They use a different  
24 nomenclature to some extent. They use a decimal  
25 system, so there are friction numbers provided for

1 stopping sight distance and for lateral friction  
2 for curve design in the manuals, so I'm aware of  
3 what those numbers are and can correlate them to a  
4 friction number as potentially as determined from  
5 field investigation.

6 Q. What would the correlated  
7 friction number be from those decimal references?

8 A. For lateral friction on  
9 curves -- I apologize, I don't have the manual in  
10 front of me, so it's probably dangerous to recall,  
11 but it's in the range of 0.19, which would  
12 correlate to 19 as a friction number for lateral  
13 friction through horizontal curves, and for  
14 stopping sight distance the friction number is  
15 typically 0.29, I believe, for 90 kilometres an  
16 hour design speed or 100 kilometres an hour design  
17 speed, pardon me, but I would have to double check  
18 that with the manual and I apologize.

19 Q. No problem. So, in terms  
20 of the latter, is there a correlated friction  
21 number that you can use?

22 A. Well, the crude  
23 correlation is simply the 0.29 is equal to 29.  
24 The challenge is that the -- it's a theoretical  
25 number, so it means to measure friction, there are



1 a variety of means measurement techniques that can  
2 be utilized. And so, it was my view and still is  
3 at the time that it's a bit dangerous to do a  
4 direct comparison between the theoretical  
5 number and the geometric design guides and the  
6 number, which is determined from whatever  
7 measurement technique you're using in the field.

8 Q. Okay. Thank you.

9 Registrar, can you go to OD 7, page 39,  
10 paragraph 160. Thank you.

11 So, Mr. Malone, I'm happy to  
12 take you to the underlying document, but this  
13 reflects Gary's response to your e-mail. His  
14 response is in red. Do you remember receiving an  
15 e-mail in that format, where he's putting in his  
16 answers into your initial e-mail?

17 A. I do, yes.

18 Q. From Mr. Moore's  
19 responses here, what did you conclude about  
20 whether or not the City had conducted its own  
21 friction testing?

22 A. Well, Mr. Moore responded  
23 to a couple of questions. One of them was the --  
24 I think it's below the line here, if I've got it  
25 right. Yes, it's the very bottom line. It says:

1 "Testing was done by MTO  
2 both times."

3 So, I would say they are  
4 comparable, meaning the numbers that are in the  
5 two groups of testing. So, my understanding from  
6 the response from Mr. Moore was that friction  
7 testing had been done in 2007, which would have  
8 been just prior to or immediately at the opening  
9 of the Red Hill Valley Parkway, and subsequently  
10 friction testing had been done by MTO, not by the  
11 City, in 2013.

12 So, my conclusion was that the  
13 City had not done any friction testing on the  
14 parkway and the indication was that there were two  
15 rounds of tests that had been done. I'm assuming  
16 the 2013 one would have been prior to completion  
17 of the 2013 report anyways. No other information  
18 was provided about friction testing being done by  
19 the City.

20 Q. Okay. And you concluded  
21 that the testing in 2007 and the testing in 2013  
22 had both been done by MTO?

23 A. I didn't conclude that --

24 Q. You interpreted --

25 A. I was told that by

1 Mr. Moore, so I accepted the statement that he  
2 made, that testing was done by MTO both times, so  
3 I would say they are comparable. That was his  
4 quote, not mine.

5 Q. Did you take any steps to  
6 confirm with other City staff if friction testing  
7 had been done expressly in response to CIMA's 2013  
8 recommendations after you received this e-mail?

9 A. No, I didn't. I had  
10 spoken to Mr. Moore and asked him that question,  
11 highlighting that friction testing had been  
12 recommended in our 2013 report and the e-mail, the  
13 previous e-mail, was what he had responded with,  
14 so I understood that to be a conclusive answer  
15 from the City, from the person responsible to the  
16 City for friction testing, which would have been  
17 Mr. Moore on the Red Hill Valley Parkway, as being  
18 an indication that it had not been done. So, no,  
19 I didn't check with others because I had a  
20 conclusive answer from the City.

21 Q. Did Mr. Moore's responses  
22 in this e-mail provide you with clarity as to  
23 whether the City had a friction assessment  
24 process?

25 A. Well, it provided me with

1 an indication that they did not have a friction  
2 assessment process. MTO, at the bottom of the  
3 first paragraph, the question was about the  
4 friction numbers from the MTO report and his  
5 response was, don't know, is indicative to me that  
6 there wasn't an understanding of the  
7 interpretation of the MTO results or they didn't  
8 have their own internal process to do an  
9 assessment.

10 And the next paragraph as  
11 well. It also highlights not a City  
12 specification.

13 Q. When Mr. Moore told you  
14 that the testing had been done by MTO both times,  
15 did you accept that statement at face value?

16 A. Yes, absolutely.

17 Q. When Mr. Moore told you  
18 that the test results from 2007 and 2013 were  
19 comparable, did you accept that statement at face  
20 value?

21 A. I accepted what was  
22 written in this e-mail. I wasn't sure what  
23 interpretation had taken place, particularly in  
24 respect to some of the responses that are in this  
25 e-mail. So, I can't say that I had any confidence

1 that there wasn't an interpretation of the MTO  
2 data, but to be honest I can't say there wasn't.  
3 It was just data done by others, not by the City.

4 Q. Did you contact anyone at  
5 the Ministry of Transportation to discuss the  
6 friction test results that Mr. Moore sent you?

7 A. No, I did not.

8 Q. Why not?

9 A. Because this information  
10 that the Ministry had conducted friction testing  
11 was simply confirmation for me that the City  
12 itself had not conducted friction testing in  
13 accordance with the recommendations that we had in  
14 the 2013 report. And our recommendation was that  
15 the City could conduct friction testing on their  
16 roads and the City -- with the intent that the  
17 City would interpret those results and make their  
18 own determination as to what to do with those  
19 results.

20 Mr. Moore, by the provision of  
21 this information, confirmed for me that the City  
22 had not done that, and so it was frankly not  
23 relevant to me that the Ministry had done it. It  
24 was not a Ministry highway. I was aware of that.  
25 We had suggested the City undertake their testing,

1 the City evaluate their friction results, and so I  
2 didn't have any results from the City to comment  
3 on and I didn't think it was relevant that the MTO  
4 information in the context of what I was trying to  
5 understand, which was whether or not the City had  
6 done friction testing.

7 Q. Okay. Mr. Moore stated  
8 in his response that MTO keeps friction numbers,  
9 quote, "close to the vest." "This info very close  
10 to the vest," end quote. Did you know at the time  
11 whether that was true or not?

12 A. No, I did not.

13 Q. Did you know whether any  
14 other municipality had a performance specification  
15 for friction levels?

16 A. If you're asking in the  
17 context of a specific friction number, is that the  
18 context of the question?

19 Q. The context of the  
20 question was you asked Mr. Moore:

21 "Do you have a  
22 performance specification  
23 for the FN values strived  
24 for?"

25 And my question was: At this

1 time, did you know if other municipalities had  
2 performance specifications for an FN value?

3 A. No, I did not at the time  
4 know whether other municipalities had a  
5 performance specification for a specific FN value.  
6 I was aware that some municipalities had friction  
7 evaluation capabilities or undertook that on  
8 occasion on some of their roads, but generally  
9 friction measurement and evaluation and a  
10 performance specification for friction was not a  
11 standard part of work that I would be involved in  
12 and I, from my understanding, was not part of  
13 normal design maintenance and operation side.

14 Q. Okay. Earlier you said  
15 geometric design work manuals dealt with friction  
16 levels and we went through I think what you called  
17 the crude correlation. Just to ensure that I have  
18 your evidence on this, where did you get the  
19 information that a FN number less than 30 was  
20 below a desired level, if that in fact was your  
21 evidence?

22 A. I didn't -- I don't  
23 believe I stated that earlier. I didn't know  
24 where the -- I don't recall where I received any  
25 basis for that question. Obviously I got it

1     somewhere.

2                             I am familiar with the  
3     geometric design guide that indicates a friction  
4     number for stopping sight distance at 100  
5     kilometres an hour, which I believe is 0.3, which  
6     is 30. So, the 30 number or 0.3 number in the TAC  
7     guidelines, 0.30, is, you know, considered to be a  
8     friction value which is incorporated in terms  
9     undertaking design. When you design a road for  
10    stopping sight distance, you incorporate a  
11    friction number as well as the curve radius and  
12    the reaction, perception to reaction time, and the  
13    braking distance required. And so, the friction  
14    number comes into play in terms of understanding  
15    what stopping sight distances may be required as  
16    given locations.

17                            And similarly, friction value  
18    is incorporated into the calculation for  
19    horizontal curves, taking into account the radius  
20    of the curve and superelevation and the friction  
21    value assumed to be available on the road surface.

22                            Q.    Okay. So, apart from  
23    that explanation from design manuals, do you have  
24    any other recollection for the comment in this  
25    e-mail where you say:



1 "Am I correct that FN  
2 numbers of less than 30  
3 are below the desired  
4 level?"

5 A. I think I've already  
6 answered that. I don't --

7 Q. Anything else besides  
8 what you've already told us? Sorry for  
9 interrupting.

10 A. I don't recall the  
11 specific reference that I made and the TAC  
12 reference would be the most critical one, in my  
13 mind.

14 Q. Okay. We've already gone  
15 through the attachments to the first e-mail.  
16 Mr. Moore didn't provide to you at any point a  
17 copy of the Tradewind report, did he?

18 A. Mr. Moore never did. I  
19 only received the Tradewind report in 2019.

20 Q. On August 7, 2015, did  
21 you know that the Tradewind report existed?

22 A. Similar to the previous  
23 answer. Because I didn't receive it until 2019,  
24 no, I had no idea what it was. It was explained  
25 to me in this e-mail from Mr. Moore that both of

1 these studies were done by the MTO. Tradewind  
2 didn't mean anything to me at the time.

3 Q. Okay. Registrar, if you  
4 can close that call out and go back into CIM10018.

5 So, just for clarity, in the  
6 e-mail, in the lower e-mail, from Golder where it  
7 says:

8 "In 2013, the friction  
9 numbers were measured on  
10 the RHVP in both  
11 directions by Tradewind  
12 Scientific using a grip  
13 tester and then their  
14 average FN numbers are as  
15 follows."

16 And then there's four rows.  
17 My question specifically was: Did you know of the  
18 existence of a report prepared by Tradewind at the  
19 time, in August of 2015?

20 A. Based on this e-mail, I  
21 knew there was friction testing done in 2007 and  
22 again in 2013. I questioned Mr. Moore and he  
23 confirmed that both of those were done by MTO.  
24 Tradewind Scientific did not mean anything to me  
25 at the time, so I didn't know what it was. I did

1 not have the Tradewind Scientific report. It was  
2 not provided as part of this attachment and the  
3 first time I ever saw it was in 2019.

4 Q. Okay. And Mr. Moore  
5 never conveyed to you the fact that such a report  
6 existed?

7 A. I never asked the  
8 question. He never conveyed it. He confirmed  
9 that these two sets of testing were done by MTO.

10 Q. Did you ever expressly in  
11 2015 ask Mr. Moore to provided you with all of the  
12 friction test data and reports that Dr. Uzarowski  
13 refers to in this e-mail?

14 A. I never asked Mr. Moore  
15 for any friction testing results. My concern, my  
16 focus, was on the recommendation we had made in  
17 2013 for the City to -- that the City could  
18 undertake friction testing. I was seeking an  
19 understanding as to whether or not that had  
20 occurred and, based on this e-mail and the series  
21 of responses that followed, it was my  
22 understanding clearly that the City had not done  
23 that.

24 So, no, I didn't pursue  
25 further this information because this was

1 confirmation that the City had not done or, sorry,  
2 confirmation had been provided that the City had  
3 not done friction testing. That's the only  
4 element I was trying to validate in the series of  
5 e-mails and subsequent responses.

6 Q. Thank you. Registrar,  
7 can you go to OD 7, page 39, paragraph 118,  
8 please.

9 So, you send that exchange  
10 with Mr. Moore to your colleagues at CIMA and you  
11 say:

12 "It doesn't help much  
13 because it appears that  
14 the City abdicates  
15 responsibility for  
16 assessing friction on  
17 pavement surfaces to the  
18 MTO for some reason."

19 What did you mean by abdicates  
20 responsibility?

21 A. Well, I think the intent  
22 of this sentence was informing my co-workers that  
23 the City had not done friction testing on the  
24 roadway per our recommendation in 2013 and I had  
25 been relayed, we had been relayed, some

1 information from the MTO. And so, I think my  
2 interpretation was that the City may be relying on  
3 MTO or I used the word "abdicates" because it  
4 appeared that the City was not responding to the  
5 request, suggestion, that friction testing should  
6 be done. They simply provided me with some  
7 information on friction testing that had been done  
8 by others.

9 Q. Thank you. And if the  
10 City had conducted friction testing in 2013 and  
11 provided it to you in 2015, how would you use the  
12 friction testing that had been conducted, you  
13 know, two years prior? What use would that be to  
14 you?

15 A. I wouldn't use the  
16 friction testing results. What I was looking for  
17 was information on the City's use of friction  
18 testing results.

19 So, the purpose of the  
20 original recommendation in 2013 for friction  
21 testing was for the City to gather additional  
22 information and come to some conclusions  
23 internally as to their assessment of the friction  
24 on pavement surface. We did not know as we were  
25 undertaking CIMA's safety reviews, both in 2013

1 and again in 2015, what friction values were. It  
2 was not our task to measure friction because that  
3 is something that the municipality needs to do  
4 using whatever technique and method they elect to  
5 set their baseline and standard.

6 I understand friction values  
7 in the realm of design and operations, but the  
8 determination as to whether or not your pavement  
9 surface friction is sufficient is a decision that  
10 the road authority needs to make themselves using  
11 whatever analysis techniques they have decided to  
12 utilize.

13 And so, in response to your  
14 question, my comment, perhaps flippantly, was that  
15 the City was abdicating that responsibility to the  
16 Ministry or perhaps a better wording would be that  
17 the City was not assessing friction. They just  
18 relayed some MTO information to us.

19 Q. Given your experience as  
20 a road safety expert, would you have expected that  
21 the City would have a friction assessment program?

22 A. I would expect the City  
23 would have the capability of assessing friction.  
24 I can't comment as to whether or not they should  
25 have a friction assessment program, you know, in a

1 formal sense with some sort of regular testing and  
2 applications and measurements. Friction values  
3 are defined in the geometric design guides that  
4 we've discussed, and so there's an understanding  
5 that if you're going to operate a roadway, you  
6 need to have those friction values because that's  
7 what has been built into the design. And then the  
8 road authority needs to make their own  
9 determination as to how or whether or not they're  
10 providing that friction value on their road  
11 surface. It's not a decision for CIMA to  
12 undertake. It's an operating decision by the  
13 municipality.

14 Q. In this e-mail, you say:  
15 "We'll need to decide how  
16 to deal with this in the  
17 report."

18 Why not just put it into the  
19 report? This being the 2015 report that CIMA is  
20 working on.

21 A. Well, no. The question  
22 is whether or not we should be including the call  
23 for friction testing in the report. We had  
24 included that in the 2013 report and it was  
25 apparent to me, based upon information provided,

1 that the friction testing had not been done in  
2 2013. We were contemplating including friction  
3 testing in the 2015 report. We were reviewing new  
4 areas of the highway, so there would have been a  
5 call for friction testing to be done on the new  
6 portions that we were reviewing based on new  
7 information anyways, but the simply reinforced the  
8 fact that no friction testing had been done so  
9 far.

10 So, we weren't -- the  
11 reporting of the friction numbers would never have  
12 been in our report. The report was recommending  
13 that friction testing and analysis be done by the  
14 City, and what we did was include that  
15 recommendation again in the 2015 report with more  
16 forceful language.

17 Q. Okay. If you had had --  
18 you said reporting of friction numbers would never  
19 have been done in the report, but if you had had  
20 City-produced, City-conducted, friction tests,  
21 might that have assisted CIMA in determining the  
22 appropriate countermeasures?

23 A. No. We had highlighted  
24 countermeasures to deal with what was potentially  
25 poor friction on the roadway, and those



1 countermeasures were identified and listed in the  
2 report. The City needs to make a determination  
3 whether friction was in fact the causal factor in  
4 crashes.

5                               The challenge in the safety  
6 review is that there are multiple potential  
7 factors that lead to collisions occurring.  
8 Friction, because of the preponderance of wet road  
9 crashes, friction was one of the potential causes  
10 without sufficient information having been gleaned  
11 as to whether or not friction was problematic, but  
12 speeds were another concern. The curvilinear  
13 alignment of this highway was another concern and  
14 it's impossible to know which was the causal  
15 factor of collisions as opposed to a correlated  
16 factor.

17                               So, simply knowing or listing  
18 the friction numbers that would have been in the  
19 MTO report would have served no purpose in CIMA's  
20 report. We're not assessing the friction on the  
21 road surface. What we were saying to the client  
22 is they should assess friction on the road surface  
23 because that may be something that they need to  
24 assess, similarly to the way speed should be  
25 assessed. We made comments in the 2015 report

1 about the need to assess speed and we highlighted  
2 that that information is useful and needs to be  
3 interpreted by the City.

4 Q. Well, why don't we go  
5 into the report, the first draft of the CIMA  
6 report, that was sent to the City in September of  
7 2015.

8 Registrar, can you go to OD 7,  
9 page 40, paragraph 122.

10 So, this is the transmission  
11 of the draft 2015 report. You see it's  
12 September 6.

13 Registrar, can you close that  
14 out and can you go to CIM10146.0001.

15 So, this, like others we  
16 looked at, is your general logo and this is your  
17 B558 project number. It says Draft Report,  
18 September 2015. I don't see on this, unless I'm  
19 not looking carefully, your numbering system, your  
20 E001?

21 A. It's embedded in the file  
22 name.

23 Q. Okay. Registrar, can you  
24 go to image 3, please. Image 4, please. Thank  
25 you.

1                   So, I'm just going to go  
2 through the table of contents so that we're not  
3 going through all the details. As set out in that  
4 task list and very much like the 2013 report, CIMA  
5 did a review of collisions for the entire Red  
6 Hill. Is that right?

7                   A. Yes.

8                   Q. And you also did a field  
9 investigation?

10                  A. Yes.

11                  Q. You did an illumination  
12 review, which is right on the bottom of that page?

13                  A. Yes.

14                  Q. Registrar, can you go to  
15 the next image, please.

16                    You determined a number of  
17 potential countermeasures: Signage, friction  
18 testing, illumination, delineation, and then  
19 median barrier, which was one of the issues  
20 Mr. Ferguson had raised with you. Then you did a  
21 cost-benefit analysis and then you did  
22 recommendations. So, very much the same sort of  
23 format as the 2013 report. Right?

24                  A. Yes.

25                  Q. Okay. So, I'm going to

1 go to page 17. Apologies, that is image 17 and  
2 what I'm looking for is image 24. There we go.

3 So, you've had -- I'm not  
4 going to take you through it, but you've gone  
5 through a summary of the work you've done and the  
6 conclusions on the collision review, and then you  
7 have a summary where you have identified:

8 "Wet weather collisions  
9 were found to represent  
10 approximately 50 percent  
11 of all collisions in the  
12 study area, which is  
13 significantly high  
14 compared to typical  
15 proportions."

16 What do you mean it's  
17 significantly high compared to typical  
18 proportions?

19 A. Well, I think we compared  
20 to provincial data and normally on any road, any  
21 given road, the number of collisions on wet roads  
22 is not as high as 50 percent. It's significantly  
23 less than that.

24 Q. You also find that single  
25 motor vehicle collisions amounted to 44 percent of

1 all collisions in the study area, followed by  
2 rear-ends and side-swipes. And was that higher  
3 compared to the typical proportions?

4 A. I would have to double  
5 check. I don't see that we referenced that  
6 specifically in this summary.

7 Q. Okay. You also say that  
8 the most frequent apparent driver action was lost  
9 control, followed by some driving properly, speed  
10 too fast, and both lost control and speed too fast  
11 are significantly high compared to typical  
12 proportions.

13 So, there, a driver action, is  
14 that based on the collision history records that  
15 are being reviewed?

16 A. It's based on information  
17 provided in the motor vehicle accident reports as  
18 reported to the police. There's sometimes  
19 challenges with the accuracy of that information.

20 Q. Okay. Registrar, can you  
21 go to the next image, please.

22 You have under Critical  
23 Locations and then at the very top you identified  
24 a northbound direction, one particular section  
25 around the King Street interchange, a southbound

1 direction, the on-ramps at various roads and all  
2 locations with a highest collision frequencies are  
3 located within or on the approach to or leaving  
4 horizontal curves?

5 And then you've also  
6 separately set out median-related collisions and  
7 the critical locations for median-related  
8 collisions.

9 Registrar, can you go to the  
10 next image, please and if you could call out under  
11 potential contributing factors to collisions and  
12 down to excessive speed. So, this is an overall  
13 finding from the collision review. You indicate  
14 that the proportion of wet weather surface  
15 collisions in the study area was significantly  
16 higher than typically observed in the City and in  
17 the province. We've already gone through that.  
18 And you said that a proportion of wet weather  
19 surface conditions suggests one or more of the  
20 following conditions may be present: Inadequate  
21 skid resistance, hazardous manoeuvres and  
22 excessive speed.

23 And is that conclusion based  
24 on the nature of wet weather conditions or is  
25 there something specific about the conclusions you

1 found here that led you to those three conditions?

2 A. Those three bullets are  
3 generic elements for -- linked to wet surface  
4 condition collisions. It's taken from what's  
5 called the PIARC Road Safety Manual as the  
6 reference number 9. It's a generic description of  
7 types of factors that may lead to wet surface  
8 conditions or wet surface collisions, excuse me.

9 Q. Okay. Like yesterday  
10 when you said that you look at the road, you look  
11 at the vehicle and you look at the driver, so here  
12 you're looking at aspects of those related to wet  
13 surface conditions. These are the same sort of  
14 generic statements that are possible contributors  
15 to wet surface conditions. Is that right?

16 A. Yeah. I think the one  
17 that's not listed here, which should be, is the  
18 horizontal alignment as well, curves in the  
19 roadway, but these are the generic factors if you  
20 exclude geometric elements that would be possibly  
21 linked to wet road crashes.

22 Q. Okay. Registrar, can you  
23 cancel this call out and call out the next three  
24 paragraphs. Thank you.

25 So, you also reference driver

1 actions in the study area, another indication  
2 being high speeds may be involved and the  
3 consequences of improper lane change may be  
4 aggravated in high speeds and wet surface  
5 conditions.

6 And so, these were all just a  
7 summary of the potential contributing factors to  
8 collisions. Is that right?

9 A. Yeah, I think so.  
10 Correct.

11 Q. Recognizing that this is  
12 a study of the entire parkway and 2013 was a  
13 smaller study area, how did the 2015 collision  
14 review compare to the 2013 collision review?

15 A. There were significantly  
16 more collisions on the main line portions of the  
17 highway, particularly related to areas where there  
18 were horizontal curves, as opposed to the 2013  
19 study, which was to the south. The focus there  
20 was on the interchange and the ramps, particularly  
21 what's called ramp 6 at Mud Street, still a  
22 geometric correlation there, but the location was  
23 ramp as opposed to main line.

24 So, in this section of the  
25 highway, there were a greater number of collisions



1 that were associated with located in conjunction  
2 with the horizontal curves.

3 Q. Was that an unexpected  
4 finding? When you went into this, were you  
5 predicting that that is what you would find?

6 A. We try never to predict  
7 the purpose of the study or the evaluation, so we  
8 come in with a clean slate in our assessment.  
9 It's not unusual to find collisions associated  
10 with a curve, because that's where the physical  
11 limitations of the roadway in that it curves  
12 instead of going straight have the potential to  
13 result in collisions. If a driver doesn't see the  
14 curve, they drive off it, that's a collision, so  
15 you have to physically interact with the road if  
16 you're driving through a curve. So, it's not  
17 uncommon that collisions will occur on curves and  
18 it's not uncommon that there will be more  
19 collisions at curves, but we never presuppose what  
20 the outcome is going to be.

21 Q. Okay. Registrar, can you  
22 call up image 29 and image 30.

23 So, this is on operating  
24 speeds and the report indicates that you reviewed  
25 speed studies conducted for the 2013 RHVP study.

1 Registrar, can you just  
2 highlight that. You don't need to call it out,  
3 but it's the second line on image 29, "CIMA  
4 Reviewed the Speed Studies Conducted for the 2013  
5 Speed Study." Thank you.

6 So, CIMA did not conduct speed  
7 studies itself in advance and for the 2015 CIMA  
8 report. Is that right?

9 A. We didn't conduct speed  
10 studies. The City provided us with speed study  
11 data and the data they provided us had been the  
12 same data that was provided in the 2013 study.

13 Q. And on image 30 at the  
14 top, there's a table for the RHVP operating  
15 speeds. That's the results of the speed study  
16 from 2013 being summarized in table 5. And just  
17 above that table it says:

18 "An average of more than  
19 500 vehicles per day were  
20 recorded exceeding 140  
21 kilometres per hour."

22 Do you see that?

23 A. Yes.

24 Q. I understand that this  
25 later became a controversy, this average of 500

1 vehicles per day were recorded exceeding 140  
2 kilometres. To your knowledge, this is  
3 information came from the 2013 study. Is that  
4 right?

5 A. That was my  
6 understanding, yes.

7 Q. And it was conducted by  
8 Pyramid on behalf of the City?

9 A. Well, the City provided  
10 us with the data and I believe their contractor  
11 was Pyramid.

12 Q. Okay. And did you have  
13 any, at the time when you were preparing the 2015  
14 report, reason to doubt the accuracy of those  
15 speed studies?

16 A. No.

17 Q. And did you have any  
18 concerns with using speed study data that was at  
19 least a couple of years old?

20 A. Not particularly. Speed  
21 study data tends to be fairly static. The road  
22 had been in operation since 2007, so data that was  
23 from 2013 when we're undertaking our study in  
24 mid-2015 was not -- I would believe it would be  
25 fairly accurate. I wouldn't expect speed data to

1 have changed significantly. Newer and more recent  
2 is better, but I wasn't overly concerned by the  
3 lag in time.

4 Q. Okay. In the paragraph  
5 that is under table 5, you reference a ball-bank  
6 indicator study to gain additional understanding  
7 of the potential collision contributing factors.  
8 Can you explain what a ball-bank indicator study  
9 is typically used for and how you used it here?

10 A. I can try. A ball-bank  
11 study is an empirical test that's conducted in a  
12 moving automobile. It uses a measure, which looks  
13 like a level on a curve, and it seeks to measure  
14 forces that an occupant of a vehicle would feel as  
15 they travel around a corner.

16 So, if you go around a curve  
17 at a slow speed, the measurement of ice would give  
18 you an indicator of degrees of angle, these  
19 numbers that are listed as the ball-bank readings,  
20 10, 12, whatever. And if you go around the same  
21 curve at a higher speed, the angle measured would  
22 be higher and there are tolerances provided in  
23 industry guidance that indicates what is an  
24 acceptable measurement for selected speeds as you  
25 travel through the curve. I hope that helps.

1 Q. It does. And what  
2 conclusions did CIMA come to in respect of the  
3 vicinity around King Street and Kingston Road,  
4 those interchanges, after completing the ball-bank  
5 indicator study?

6 A. So, just to back up half  
7 a step, the ball-bank indicator gives you an  
8 indication of what's called the advisory speed  
9 through a curve. So, the curve, the roadway, has  
10 been designed in accordance with some geometric  
11 design parameters. And you can measure the  
12 advisory speed through the curve by doing a  
13 mathematical calculation.

14 But the ball-bank provides a  
15 similar analysis that's an empirical test. It  
16 considers the radius of the curve, because you're  
17 travelling through the curve, it considers the  
18 speed of the vehicle as you travel through the  
19 curve, because you measure it at different  
20 operating speeds. By default, it takes into  
21 account the friction which is provided as you  
22 travel through the curve and you end up with a  
23 determination of a -- the degree of the  
24 sensitivity as you go through and make a  
25 conclusion as to what the advisory speed should be

1 through the curve.

2                                 So, long story short, the  
3 answer that was concluded in assessing these three  
4 curves was that the advisory speed through the  
5 curve in question, I can't remember exactly which  
6 one we're talking about here, was that the  
7 advisory speed was 100 kilometres an hour. It's  
8 not the speed at which you're physically capable  
9 of travelling through. It's just an indicator as  
10 to what would be a comfortable speed for  
11 motorists, is the word used in the guidance.

12                                 Q. Thank you.

13                                 A. And you supplement the  
14 results of the ball-bank study. You use that to  
15 help make determinations as to whether additional  
16 information needs to be provided to motorists in  
17 the form of an advisory speed tab. So, if you --  
18 and I'm sure you've experienced it in your  
19 driving. You'll see a curve warning sign on the  
20 roadway and in some locations there will be an  
21 advisory speed tab below that, some measurement,  
22 which is less than the posted speed limit. That's  
23 what the ball-bank study is for, is to help you  
24 make a determination whether or not you need to  
25 provide an advisory speed tab in conjunction with

1 the curve warning information which is present.

2 Q. Thank you. Registrar,  
3 can we go to image 32 now, please.

4 So, turning to pavement  
5 surface, the draft of the report references stone  
6 mastic asphalt and there are two references that  
7 are footnoted. Who drafted this and found those  
8 footnotes?

9 A. I don't remember  
10 precisely who drafted it. I could take a guess,  
11 but I won't do that. It wasn't me. And, sorry,  
12 the second part of your question was?

13 Q. Where do those references  
14 come from?

15 A. I would have to look at  
16 the references. Maybe it's in the bottom.

17 Q. Maybe I'll put this  
18 question differently. To your knowledge, was this  
19 research that was done internal to CIMA or was  
20 this information that was provided from some other  
21 source?

22 A. As referenced in the  
23 bottom of the page, there are other references  
24 that are not done by CIMA.

25 Q. But they were -- these

1 references were researched by CIMA. They weren't  
2 provided to CIMA from the City?

3 A. I don't believe they were  
4 provided by the City. We didn't do the research.  
5 We are referencing research which was done.

6 Q. Yes. Okay. The second  
7 paragraph says:

8 "Industry identified  
9 characteristics of SMA  
10 pavements is that skid  
11 resistance is lower in  
12 newer surfaces."

13 So, this is the early age low  
14 friction problem or issue from that paper that  
15 Mr. Moore sent you. Is that right?

16 A. I don't think it's  
17 actually the paper Mr. Moore referenced, but I  
18 think it's the same phenomenon which is discussed  
19 in another paper.

20 Q. Thank you, yes. I meant  
21 the phenomenon that we're talking about. By this  
22 point, had you personally undertaken any further  
23 research about early age friction with SMA?

24 A. I'm sure I had after the  
25 discussion with Mr. Moore and that likely led to



1 the internal discussion at CIMA that led to the  
2 inclusion of this. I don't believe I did this  
3 particular research, but, you know, it would be a  
4 bit of a collaborative effort potentially.

5 Q. Okay. And here, the  
6 draft says:

7 "The proportion of wet  
8 surface collisions seems  
9 to be increasing over the  
10 years."

11 And then there's a caveat in  
12 the footnote:

13 "This suggests that if  
14 low skid resistance is a  
15 contributing factor, it's  
16 not necessarily related  
17 to normal early life  
18 properties of SMA  
19 pavements."

20 And that was the premise on  
21 which you were proceeding, that this was not an  
22 early life friction issue. Is that right?

23 A. I think what we were  
24 trying to do was include in the report that  
25 component, that element, of the early life lower

1 friction values in SMA asphalts to assist the City  
2 in some context of analyzing the -- utilizing the  
3 recommendations that we were providing, going to  
4 be providing them.

5 Q. Okay. Registrar, can we  
6 go to image 41. So, this is in the  
7 Recommendations section. And just continuing with  
8 pavement surface, one of the recommendations set  
9 out in this draft that we're looking at is to  
10 perform friction tests or friction testing and you  
11 say in the second paragraph:

12 "Because of the high  
13 proportion of wet surface  
14 condition and SMV  
15 collisions, the City  
16 could consider  
17 undertaking pavement  
18 friction testing on the  
19 asphalt to get a baseline  
20 friction coefficient to  
21 which to compare to  
22 design specifications."

23 So, I know you talked about  
24 this yesterday, but again, can you unpack why CIMA  
25 thought that pavement friction testing would

1 provide value to the City?

2                                   A. Well, I think the  
3 simplest answer is just perhaps an analogy to say  
4 if, for example, we didn't have any traffic speed  
5 information, we would then have recommended that  
6 speed studies be undertaken so that you can  
7 understand what's happening with speed. Speed  
8 would be a potential causal factor on collisions  
9 in horizontal curves, and so collection of speed  
10 data would assist in understanding if that  
11 contributes.

12                                   Friction data is in a similar  
13 category. In this case, we didn't have any  
14 friction information about the road surface. We  
15 had measured it, you know, to some extent by proxy  
16 with the ball-bank studies, but it's not a direct,  
17 by any means, friction measurement. But of course  
18 as you travel around a corner undertaking a  
19 ball-bank you are engaging the friction of the  
20 tires on the road surface.

21                                   So, the point was that  
22 friction information, input, is needed by the city  
23 in order to investigate whether or not friction is  
24 a causal factor, contributing factor, to  
25 collisions, and we had recommended that in 2013

1 and we were priming up to recommend it again in  
2 2015.

3 Q. Okay. In 2013, CIMA  
4 recommended the overlay of a high-friction  
5 application on a few different places, but I'm  
6 going to specifically focus on ramp 6.

7 During your work in 2015 for  
8 the 2015 CIMA project, did you confirm whether  
9 that recommendation had been implemented?

10 A. No, we didn't confirm  
11 whether or not any of the recommendations from  
12 2013 had been implemented. We had no follow-up  
13 project to undertake the review of those  
14 recommendations.

15 Q. I don't want this to be a  
16 memory test, but in respect of ramp 6, in the 2015  
17 CIMA report, you reconducted collision review on  
18 ramp 6. Right?

19 A. Sorry, we?

20 Q. Did CIMA reassess or  
21 reconduct a collision review in respect of ramp 6?

22 A. If information had been  
23 provided updating the crash information, we would  
24 have updated our information. I can't recall  
25 precisely whether we did or not. I'm assuming we

1 had overall update of collision information, so  
2 ramp 6 should or would have been included in that.

3 Q. Okay. Registrar, can we  
4 go to image 40, please. Apologies, it's image 39.  
5 Thank you.

6 So, just turning now to  
7 illumination, you -- pardon me for saying "you."  
8 I mean to say the report. The report indicates  
9 that the primary objective of illumination is to  
10 increase safety and the report mentions design  
11 choices that were made during the design phase  
12 that were intimately linked to approvals.

13 And so, there you're talking  
14 about environmental constraints and approvals. Is  
15 that right?

16 A. Yes.

17 Q. In advance of preparing  
18 this draft, had CIMA obtained further information  
19 about the specific environmental constraints that  
20 were assessed during the design phase?

21 A. Not to my recollection in  
22 any detail. I think we had some of the basic  
23 information that allowed population of this  
24 content, but we didn't have the full environmental  
25 assessment history records and all of that.

1 Q. And there are some  
2 references footnoted there. Do you recall whether  
3 CIMA went to try to find that information on its  
4 own or whether the City provided information to  
5 populate the drafting that we've just looked at  
6 here?

7 A. I don't honestly recall  
8 exactly which. We could have done it either way.  
9 Some information is publicly available and search  
10 the internet. I know we requested information  
11 and, you know, various things that we asked for  
12 were not provided or not available from the City,  
13 like the geometric design plans for the roadway,  
14 for example, we were told they were not available.

15 Q. Okay. The next paragraph  
16 goes through the warrant process, which we've  
17 already talked about.

18 Registrar, can you go to the  
19 next image, please.

20 Under table 9, there is  
21 results of the TAC warrant and the MTO warrant  
22 that CIMA conducted, and both indicate that they  
23 are warranted.

24 Just for clarity, that  
25 warranting, that was for the entire illumination

1 of the Red Hill. Is that correct?

2 A. That's my understanding,  
3 yes.

4 Q. In the paragraph between  
5 table 9 and table 10, it says:

6 "The MTO warrant provides  
7 additional criteria based  
8 on the benefit-cost  
9 ratio."

10 So, I believe you said  
11 yesterday that there's some differences between  
12 the TAC warrant analysis tool and the MTO warrant  
13 analysis tool. And do those differences reflect  
14 the differences between the warranting condition  
15 of 60 and 80?

16 A. They're similar but  
17 they're not the same tool. There's some  
18 differences between them. As highlighted, the MTO  
19 applies to MTO highways, roadways. I would need  
20 to open up each warrant to review the differences,  
21 but there are differences. They use a different  
22 number, so --

23 Q. I'm not going to make you  
24 do that. Is one of the differences between the  
25 MTO warrant process and the TAC warrant process

1 the cost-benefit calculation that plays into the  
2 warranting threshold? Is that correct?

3 A. Yeah, as stated in the  
4 paragraph between the two tables.

5 Q. Okay. And so, in this  
6 case, table 10 sets out the cost-benefit ratios  
7 and the warrant, and this report goes on to say  
8 that:

9 "Illumination will be  
10 warranted if the  
11 benefit-cost ratio of  
12 providing it is greater  
13 than one and optional if  
14 otherwise."

15 And then we're going to come  
16 back to that in a moment.

17 Before we go there, the next  
18 paragraph talks about other factors to be  
19 considered, including wildlife and drivers' eyes  
20 and other things, so you're providing a fair bit  
21 of context to consider whether to do illumination,  
22 even if it is warranted. Is that fair to say?

23 A. Yeah. I think we're  
24 giving some more complete context with respect to  
25 the potential for consideration of illumination in



1 the context of the Red Hill Valley Parkway. There  
2 are other factors -- as with any warrant, there  
3 are other factors that must be considered.

4 Engineering judgment must come into play.

5 Q. Okay. Registrar, can you  
6 go to image 42, please. Actually, sorry, I think  
7 we'll start on 41. If you can show image 41 and  
8 42 at the same time. There we go.

9 So, at the bottom it says:

10 "The primary objective of  
11 illumination is to  
12 increase safety."

13 We've already said that. And  
14 it says:

15 "As discussed in  
16 section 6, continuous  
17 illumination along the  
18 Red Hill is either  
19 warranted or optional,  
20 although restrictions  
21 from the approval phase  
22 may result in an  
23 undesired condition where  
24 illuminated and  
25 non-illuminated sections

1 alternate."

2 And then you set out the cost  
3 at CMF for this countermeasure. What is CMF?

4 A. CMF is collision  
5 modification factor.

6 Q. And then you set out your  
7 production costs. For this, where you say,  
8 "Continuous illumination is either warranted or  
9 optional," CIMA concluded that it was warranted.  
10 Is that right?

11 A. What we concluded was  
12 that the warrant was met. What we're highlighting  
13 is the context of what potential benefits come  
14 from installation of lighting. So, there's a CMF  
15 indicated. CMF is the potential for the  
16 countermeasure to modify, change, the number of  
17 collisions that might occur.

18 As you can see, it's very  
19 close to one, so the collision reduction value of  
20 lighting is not terribly good, and so that comes  
21 into consideration when you're doing the  
22 benefit-cost analysis.

23 Q. Okay. I have some  
24 additional questions on this, Commissioner, but I  
25 do note the time and I want to be mindful of our

1 regular lunch break. Would you like me to  
2 continue? I probably have another five more  
3 minutes on this and then I'll wrap up to another  
4 topic.

5 JUSTICE WILTON-SIEGEL: Thank  
6 you. Why don't we stop if it's going to be five  
7 minutes?

8 MS. LAWRENCE: Thank you.

9 BY MS. LAWRENCE:

10 Q. Registrar, if you can go  
11 back to that same document, CIM10146, and if you  
12 can go to image 55, please. Sorry, it's  
13 CIM10146.0001, image 55.

14 So, Mr. Malone, we did not go  
15 through all of the countermeasures that were  
16 suggested here, but CIMA did provide a summary of  
17 what it says at the top, prioritize list of  
18 countermeasures:

19 "The priority has been  
20 assigned based on ease of  
21 implementation,  
22 importance, ability to  
23 reduce collisions and  
24 ability to reduce  
25 severity."

1                   So, you would agree with me  
2    that CIMA turns its mind, its attention, to how to  
3    characterize a timeline for proposed  
4    countermeasures based on the factors that are set  
5    out in that paragraph. Is that right?

6                   A.    Yeah, and the client had  
7    requested a timeline to be included in the report.

8                   Q.    Okay. Do CIMA's  
9    recommendations on timelines or timing ever  
10   reflect its views for the urgency for improvements  
11   from a safety perspective?

12                  A.    Well, I wouldn't use that  
13   terminology. Any recommendation that we provide  
14   is intended to improve safety. If they can be  
15   done instantaneously, then that potential  
16   improvement would occur at the same time.

17                  The real world is that some  
18   things are able to be done quickly and other  
19   things may require significantly longer periods of  
20   time, including, as discussed previously, if  
21   there's significant budgeting or capital budgeting  
22   required as opposed to operating budgets.

23                  So, I think the timeline  
24   column that's provided here is primarily a  
25   reflection of the reality of installation and

1 budgeting for the completion of -- and I think  
2 that's sort of evident to some extent if --  
3 high-tension cable barrier, for example, was  
4 installed tomorrow after the report was released,  
5 that would have the greatest impact of reducing  
6 crossover collisions, but it's a significant  
7 decision-making process, it had not been included  
8 in original design, requires extensive capital  
9 budgeting, planning and installation, so it is  
10 going to be a longer term before that can be  
11 achieved as opposed to others which may be short  
12 term.

13                                 So, personally, I don't think  
14 that these are ordered in terms of imperative of  
15 safety improvement. They're all important for  
16 improving safety. That's why they've been  
17 recommended.

18                                 Q.    Okay. Thank you.

19                                 So, those are my questions in  
20 respect of this document and I think it's a good  
21 time, before we move to another topic, to take our  
22 lunch.

23                                 JUSTICE WILTON-SIEGEL: Okay.  
24 Well, it's almost 1:10, so we'll come back at,  
25 let's say, 2:20. We stand adjourned until that

1 time.

2 --- Luncheon recess taken at 1:08 p.m.

3 --- Upon resuming at 2:20 p.m.

4 BY MS. LAWRENCE:

5 Q. Good afternoon,

6 Mr. Malone. So, we are going to move forward in

7 time.

8 Registrar, can you bring up OD

9 7, page 43, paragraph 131, please.

10 So, just a reminder, CIMA has

11 sent the City a draft of the 2015 CIMA report.

12 That was the document that we were just looking

13 at. And on September 22, 2015, City staff

14 attended a meeting with you and CIMA staff and one

15 of your colleagues prepared notes, which is set

16 out at the top of page 44.

17 Registrar, can you call that

18 out, please. Thank you.

19 So, CIMA summarized findings

20 and recommendations from both reports. That

21 reference to both reports, was CIMA concurrently

22 doing a LINC safety review study?

23 A. Not quite concurrently.

24 We had started the LINC report previous, but I

25 believe that's what it's referring to, both the

1 LINC meeting crossover crash report and the report  
2 done for the Red Hill.

3 Q. Okay. The next bullet  
4 point is a reference to the traffic management  
5 program. Were you generally aware of the City's  
6 traffic management program?

7 A. Yeah. The City was  
8 undertaking another review, another study,  
9 relating to intelligent transportation systems and  
10 traffic management program or installation of  
11 message boards along the LINC in particular.

12 Q. I'm just going to refer  
13 you to the last of the paragraphs here:

14 "CIMA to provide revised  
15 final report by October  
16 6 -- "

17 It says 2020. I think it's  
18 2015 and that is just a typographical error. So,  
19 you have about a month to prepare the final  
20 version of the report. Does that sound right, to  
21 your recollection?

22 A. I don't recall the  
23 timeline exactly, but it would have been between  
24 the first and second editions that were issued.

25 Q. Okay. Do you recall any

1 discussion in this meeting or at any point before  
2 your next draft where there was discussion about  
3 the potential for widening the Red Hill?

4 A. I remember some  
5 discussion about context of suggestions for  
6 improvements in the context of potential widening  
7 of the roadway, and I have seen documentation in  
8 review for this testimony, but I can't recall it  
9 all precisely.

10 Q. Okay. That's fine.  
11 Registrar, you can close out this call out,  
12 please.

13 Now, apart from what's in  
14 these notes that's we've just gone through, do you  
15 remember anything else from that meeting?

16 A. No. I really don't have  
17 a great recall of the meeting.

18 Q. Okay. Turning now to the  
19 October, when CIMA had agreed to provide a revised  
20 final report. Registrar, if you can bring up OD,  
21 page 46, paragraph 139, please. Thank you.  
22 Apologies, can you take that call out down.  
23 That's not the call out that I wanted. Sorry  
24 about that. It's 138. Registrar, if you could  
25 call out paragraph 138. Thanks.



1                   So, on October 7, your  
2   colleague sent city staff copies of the CIMA LINC  
3   report and the CIMA Red Hill report, and indicated  
4   if they had questions or comments, to not  
5   hesitate, but these were characterized as the  
6   final reports.

7                   Registrar, can you go into  
8   HAM672, please.

9                   So, this is the attachment to  
10  that e-mail that I just referred you to and I'm  
11  going to take you -- I'll ask a general question.  
12  In terms of the recommendations around cat's eyes  
13  and markings and signage, those recommendations,  
14  which we already touched upon, those didn't change  
15  in the various versions of the drafts of this  
16  report, did they?

17                  A.   I would have to double  
18  check to be sure. I know that there was no change  
19  in the items that were identified for improvements  
20  in versions 2 and 3. I would have to double check  
21  version 1 first.

22                  Q.   Okay. Registrar, can you  
23  go to image 54, please.

24                  So, we looked before the lunch  
25  break at an earlier draft and now I'm going to

1 take you to this draft.

2 And, Registrar, if you can  
3 call out the section under 9.1.5.

4 So, in this draft, the CIMA  
5 report indicates again -- we've gone through  
6 this -- that the collision review found a portion  
7 of the non-daylight collisions was higher than  
8 averages. And this version of the report says:

9 "A review of the MTO  
10 policy and warrant  
11 indicated that continuous  
12 illumination is warranted  
13 in the study area."

14 And for this report, the study  
15 area is the entirety of the RHVP. Correct?

16 A. Yes, I believe so. Yes.

17 Q. And this is continuous  
18 illumination of the main line?

19 A. Continuous illumination  
20 would be the main line, yes.

21 Q. The report provides an  
22 estimated installation cost and the benefit-cost  
23 number of \$810,000 and 2.77. And then it goes on  
24 to provide, with similar language as the document  
25 that we were looking at before lunch, other

1 factors that need to be taken into account. And  
2 in the last sentence:

3 "All illumination must be  
4 assessed in relation to  
5 the environmental  
6 approval constraints  
7 which exist, as well as  
8 the cost of installation  
9 and maintenance  
10 implications."

11 Registrar, can you now go to  
12 image 57. And so, this is an updated summary  
13 table to the one we looked at before lunch in the  
14 earlier draft and you'll see under the line it  
15 says Short-term Total in the bottom third of the  
16 page. And there's now two lines, install  
17 continuous illumination as a long-term option or  
18 prioritize list of countermeasures, so it's a  
19 countermeasure there, and then install  
20 high-tension cable guardrail, and both of those  
21 are under long term and they have come comments  
22 beside them.

23 And so, by this version, the  
24 October 7 version of the CIMA report, CIMA had now  
25 included the continuous illumination warrant, the

1 estimated installation costs, the benefit-cost  
2 number and had included, as a long-term option,  
3 install continuous illumination. Do you agree  
4 with that?

5 A. Yes.

6 Q. So, at the conclusion of  
7 the project to complete the 2015 CIMA report, you  
8 viewed continuous illumination of the main line as  
9 a responsible recommendation for CIMA to make?

10 A. It was a countermeasure  
11 which was listed amongst the ones for the City to  
12 undertake, yes.

13 Q. Okay. Nothing had  
14 changed regarding your understanding of the  
15 feasibility of continuous illumination between  
16 2013 and 2015. Correct?

17 A. Well, no. It's a  
18 different piece of roadway, so the earlier study  
19 only dealt with the portion from Greenhill to the  
20 south, to Dartnall, and this portion covered the  
21 entire length, so there's different context in  
22 terms of feasibility because it's a different  
23 piece of roadway.

24 Q. Nothing had changed in  
25 terms of the feasibility of the environmental

1 constraints that you understood applied to the  
2 parkway?

3 A. I think the report  
4 highlights that the environmental constraints  
5 or environmental approvals, which had been --  
6 which are in place, had been identified, but the  
7 scope of work that we were provided for the 2015  
8 assignment more clearly indicated that  
9 illumination was within scope, whereas the  
10 previous version, the 2013 portion, I should say,  
11 of the study clearly indicated that it was out of  
12 scope.

13 Q. Thank you. My question  
14 was specifically about the feasibility and maybe  
15 I'll just rephrase it.

16 Between 2013, when CIMA  
17 prepared that report, and 2015, nothing, to your  
18 knowledge, there was no change in terms of the  
19 environmental approvals on the Red Hill?

20 A. Well, there's two  
21 different things. I agree with your second part  
22 of your question that, yes, there's no change to  
23 my understanding to the environmental assessment  
24 approvals that had previously been identified.

25 The feasibility of lighting or

1 not is a different decision when you're looking at  
2 the entire eight or nine kilometres of roadway  
3 instead of four kilometres that were reviewed in  
4 the first portion.

5 Q. Okay. Thank you.  
6 Registrar, can we go back to OD 7, page 46,  
7 paragraph 139. If you can call out 139,  
8 including -- actually, just call out 139 that's on  
9 page 146, please. Thank you.

10 So, on October 20, you and two  
11 of your colleagues from CIMA met with Gary Moore,  
12 David Ferguson and Martin White to discuss the  
13 2015 CIMA report and the 2015 CIMA LINC report,  
14 and one of your colleagues prepared a meeting  
15 summary.

16 I'll turn to that meeting  
17 summary in a moment, but before I do, do you  
18 recall who asked for this meeting?

19 A. I don't really. I would  
20 suspect it would be the City, but I don't recall.  
21 I certainly don't recall the individual.

22 Q. Sorry, I missed that last  
23 part.

24 A. I said I certainly don't  
25 recall the individual.

1 Q. Do you recall Mr. White,  
2 Mr. Ferguson and Mr. Moore attending this meeting?

3 A. I don't have a great  
4 recollection of this meeting, so if the minutes  
5 indicate so, then I believe that would be the  
6 case, but I don't have an image in my mind of  
7 them.

8 Q. Okay. I'm going to pull  
9 up the meeting minutes just to hopefully refresh  
10 your memory or at least orient you. It's CIM9287.

11 So, you'll see at the top --  
12 and I can see the Commissioner looking, so I'm  
13 going to try to pull this out a little bit more --  
14 under Persons Present, Registrar, can you pull out  
15 the box that has Persons Present. Sorry, the left  
16 side of that one. So, there we go.

17 There's the attendees. Is  
18 that helpful to recall this meeting?

19 A. The meeting summary is  
20 helpful. I still don't have a specific  
21 recollection of it, but I --

22 Q. Fair enough.

23 A. -- trust the meeting  
24 minutes.

25 Q. You can take that call

1 out down, please. The location is listed as 1375  
2 Upper Ottawa. I don't know if that assists to  
3 orient to this meeting.

4 Were you given any guidance  
5 from anyone at the City in advance of this meeting  
6 about what to address at this meeting?

7 A. Not that I recall. If we  
8 did, it would probably have been listed in an  
9 agenda for the meeting, and I don't think there is  
10 one.

11 Q. I think one has not been  
12 provided to us. Do you know why Mr. Moore was  
13 present?

14 A. I assumed he would be  
15 present because some of the items that are listed  
16 in the report are fairly major capital  
17 expenditures, lighting and so on and so forth,  
18 guide rail, and those would require design input  
19 as opposed to the level of items that would  
20 typically be dealt with Mr. White and  
21 Mr. Ferguson.

22 Q. Registrar, can you call  
23 out the third to last and the second to last  
24 bullet points on this page, the one that starts,  
25 "Mr. Moore stated" and "CIMA clarified." Thank



1 you.

2 Just before I put the call out

3 on, this is:

4 "BM summarized findings  
5 and recommendations from  
6 the RHVP report."

7 And then this is the next  
8 bullet point:

9 "Mr. Moore said that  
10 friction testing was  
11 conducted recently  
12 following standards and  
13 resulted satisfactory."

14 Do you remember anything else  
15 about what he said about friction testing?

16 A. I don't. I understood  
17 that to be referring to the previous exchange in  
18 the e-mail that we talked about on August 5, 6 and  
19 7, so that was the context of it, but I don't  
20 recall anything more specifically than that.

21 Q. Did he specify which  
22 friction test results he was talking about?

23 A. I don't believe so. I'm  
24 not sure if it would have been noted in the  
25 minutes, but I don't have a recollection of it.

1 Q. You said you understood  
2 it was about that previous exchange. Did he  
3 specify that he was talking about MTO-conducted  
4 friction testing?

5 A. I can't recall that level  
6 of detail from the discussion, so the minutes will  
7 have to reflect.

8 Q. Did he mention, that is  
9 Mr. Moore, Tradewind during this discussion?

10 A. Not to my recollection.

11 Q. Did he offer to provide  
12 the test results to anyone at this meeting?

13 A. Again, not that I recall.  
14 I assume that would have been indicated in the  
15 meeting minutes, meeting notes, if that had been  
16 the case, because that would likely be a follow-up  
17 action.

18 Q. At this point in CIMA's  
19 work on this project, having provided what one of  
20 your colleagues identified as a final draft, would  
21 you have been interested in receiving friction  
22 test results?

23 A. No, not really. The  
24 input from the report in 2013 and again in 2015  
25 was for friction testing to be undertaken by the

1 City, not for CIMA to review the friction testing  
2 results. So, if Mr. Moore is stating that  
3 friction testing has been done and his results are  
4 satisfactory, then that would be an indication  
5 that he has followed or accepted the input that  
6 was provided in the 2013 and the 2015 reports.

7 So, we were not seeking to get  
8 the friction results. It's not something that  
9 CIMA was reviewing. We were asking the City,  
10 recommending, suggesting to the City, that they  
11 undertake friction testing because it may be a  
12 causal factor and there appeared to be an absence  
13 of information.

14 Q. Did Mr. Moore tell you  
15 during this meeting that CIMA should reconsider  
16 the recommendations that it had put in the 2015  
17 report to recommend friction testing?

18 A. Not to my recollection,  
19 no.

20 Q. Did you perceive that  
21 Mr. Moore was attempting to persuade CIMA to  
22 remove friction testing recommendations from its  
23 report?

24 A. No. We never made a  
25 change, so no, I don't think that was the case at

1 all. He may have had a different opinion. I'm  
2 not sure exactly what was going through his mind.  
3 But I don't recall any pressure on CIMA to make a  
4 change to the recommendations, the inputs, that we  
5 had in the report.

6 Q. Did Mr. Moore provide any  
7 commentary about the very idea of friction testing  
8 as not having value?

9 A. Not directly that I  
10 recall, no. You're talking, just to make sure  
11 we're on the same page, in the context of this  
12 meeting?

13 Q. In the context of this  
14 meeting.

15 A. I've since read other  
16 materials, but in the context of this meeting, no,  
17 I don't recall that occurring at all.

18 Q. And leaving out of your  
19 mind materials you might have read to prepare for  
20 today, in your personal observations, did  
21 Mr. Moore ever convey to you a view that friction  
22 testing as an idea, as a concept, was without  
23 value?

24 A. I never got that direct  
25 input, no, not from -- not that I gleaned from my

1 interactions with Mr. Moore.

2 Q. Okay. The second bullet  
3 point in these minutes say:

4 "CIMA clarified that  
5 actual weather conditions  
6 occurring on the Red Hill  
7 may exceed typical  
8 testing. Testing  
9 conditions and more  
10 rigorous testing should  
11 be undertaken in order to  
12 rule out pavement  
13 friction as a problem.  
14 Speeding is definitely a  
15 contributing factor, but  
16 the contribution of  
17 pavement should not be  
18 ruled out."

19 Do you remember who as amongst  
20 your colleagues at CIMA provided this  
21 clarification?

22 A. I don't precisely. I  
23 suspect it was me, but I don't remember.

24 Q. Do you recall if  
25 Mr. Moore had a response to that clarification or

1 that information from CIMA?

2 A. I don't. If it had been  
3 significant, I think it would have been recorded  
4 in the minutes and I don't see anything there.

5 Q. And so, when this  
6 commentary attributed to CIMA, which you or one of  
7 your colleagues made, said speeding is definitely  
8 a contributing factor but the contribution of  
9 pavement should not be ruled out, in 2015, what  
10 was your view of the relationship between speeding  
11 and the condition of the pavement?

12 A. Well, both friction and  
13 speed are relevant as to the capability of a  
14 vehicle to traverse a curve in particular, and so  
15 both elements ideally need to be understood in  
16 order to determine which or how much each  
17 contributes to the -- has contributed to the  
18 potential outcome.

19 Obviously speeding is  
20 something that the driver selects, makes a  
21 decision to operate at a given speed, and friction  
22 is an aspect of the road itself. The driver  
23 doesn't have direct impact on what the friction  
24 may or may not be. So, both are important and in  
25 this case the preponderance of wet road collisions

1 gave us an indication that the friction of the  
2 pavement surface is something that should be  
3 investigated, which is why the recommendation was  
4 in the report and the consideration was in the  
5 2015 report.

6 Q. Thank you. Registrar,  
7 can you close that call out and call out the very  
8 last bullet on this page.

9 So, this is also from the  
10 minutes:

11 "Issues with illumination  
12 discussed (cost +  
13 environmental  
14 restrictions)."

15 What do you recall, if  
16 anything, Mr. Moore said on the topic of  
17 illumination during this meeting?

18 A. I think I only vaguely  
19 recall that he highlighted that illumination would  
20 be a very expensive process and there were  
21 environmental restrictions referring to the  
22 environmental assessment approvals that have been  
23 discussed that were hurdles that would need to be  
24 addressed in order to deal with the illumination  
25 commentaries.

1 Q. Did you perceive that his  
2 comments were an attempt to persuade CIMA to  
3 remove the recommendation for illumination in  
4 CIMA's report?

5 A. No, not at all. He was  
6 providing input from his perspective, which was  
7 the design and construction side of the line, and  
8 that was valuable input. I believe we already  
9 understood those fundamental components. You  
10 know, perhaps he felt it was necessary to identify  
11 the importance of them in the discussion. But no,  
12 no indication or discussion to remove or change  
13 our recommendations or our inputs.

14 Q. Okay. Registrar, can you  
15 close that call out and can you bring up the next  
16 image side by side. And can you call out the  
17 bullet on image 1 that starts with "Discussion  
18 Followed on the Benefits/Costs." It is the  
19 seventh bullet down. Thank you. And then if you  
20 can also call out the first bullet on image 2.  
21 Thank you.

22 So, Mr. Malone, the top call  
23 out here is under the summary in these minutes  
24 that relate to the LINC report. Did CIMA  
25 undertake an assessment of whether there should be



1 a median barrier on the LINC in the LINC safety  
2 review?

3 A. Sorry, could you repeat  
4 the question again? I was reading the paragraph.

5 Q. Sure. So, this is under  
6 the summary of the discussion about the LINC  
7 report. Did CIMA, in its LINC safety review,  
8 discuss the installation of a median barrier on  
9 the LINC?

10 A. I have not reviewed that  
11 report as part of the preparation for this  
12 questioning today, so I would have to go back and  
13 double check. It was a review of median crossover  
14 crashes, and so I believe that median barrier was  
15 contemplated in the report, but I'm sorry, I  
16 haven't refreshed my memory on that content prior  
17 to this discussion.

18 Q. That's fine. Here, do  
19 you recall in this meeting Mr. Moore indicating  
20 that he believed benefits would not offset costs  
21 in respect of installation of a median barrier and  
22 said that current situation reflects the risk this  
23 City is willing to assume? Do you remember that  
24 part of the discussion in this meeting?

25 A. No, I don't really

1 remember the specifics of it. I think the minutes  
2 reflect -- I take it to be an accurate reflection  
3 of what was stated.

4 Q. Okay. Then in respect of  
5 the part of the meeting that dealt with the RHVP  
6 report is the second call out, so it says:

7 "Address speed and wet  
8 surface first and  
9 reevaluate benefit of  
10 median barrier. Overview  
11 provided on short-term  
12 measures."

13 And so, is it fair to say that  
14 the City staff were directing CIMA to focus on the  
15 countermeasures short of the median barrier before  
16 turning to the median barrier in its report?

17 A. I'm not sure who stated  
18 the sentence. I would highlight that median  
19 barrier does not prevent crashes. It mitigates  
20 the outcomes of crashes if there's an event where  
21 a vehicle enters and potentially is going to cross  
22 the median. So, crashes continue to occur with  
23 median barrier and, in fact, you can potentially  
24 have more crashes because instead of cars just  
25 stopping in the median, they hit the barrier.

1                   So, I think the sentence is  
2    reflective of the prudent approach, which would be  
3    if you can prevent, stop, collisions from  
4    occurring, entering and crossing median, then that  
5    is a better solution because you don't need the  
6    barrier at that point. In fact, if you have very  
7    few or no median crossover cashes, the barrier is  
8    more of a hazard than it is a benefit, so I think  
9    it's just a reflection of the industry approach to  
10   the application and potential benefit of median  
11   barrier, but also the potential drawbacks.

12                   Q.    Okay. In the last  
13   version of the CIMA report that we just looked at,  
14   in fact, you'll recall the median barrier is a  
15   long-term countermeasure that is discussed. Do  
16   you recall that?

17                   A.    I do. I think it's long  
18   term for two reasons. One is that it's capital  
19   dollars intensive, so it takes time to plan,  
20   design. There's drainage issues that would needed  
21   to be addressed. Physically building it is a  
22   time-consuming and expensive process.

23                   And secondly, if you're able  
24   to reduce collisions through other means, then you  
25   theoretically potentially do not need the barrier

1 at all. So, if there are no median crossovers,  
2 you don't need a barrier to mitigate the  
3 consequences of those events.

4 Q. So, CIMA, before this  
5 meeting, had already come to the recommendation of  
6 suggesting short-term barriers -- pardon me,  
7 short-term countermeasures and then considering  
8 the effect of those countermeasures on collisions  
9 and then moving to the median barrier as a second  
10 stage countermeasure recommendation. Is that  
11 fair?

12 A. It probably wasn't  
13 articulated that clearly in the report, but in  
14 reality that's what occurs. You can do the  
15 short-term measures in just that, a short period  
16 of time. You would potentially be able to see the  
17 consequences, the benefits, ideally of those  
18 measures that were implemented in short-term. And  
19 by the time you get to your long-term, you may be  
20 able to make the decision that it's not required.

21 You can potentially initiate  
22 the process of both of them at the same time.  
23 It's just that the actual implementation of a  
24 median barrier will take much longer to do because  
25 of the intensity of the work itself.

1 Q. That's fair. I actually  
2 think it is quite clearly explained in the report.  
3 I'm not going to take you back to it, but I  
4 understand and I think what you just said is  
5 consistent with what you have in the report.

6 Did Mr. Moore explain what he  
7 meant by "current situation reflects the risk the  
8 City is willing to assume in respect to median  
9 barriers"?

10 A. Not that I recall in any  
11 explicit description.

12 Q. Do you recall any  
13 discussion about risks around median barriers and  
14 risks that the City would assume?

15 A. Well, neither roadway had  
16 continuous median barrier on them, the LINC or the  
17 Red Hill, and so by definition, there was a risk  
18 present there that had been determined at the time  
19 of the construction, design and construction, of  
20 both of roadways. So, a risk had been assumed.  
21 There's also risk in transportation and that was  
22 one that existed on both of the facilities.

23 Q. Okay. Registrar, you  
24 close these call outs and if you can call out the  
25 second bullet point on image 2.

1                   Did Mr. Moore explain what he  
2    meant by preferring the term "potential  
3    solutions," quote, unquote, instead of quote,  
4    unquote, "recommendations"?

5                   A.    Not that I recall  
6    explicitly. I think it's a reflection of that the  
7    City was going to consider the range of solutions,  
8    countermeasures, that had been proposed and make  
9    their own determination as to what to proceed  
10   with.

11                  Q.    Is there a difference in  
12   your profession, in the consultancy that you do,  
13   between a recommendation and a potential solution?

14                  A.    I think it depends on the  
15   context that you use the words. I know in this  
16   report, between edition 2 and edition 3, there was  
17   a change in the title of the section 9 from  
18   Recommendations to Options for Consideration, I  
19   think it was.

20                  Q.    Mm-hmm.

21                  A.    But in my view, it didn't  
22   change anything at all. The entire content  
23   essentially word for word of the items that are  
24   listed is the same, so whether you call them  
25   potential solutions or recommendations or actions

1 or countermeasures, I'm not sure it makes a  
2 difference if the items are all still listed  
3 there.

4 Q. Okay. Would you agree  
5 that the term "recommendation" suggests that a  
6 consultant has applied their expertise to a range  
7 of potential solutions and come to select one as  
8 the recommended approach or come to recommend  
9 several as the recommended approach in their  
10 professional judgment?

11 A. I think what matters is  
12 the list that is provided, and so the list of  
13 items, ten countermeasures, that were listed in  
14 that section of the report is the critical piece.

15 Q. So, you don't agree that  
16 recommendation has a particular meaning, the one  
17 that I just gave you?

18 A. That could be one of the  
19 meanings. I'm not as fixated on the title of the  
20 section as I am on the content that was present.  
21 So, the content which was there were the things  
22 that we suggested the City do. CIMA has no  
23 control over the actual implementation or not.

24 Q. I understand that.  
25 That's going to be what the City staff assesses in

1 their discretion and perhaps recommends to an  
2 appropriate committee. Is that fair?

3 A. What action they take  
4 with it is their choice, yes.

5 Q. Okay. But for you as a  
6 consultant, you go through the long process that  
7 we've talked about, come up with particular  
8 preferred countermeasures that you then provide to  
9 the City. That's a recommendation, isn't it?  
10 Isn't it important to call it a recommendation?

11 MR. PROVOST:

12 Mr. Commissioner, if I may, I haven't intervened  
13 once in a day and a half, but now I do because I  
14 think the question is exactly the same that has  
15 been addressed previously.

16 MS. LAWRENCE: I'm happy to  
17 move on.

18 JUSTICE WILTON-SIEGEL: Okay.  
19 Thank you.

20 BY MS. LAWRENCE:

21 Q. After this meeting that  
22 we're looking at on October 20, did you learn any  
23 more about Mr. Moore's views on the draft CIMA  
24 report?

25 A. In preparation for this



1 testimony, I was provided with various amounts of  
2 information that made me aware of some of the  
3 comments and views that he had, yes.

4 Q. Just to add a bit of a  
5 boundary to my question, after this meeting and  
6 before March 2019, did you learn any more about  
7 Mr. Moore's views on the draft report?

8 A. No.

9 Q. Registrar, you can take  
10 down this call out and this document. Thank you.

11 Did you ever receive a copy of  
12 a document that had Mr. Moore's written comments,  
13 written edits or comments, on the CIMA report?

14 A. No, I did not.

15 Q. Did you ever discuss  
16 Mr. Moore's proposed edits to the report with  
17 anyone at CIMA who may have received them?

18 A. I didn't know of anyone  
19 receiving them. I didn't receive them and I don't  
20 recall anyone discussing with me that they had  
21 received them, so no would be the answer.

22 Q. During the meeting on  
23 October 20, did Mr. White or Mr. Ferguson have any  
24 comments or any response to Mr. Moore's comments  
25 as reflected in the minutes?

1                   A.    I think the minutes would  
2    show if they did, so...

3                   Q.    Do you recall if  
4    Mr. Ferguson or Mr. White asked for clarification  
5    from Mr. Moore about the friction testing results  
6    that he mentioned?

7                   A.    I don't recall that, no.

8                   Q.    What do you remember, if  
9    anything, about the tone of this meeting as  
10   between the City staff?

11                  A.    Between the City staff?

12                  Q.    Yeah.

13                  A.    Nothing at all.  I have  
14   no recollection of anything.

15                  Q.    And what about generally  
16   the tone of this meeting with everyone in  
17   attendance?

18                  A.    No recollection.  Nothing  
19   comes to mind that sparks a memory.

20                  Q.    Okay.  So, nothing  
21   particularly heated, acrimonious, nothing like  
22   that?

23                  A.    No, no, not at all that I  
24   recall.

25                  Q.    Okay.  Registrar, we are

1 going to turn now to OD 7, page 60, paragraph 183.

2 Thank you.

3 So, you'll recall you were  
4 having that meeting on October 20. On  
5 November 12, Mr. Ferguson e-mailed you and  
6 attached a revised version of the staff report, so  
7 that's the City staff report, summarizing the two  
8 reports and says that they have attached the  
9 report:

10 "And with respect to the  
11 reports, there being the  
12 CIMA reports, we are  
13 asking that the wording  
14 that states  
15 recommendations be  
16 changed to options for  
17 consideration."

18 Did he offer you any further  
19 explanation about the request for that wording  
20 change?

21 A. Not that I recall.  
22 Nothing more than the content of this e-mail.

23 Q. Had you had any further  
24 discussions with Mr. Ferguson about the idea of  
25 changing CIMA's recommendations to options for

1 consideration between the October 20 meeting and  
2 this e-mail?

3 A. I don't think so. And I  
4 know that the City staff were in the process of  
5 preparing a report to council, but I don't recall  
6 any other communication in that regard.

7 Q. Okay. In the fourth  
8 paragraph, he says:

9 "You will see in the  
10 attached identified  
11 short-term options and  
12 long-term options. Could  
13 reports have a similar  
14 layout?"

15 So, that was attached. There  
16 was this attachment and then there was also the  
17 report that's in the very first paragraph.

18 Do you recall if you read the  
19 draft of the staff report that Mr. Ferguson sent  
20 to you?

21 A. I really don't recall  
22 having read it. It wouldn't have been for me to  
23 comment on or edit. It was a staff report. I'm  
24 sure I had an overview of it, but I don't really  
25 remember.

1 Q. Okay. Registrar, can you  
2 take that call out down and can you pull up  
3 CIM9859.0002, the native form. Thank you,  
4 Registrar. Sorry about that. Registrar, just to  
5 make sure that we're looking at this, because  
6 we've had some issues with native, can you go to  
7 page 53, image 53, which is page 45, and if you  
8 can just hover over Conclusion.

9 So, you see that's your  
10 colleague.

11 And then if you can scroll  
12 down just a little, Registrar, and hover over  
13 Options for Consideration.

14 So, you'll see that's you,  
15 Mr. Malone, on November 20. So, this document  
16 reflects CIMA's inputting of Mr. Ferguson's  
17 comments. Do you remember actually going into the  
18 document and making these changes?

19 A. No, I don't.

20 Q. Okay. Registrar, can you  
21 scroll down to the next page, please.

22 So, there's some reference  
23 here to the high-tension cable median barrier  
24 system.

25 A. Are you able to flag for

1 me whose comments are which? Who has made the  
2 comments? I see blue and red.

3 Q. I was attempting to do  
4 that with my reference before. The red is  
5 Mr. Hawash and the blue is yours.

6 A. Okay.

7 Q. And so, you were content  
8 to making some changes to the high-tension median  
9 barrier cable system section, consistent with  
10 Mr. Ferguson's request in that e-mail that we just  
11 went through?

12 A. Well, I'm not sure it's  
13 all in relation to Mr. Ferguson's input, but we  
14 were reviewing again, so we were checking. I know  
15 there were other wording changes that were made in  
16 conjunction with the change from the word  
17 "recommendation."

18 Q. Mm-hmm. Okay. And if  
19 you just look down to 9.1.2 at the bottom there,  
20 there's a change from "is recommended" to "should  
21 be considered," and that's your track changes?

22 A. It's an intentional  
23 change, yes.

24 Q. And so, you were content  
25 to accept Mr. Ferguson's request to change words

1 that speak to recommendation, so recommendations  
2 or is recommended to options for consideration or  
3 should be considered?

4 A. "Should be considered"  
5 has some very specific meaning in traffic and  
6 transportation engineering. The word indicates  
7 that the action should be done unless there's a  
8 reason not to, so it's part of the reason for that  
9 change or the use of that particular phrasing  
10 "should be considered."

11 Q. Okay. Registrar, can you  
12 go to image 59, which is page 51.

13 And so, you'll see this is  
14 Mr. Hawash adding this in, but it is coming from  
15 Mr. Ferguson's e-mail, and the proposal is to  
16 change conduct pavement friction testing from a  
17 short-term timeline to medium. And Mr. Hawash  
18 says:

19 "I don't agree with the  
20 City. Let's discuss."

21 Do you recall discussing this  
22 with him?

23 A. I really don't recall the  
24 discussion. I know it was returned to short term  
25 in the version that was delivered to the City.

1 Q. Do you know why  
2 Mr. Hawash or you made the decision not to accept  
3 that request to change from short to medium?

4 A. My recollection is that  
5 this is sort of linked with the 2013 report where  
6 there had been a recommendation for friction  
7 testing. I had not been provided with information  
8 that indicated that the City had done friction  
9 testing, and so we continued to include it on the  
10 list of countermeasures and elevated its  
11 importance with the use of short term.

12 Q. Do you recall any  
13 discussion with anyone at the City about why you  
14 were not going to make that change?

15 A. I do not, no.

16 Q. Nowhere in this final  
17 report does CIMA reference the friction data that  
18 Mr. Moore sent you in August 2015. Right?

19 A. The MTO data?

20 Q. Any of the friction data  
21 that Mr. Moore sent you in that e-mail.

22 A. None of that data was  
23 included because my understanding was it was MTO  
24 data not available for public release and this  
25 report would have been public if it was sent to



1 the City.

2 Q. Do you agree it would  
3 have been helpful for your client, the City, to be  
4 reminded that there had been an earlier  
5 recommendation for friction testing and  
6 confirmation that you had not been provided, you,  
7 CIMA, had not been provided with any reports  
8 analyzing the testing, if it had been done, or at  
9 least any that you could use? Would that have  
10 been helpful for the City to have?

11 A. Well, you asked several  
12 questions --

13 Q. I did and my apologies  
14 for that. If you can answer them, please do. If  
15 you need some clarification, please let me know.

16 A. If you can parse them  
17 out, that would be appreciated.

18 Q. Sure. Do you agree that  
19 it would have been helpful for your client to be  
20 reminded that CIMA had made friction testing  
21 recommendation in 2013?

22 A. I don't think the City  
23 needed to be reminded. The previous report was  
24 less than two years before. It was still  
25 relatively fresh. There had been discussions with

1 Gary Moore in August of 2015 regarding that exact  
2 issue, so no, I don't think the report needed to  
3 provide an explicit reminder of it. I think it  
4 was very clearly stated and the fact that it was  
5 in the report, the second report as well as the  
6 first report. The reminder was the second report  
7 for the action.

8 Q. Did you attend the Public  
9 Works committee meeting on December 7, 2015 at  
10 which the City presented the 2015 CIMA report?

11 A. I was asked to attend and  
12 I did attend, yes.

13 Q. Thank you. Apologies.  
14 Before we close this document, this is a native  
15 version of a document in the OD and I would like  
16 to make it the next exhibit, which is Exhibit 61.

17 EXHIBIT NO. 61: RHVP  
18 Detailed Safety Analysis,  
19 Final Draft, October  
20 2015, CIM9859.0002.

21 THE WITNESS: I'm sorry to  
22 interrupt, but you had several questions  
23 previously but only clarified one of them. Did  
24 you want me to answer others?

25 BY MS. LAWRENCE:

1 Q. No. It was just a  
2 complicated question, but when I rephrased it you  
3 answered the question that I actually had.

4 A. Okay. Thank you.

5 Q. Registrar, you can close  
6 this document and if you can go to OD 7, page 74,  
7 paragraph 223, please. And just bring it up. No  
8 need to call it out. Thank you.

9 So, this is in respect of the  
10 December 7 Public Works committee meeting that you  
11 said you did attend. Right?

12 A. I was present in the  
13 meeting, yes.

14 Q. Registrar, can you call  
15 out paragraphs 233 to 235, please.

16 So, from a video of this, the  
17 overview document summarizes that Councillor  
18 Merulla asked Mr. Moore, who was also present at  
19 the meeting, to elaborate on the quality of the  
20 asphalt used, asking whether the City used  
21 low-grade asphalt in comparison to that used by  
22 the MTO in constructing the Red Hill. And  
23 Mr. Moore replied that the City had used SMA,  
24 which was MTO's top mix.

25 Mr. Moore also informed the

1 Public Works committee that the MTO had performed  
2 initial friction testing and received results at  
3 or above what MTO typically expected from  
4 high-grade friction mixes. He also referenced  
5 performance of subsequent testing and said he had  
6 no concerns about the surface mix.

7 Finally, he said in respect of  
8 whether the quality of the parkway was different  
9 than any 400-series highway, that the Red Hill was  
10 above that grade. Do you have a specific  
11 recollection of this exchange between Mr. Moore  
12 and the councillor?

13 A. I recall Mr. Moore  
14 answering questions, but I don't recall the  
15 specifics.

16 Q. Did you discuss this  
17 exchange that Mr. Moore had with the councillor  
18 with Mr. Moore after the meeting?

19 A. Sorry, with the  
20 councillor or with Mr. Moore?

21 Q. Did you discuss with  
22 Mr. Moore the exchange that Mr. Moore had had with  
23 the councillor after the meeting?

24 A. No, not to my  
25 recollection. I think I left the meeting

1 immediately after it was done. Sorry, I had been  
2 asked to attend to potentially answer questions  
3 regarding the CIMA report, and there were none.

4 Q. Okay. Did you discuss  
5 Mr. Moore's comments at this meeting with anybody  
6 else at the City after the meeting?

7 A. Not that I recall, no.

8 Q. Okay. Commissioner, I'm  
9 going to be moving on to another topic and I see  
10 that it's 3:17. Would it make sense to take our  
11 afternoon break now?

12 JUSTICE WILTON-SIEGEL: My  
13 apologies. I was on mute. Let's take our break  
14 now. We'll return at 3:30.

15 --- Recess taken at 3:17 p.m.

16 --- Upon resuming at 3:30 p.m.

17 BY MS. LAWRENCE:

18 Q. Mr. Malone, you said  
19 earlier that, to your knowledge, CIMA used speed  
20 data in the 2015 report that had been collected in  
21 speed studies in 2013?

22 A. That was my recollection,  
23 that the data originated from a collection done in  
24 2013 or in advance of the 2013 report that we had  
25 completed.

1 Q. Okay. And you said  
2 earlier that you had no concern about using speed  
3 data that was a couple of years old in the 2015  
4 report?

5 A. My preference would have  
6 been to use more current data, but that wasn't  
7 unacceptable. It was, as I mentioned earlier with  
8 respect to speed, the speed profile wouldn't be  
9 expected to change as significantly as perhaps  
10 collision data, so it would be representative.

11 Q. Okay. Do you recall that  
12 after the meeting of the Public Works committee in  
13 December 2015, there was some controversy about  
14 the speed data that was set out in the 2015  
15 report?

16 A. There were some  
17 questions, but it wasn't controversial to me.

18 Q. Fair enough. And, in  
19 particular, there was some questions raised about  
20 speed data showing 500 vehicles a day exceeding  
21 140 kilometres an hour. Do you remember that?

22 A. I do, yes.

23 Q. Okay. Registrar, I would  
24 like to pull up CIM9606, please.

25 So, this is an e-mail from

1 January 29, 2016 and it's from you to Mr. Ferguson  
2 and it is the end of a chain of e-mails in which  
3 there is back and forth trying to clarify where  
4 CIMA got its speed data for the 2015 report. And  
5 then this is the e-mail in which you respond about  
6 the data and about your views about the data.

7 Did you investigate whether or  
8 not there was any reason to doubt the accuracy of  
9 the speed data that CIMA used in the 2015 report?

10 A. Yes. We went back and  
11 reviewed the information and there were a series  
12 of e-mails that went back and forth with the City  
13 regarding some other data collection sources that  
14 they had been trying to confirm the veracity of  
15 the data used in our analysis, and I was satisfied  
16 that we had data that I had no reason to question  
17 and, therefore, accepted the results from it.

18 Q. Did that appear to  
19 satisfy the City on this point?

20 A. Depends who you mean by  
21 the City.

22 Q. Mr. Ferguson?

23 A. Which one?

24 Q. David Ferguson?

25 A. I think this e-mail

1 summarizes the thread sufficiently. I think the  
2 issue of the data had been addressed. I believe  
3 others agreed to disagree as to whether or not it  
4 was accurate. We were satisfied it was and we  
5 didn't see any reason to make a change to the  
6 report, and I think David Ferguson was also  
7 satisfied with that investigation and the response  
8 that we had provided to the query.

9 Q. Okay. And when you say  
10 others might have agreed to disagree, was that  
11 councillors who raised whether that seemed like a  
12 high number of high-speeding vehicles?

13 A. Yeah. The question had  
14 been raised by Councillor Lloyd Ferguson and  
15 Councillor Whitehead both participated in a  
16 meeting that I was asked to attend to explain  
17 where the data came from and, you know, how the  
18 numbers which had been quoted in the report, where  
19 they originated and how that got to be the case.

20 The basic concern was that  
21 Mr. Lloyd Ferguson, Councillor Lloyd Ferguson, was  
22 familiar with the enforcement activities by the  
23 police and his information from the police was  
24 that they were not finding similar results, so we  
25 went through an explanation as to how our data is



1 collected, how it's different than the enforcement  
2 actions the police undertake and why there might  
3 be variances and differences in the data points  
4 and such.

5 Q. Okay. And just in terms  
6 of that last, how your data is collected, am I  
7 correct that Pyramid is a contractor who will do a  
8 speed study over a period of time, 24 hours or  
9 48 hours, and they'll do an assessment of the  
10 speeds of vehicles captured in the period of time  
11 that they are studying?

12 A. Yeah. They use equipment  
13 mounted on the road surface and measure any  
14 vehicles that go over that equipment for, as you  
15 say, a continuous period of time. I can't  
16 remember the exact duration, but I believe it was  
17 7 days, if not 14 days. And that total quantity  
18 of data in theory collects the information on  
19 every car passing by, and so from my experience we  
20 see that data, that type of data, collected by  
21 companies like Pyramid and others using similar  
22 equipment to what Pyramid was using in studies  
23 across the country, so it's a very standard  
24 approach to gathering data.

25 Q. Okay. In 2018, you,

1 CIMA, was retained to complete a speed study along  
2 the LINC and the Red Hill. Do you remember that?

3 A. I do, yes.

4 Q. Registrar, can you go to  
5 CIM15996, please.

6 This is an e-mail exchange  
7 with one of your colleagues at CIMA and Mike  
8 Dworzak at Pyramid. Did you retain Pyramid to  
9 collect speed data for the 2018 speed study that  
10 CIMA was doing?

11 A. That's my recollection,  
12 yes.

13 Q. To the best of your  
14 knowledge, did CIMA use the same collection  
15 process that we were just discussing in 2018?

16 A. Well, Pyramid would be  
17 the company, the contractor, that would collect  
18 the data and, to my understanding, they use the  
19 same methodology and type of equipment to gather  
20 this data in 2018, yes.

21 Q. In general, how did the  
22 data collected in 2018 by Pyramid compare to the  
23 data collected in 2013?

24 A. I'm not sure I'm familiar  
25 enough with the details to be able to give you an

1 accurate answer. I could research it, but I'm  
2 sorry, I don't have that available at the moment.

3 Q. Maybe I'll ask the  
4 question differently. Did the data collected in  
5 2018 by Pyramid cause you to reconsider the  
6 accuracy of the data in 2013?

7 A. Not to my recollection.  
8 The one thing I would highlight is when you  
9 undertake data using the types of tools that we're  
10 talking about, the on-pavement sensors, you can  
11 set up the collection into different, they call  
12 them bins, different formats, and I don't recall  
13 if the two formats were identical or if there was  
14 some simplification of the formatting in one or  
15 the other versions.

16 The 2013 data included speed  
17 information separated out for speeds of 140  
18 kilometres an hour and higher. I don't recall  
19 whether or not that was the case in the 2018  
20 collection of data.

21 Q. Okay. Thank you. As a  
22 casual employee of CIMA, do you act as an expert  
23 in litigation involving road safety issues?

24 A. I get hired as an expert  
25 with respect to civil litigation matters on a

1 regular basis, yes.

2 Q. Do you currently act for  
3 the City of Hamilton as an expert in any  
4 litigation involving the Red Hill?

5 MR. LEDERMAN:

6 Mr. Commissioner, if I could just interject. I  
7 have a concern about the line of questioning that  
8 I believe Ms. Lawrence is about to ask Mr. Malone.

9 JUSTICE WILTON-SIEGEL: Just  
10 before you do that, perhaps we could ask the  
11 registrar to take down the current image so that I  
12 can at least see Mr. Lederman. Go ahead,  
13 Mr. Lederman.

14 MR. LEDERMAN: Thank you,  
15 Mr. Commissioner. So, as you know, Rule 42 of the  
16 rules of this inquiry provide that nothing is  
17 admissible in evidence at the inquiry that would  
18 be inadmissible in a court by reason of any  
19 privilege under the law of evidence.

20 JUSTICE WILTON-SIEGEL: Let me  
21 just stop for a second. Are you specifically  
22 objecting to this question?

23 MR. LEDERMAN: This question  
24 and I suspect the next several questions that  
25 Ms. Lawrence is about to put to the witness.

1 JUSTICE WILTON-SIEGEL: Rather  
2 than deal with this in a hypothetical way, let's  
3 deal with them question by question. So, are you  
4 specifically objecting to the question, does he  
5 act as an expert for the City?

6 MR. LEDERMAN: Yes, that one,  
7 Mr. Commissioner, and if you hear the other  
8 questions that Ms. Lawrence is about to put to the  
9 witness, you'll understand the context for my  
10 objection.

11 JUSTICE WILTON-SIEGEL: Well,  
12 I'm in your hands as to whether you want me to  
13 have Ms. Lawrence put the three questions so we  
14 have them before us or we deal with them on a  
15 case-by-case basis, but I'm not going to deal with  
16 one question and two hypotheticals.

17 MR. LEDERMAN: Well, I guess  
18 what my concern is is before the witness answers  
19 the questions, I would like the opportunity to  
20 have you hear my objection, particularly as it  
21 relates to a concern about privilege.

22 JUSTICE WILTON-SIEGEL: Okay.  
23 Well, is there any privilege issue here with  
24 asking whether he has acted as an expert for the  
25 City in respect of safety, road safety?

1 MR. LEDERMAN: That question  
2 in and of itself, I have no difficulty with that  
3 from a privilege perspective, but it's the  
4 sequence that follows from that.

5 JUSTICE WILTON-SIEGEL: I'm  
6 not going to speculate on sequence. If you don't  
7 object to that question, then I think the question  
8 should be put, and then the next question can be  
9 put and you can address your next objection at  
10 that time.

11 So, Ms. Lawrence, why don't  
12 you put this question again to Mr. Malone?

13 MS. LAWRENCE: Sure.

14 BY MS. LAWRENCE:

15 Q. Mr. Malone, do you  
16 currently act for the City of Hamilton as an  
17 expert in any litigation involving the Red Hill?

18 A. No.

19 JUSTICE WILTON-SIEGEL: Okay.

20 BY MS. LAWRENCE:

21 Q. Have you been named  
22 personally --

23 JUSTICE WILTON-SIEGEL: Sorry,  
24 just let me make a note.

25 MS. LAWRENCE: Pardon me.

1 JUSTICE WILTON-SIEGEL: Okay.

2 What's your next question?

3 BY MS. LAWRENCE:

4 Q. Have you been named  
5 personally as a defendant in any litigation  
6 involving the Red Hill?

7 JUSTICE WILTON-SIEGEL: Now,  
8 I'll just stop for a second and ask Mr. Lederman  
9 whether there's a question of privilege there.

10 MR. LEDERMAN: I've got no  
11 concern about that, and as to whether that is a  
12 relevant question for this inquiry, I will defer  
13 to you, Mr. Commissioner, as well as to  
14 Mr. Provost, but I've got no concern about  
15 privilege with respect to that.

16 JUSTICE WILTON-SIEGEL: Okay.

17 MR. PROVOST: I assume it's  
18 public record -- this is Richard Provost -- so I  
19 am having a really hard time seeing an objection.

20 JUSTICE WILTON-SIEGEL: Thank  
21 you, Mr. Provost. I concur in your legal  
22 analysis.

23 Ms. Lawrence, you can put the  
24 question again to Mr. Malone.

25 MS. LAWRENCE: Sure.

1 BY MS. LAWRENCE:

2 Q. Have you been named  
3 personally as a defendant in any litigation  
4 involving the Red Hill?

5 A. Not that I've been  
6 informed of.

7 JUSTICE WILTON-SIEGEL: Okay.  
8 Okay. Last question, Ms. Lawrence?

9 MS. LAWRENCE: It wasn't just  
10 three questions.

11 JUSTICE WILTON-SIEGEL: I'm  
12 sorry.

13 MS. LAWRENCE: There's a few  
14 more.

15 JUSTICE WILTON-SIEGEL: I  
16 thought there were three. Go ahead.

17 BY MS. LAWRENCE:

18 Q. To your knowledge,  
19 Mr. Malone, has CIMA been named as a defendant in  
20 any litigation involving the Red Hill?

21 JUSTICE WILTON-SIEGEL: I  
22 assume, there being no objection to that  
23 question --

24 MR. LEDERMAN: No objection.

25 JUSTICE WILTON-SIEGEL: --



1 Mr. Malone, you can answer the question.

2 THE WITNESS: Not to my  
3 knowledge.

4 BY MS. LAWRENCE:

5 Q. Mr. Malone, are you  
6 personally a party to any joint defense agreement,  
7 cooperation agreement or tolling agreement with  
8 the City of Hamilton?

9 MR. LEDERMAN:

10 Mr. Commissioner, I have trouble with that  
11 question.

12 JUSTICE WILTON-SIEGEL: Okay.  
13 I'm just going to get the full question. Party to  
14 any joint defense agreement, tolling agreement --  
15 what was the full question, Ms. Lawrence?

16 BY MS. LAWRENCE:

17 Q. Are you personally party  
18 to any joint defense agreement, cooperation  
19 agreement or tolling agreement with the City of  
20 Hamilton?

21 And perhaps just as a matter  
22 of efficiency, my next question to which I also  
23 expect an objection is: To your knowledge, is  
24 CIMA a party to any such agreement?

25 JUSTICE WILTON-SIEGEL: Okay.

1 MR. LEDERMAN: I have the same  
2 objection to that question.

3 JUSTICE WILTON-SIEGEL: Yes,  
4 of course. So, Mr. Lederman, I'll hear your  
5 submissions.

6 MR. LEDERMAN: Thank you,  
7 Mr. Commissioner.

8 In late February, I had an  
9 exchange with commission counsel in which I was  
10 asked, as counsel for the City of Hamilton, as to  
11 whether or not the City of Hamilton had entered  
12 into any tolling agreements, joint defense  
13 agreements, cooperation agreements, with respect  
14 to any anticipated pending or existing litigation  
15 involving the Red Hill Valley Parkway with respect  
16 to any of the participants in this inquiry or with  
17 CIMA.

18 At that time, I advised  
19 commission counsel that it was our view that that  
20 information is privileged and, in any event, was  
21 not relevant to the terms of reference in this  
22 inquiry, but most importantly is privileged.

23 As you know, Mr. Commissioner,  
24 I act for the City of Hamilton in this inquiry. I  
25 do not act for the City in connection with the

1 existing litigation that it's carried on, but it  
2 is my role to ensure that privilege is safeguarded  
3 through this inquiry process and so that  
4 information is not improperly divulged that will  
5 betray a privilege that exists in connection with  
6 existing litigation or anticipated litigation  
7 involving related matters on the Red Hill Valley  
8 Parkway as against the City of Hamilton.

9 I advised commission counsel  
10 of our position that this was privileged and, on  
11 March 18, commission counsel wrote to us to advise  
12 that it would consider our position and would get  
13 back to us. Commission counsel never came back to  
14 us to advise that it had disagreed with our  
15 assertion of privilege until last night, in which  
16 we were advised that commission counsel intended  
17 to ask these questions of Mr. Malone during the  
18 course of his testimony today.

19 This is not information that  
20 is contained in any statement of anticipated  
21 evidence. It is not information that is contained  
22 in the overview document. And what I'm concerned  
23 about, Mr. Commissioner, is that this is, in  
24 effect, an attempt to circumvent or do an end run  
25 around the City's assertion of privilege over



1 you have the authorities before you or perhaps in  
2 front of a delegate to have that matter properly  
3 adjudicated before the evidence is led from this  
4 witness or any other witness.

5 Now, I recognize that  
6 Mr. Malone is here today, but he is scheduled to  
7 come back for another round at a later hearing  
8 block, which would certainly allow for an  
9 opportunity to deal with this issue before that  
10 testimony or that issue is raised.

11 JUSTICE WILTON-SIEGEL: Let me  
12 ask. I take it that your real issue is privilege,  
13 not relevance?

14 MR. LEDERMAN: Well, my most  
15 significant issue in terms of why it is that I'm  
16 rising now before any answer is delivered is, yes,  
17 because of privilege. Obviously relevance is  
18 something that you can weigh, but my bigger  
19 concern is privilege, given that the rules are  
20 quite clear that privileged information is  
21 inadmissible.

22 JUSTICE WILTON-SIEGEL: Let me  
23 ask Mr. Provost. Does your client object to  
24 answering the question?

25 MR. PROVOST:

1 Mr. Commissioner, no, he doesn't object. I have a  
2 hard time seeing that other party would have a  
3 privilege with regard to a witness that's not  
4 their employee or anything.

5 Also, if the answer is no, how  
6 can it be privileged? There's no relation.  
7 There's no existence of a document. If indeed the  
8 answer was yes and the question was asked, okay,  
9 can I see the agreement, that is a different  
10 story.

11 MR. LEDERMAN: But,  
12 Mr. Commissioner, if I may just reply to that.

13 JUSTICE WILTON-SIEGEL: No. I  
14 want to let Mr. Provost complete whatever  
15 submissions he wishes to make first.

16 MR. LEDERMAN: Oh, I'm sorry.  
17 I thought he had completed. Pardon me.

18 MR. PROVOST: I did, My Lord.  
19 Mr. Commissioner, I did.

20 JUSTICE WILTON-SIEGEL: That's  
21 quite all right.

22 MR. PROVOST: You wear both  
23 hats, so it's okay.

24 JUSTICE WILTON-SIEGEL: In  
25 this, I only wear one hat, Mr. Provost, and it's a

1 hat which is slightly different from the one that  
2 I wear in court.

3 MR. PROVOST: I understand  
4 that.

5 JUSTICE WILTON-SIEGEL: And I  
6 think it's important that we all understand that.  
7 Let me just make a note here.

8 MR. PROVOST: My answer is the  
9 same for the complementary anticipated second  
10 question for which the attorney Ms. Lawrence is  
11 expecting an identical objection.

12 JUSTICE WILTON-SIEGEL: Thank  
13 you.

14 MR. LEDERMAN: So,  
15 Mr. Commissioner, if I may just --

16 JUSTICE WILTON-SIEGEL: I  
17 think I should allow Ms. Lawrence to respond and  
18 then I will allow you to reply, Mr. Lederman.

19 MR. LEDERMAN: Thank you.

20 MS. LAWRENCE: Thank you,  
21 Mr. Commissioner. First, and I am reluctant to do  
22 this, but Mr. Lederman did not, in my view, fairly  
23 set out the discussion between commission counsel  
24 and his office. And, to be clear on the record,  
25 commission counsel and counsel for the City did

1 have discussions about this. Commission counsel  
2 was very clear that we did not agree that this was  
3 not relevant and it was our position that it was  
4 not privileged. And the last of that  
5 communication was that we would consider the  
6 position, but commission counsel's position was  
7 very clear.

8                   And Mr. Lederman is exactly  
9 correct that I, last night, provided notice to the  
10 parties of commission counsel's intentions to  
11 raise these questions today, having very recently  
12 received anticipated evidence in respect of the  
13 questions and the answers that I proposed to ask.

14                   Commission counsel's view is  
15 that issues around joint defense agreements and  
16 cooperation agreements in particular are very  
17 relevant to the assessment, to your assessment, of  
18 the credibility of witnesses.

19                   Second, commission counsel's  
20 position is that agreements, at least as we have  
21 before us right now, any potential agreement could  
22 not be privileged if the common interest privilege  
23 is the privilege that is being asserted, and if  
24 Mr. Provost has confirmed that he has no  
25 objection, there's simply not a privilege to be



1 asserted.

2 Third, I have not heard  
3 Mr. Lederman say that there is some independent  
4 privilege that the City has that is attempting to  
5 maintain, nor that there is some agreement or  
6 obligation that CIMA has that would prohibit them  
7 from providing the answer to the question that  
8 I've asked.

9 In commission counsel's view,  
10 it is appropriate for this matter to go before  
11 you, Commissioner. It is unnecessary to go before  
12 a delegate. And I have given notice to all  
13 counsel that commission counsel does anticipate  
14 asking these questions and certainly we can  
15 continue to have objections and make submissions  
16 on facts, depending on the witness who is being  
17 questioned.

18 But for this witness in these  
19 circumstances, it's commission counsel's view that  
20 it would be appropriate for you to conclude that  
21 it is not privileged because there's not an  
22 assertion of privilege that is being clearly  
23 identified and it is entirely relevant to the work  
24 before you.

25 Those are my submissions.

1 Thank you.

2 JUSTICE WILTON-SIEGEL:

3 Mr. Lederman, before you address your reply, I  
4 want to distinguish between this particular  
5 witness and the other cases, knowing well that, I  
6 guess you've already expressed it yourself, but it  
7 would be expected that you're raising this because  
8 this is the first time this question is being put  
9 to any witness and you will potentially object to  
10 others, if not this witness.

11 So, I want to say that insofar  
12 as there are others who express a concern for  
13 privilege when the question is put to them, I  
14 agree with you that this should be the subject of  
15 a formal motion, which we'll have to build into  
16 the process.

17 I'm having trouble seeing how  
18 we need to address that at the present time in  
19 respect of this witness, who has raised no  
20 objection, and any reply that you wish to make  
21 should be put in that context.

22 MR. LEDERMAN: So, let me  
23 reply to that, then. And that's exactly the  
24 mischief that I want to avoid by allowing for this  
25 question to be asked of this witness. Then we get

1 to the next witness before we've actually had the  
2 legal question properly adjudicated.

3 In other words, in my  
4 respectful submission, Commissioner, it would not  
5 be appropriate to, one by one, go through the  
6 participants and ask this question and only those  
7 that assert the privilege is just a way of  
8 identifying which parties, if any, have entered  
9 into a tolling agreement or the like. And that  
10 can't be a fair way of dealing with a question as  
11 to whether or not the City has the right to  
12 validly assert privilege over the existence or the  
13 content of any such agreement that it may have  
14 with any participant in this process in connection  
15 with the ongoing litigation involving the RHVP.

16 In other words, I appreciate  
17 that Mr. Provost doesn't object to this witness  
18 answering that question, but the implication of  
19 allowing the witness to answer this question  
20 before the matter has been adjudicated is it  
21 preordains the result so that the inference can be  
22 drawn if and when we get to a witness who does  
23 object to that information being raised.

24 And that's precisely why, in  
25 my respectful view, if this is the line of

1 questioning that is intended to be asked, we need  
2 to sort out whether or not privilege applies to  
3 this first. If the answer is no, that there is no  
4 privilege associated with it, then absolutely any  
5 witness can be asked. But to do it in a piecemeal  
6 way, in my view, would be unfair and just erodes  
7 the question of privilege before we've had an  
8 adjudication on the point.

9 JUSTICE WILTON-SIEGEL: All  
10 right. It's 4:01 today.

11 MR. PROVOST:  
12 Mr. Commissioner, with your permission.

13 JUSTICE WILTON-SIEGEL: Yes.

14 MR. PROVOST: I would like to  
15 add the following: If we push this situation to  
16 an extreme, a party to an inquiry like this one  
17 could impose NDA, non-disclosure agreement, on  
18 various witnesses here and there. That would  
19 unfortunately deprive you of a complete  
20 appreciation of their credibility. That alone, I  
21 believe, is sufficient to dispose of the  
22 objection.

23 JUSTICE WILTON-SIEGEL:  
24 Mm-hmm. Well, I will say for the benefit of  
25 counsel I think that comment is directly relevant

1 to the issue of relevance and I'm having trouble  
2 seeing how this is not a relevant question.

3 This is not litigation, as we  
4 said a moment ago, so the role of the judge is not  
5 at play here. In litigation, the judge would be  
6 limited to the evidence that the parties wish to  
7 put before the court. This is different insofar  
8 as the Commissioner is mandated to attempt to  
9 understand the facts. And an important  
10 consideration in respect of that is whether the  
11 participants who appear before the inquiry are in  
12 fact not independent but are in fact aligned and  
13 are giving the same story, and that certainly goes  
14 to credibility. I think that's what Mr. Provost  
15 was alluding to. So, I'm having trouble seeing  
16 how this is a question. There's a legitimate  
17 question of relevance.

18 With respect to the question  
19 of privilege, Mr. Lederman, I don't understand the  
20 concept of common interest privilege in the  
21 context of a situation where the party to whom a  
22 question is being put has no objection to  
23 answering it.

24 MR. LEDERMAN: No. Perhaps  
25 let me just address, before we talk about the

1 common interest privilege point, let me address  
2 the relevance point.

3 I would agree with you,  
4 Mr. Commissioner, that it may be relevant and  
5 would be relevant if there were such an  
6 evidentiary arrangement in place in the context of  
7 an inquiry, and indeed I think there are some  
8 cases that deal with that. That is very different  
9 than asking whether a tolling agreement or other  
10 types of standard joint defence agreements are in  
11 place in connection with related litigation  
12 involving the subject matter. So, that's my  
13 answer to the relevance point, which we can  
14 address separately.

15 But quite apart from  
16 relevance, the privilege issue is that the  
17 privilege exists in connection with both  
18 litigation privilege in which a party to  
19 litigation, not infrequently, can enter into  
20 tolling agreements, joint defence agreements with  
21 either co-defendants or potential third-party  
22 defendants in that litigation, and that is a  
23 privileged agreement and the circumstances in  
24 which a party to litigation may enter into those  
25 agreements are subject to both litigation

1 privilege and solicitor-client privilege, as well  
2 as common interest privilege.

3 And so, whether or not a party  
4 has actively engaged in that type of agreement,  
5 that's a privileged question. And, in my  
6 respectful view, that should be adjudicated before  
7 peeling off one witness after the next saying,  
8 well, do you have any such agreement in place in  
9 connection with the litigation involving the Red  
10 Hill Valley Parkway?

11 And so, I only ask -- let me  
12 just finish by this point.

13 JUSTICE WILTON-SIEGEL: I'm  
14 just trying to understand what the common interest  
15 privilege is that's being asserted.

16 MR. LEDERMAN: So, if a party  
17 to litigation has entered into a tolling agreement  
18 or a joint defence agreement, even though they may  
19 have positions that are adverse vis-à-vis the  
20 plaintiff in a piece of litigation, they share a  
21 common interest in defending or preserving a  
22 tolling agreement or any such agreement in  
23 connection with that plaintiff. That's how a  
24 common interest privilege --

25 JUSTICE WILTON-SIEGEL: I

1 fully understand that. I'm having trouble  
2 understanding how the fact that they have entered  
3 into such an agreement as opposed to the contents  
4 of such an agreement is privileged.

5 MR. LEDERMAN: Well, the fact  
6 of whether or not they've entered into such an  
7 agreement is equally, in my respectful submission,  
8 also privileged, just as did a party seek legal  
9 advice. That equally would arguably be subject to  
10 privilege, not just the content of that advice but  
11 whether or not they've sought legal advice.

12 JUSTICE WILTON-SIEGEL: Well,  
13 this is not the occasion perhaps to engage in that  
14 debate, but if that's the context in which you  
15 assert the common --

16 MR. LEDERMAN: Well, what I'm  
17 trying to suggest, Mr. Commissioner, is this is an  
18 issue that I view that you would benefit from  
19 being briefed, and I don't think, given that  
20 Mr. Malone is scheduled to return, that there is  
21 any prejudice to having this issue properly  
22 brought before you to be adjudicated before these  
23 questions are asked.

24 JUSTICE WILTON-SIEGEL: Okay.  
25 Before I make any sort of decision, do any of the



1 other participants wish to speak to this matter?

2 MS. LAWRENCE: Recognizing I'm  
3 not sure if Ms. Roberts is about to unmute -- I  
4 see her on the screen -- I do have one final set  
5 of submissions. I know we've done, I think, two  
6 go-arounds --

7 JUSTICE WILTON-SIEGEL: I just  
8 wanted to hear from any of the other counsel  
9 before I give you the opportunity to make your  
10 response.

11 MS. LAWRENCE: Thank you.

12 JUSTICE WILTON-SIEGEL: I'm  
13 taking the silence to be a negative. Okay,  
14 Ms. Lawrence.

15 MS. LAWRENCE: I do see  
16 Ms. McIvor is on the screen.

17 JUSTICE WILTON-SIEGEL:  
18 Ms. McIvor.

19 MS. MCIVOR: I'm sorry. I  
20 have nothing to say at the moment. I just thought  
21 that I would turn on my camera in the event that I  
22 do moving forward.

23 JUSTICE WILTON-SIEGEL: Okay.  
24 Thank you.

25 MS. MCIVOR: Thank you.

1 JUSTICE WILTON-SIEGEL:

2 Ms. Lawrence.

3 MS. LAWRENCE: Thank you. In  
4 respect of the issue of whether this should be  
5 before you by way of a motion or by way of a  
6 proper briefing, as I think is how Mr. Lederman  
7 characterized it, in my view, where a witness  
8 objects themselves to a question, either  
9 individually or by counsel, it would certainly be  
10 beneficial for you to obtain fulsome submissions  
11 from that person and any other entity who may  
12 share in the same position as the objector.

13 I would anticipate that we may  
14 have such circumstances and those can be dealt  
15 with, I think, quite differently than the issue  
16 before you today. I would categorize Mr. Malone  
17 and Mr. Provost's lack of objection to any issue  
18 in answering the question as evidence that there  
19 is no privilege that CIMA or Mr. Malone themselves  
20 are asserting, and I have not heard an  
21 articulation from Mr. Lederman about the assertion  
22 of privilege that the City is independently  
23 claiming.

24 So, in my view, you can  
25 absolutely hear the relevant answer to this issue

1 without a motion on this issue. And to the extent  
2 that there are other witnesses who object to that  
3 issue, I would anticipate and hope that among  
4 counsel we can have discussions on that before  
5 that happens on the record and we can perform  
6 appropriate motion materials and briefs for you at  
7 that time. But for today, in the circumstances of  
8 this witness and his counsel, I simply don't see  
9 why it would be deferred. Thank you.

10 MR. LEDERMAN:

11 Mr. Commissioner, can I just reply to that?

12 JUSTICE WILTON-SIEGEL: Before  
13 you reply to that, and I don't think I need a  
14 reply, I simply want to understand exactly what  
15 kind of motion we would have. It would be a  
16 motion, as I see it, as to whether or not there  
17 could be some kind of common interest privilege  
18 asserted by the City in circumstances where a  
19 participant does not assert such a privilege or  
20 any privilege. Is that my understanding?

21 MR. LEDERMAN: I would imagine  
22 the motion would involve the very request that I  
23 received from commission counsel on February 25,  
24 which was to advise as to whether or not the City  
25 of Hamilton had entered into tolling agreements

1 and the like with any of the participants.

2 JUSTICE WILTON-SIEGEL: That  
3 is not what's before this court and not what I  
4 would envisage in terms of any motion. I say  
5 again the issue before this tribunal is whether  
6 the City can assert an interest, privilege, in  
7 circumstances where the questioned party does not.

8 MR. LEDERMAN: I have to go by  
9 the rules of this inquiry, Mr. Commissioner, that  
10 says nothing is admissible in this proceeding by  
11 virtue of something being privileged. And so, the  
12 question that was put to me as counsel to the City  
13 of Hamilton was to disclose the existence of any  
14 such tolling agreements. The City of Hamilton has  
15 taken the position that if it has tolling  
16 agreements in place involving litigation involving  
17 the Red Hill Valley Parkway, that such agreements  
18 are subject to privilege.

19 So, I would have thought that  
20 the motion before you is to determine whether or  
21 not any such tolling agreements in connection with  
22 that litigation are indeed subject to privilege.

23 JUSTICE WILTON-SIEGEL: Let me  
24 just make a note. Okay. I am going to take this  
25 one under advisement overnight and I will advise

1 the parties tomorrow morning of my decision with  
2 respect to Mr. Lederman's position.

3 In the meantime, we still have  
4 some time left and I think we should proceed to  
5 the first, if Ms. Lawrence has no other questions.

6 MS. LAWRENCE: I just have one  
7 housekeeping matter. The very last exhibit that I  
8 raised with Mr. Malone, I did not mark it as an  
9 exhibit and I should have. This is CIM15996. We  
10 don't need to pull it up again. I would like to  
11 mark that as the next exhibit, as I understand  
12 it's not in the overview documents, and that is  
13 Exhibit 62.

14 EXHIBIT NO. 62: E-mail  
15 exchange between CIMA and  
16 Mike Dworczak at Pyramid,  
17 CIM15996.

18 MS. LAWRENCE: Thank you.

19 BY MS. LAWRENCE:

20 Q. And subject to the  
21 Commissioner's ruling in respect of the questions  
22 that I have put on the record that I would like to  
23 ask, those are my questions for you, Mr. Malone.  
24 Thank you very much for your time and attention  
25 today.

1 JUSTICE WILTON-SIEGEL: Okay.

2 MS. LAWRENCE:

3 Mr. Commissioner, I've spoken to counsel about  
4 timing and I understand that MTO anticipates being  
5 quite short in its examination, ten minutes or  
6 less, which would fit us in still before 4:30, so  
7 subject to Ms. McIvor's view, I think it would  
8 make sense to turn to her first and then we can  
9 discuss before we end for the day the process for  
10 tomorrow, if you would like.

11 JUSTICE WILTON-SIEGEL: Okay.

12 MS. MCIVOR: Hello,

13 Commissioner. And, Ms. Lawrence, that's right. I  
14 still expect to be quite short, quite brief.

15 EXAMINATION BY MS. MCIVOR:

16 Q. Mr. Malone, I'm

17 Heather McIvor. I'm counsel for MTO.

18 And, Mr. Commissioner, if I  
19 might proceed?

20 JUSTICE WILTON-SIEGEL: Please  
21 do.

22 BY MS. MCIVOR:

23 Q. There was discussion  
24 today, Mr. Malone, about the 2007 MTO testing  
25 results that were provided to you by Mr. Moore,

1 and you mentioned that they were not included in  
2 the CIMA report because you assumed that MTO did  
3 not want them distributed. Is that right?

4 A. Well, they were provided  
5 to me by Mr. Moore and his notation indicated to  
6 keep them confidential, so my understanding was  
7 they were not materials from the City of Hamilton,  
8 they were MTO materials, and so I didn't have MTO  
9 approval to utilize them, include them in the  
10 report or otherwise make them public, and so  
11 that's why I didn't.

12 Q. Okay. Fair enough. But  
13 I just wanted to clarify, you didn't speak to  
14 anyone from MTO regarding these results and  
15 regarding their views about their distribution.  
16 Is that fair?

17 A. That's correct, yes.

18 Q. Okay. And I believe it's  
19 been clearly stated by your answer to my last  
20 question, but you received them from Mr. Moore and  
21 it was Mr. Moore who requested that they not be  
22 published. Is that correct?

23 A. Yes, consistent with the  
24 e-mail that was displayed earlier today and the  
25 wording that was in that e-mail. Yes.

1 Q. Right. Okay. So, by  
2 virtue of the fact that he was providing them to  
3 you, you would have been aware presumably that MTO  
4 had already released them to the City. Is that  
5 fair?

6 A. Well, the thread was from  
7 Golder and Golder had sent them to the City, so  
8 I'm not sure how the chain of ownership existed,  
9 but it was Golder to the City and the City to me  
10 and they were included in the Golder report, so I  
11 don't really know the origin --

12 Q. Okay. And that's fair  
13 enough. But somehow they were -- before they came  
14 to you, they were in the hands of Golder and the  
15 City. Is that right?

16 A. Correct, yes.

17 Q. Okay. Thank you. Those  
18 are my questions for you, Mr. Malone.

19 JUSTICE WILTON-SIEGEL: Okay.  
20 Ms. Lawrence.

21 MS. LAWRENCE: Commissioner, I  
22 anticipate that I've heard from Ms. Roberts that  
23 she will be about half an hour and from the City  
24 that they will be about an hour, so although we  
25 have a few minutes left before 4:30, I would



1 propose to adjourn early and start with those  
2 cross-examinations tomorrow morning.

3 JUSTICE WILTON-SIEGEL: Okay.  
4 We will do that. And then we have Mr. Applebee  
5 coming in. Is that correct?

6 MS. LAWRENCE: That is  
7 correct. I had asked for him to be available by  
8 1:00 p.m. and I'll ask if I can have him attend  
9 even earlier so that we can move smoothly through  
10 tomorrow.

11 JUSTICE WILTON-SIEGEL: Okay.  
12 Good. I'll leave you to speak to counsel about  
13 that and we'll, then, stand adjourned until 9:30  
14 tomorrow morning.

15 --- Whereupon the proceedings adjourned at  
16 4:19 p.m. until Wednesday, June 1, 2022 at  
17 9:30 a.m.

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